Bulgaria

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Introduction

The history of Bulgarian tenancy law dates back to the end of the 19th century. The first law, containing provisions on tenancy contracts - *the Law on Contracts and Obligations* - was enacted in 1892.[2] In its major parts the law was a reception from the Italian Civil Code of 1865. It comprised a general part dealing with all types of obligatory relationships and a special part dealing with various types of contracts, inclusive of tenancy contracts.

At the beginning of the 20th century, the need for State intervention in regulating tenancy relationships became palpable due to urbanization and an increase in the population of major cities, particularly that of the capital. This need dramatically increased during and after the World War I when economic crises affected the solvency of Bulgarian citizens'. As a direct result, many families found themselves unable to meet rent payments and many ended up on the street.[3] This prompted the adoption of the first special statute on tenancy in 1917, known as the "Law on Tenancy and on Buildings during the War Period"[4]. The law provided for special protection of tenants and restricted the landlords' right to increase rents. In the period between 1920 and 1944, various special laws and regulations aimed at protecting that sector of the population who did not own their housing was enacted. These laws were normally short in life,[5] being adopted in order to respond to particular social needs that stemmed from the social or economic crises characteristic of that period. Common features of these special tenancy laws and regulations - named also exclusive laws and regulations - were: restrictions on rent increase, the imposition of obligations on owners to rent rooms or houses if the living space per person in a family exceeded the figures established in law. Normally, these laws were limited in temporal, territorial[6] and subjective scope.[7] The special legislation excluded the application of the general regime, provided for in the Law on Contracts and Obligations, where the latter was in contradiction with the former. However, due to the limited temporal, territorial and subjective scope of the special legislation, the two regimes - both the general and the exclusive - applied concurrently.

The Regime During Socialism

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[1] Researcher, EUI Florence.

[2] Promulgated in State Gazette 268/ 05.12. 1892; which entered into force as of 1st March, 1893.

[3] See Andreev, M. " History of the Bulgarian Bourgeois State and Law, 1878-1917" SNI. Second ed., 1980, at p.77-78.

[4] Published in State Gazette 79/12.04.1917. On the preparatory work of the law, see Borissov, J. "Tenancy Law in Bulgaria", Book I, Ciela, 2002, at p.16-22.

[5] On the history of these laws see Borissov, op. cit, supra note 3, at p.29-108.

[6] Normally limited to big cities or to the capital only.

[7] The State intervened also by building apartments in shared buildings, these apartments were rented under the rules of the special regime; see for instance the *Law on making economical houses and the encouragement of house building*, published in State Gazette 65/ 24.04.1924.

During the socialist period 1944-1989, the dual regime continued to apply. Although the exclusive regulations were meant to be temporary and exceptional, during the period their application became the rule, rather than the exception[8]. The shortage of housing brought about one of the most restrictive laws in 1947 – *the Law on tenancy*. The law imposed obligations on owners to lease property; tenancy relationships were set up by virtue of administrative orders; rents were fixed etc. Later, in the 1960s, building of public apartments was intensified. The enlargement of the public housing fund enabled the liberalisation of the special regime applied with regard to the renting of private houses and apartments. The Law on tenancy relationships[9] eliminated the former obligations imposed on owners to lease their property. The special regime continued to apply predominantly to apartments and houses owned by the state, but still, there were few exceptions, which in practice made the special regime applicable to private housing too. These exceptions were predetermined by the "Law on ownership and the rights of citizens"[10], which introduced a number of restrictions on citizens' right of ownership. It restricted the number of apartments or houses that a family might own and imposed limitations on the size of the living space to which families were entitled. The excessive immovable property of citizens was subject to obligatory renting in accordance with the special regime.[11]

The Regime after 1989

Following the political changes in 1989, a major reform of the regime of ownership was initiated. This further had a repercussion on the tenancy regime. The restrictions on individual ownership and on the disposition of such ownership were repealed[12]. As a result, the special regime was rendered inapplicable to the renting of private housing. By amendment of the Law on Ownership, municipal ownership, which was abolished under socialism, has been now restored[13]. The new Constitution of the Republic of Bulgaria adopted on 12th of July 1991 recognises the equality of the three types of ownership – state, municipal and individual. It proclaims that private property is inviolable. This constitutional norm is an emanation of the great respect for private property in the new democratic society.

The regime of tenancy has been further affected by the restitution process, as a result of which, private property has flourished at the expense of the state-owned property. This reveals the growing importance of the general regime, which in practice has become the only regime applicable to the renting of private housing. The various restitution laws[14] contain temporary provisions, providing solutions to conflicts between tenants inhabiting property - subject to restitution, and new owners. The principle has been that the former tenancy contracts will be rendered contracts for an

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[8] Kozhuharov, A " The Law of Obligations, Type of obligatory relationships, Part III" edited by Gerdzikov, O., Sofi-R, 1992, at p. 351.

[9] Promulgated in State Gazette 53/08.07.1969; The law repeals the Law on tenancy of 1947.

[10] Promulgated in State Gazette 26/30.03.1973.

[11] Comprehensive analyses of the Law on Tenancy relationship is offered by Borissov op. cit supra note3 p.185-246.

[12] The Law for amending and supplementing the Law on ownership of citizens, promulgated in State Gazette 21/13.03.1990.

[13] Amendment promulgated in State Gazette 31/17.04.1991.

[14] Due to the different methods of expropriation used, and also because of the various types of immovable properties that were subject to expropriation, different restitution laws were necessary for the solution of the various hypotheses.

indefinite period of time, which will allow the new owners to terminate the tenancy contracts by serving a one-month notice (see answer to question 6 below).

It should be noted that the new Constitution and the entire body of legislation in the post-socialist period aims at eliminating restrictions imposed upon individual freedoms and private ownership, which were characteristic of the socialist period. They embody the spirit of economic freedom and pay great respect to private ownership. The strong influence of the State and its interference in the private sphere during decades of socialism continues to trigger a negative attitude vis-à-vis state activism. The dominant view remains that the State should refrain as much as is possible from regulating private relationships and leave sufficient space for free market initiative. Actually, the principles of free market initiative and of the inviolability of private property give impetus to two obvious tendencies in the current development of tenancy law. The first is to downplay the potential regulatory role of the State, particularly as a social regulator. This tendency evidently acts to the detriment of the socially disadvantaged members of society, who remain a highly significant percentage of the population. The second tendency, which materialises as a result of this deep-seated respect for private property, is the preferential treatment afforded to owners of property.

The Regime at Present

Sources of law

The Constitution does not contain provisions directly relating to tenancy relationships. However, the constitutional recognition of the inviolability of private property and the constitutional principle of free market initiative has a significant influence upon tenancy relationships. These constitutional norms inform not only the new legislation, but also judges' thinking.

The major source of law for tenancy relationships is the statutory law, establishing the general and the exclusive regime. Important sources of law are also the decisions of the General meeting of the Civil Department of the Supreme Cassation Court. These decisions are binding upon the judicial and the executive authorities. The decisions of the general meeting of the Supreme administrative court have the same effect.

Theoretically the case law of the Supreme Cassation Court do not have binding effect, and the lower courts are not obliged to follow it. In practice however, judges in the lower courts always take into account the supreme courts' decisions, and would rarely issue a judgment in contradiction with consistent case law of the Supreme Cassation Court. Thus, it could be argued that case law, although not being officially a source of law, is of virtually tantamount significance. Another source of law is the principle of justice, which is explicitly stipulated in the Civil Procedural Code.

General and Exclusive Regime

The general and exclusive regimes continue to apply concurrently at present, however the role of the latter is significantly diminished. The State withdrew to a great extent from regulating tenancy relationships. At present there is no legal mechanism allowing for the state to intervene in tenancy relationships between private parties. Renting private property is regulated solely and entirely by the general regime laid down in the Law on Contract and Obligations (hereinafter "the LCO") based on the principle of freedom of contract. The exclusive regime applies solely to the renting of

state owned, municipal owned property, and to property owned by state enterprises or organizations[15].

However, as a result of both the privatisation and restitution processes, the number of state owned properties has fallen significantly. Moreover, due to economic difficulties and a lack of resources needed to maintain the fund of public housing, the State has sought ways to free itself from the burden of administering a large fund of state owned housing and has been encouraging citizens, though informally, to purchase apartments rather than to rent. In addition, a bank crisis during the first half of the 1990's added to a high percentage of inflation prompted much of the population to invest their savings in purchasing apartments. It should also be pointed out that, traditionally Bulgarians associate ownership with security and stability. This accounts for why, even in the most economically difficult periods in Bulgarian history, the population has shown a preference for purchasing property rather than renting. As a result, the percentage of rented houses and apartments at present is insignificant in comparison with the ownership of property[16].

Exclusive Regime

Due to the reduction of the state owned housing fund, the percentage of the population renting private houses is greater than the percentage of the population that rents state or municipal owned apartments.[17] The existing legislation is indicative of the diminishing importance of the exclusive regime. There is no coherent act establishing the rules of the exclusive regime. Separate provisions are contained in several acts – the Law on State Property[18] and the Regulations for its application[19], the Law on Municipal property[20] and the Regulations for its application, the Regulations of the order under which the State exercises its right of ownership in the state owned enterprises,[21] several ordinances relating to the housing fund belonging to the Ministry of defence and the Ministry of internal affairs.[22] The common features of the special regime provided for in those acts can be boiled down to the following: (i) the special provisions establish criteria for determining the range of persons and

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[15] For instance, the Ministry of defence and the Ministry of internal affairs maintain housing funds, meant to satisfy the housing needs of their employees.

[16] According to data of the NSI for 1999, private ownership in the cities comprises 89,5 % of all the housing in the country, while in the villages private ownership is 97,6 %. The aggregate percentage of state, municipal and state enterprises' property is 10.5 %.

The official statistics for 2001 reveal that 91,3 % of the population live in properties (houses and apartments) that they themselves own. The percentage of people living in properties (houses and apartments) that they themselves own in the capital Sofia is 84, 8%.

[17] The official statistics for 2001 further reveal that 4, 5 % of the population rents private houses, while the percentage of population renting state owned houses is 3,4%. Importantly, it should be noted here that the percentage of the population renting private houses and apartments is greater. The statistics are based on data collected from tax offices. Often parties prefer not to execute contracts in writing, so that landlords may escape tax duties on the income derived from rent payments. Such contracts remain unregistered and there is no official information about their percentages.

[18] Promulgated in State Gazette 44/21.05.1996, subsequently amended.

[19] Promulgated in State Gazette 82/27.09.1996, subsequently amended.

[20] Promulgated in State Gazette 44/21.05.1996, subsequently amended.

[21] Promulgated in State Gazette 10/01.02.1994, subsequently amended.

[22] See for instance Ordinance 8/15.03.1996 on administering, maintaining, renting and selling houses from the housing fund of the Ministry of internal affairs, promulgated in State Gazette 24/1996.

Ordinance 3/19.08.1998 on accommodation in houses, work shops and garages belonging to the housing fund of the Ministry of Defence, promulgated in State Gazette 107/1998, subsequently amended.

families who can benefit from renting public apartments - their financial status and the lack of any immovable property are decisive factors; (ii) there is a selection procedure - the selection is performed by committees entrusted with the task to review and assess the documents provided by candidates in support of their applications for public housing; (iii) the tenancy relationship arises via an administrative order for accommodation, issued by the regional governor, the mayor or the governor of the organisation, on the basis of which a standard tenancy contract is concluded; (iii) there are strict rules for determining the amount of payable rent - the rent may vary depending upon the status of the apartment, its location, etc; (iii) the size of the rented apartments given to tenants depends on the number of family members; (iv) the tenancy rights extend to all members of the tenant's family.

The fact that at present the exclusive regime is to a degree neglected, due to political and economic factors, does not imply that there is currently no need for public housing and for an improved regulation of the renting of private housing. The need for heightened State interventionism is palpable in the major cities, and above all in the capital, which as a university and business centre attracts many younger residents.

General Regime

Currently the general regime laid down in the LCO plays a major role. The LCO has been effective for almost 50 years. Although elaborated during the socialist period, and intended to regulate very different economic and social relationships, the LCO still proves to provide satisfactory and adequate solutions to contractual and other obligatory relationships. It is deemed to be one of the most successful statutory acts in the legislative history of Bulgaria. The law is aligned with the principles of the continental law system and borrows solutions from the French and German traditions. Nevertheless, it is not a direct transplant from any particular source and is considered a purely Bulgarian creation.[23] Although not a code, the law does codify the various types of obligatory relationship. It is divided into two major parts – a general and a special part. The general part establishes all sources of obligatory relationships – contracts, torts, unjust enrichment, negotiorum gestio, and unilateral promises. It further establishes the rules on conclusion, validity, performance, non- performance, delayed performance and the rescission of contracts, guarantees, pledges and mortgages. The law is predicated upon the principle of freedom of contract. It recognizes parties' freedom to determine the content of the contract insofar as the contract does not contravene mandatory provisions of law and good morals.[24] By virtue of a new provision introduced by amendment in 1993, the binding effect of contracts upon parties is equated with the binding effect of law. [25] The explicit attribution of such an effect to contracts has a more political than strictly legal consequence. This approach is in keeping with the spirit of the constitution and, generally speaking, with the entire corpus of post-socialist legislation which seeks to pay homage to private property, individual autonomy and to freedom of economic initiative.

[23] Kalaidzhiev, A., "Law of Obligations, General Part", Second Editon, Sibi, 2002. at p.24.
[24] Article 9 of the LCO.
[25] Article 20(a) of the LCO, introduced in 1993.

The Special part of the LCO deals with various types of contracts[26] which includes the Lease contact. It should be noted that until 1996 the LCO used to apply to other types of contracts and transactions, which were by their nature commercial. Following the adoption of the special part of the Commercial Code in 1996 the rules applicable to these types of transaction were repealed from the LCO and their regulation fell under the provisions of the Commercial Code. As a result the LCO applies now predominantly to relationships between individuals, and only in a minor way to commercial transactions in order to breach gaps in the Commercial Code. However, the Commercial Code does not contain rules on commercial lease and pursuant to the principle of subsidiary application, the LCO applies to commercial lease. As a result under Bulgarian law a number of provisions apply to lease contracts concluded between individuals and between traders. Thus, the Bulgarian legislation, unlike most of the contemporary laws enacted in Europe, does not provide separate sets of rules for commercial lease and lease contracts between individuals. Identical rules apply to both. An additional fundamentally important aspect of the Bulgarian law is that the same rules apply irrespective of the particular type of property leased and/or the purpose(s) for which it is leased. The LCO applies regardless of whether a property is leased as a house or as a garage, whether the property will be used as accommodation or as an office or for any other lawful purposes. The law does not recognise any difference between tenancy and lease contracts. Indeed, tenancy contracts are simply deemed to be a form of lease contract, and are subject to identical rules. Moreover the term "tenancy" is not a legal term recognised in Bulgarian law. The law does not use different words for lease, rent or tenancy. The general term employed is that of "lease". Specifying that property is subject to a "lease" indicates the purpose for which it will be used. However, in view of the purposes of the present project and in order to bring this report on the current status of the law of Bulgaria into line with the national reports of the other countries, I shall adopt and use hereinafter the term "tenancy" to indicate that the lease of housing and apartments is intended to be used as accommodation, and that the terms "Tenant" and "Landlord" indicate the parties to such a lease contract.

Basic characteristics of Tenancy contract

The rules relevant to tenancy contract are provided for in the general as well as in the special part of the LCO. The provisions on conclusion, performance, delay, non-performance and rescission set forth in the general part of the law are applicable to all types of contracts, including tenancy contracts. The particular rights and obligations of the parties are provided for in the special part of the law. Most of the norms, with rare exceptions, to which I will refer below, are dispositive, and parties are free to deviate from them. The combined application of the rules of the special and the general part of the law operates effectively and does not raise interpretative problems. Moreover, this approach provides suitable solutions with respect to possible lacunae in the special parts, as reference to the general part normally gives a satisfactory solution.

[26] Sale (articles 183- 213), Exchange (articles 222-224); Donation (articles 225-227); Lease of property (articles. 228-239); Loan (articles 240-242); Loan for use (articles 243-249); Deposit (articles 250-257); contract of manufacture (articles 258- 269); Civil partnership (articles 357- 364); Settlement (articles 365-367); Public pledge of award (articles 368-369).

Under Bulgarian law, a tenancy contract is a consensual contract - it can be validly concluded without the need to observe a particular form; indeed a mere oral agreement is sufficient. The law ascribes to the various forms of tenancy contract different functions, the effect of which is either to ensure the proof of the existence of a contract in litigation proceedings or to protect tenants against third parties' rights over the property (see answer to question 4 below).

A tenancy contract does not confer property rights or any other real rights to tenants. The rights and obligations created by virtue of the contract are purely obligatory. For this reason, there is no requirement for the Landlord to be an owner of the rented property. Persons having either obligatory or real rights to use the property or even only a right to administer the property can lawfully execute tenancy contracts. However, the nature of the Landlord's rights over his/her property is important with regard to the determination of the maximum period of time for which he is allowed by law to conclude the contact. (see answer to question 6 below).

The essential elements of a tenancy contract are considered to be, the property and the rent. These two components must be adequately specified in order for the contract to be given legal effect. Without sufficient clarity on the identity of the object of the contract and the price, the contract will not produce any effects due to an absence of agreement on the primary terms of the contract. [27] The law does not impose any restrictions on the mode of formulation or on the amount of the payable rent. In general, the lack of an agreement on other elements of the contract will not negative its validity. With regard to other rights and obligations that may arise, in the absence of expressed agreement between the parties, the rules laid down in law will be applied.

With regard to the landlord, the primary obligations as established by law are as follows: (i) an obligation to deliver the property to the Tenant; (ii) an obligation to maintain the property in a suitable state for the period of tenure - the landlord must meet all expenses for repairs, except for those due to conventional, 'everyday' use; (iii) an obligation to ensure for the benefit of the tenant an undisturbed use of the property;

The basic obligations imposed upon the tenant are: (i) to pay the agreed rent; (ii) to take care of the property and use it with due diligence; (iii) to return the property immediately once the contract is concluded.

Tenancy contracts can be concluded for a definite or indefinite period of time. In the case of a definite period, this may not exceed 10 or 3 years, depending upon the landlord's rights (see answer to question 6 below). The rules on termination of contracts differ depending on whether the contracts is for a definite or indefinite period. Parties may not terminate contracts with a specified duration, prior to the expiration of the contract, while parties can withdraw from contracts agreed for an indefinite period of time by simply serving one month's notice to the other party, or in a situation where the rent is paid daily, by simply serving one day's notice. Needless to say, upon mutual agreement, parties may always terminate a contract

[27] See article 26 of the LCO, which provides that contracts without an object are void.

prior to its expiry date. It is further possible to agree that the termination of a contract is conditional upon the occurrence of particular events.

The rescission of a tenancy contract is subject to the general rules. A non-defaulting party may at all times rescind a contract should the other party fail to perform his/her obligations. The non-defaulting party may rescind by serving notice giving the defaulting party an appropriate period of time to perform. The contract is held to be rescinded should the other party subsequently fail to perform within the period of grace. However, the non-defaulting party may serve a notice[28] of rescission without allowing time for performance, where the performance has become impossible in whole or in part, or where due to the default, performance has since been rendered useless or where the fulfilment of a particular obligation should have been performed within a fixed period of time. No rescission is permissible if the non-performed obligation is immaterial to the non-defaulting party's interest. It should be pointed out that a tenancy contract is a contract for continual performance. The law provides that the rescission of contracts for a continuous performance comprises an exception from the rule that rescission has retroactive effect. Thus, the rescission of the tenancy contract does not produce a retroactive effect – obligations performed prior to rescission are unaffected and remain valid.

Upon rescission the non-defaulting party is entitled to compensation for non-performance. The rules on tenancy provide for rescission ex lege in case the property 'perishes' (see answer to question 11 below).

It should be noted that, by virtue of the tenancy contract, the tenant does not obtain the status of possessor in a strict legal sense. The tenant uses the property in his/her position as a holder of the property (see answer to question 24 below).

Other forms of lawful possession

A lawful holding of property could be based on a "loan for use" contract. This type of contract allows for one of the parties (the lender) to grant property to the other party (the borrower) for its temporary use without consideration. This type of contract is a real contract and it is deemed to be concluded with the delivery of the property to the borrower. Unlike the tenancy contract, the delivery of the property is not an obligation, but is a factual act bringing about a valid contract. The loan agreement, unlike the tenancy contract, is a unilateral contract – it confers obligations upon only one of the parties (the borrower). Similar to the tenancy contract it is a contract for continuous performance. Given the unilateral character of the contract and the lack of consideration, this type of contract is rarely used, and if at all, it is used between relatives or close friends.

Another type of lawful possession could be based on a real right of use. A real right of use is established by contract in a notary form. By virtue of a notary contract the owner deprives himself of the use of his/her property in favour of the user either against or without consideration. Given the notary form of the contract, the right of use is normally granted for a long period of time and most often for life. The real right is not transferable and expires after the death of the user, unless a shorter

[28] If the contract has been executed in writing, the notice should be in writing too.

period is stipulated. The contract can be rescinded only through the courts and is regulated by the law of property.

Rules on procedure

The right to bring proceedings in a case involving a tenancy relationship and the dispute settlement process itself are both regulated by the general procedural rules of the Civil Procedural Code. Disputes are heard by regular courts and are subject to the general rules on jurisdiction.

The Bulgarian legislation establishes three-instance proceedings[29], which normally result in quite a lengthy litigation process. For a number of disputes, including those based on tenancy law, time is a key consideration and prolonged proceedings may render the final judgement ineffective. For this reason new rules aimed at speeding up the processing of such claims were introduced in the Civil Procedural Code in 1999. The new rules do not change the essence of civil proceedings but simply establish shorter periods for the submission of documents, for the delivering of subpoenas, the submission of experts' conclusions, and the issuance of court decisions[30]. Whilst this is perhaps not the most suitable solution[31], it has nonetheless improved the effectiveness of court proceedings.

The tenant may also rely on administrative protection set down in the Civil Procedural code. These rules entitle the tenant, who has been deprived of the property, to file with the regional court an administrative request for restitution of possession.[32] If the request is well founded, the judge issues an order for restitution, subject to immediate enforcement.[33] The order does not have res iudicata effect. Nevertheless, the speed and low cost[34] of this procedure makes it typically the preferred solution.

As has been pointed out above, the percentage of rented property is insignificant when compared to the ownership of private property[35]. For this reason the percentage of legal disputes that arise from tenancy contracts does not constitute a significant proportion of the total of legal disputes involving contracts. Legal disputes which do arise from tenancy agreements most often involve the non-payment of rent or a claim for the return of possession of rented properties upon termination of a tenancy contract. In the latter case, tenants normally argue that the contract has not been properly terminated and that they may remain in the premises

[29] First instance, instance of appeal,cassation.
[30] On the fast procedure introduced in 1999, see Stalev, Zh., " Bulgarian Civil proceedings" S, 2000; at p.612-616.
[31] The amendment has been criticised for not being sufficiently effective, because of the opportunity provided for derogation from the fast track proceeding. Upon request by the respondent, and provided that the case is factually or legally intricate, the judge may decide to hear the case under the regular proceedings. The combining of several claims further leads to further derogation from the fast track process.
[32] On the procedure see Stalev, op. cit, supra note 29, at p.626-619.
[33] Both the police and the mayors are under obligation to cooperate in the enforcement of the order.
[34] There is no fee for filing the request; the payment of expenses for the procedure must be met by the losing party and are fixed at at the amount of 10-200 leva (equivalent to 5-100 euro).
[35] See the figures in footnote 15 above.

on the basis of an effective contract. Commonly it is landlords that initiate litigation, with tenants typically appearing in court as respondents.

The length of proceedings prior to the adoption of the faster procedure in 1999 often dissuaded landlords from litigating. The new procedure now provides speedier remedy and is likely to increase case law.

The state fee for filing a claim based on a tenancy contract is a standard fee, applicable to material claims, at the amount of 4 % of the claimed interest. Where the claim pertains to the continuation or termination of a tenancy contract, the basis for calculating the fee is the amount of rent payable per year. It should be noted that article 63 of the Civil Procedural Code allows the courts to waive state fees and expenses relating to proceedings for persons in particularly difficult financial conditions. For this purpose the person should present before the president of the court a certificate regarding his/her material status, to be issued by the municipal (regional) people's council or mayor's office, affirming that he/she does not possess sufficient means to pay fees and costs.

The parties of course are free to choose to defend themselves without seeking the assistance of a qualified lawyer, nor is the court obliged to appoint a legal consultant for the purpose of the proceedings ex officio, as is the case in criminal proceedings. A legal adviser's fees may vary significantly. . Whilst the expenses relating to the proceedings and the legal advisers' honoraries may have a potentially negative effect upon parties considering whether or not litigate, yet they are virtually never a serious factor in dissuading an aggrieved party not to bring proceedings.

The Bulgarian law does not contain provisions relating to landlord and tenant associations. To the best of my knowledge such associations do not exist or if they exist they are not influential and have little, if any, social significance. The Civil Procedural Code does not provide for the possibility for tenants' or landlords' associations to appear in the proceedings assisting one or other party.

The execution of tenancy law decisions by the courts is subject to the general rules of execution provided for in the Civil Procedural Code.

Set 1: Conclusion of the Contract

Introductory notes

The conclusion of tenancy contracts is regulated by the rules on the conclusion of contracts set out in the general part of the LCO. According to these rules, the conclusion of a contract requires one of the parties to have made an offer and the other party to have accepted it. However, not every statement or proposal for the conclusion of a contract amounts to an offer. In order to be valid and binding upon the party as an offer, the statement made should meet several requirements:
(i) it should clearly express a party's intention to be bound by the offer;
(ii) it should clearly demonstrate a party's serious intention to conclude a contract – *animus contrahendi obligationis* ;
(iii) it should be complete.

The serious intention of the party to conclude a contract should be deduced by construing the statement made. In order to be deemed complete the offer should contain all essential terms of the contemplated contract. With regard to the tenancy contract these are: (i) identification of the rented property and (ii) stipulation of the rent.
The offer is deemed complete when the contract can be concluded by mere acceptance by the other party i.e. the contract can be fulfilled without any further negotiations, counter-offers or additional stipulations. It should be noted that the requirements needed to establish a valid offer are not explicitly set out in law. Rather they have been elaborated firstly by legal doctrine, and subsequently adopted by the courts.

The law does not require any particular form for the offer to be valid. For instance, oral offers are valid and binding.

Pursuant to article 13 of the LCO an offeror is bound by the offer until the expiration of the time period either specified therein or usually required under the specific circumstances for the acceptance to reach the addressee. However, the offer can be withdrawn, provided that the withdrawal reaches the addressee earlier or at the same time when the offer reaches him. In such a case no obligations arise for the offeror. Provided that no time period for acceptance has been specified, an offer made to a person present loses its effect if it is not accepted immediately, whereas an offer made to a person who is not present loses its effect after the expiration of a period of time normally needed for the acceptance to reach the offeror.

The rules with regard to "acceptance" are equally scant. Similarly, they have been developed in the legal doctrine in accordance with the classical interpretation of contract as a function of the autonomy of the parties' will.[36] Similar to the requirements with regard to the "offer", the "acceptance" should also demonstrate the addressee's intention to conclude the contract – *animus contrahendi obligtionis.* The "acceptance" should be addressed only to the offeror. According to the legal doctrine the "acceptance" should be unconditional and should be entirely in response to the offer. Any deviation from the "offer", would render the "acceptance' merely a counter-offer for a new contractual agreement.

Unless explicitly demanded by the offeror, no particular form is required for the validity of the acceptance. If the offer has prescribed a period for acceptance, acceptance after the expiry of the term does not oblige the offeror. The rules on withdrawal are the same as those applicable to the withdrawal of an offer. Silence or inactivity does not imply acceptance. The contract is deemed to be concluded as of the moment the acceptance reaches the offeror.

The law does not contain provisions relating to an offer made to an indefinite number of persons or to unspecified persons. Nevertheless, it is undisputable that an offer could be validly made to a non-specified addressee. Such offers should clearly show

[36] See article 150 of the German Civil Code; see Kozhuharov, "The Law of Obligations, General Part. Book 1", edited by Gerdzhikov, O., Sofi-R, 1992, at p. 44.

that the offeror would be willing to conclude a contract irrespective of the identity of the addressee[37].

The rules on concluding contracts in Bulgarian law are aligned with the Principles of European Contract Law, prepared by the Commission of European Contract law (hereinafter "PECL")[38]. Although the rules provided for in the LCO are not as detailed as those in the PECL, they have been developed by the case law according to the logic implied in the PECL.

<u>Question 1: Choice of the Tenant</u>

L offers an apartment for rent in a newspaper. T replies and shows interest. However, L rejects T after she tells him that she:

a) has a husband and three children.

b) is a Muslim, and L is afraid of terrorism.

c) has a small dog.

d) is a hobby piano player and wants to play about 1 hour every evening from 8-9 pm.

e) does not have full capacity and is under custody.

Does T have a claim against L?

<u>Variant</u>: In order not to lose any chances to get the apartment, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages?

Having pointed out the characteristics of the offer under Bulgarian law, a distinction should be drawn between "offer" and other statements or proposals. An announcement for renting, published in newspapers normally would not amount to an offer. Announcements may take various forms, such as advertisements, inquiries, or invitations for negotiations. However, they normally express only an offeror's intention to negotiate, rather than his/her intention to conclude a contract. Such announcements are rarely considered sufficiently complete as to amount to an offer. Moreover, it should be recalled that an essential element of the tenancy contract is the need to specify the object of the contract and to identify the proposed property as available for renting purposes. Therefore, an offer for the conclusion of a tenancy contract should reasonably provide a full description of the property. The tenant would normally want to examine said apartment, as one of the tenant's obligations is to return the property upon termination of the contract in the same condition as he himself found it in at the time of the conclusion of the contract. Therefore, the tenant would be unwise to run the risk of accepting an offer, trusting solely in the word of the landlord. Likewise, the landlord would rarely run the risk of renting his property to someone who he has not met. Although a tenancy contract is not an *intuitu personae* contract by definition, the landlord is normally interested in the personality of the potential tenants and the latter is typically a decisive factor for the conclusion of a contract.

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[37] If this is the case, then the offer should reflect the landlord's serious intention to conclude the contract irrespective of the personality of the tenant. However, such a situation would create problems, if several people accept the offer simultaneously.

[38] Ole Lando and Hugh Beale (eds.) "Principles of European Contract Law", Part I and Part II, Combined and Revised, Kluwer Law International, 2000.

For the above reasons, in practice in Bulgaria advertisements published in newspapers are not considered to be offers, but merely invitations for negotiations. Of course, theoretically it is not inconceivable that a newspaper announcement could be defined in such a way as to meet all of the requirements for a valid offer. Moreover, the offer may be formulated so that it indicates that the landlord is not interested in the personality of the potential tenant.

As such, I shall thus consider the possible solutions to question 1 in two parts. I shall firstly assume that there has been a valid offer made in the newspaper followed by a valid acceptance. Secondly, I shall consider the remedies available in a situation where the announcement does not amount to an offer.

(1) Valid offer followed by valid acceptance

It should be stressed that the LCO recognises the principle of freedom of contract, which assumes the right of landlords to choose with whom to contract and to determine the conditions of their offers. In this respect the landlord is free to decide that he/she will not rent to families or to people of a particular ethnical background. The law does not impose any obligation either to necessarily rent, or to necessarily rent to whomsoever.

However, provided that the advertisement made in the newspaper constitutes a valid offer for the conclusion of a contract, without any specification as to the persons to which it has been addressed or as to any other special conditions, and provided that the offer has been accepted, the contract will be held to be validly executed. Neither of the conditions enumerated in (a), (b), (c),(d) could be a valid reason for the landlord's refusal to fulfil his obligations under the contract. With regard to hypothesis (a), it should be noted that the family is protected by the Constitution and the landlord's refusal to fulfil the contract on the ground specified under (a) would be in contradiction with the Constitution and the Family Code (see answer to question 2 below). With regard to hypothesis (b) it should be pointed out that the Constitution recognises equality of all citizens under the law, irrespective of race, nationality, ethnic identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status[39]. The freedom to choose and practice religion is similarly enshrined in the Constitution[40]. Article 5 (2) of the Constitution states that the provisions of the Constitution apply directly. Moreover, Bulgaria has ratified the International Convention for the abolition of all forms of racial discrimination[41] pursuant to which Bulgaria undertakes to ensure equality before law and effective judicial protection for all persons, irrespective of race, colour, national or ethnic origin. The provisions of the Convention also apply directly.[42] Therefore, the

[39] Article 6 of the Constitution.
[40] Article 13 and article 37 of the Constitution.
[41] Ratified on 23.06.1966.
[42] Pursuant to article 5 (4) of the Constitution any international instruments which have been ratified by the constitutionally established procedure, promulgated, and have entered into force with respect to the Republic of Bulgaria, are to be considered as fully part of the domestic legislation of the country. They supersede any domestic legislation stipulating otherwise.

landlord's refusal to fulfil the contract on the basis of racial, ethnic or religious grounds would be illegal.

The grounds mentioned under (c) and (d) cannot be relied on for the purpose of refusing fulfilment of the contract, unless the offer had explicitly made the contract conditional upon those particular requirements. Those conditions are neither essential elements of tenancy contracts, nor does the law contain any restrictive provisions in this respect. Given this state of affairs, in the absence of particular requirements to this effect in the offer, the landlord would be unable to terminate the contract on the grounds under (c) and (d). In situation (d), the *Regulation on management, order and control in condominium* would apply (see the answers to Set 6)

If L refuses to fulfil the contract by refusing to hand over the keys of the apartment to T, T has the following options:

(i) he/she may file a claim on the grounds of non-performance, and based on article 79 of the LCO, seeking performance and compensatory damages for the delay in performance; or

(ii) he/she may file a claim pursuant to article 79 of the LCO claiming damages for non-performance.

In both of these cases the damages would cover both the loss suffered and the loss of profit insofar as they are as a direct consequence of the breach of contract and were foreseeable at the time of entering into the contractual agreement. If it is proved that the Landlord has acted in bad faith, he shall be liable for all direct damages.

(iii) he/she may file a constitutive claim for rescission of the contract combined with a claim for compensation for damages caused by the breach of the contract.

The hypothesis outlined in (e) raises the issue of validity of contracts. According to article 27 of the LCO, contracts concluded by persons who are legally incapable, and which fail to observe the legal requirements established to deal with such contracts shall be void. The law distinguishes between two types of custody – full and limited. Persons who are under full custody are unable to express a valid will and are therefore unable to conclude valid contracts. If the offer has been accepted by a person under full custody, the contract would be null and void from the moment of its conclusion. The solution would, however, be different if the tenant is under limited custody. Persons under limited custody can conclude contracts only with their trustees' consensus. In the absence of a trustees' consensus, the landlord may avoid the contract. For this purpose a constitutive claim for invalidity should be filed. Upon judicial recognition of the invalidity of the contract, each party is obliged to return any benefits that have been received under the contract. Restitution is due on the grounds of unjust enrichment.

(2) An invitation for negotiations

As has been pointed out above the law gives landlords the freedom to choose their contracting partners. The law does not impose upon landlords any obligation to negotiate and conclude contracts with families or with persons belonging to a particular ethnic or religious grouping. Thus, if the landlord in making an offer

initially defines the group of people to whom it is directed in a manner that *de facto* excludes families or Muslims, the invitation for negotiation would still be valid. However, the invitation would be invalid if the landlord invites a member of a family stating that the invitation applies only to this member, and not to the remainder of the family, as the entire family enjoys a special form of protection under both the Constitution and the Family Code.

A situation whereby a landlord explicitly states that he will not negotiate with Muslims would be much more controversial in practice. The issue is delicate because here freedom of contract collides with the principle of non-discrimination. No precedent exists in Bulgarian law in this respect, and so I can merely offer a possible solution.
In my view, even in this situation, where the landlord has blatantly demonstrated a discriminatory attitude, he could not be obliged to invite and negotiate with Muslims against his will. Thus, in my view, an invitation explicitly excluding Muslims would still be legally valid. This is so because there is no general obligation on people having exclusive property to rent that property. If landlords are not obliged to rent at all they can hardly be forced to negotiate and rent to particular persons. This does not mean that the offended Muslim may not seek remedy against the landlord. However, this would be on different legal grounds. One possibility for the aggrieved party would be to file a claim in tort for non-pecuniary damages. Despite the direct applicability of the Constitution, which recognises the right to choose one's religion and equality before the law, irrespective of ethnic and religious background, in my view it cannot be relied upon here to oblige the landlord to negotiate and conclude a contract with persons that he, for whatever reasons, dislikes.

If the landlord does not specify in the published invitation the type of persons with whom he wishes to negotiate, and provided that he has not made any further stipulations, then the rules on preliminary contractual liability will apply. In any of the cases under (a), (b), (c), (d), the potential tenants can, as a matter of principle, rely on article 12 of the LCO, which provides that parties shall act in good faith in conducting negotiations and concluding contracts. Otherwise they shall be liable for damages. This provision equates with article 2:301 "Negotiations contrary to Good Faith" of PECL. If the potential tenants want to recover compensation they shall bear the onus of proving at least: (i) the landlord's bad faith and (ii) the amount of damages suffered. Usually, this is a very arduous task and for this reason the case law under article 12 of the LCO is extremely scant. There is a current debate in the literature with regard to the nature of the liability incurred as a result of bad-faith negotiations. Some authors claim that it is tortious liability[43], others authors qualify it as a special type of preliminary contractual liability[44]. The courts' practice is not constant in this respect. Judges take one or other view [45] and the case law is inconsistent.

[43] Antonov, D., "Tort", S. 1965; Topalova, L., "The compensation for missed profit in the socialist organisations", S, 1960, at p. 34.
[44] Gocev, B., " Contractual and Tort liability" S, 1979, at p.12- 15; Stoichev, K., "About the basis and the character of the preliminary contractual liability" Legal studies in the memory of professor Ivan Apostolov, S., 2001; Kalaidzjiev, op. cit, supra note 22, at p.102.
[45] 242- 56-IV GO; 2844-72-I GO; see also Konov, T. & Kalaidzjiev, A. " Liability upon breach of negative interest" State and Law, 11, (1988) at p. 24-31.

<u>Variant</u>: In order not to lose any chances to get the apartment, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages

Pursuant to article 29 of the LCO, fraud constitutes grounds for invalidating a contract. Where one of the parties has been misled through intentional misrepresentation by the other party this is grounds for making a contract void. Several requirements should be met in order to invalidate a contract. First, one of the parties to the contract should have been misled. Secondly, the deception should have been intentionally triggered either by the other party or by third persons. Third, the contract should have been concluded as a result of this deception. The conditions triggering the application of article 29 of the LCO are the same as those under article 4:107 "Fraud" of the PECL.

If the landlord in making his offer has explicitly made the conclusion of the contract conditional upon certain facts enumerated in (a) – (d) and the tenant has provided untrue information, then the landlord is entitled to avoid the contract. In the absence of an explicit conditionality, the entire contract ought to be construed with a view to ascertaining whether the contract would have been concluded in the absence of such fraud.

Provided that the Tenant has misled the Landlord, the Landlord may file a constitutive claim for invalidating the contract. The right to claim invalidity is limited to three years, which begins from the moment that the Landlord first discovers the fraud. However, the right to make an objection to an action for enforcing performance would be available to the Landlord without any time restriction. Provided that the contract has been invalidated, the Landlord has at his disposal two other claims. First, he can claim restitution on the basis of unjust enrichment[46] and thereby demand the return of the rented property. Secondly, he may claim compensation for the damages suffered as a result of the invalidated contract. However, the legal base for such compensation will not be the contract, but rather a claim in tort. Following the invalidation of the contract, the contract cannot be used as a legal basis for compensation. Such being the case, the following elements should be proved: (i) damages arising from the contract being held to be invalid; (ii) a causal link between the invalidation of the contract and the damages; (iii) fault on the part of the tenant.

If the contract has not yet been concluded, and the landlord and potential tenant remain engaged in negotiation, the landlord may hold the tenant liable for bad faith in negotiations and claim damages pursuant to article 12 of the LCO.

<u>Question 2: Sharing with Third Persons</u>

L rents an apartment to T. After some months, T wants to take into the apartment:

a) her husband and children.

b) her boyfriend.

c) her homosexual partner.

[46] See article 34 and article 55(1) of the LCO.

d) her parents.
Is this possible against the will of L? If not, what are L's remedies?

The LCO does not contain particular provisions relating to the sharing of rented apartments with third persons. The solution therefore would be derived by way of legal construction. The type of legal and/or factual relationship between the tenant and the persons sharing the apartment must be taken into account.

Article 21 of the LCO provides that contracts confer rights and obligations on the parties to the contract; and on third persons only exceptionally, where the law explicitly states.

There are several scenarios where a tenancy contract will confer rights and impose obligations upon third persons. First, the spouse of the tenant is automatically bound by the contract. His/her rights and obligations can be deduced from article 25 of the Family Code, which provides that expenses necessary for satisfying family needs shall be borne by both spouses. Article 25(2) stipulates that spouses shall be jointly and severally liable for the fulfilment of obligations undertaken by any one of them for the purpose of satisfying family needs. By virtue of this text, each spouse is considered a legal representative of the other one with regard to any contracts or transactions relating to their common household. The spouse of the Tenant will be bound by the contract without giving express agreement or even without knowing of the contract. As far as tenancy contracts relate to the common household, the spouses act as representatives of each other in the tenancy legal relationship. As a direct consequence, the spouse is deemed to be a party to the tenancy contract in law. [47]

However, this rule does not apply to other members of the family or to members of the household[48]. Therefore, tenants' grandparents or children shall not be bound by the tenancy contract, neither will they have rights under it. The same applies to the partner of the tenant. Of interest is the question whether a tenancy contract ought to confer rights and obligations upon the tenant's children, as parents are the legal representatives of the children in law. Some authors maintain that given that tenancy contracts are concluded to satisfy the needs of the family, the tenant concludes the contract in his capacity as a representative of the entire family and to the benefit of the family, including his/her children[49]. Others consider that parents in their capacity as legal representatives do not conclude tenancy contracts in the name of their children. It is accepted, however, that as houses/apartments are rented to satisfy family needs, there is a presumption that the landlord should have expected and known that the children will inhabit the apartment as well. Thus, no special stipulation to this effect is needed in the contract. The right of the children follows ex lege.

[47] About the legal nature of the representation, see Enova, L., " Family Law", Dr. Peter Beron, 1990, at p.88-91.
[48] "Household" is wider in scope than "family" and may include parents, grandparents, brothers and sisters or other relatives, who habitually live together in the same house.
[49] See Borissov, J., "Tenancy Law in Bulgaria", Book II, Ciela, 2002, at p.111.

The case will be different if the Tenant manages to arrange a stipulation in favour of a third party, for instance in favour of his/her parents or boyfriend.[50] Then the third persons will enjoy rights under the contract.

A clear distinction must however be drawn between the various scenarios outlined above, and situations where third parties - without being bound by the contract - are entitled to inhabit the rented property along with the tenant. The law is opaque on this subject, but again, legal construction can provide a solution. Firstly, the two substantial elements of the tenancy contract on which parties must reach agreement are (i) agreement on the object of the contract, i.e. the rented property and (ii) agreement on the rate of payable rent. Given that the landlord receives the desired consideration, and given that the expenses relating to the use of the property (such as electricity, heating, water, etc) under article 232 are met by the tenant and provided that the tenant complies with the obligation to use the premises (also under article 232) for the agreed purpose for which it has been rented, the landlord should not be concerned about who else inhabits the apartment with the tenant. The landlord has no legal grounds on which to rely, to object to the number or type of people that share the premises along with the tenant. Moreover, the right of members of the household to inhabit the premises could be also deduced from article 230 of the LCO, which makes the landlord liable for any defects in the premises, which endanger the tenant's health or "the health of the members of his household". This suggests that the law readily assumes that members of the household are entitled to inhabit the premises alongside the tenant. Given that the term "household" is not legally defined, it could be widely construed to include persons, who are not family members, including tenant's parents, grandparents, boyfriends, etc.

A survey of the provisions relating to subleasing are equally supportive of this approach. According to the LCO, the tenant is free to sublease parts of his/her property unless there is an explicit stipulation in the contract to the contrary. Per argumentum a fortiori, the tenant should be deemed free to share the property with people he/she chooses unless there is an explicit stipulation to the contrary in the contract.

(a) The tenant will at all times be entitled to take into the flat her husband and her children. The rights of the husband and the children are based on the provisions of the Family Code and the Landlord may not object to their living in the shared apartment. Even if such a restrictive stipulation is inserted into the contract, such a condition will be null and void as being contrary to the provisions of the Family Code and also to the Constitution, which provides for protection of children and family[51]

(b) In the absence of an explicit provision to the contrary, the landlord should be in no position to legally object to the tenant's boyfriend sharing the apartment.

(c) In the absence of an explicit provision, the landlord will be unable to object to the tenant's homosexual partner sharing the apartment. In general, the tenant can rely on the constitutional provision on privacy, which asserts that privacy is inviolable and

[50] Article 21 of the LCO is similar to Article 67:110 of PECL.
[51] See article 14 of the Constitution, see Borissov, op. cit, supra note 48, at p. 112.

that everyone is entitled to protection against any illegal interference in his/her private affairs.

(d) In the absence of an explicit provision preventing the tenant inviting her parents into the premises, she will be free to do so. Subsequent objections by the Landlord will not hinder the parents' right to remain in the shared property.

Variant 1: T dies. The persons listed under a) – c), who were sharing the house with T during the last years, want to continue the contract with L under the same conditions

The death of the Tenant will not affect her husband's right under the contract, since he is jointly and severally liable under it. After the tenant's death, the tenancy relationship will continue between the husband and the landlord. Children will benefit from the parent's rights. Alternatively, the rights of the husband and the children to continue the contract could be predicated on the law of inheritance. Unless the tenancy contract has been concluded as *intuitu personae*, the rights and the obligations deriving form the tenancy contract are inheritable. The husband and children are the tenant's heirs and they may continue the contract on this basis.

Her homosexual partner and her boyfriend will not be entitled to continue the contract under the same conditions, because they do not have a legal relationship with T. Their rights to inhabit the apartment are not independent from T's rights. Once his right is terminated, their right to inhabit is simultaneously terminated.

The rights of T's parents will depend on whether they are T's heirs or not. Provided that T does not have a husband and children, her parents will be her heirs. Under these circumstances the parents will continue the tenancy relationship. More controversial would be a situation where T's parents have been living in the same apartment and therefore in the same household prior to the T's death. Some authors argue that the parents will be entitled to continue the tenancy relationship simply because they have been living in the same household[52]. However, in my view this position is based more on moral considerations rather than on strictly legal logic. For the purposes of clarity on this issue, some authors make a de lege ferenda proposal to the effect that the provisions on tenancy contracts be extended to confer rights on the members of the household, especially on those members who are financially dependent on T or are entitled to receive financial support from T[53].

<u>Variant 2: Students' house:</u> From the very beginning the apartment was inhabited by a group of students with L's consent. However, the contract was concluded only between L and T, who is one of the students and was selected by L because she had the best financial background. After the departure of one of the students from the house, T wants to accept another student called A. Is this possible against the will of L, who does not like A?

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[52] Borissov, op. cit, supra note 48, at p. 112.
[53] Borissov, op cit, supra note 48, at p. 113.

In the absence of an explicit provision restricting T to share the apartment with specified persons, L could not object to the arrival of the new student. The argument that L disliked the proposed new tenant would be irrelevant.

Question 3: Sub-renting

Does, and if yes under what conditions, T possess the right to sub-rent a room in his apartment to S? Can T make the permission conditional on an increase of the rent? What are L's rights if T sub-rents a room without permission (termination, damages)?

T does not need L's explicit permission to sub-rent a room or part of the apartment. According to the LCO, the tenant may sub-rent parts of the leased property without requesting his/her landlord's consent unless otherwise agreed by the parties. Therefore, if the landlord wants to prevent sub-renting, there must be an explicit stipulation to this effect in the contract. However, sub-renting does not discharge the tenant from his/her obligations under the tenancy contract and she remains liable for any failure of performance. T will therefore be liable even where her failure to perform is a consequence of the sub-tenant's own failure to perform.

The law does not contain provisions relating to sub-renting rented property in its entirety. The views in the literature diverge on this point. Some authors consider that construing the provision *per argumentum a contrario*, it could be concluded that the landlord's explicit consent is necessary if T wishes to sub-let the rented apartment in its entirety[54]. Others construe the provision by applying *the rule per argumentum a fortiori* and conclude that sub-renting the whole of a rented apartment does not require the explicit consent of the landlord[55]. Unfortunately, there is no guiding case law on this issue.

However, whilst taking into account the spirit of the provisions on tenancy contracts which tends to lean more favourably in the direction of the landlord, in my view the construction based on *per argumentum a contrario* interpretation is more convincing.

No contractual relationship arises between a landlord and a sub-tenant. For some time it has been disputed whether the sub-tenant is entitled to a claim against a landlord who obstructs him/her in enjoying the use of the premises. The predominant view is that the answer should be in the affirmative. It is accepted now that the sub-tenant has two options at his/her disposal. Firstly, she can file a tort claim against the landlord. Secondly, she can rely on her contractual relationship with the tenant and file an indirect claim - "action oblique" against the landlord[56], acting in the place of the tenant. This indirect claim may be invoked when the original tenant's failure to exercise her rights against the landlord threatens the exercise of the sub-tenant's rights.[57]

A different situation is the legislative solution aimed at protecting the landlord's interest vis-à-vis the sub-tenant. Despite the lack of a contractual relationship between

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[54] Popov, P., " Sublease Contract", 5 Commercial law, 2002. at 487.
[55] Kozhuharov, A., op.cit, supra note 7, p. 343, note 369.
[56] This is a borrowing from the French law.
[57] See article 134; on "action oblique" See Kalaidgiev, op. cit, supra note 22, p.508-513.

the landlord and the sub-tenant, the law does grant the landlord a right of direct claim for due rent against the sub-tenant. The Landlord cannot claim a larger amount than the amount of the rent, which the sub-tenant owes to the tenant. However, the sub-tenant may not object that he/she has made advanced payment to the tenant prior to the filing of the landlord's claim.

Question 4: Formal Requirements and Registration

a) ***Does the tenancy contract require a specific form (e.g. in writing) – if yes, what is the rationale of this requirement? What is the consequence if this form is not observed?***

b) ***If an oral contract is valid, are there any additional requirements to be satisfied to render it enforceable before a court?***

c) ***Does the contract need to be registered in a public register? What are the consequences in private law, especially in court actions, if the registration does not take place***?

The contract of tenancy is a consensual contract. It is considered validly concluded by virtue of the mere agreement of the parties, irrespective of whether the consensus is recorded in any specific form. Thus, an oral agreement will be as equally binding as an agreement in writing. However, the law does ascribe to a contract in writing several important effects. First, the form in writing is important for litigation purposes. Article 133 of the Civil Procedural Code provides that the existence of a contract, whose value is in excess of 1000 leva[58], cannot be proved by the testimony of a witness. As such, a written form of contract is essential for the purposes of establishing rights that derive from a tenancy contract whose value exceeds 1000 leva. Secondly, provided that the contract is executed in writing and the date of the conclusion of the contract has been verified by a public notary, the law confers on the tenant additional benefits. This being the case, the tenancy contract shall be binding upon any person receiving title to a rented property as a result of a transfer transaction following the date of the conclusion of the tenancy contract. The contract shall be binding upon the new owner for a period of one year, beginning from the date of the transfer of title. [59]

However, the tenant's rights will be even better protected if the contract is registered with the real estate register. Upon registration the contract shall be binding upon any person who obtains title to the property as a result of the transfer of title for the entire duration of the contract. Thus, registration of the contract is not mandatory and does not affect the validity of the contract, but it does serve to protect the tenant's interests in case the landlord transfers the title to the property. Importantly, it should be noted that a tenancy contract concluded for a period less than a year, or contracts concluded for an indefinite period of time, cannot be registered.[60]

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[58] Approximately 500 euro.

[59] Article 237 of the LCO.

[60] This follows from article 112 "e" of the Law on property and article 4 "e" of the Regulation on the Registrations, according to which tenancy contracts concluded for a period longer than 1 year are subject to registration. Thus, a contract which does not specify the duration cannot be registered, see Borissov, op. cit, supra note 47, at p. 108.

Question 5: Extra Payments and Commission of Estate Agents

During the negotiations, L requests from T who wants to become the tenant the sum of 100 Euro (the monthly rent being 1000 Euro) for the drafting of the contractual documents. Is this legal?

The request of L would not be illegal. The LCO does not establish rules relating to the expenses incurred by parties in the process of negotiating or drafting a contract. Normally each party pays his/her legal consultant to prepare a draft, or the parties agree to share the overall expenses. It could be that only one of the parties, normally the landlord, offers a draft contract, which is thereafter negotiated. If the tenant agrees with the provisions of the model contract, it would be unusual - though not illegal - if he were thereafter asked to meet the drafting expenses. If T requests amendments to be made to the contractual document in his/her favour it would be reasonable in the circumstances for these costs to be met by T. However, at all times, this remains a matter for the individual parties.

Variant 1: The sum of 500 € is requested from T by F who is the current tenant in the house,

a)because F promises to make L accept T as her successor;

Such a request on the part of F would not be illegal. The relationship between T and F could be viewed in the context of article 23 of the LCO – "promise for third party's actions". Pursuant to this provision a person (called the "promissory" or in French "portefort") can promise another person (the promisee) that a third party will perform a particular obligation or action. The contractual relationship is between the promissor and the promisee. No contractual obligations arise for the third party. Instead, the promissor will be liable to the promisee if the third party refuses to perform or to act in accordance with what the promissor has promised. Therefore, in this scenario F (the promissor) has concluded a contract with T (the promisee) to the effect that F promises that the landlord (the third party) will conclude a tenancy contract with T.
If the Landlord for whatever reason refuses to conclude the contract, F is obliged to pay damages to T.
Indeed, the rules applicable to non-performance are applicable to the contract between F and T. This is a similar situation as that outlined in Article 8:17 of the PECL - "Performance Entrusted to Another".

b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move in earlier.
If F's contract is still in effect at the time when T moves in, this would be a situation of subletting and the conditions of subletting will apply (see answers to question 3). Therefore, the payment would be lawful.

Variant 2: Estate agent A, who was first approached by T and subsequently acted as an intermediary in the conclusion of the contract, requests the sum of 2000 Euro from T as commission. The agency contract concluded between T and A foresees a commission of two monthly rents for A's services, whereas L is not supposed to pay for A's services. Is this claim lawful?

The relationship between A and T is guided by the principle of freedom of contact. Real estate agents are registered as traders under the Commercial Code and services provided by them are deemed to be commercial transactions. If A has performed his/her obligations under the agreed contract and has offered an apartment, which T likes and agrees to rent, T is therefore obliged to pay the commission – "remuneration for the service provided, pursuant to the concluded contract". T's obligation to pay the commission arises irrespective of whether L is under an obligation to pay or not. L may have executed a contract with A or may not have done so. The legal relationship between A and T, however, does not depend on the contractual relationship between A and L.

Question 6: Contract Unlimited in Time

L and T have concluded a tenancy contract, which does not contain any limitation in time. Under which conditions and terms is L allowed to give notice? In particular: Can L give notice if she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?

The LCO establishes a maximum period for the duration of tenancy contracts concluded for a finite period of time. The LCO provides for two maximum periods – 3 and 10 years, contingent upon the landlord's rights over the property. If the Landlord is entitled to dispose of the property[61], he may conclude a contract for 10 years. If his rights are limited to a managing or administering role with regard to the property, he may not conclude a contract for a period longer than 3 years.[62] The rule aims at protecting the landlord's interests. It is considered that any longer duration of tenure would significantly restrict the landlord's rights. [63]

However, if a contract is concluded for a period longer than the one specified by the LCO, the contract will not be null and void. The term relating to the duration of the contract will simply be replaced by the mandatory provision of the LCO, which prescribes for duration of no more than 10 or 3 years respectively. This solution, based on article 26 ph. 3 of the LCO, is premised on the idea that certain provisions in a contract may be voidable without rendering void the entire contract. That is, provided that the offending provisions may be replaced ex jure by mandatory rules of law, or that it may be assumed that the transaction would have been concluded even without these voidable terms. The LCO provision prescribing a maximum period of duration is evidently of a mandatory character and thus replaces ex jure any contractual stipulation to the contrary.

A contract is considered to be concluded for an indefinite period of time where no time limit is specified. The law establishes a liberal regime for the termination of tenancy contracts concluded for an indefinite period of time. Each party may withdraw from the contract by simply serving one month's notice to the other party. Moreover, if the rent is due on a daily basis each party may withdraw by serving one-day's notice

[61] The right to dispose of the property presupposes that the landlord has a real right over the property; the right to dispose relates to any transfer, amendment, restriction of a real right; see Decision 91/1974 of OSGK of the Supreme Court.

[62] Managing or administering activities include activities relating to maintenance of the property, collection of incomes from the property; use of the property. Such rights derive normally from a contract concluded between the owner of the property, who entrusts another person to take care of the property by virtue of a contract.

[63] Kozhuharov, op. cit, supra note 7, at p. 206.

only. Such a unilateral termination of the contact does not require non-performance or fault on the part of any of the parties. The party serving notice is under no obligation to provide reasons for terminating the arrangement, nor it is necessary that the other party accept his/her notice. The notice does not need to satisfy any particular form. As a consequence, if a contract is concluded for an indefinite period of time and the landlord desires to renovate the house, increase the price or simply to avail of the property for his own personal use, he is fully entitled to simply serve either one month or one-day's notice, without giving any particular reasons for his withdrawal from the contract.

a) Let us assume that in a trial, L wins a title for eviction, which acquires res iudicata effect. How will the execution of the title be normally enforced? Does T have any legal defences in the execution procedure if she does not find another apartment and risks becoming homeless once the title is executed?

Once a judgement recognising L's right to eviction becomes enforceable, L is required to file with the court a request for issuance of a 'writ of execution'. Having received this writ of execution, L must further file a request for the initiation of execution proceedings with a 'judge of execution'. The 'judge of execution' forwards a subpoena to T outlining that T has a 7 day period in which to voluntarily leave the premises. If T fails to do so, the judge drafts a protocol for delivery of possession. It is necessary for the protocol to be drafted at the apartment. If T still refuses to leave the apartment, the judge of execution is entitled to seek assistance from the police authorities. At this point T has no legal defences at his/her disposal. The possibility that T may become homeless is irrelevant.

It should be noted that a recent amendment of the Civil Procedural code allows landlords to request via the courts an order for restitution of possession without the need for court proceedings. If, upon expiration of the contract, the tenant refuses to leave the apartment, the Landlord may request the local court to issue an order for restitution of possession. The proceedings are administrative by nature. The landlord should file the request to the court no later than a month after notifying the tenant that the contract has expired. Having examined the facts of the case[64] and the arguments presented by the landlord, the judge issues an order for restitution, which enters into immediate effect. The order may be executed either by the police authorities or by the mayors.[65]

Question 7: Contract Limited in Time and Termination

L and T have concluded a contract limited to one year. Under which conditions and terms is such a contractual stipulation possible?

The Bulgarian law does not provide for a minimum duration of a tenancy contract. A contract can be concluded for one month or even for a day only.

8: Justification for Time Limit

[64] The judge will normally check whether the Tenant has any legal reason to use the flat i.e. whether the contract is still in effect.

[65] Normally it is the police authorities who execute such orders, however in small villages where there is no local police department, mayors perform this role.

a)*L and T have concluded a contract limited to one year with automatic renewal for another year, provided that no party has given notice three months before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, three months before the annual deadline, L gives notice of termination without alleging any reasons. Is this lawful?*

Article 236 of the LCO provides that if after the expiration of the term of the tenancy contract, the use of the property continues with the knowledge of, and without any objection on the part of the landlord, the contract shall be considered to be extended for an indefinite period of time (see answers to question 6 above)[66]. Therefore, the Bulgarian law allows for a silent renewal of the tenancy agreement or for renewal through acts (facta concludentia).

However, this provision does not preclude parties' liberty to agree on different conditions for a silent renewal. A stipulation such as the one under (a) would be lawful. The effect of the provision would be that every silent renewal would render the contract a contract concluded for one year. Given this situation, the rules on withdrawal from the contract applicable to contracts for an indefinite period of time will not apply.

Normally, if there is a stipulation allowing any of the parties to terminate the contract, without specifying any circumstances under which such a termination can be carried out, the stipulation would be understood to confer the right on this party to terminate unilaterally without alleging any reasons.

Nevertheless, in my view there is no universal answer to question (a). Clauses such as that under (a) should be interpreted on a case-by-case basis in accordance with the principles of legal interpretation of contracts established in article 20 of the LCO.[67] If the wording of the contract reveals that parties had no intention to bind themselves to a need to give reasons for a termination, then each party will be free to terminate without alleging any reason. Additional guidance may be obtained from observing where the term is located in the overall structure of the contract. If the term is included in the part "Conditions for termination" it could be presumed with almost complete certainty that it is the parties' common will not to make the notice conditional upon non-performance and therefore no reasons for termination would be required. Conversely, if the stipulation is incorporated in the part "Rescission", then the issue will be more difficult to resolve, because notices for rescission imply a failure to perform (see answers under Set 5)

[66] Where a tenant continues to use the property despite the landlord's objections, the tenant will be liable for compensation and will be required to fulfil all obligations, which arise upon termination of tenancy contract.

[67] Art. 20. "The common will of the parties shall be sought in interpreting contracts. Individual provisions shall be interpreted in line with the remainder of the contractual document and each article shall be interpreted in keeping with the overall aims and intentions of the contract as a whole, taking into account the objective of the contract, usage and good faith."

b) Does the restriction of notice under (a) (which is possible only once per year) apply to T, too?
If the contract does not specify who can benefit from the right to renew the contract, again the provision should be construed in accordance with article 20 of the LCO. The particular place of the clause in the body of the contract may turn out to be a decisive factor.

In Bulgarian contractual practice, the rights and the obligations of the landlord and the tenant normally constitute separate parts of the body of the contract. If the stipulation is placed in the part relating to landlord's rights and/or obligations, undoubtedly it will be deemed to be a right in favour of the landlord only.

More controversial would be the solution if the placement of the stipulation does not give clear guidance. The controversy comes from two sources. On the one hand, the Bulgarian law demonstrates a tendency to strongly protect the interest of the landlord, to the detriment of the tenant. On the other hand, contractual relationships are based on the principle of equality between the parties. In my view, however, the principle of equality should be given more weight, since it is fundamental to the law of contract. Therefore, if there is no indication as to which of the parties is entitled to benefit from a particular provision, it should be read in favour of both.

Question 9: Termination in Special Cases
L and T have concluded a contract with or without time limit.

a) L dies. Can her heirs give immediate notice to T?
The landlord's heirs will be bound by the contract unless there is an explicit provision stating that the contract will terminate upon the death of L. In the absence of any such stipulation, the heirs will not be entitled to serve immediate notice.

b) The house is sold. Has the buyer a right to give anticipated notice?
The solution would be different depending on whether the tenancy contract has been registered or not in the real estate register, or whether its date has been verified by a public notary. If the contract has been registered with the real estate registry, the new owner will be bound by the contract for the entire duration of the contractual period. If the date of the contact has been so verified the new owner will be bound by the contract for a period of one year, following the transfer of title. In any other case, the new owner may terminate the contract by serving one month's notice (see the answer to question 4 above).

The law states that in all cases the landlord shall be liable to pay compensation to the tenant if the latter is deprived of using the premises prior to the expiration of the contract due to the transfer of title. Compensation is due as a result of the landlord's failure to fulfil his obligation to ensure the tenant's enjoyment of the premises.

(c) ***A bankruptcy procedure is carried out against L at the end of which the house is auctioned off. Can the buyer give anticipated notice?***

The rules on bankruptcy were introduced in Bulgaria only in 1994[68]. For this reason and because of the long duration of bankruptcy proceedings, there is logically as yet no great abundance of case law. Neither the various rules of the Commercial Code, nor case law provide concrete solutions to question (c). The answer would therefore require legislative interpretation of the two sets of rules - i.e. the rules on tenancy and on bankruptcy.

Article 644 of the Commercial Code entitles the Receiver in bankruptcy to terminate "every contract, to which the debtor is a party, if the contract is not yet fulfilled or is only partly fulfilled". The Receiver in bankruptcy serves 15 days notice of termination. Upon the other party's request the Receiver in bankruptcy may decide to continue the contract. If the Receiver in bankruptcy does not respond to the request within this period, the contract is deemed to be terminated. Under these circumstances, the other party is entitled to compensation for damages suffered and becomes a creditor in the bankruptcy proceedings. These rules will similarly apply to the termination of tenancy contracts. Article 644 does not provide for any exception from the rule. In my view the registration of the tenancy contract with the real estate agency or the notary verification of its date will not preclude the possibility for the Receiver in bankruptcy proceedings to terminate the contract. However, if the Receiver in bankruptcy decides not to terminate the contract and the property is subsequently auctioned off, the registration of the tenancy contract and the notary's verification, in my view, will prevent the buyer from serving an anticipated notice. Under these circumstances the solution will be the same as the one under (b) above.
In my view the method of transferring title: by way of transaction performed by the landlord himself or by the Receiver in bankruptcy in the framework of a bankruptcy proceeding should not lead to different legal consequences. In both cases there is a title transfer and therefore the rules on tenancy contracts related to title transfer should apply.

Question 10: Tenancy "For Life"
L rents an apartment to T, with the contract* containing *the explicit clause "for life". May, and if so under what circumstances, L give notice before T's death?

"For life" clauses would be null under Bulgarian law, but would not lead to the invalidation of the entire contract. Such a clause would be simply replaced automatically by the mandatory provisions, which prescribe for 10 or 3 years at most (see answer to question 6 above). The rationale is that the effect of renting property "for life" would be better achieved by establishing a real right of usage. The presumption is that if the parties want to conclude a tenancy contract for a period longer than 10 years, their real intention is to execute a contract for establishing a real right of usage. [69]

[68] Part IV of the Commercial Code, promulgated in State Gazette 63/1994, subsequently amended in 1998 and in 2000;
[69] The real right of usage is provided for in the Law on property; for its validity a notary form is required.

Question 11: Termination under Exceptional Circumstances

L and T have concluded a tenancy contract with or without time limit. Under what conditions and terms may one party give "exceptional" notice in unforeseen circumstances? *In particular:*

a) ***Can L give immediate notice if T did not pay the two last monthly rents?***
b) ***Can L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?***
c) ***Is a contractual clause ("clause résolutoire") valid according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents or commits any other "gross" breaches of her duties?***

Under Bulgarian law, the occurrence of unforeseen circumstances excuses parties from performing the tenancy contract, where there is a causal link between the unforeseen circumstances and the non-performance. There has been a debate in the literature with regard to the difference between "unforeseen circumstances"(casus fortuitus) and force majeure[70]. However, there is a consensus, supported also by case law, that both "unforeseen circumstances" and force majeure render performance impossible and consequently excuse non-performance. The law uses the term unforeseen circumstances, without providing a legal definition. However, it has been accepted in the doctrine, as well as in the case law, that the elements of the unforeseen circumstances are: the unpredictability of the event(s) in question, lack of fault on the part of the debtor[71], an impossibility of performance and a causal link between the event and the impossibility of the performance[72]. These elements equate with the elements of the 'impediment" provided for in article 8:108 (1) of PECL, according to which the impediments must be: (i) beyond the debtor's control; (ii) could not have been taken into account; (iii) insurmountable or irresistible i.e. could not have been avoided. Similarly, it has been accepted in Bulgarian legal theory that all of these elements must be fulfilled before such a defence can operate.

According to the rules on rescission of contracts, if the performance of one of the parties is rendered impossible as a result of unforeseen circumstances, the contract is rescinded ex lege.[73] In such a case, the non- performing party is not liable for damages suffered by the other party. Where the impossibility is only partial, i.e. performance of some of the obligations is still possible, the other party is entitled to claim a proportionate reduction of his/her obligations or, alternatively, to rescind the contract by filing a claim and instigating court proceedings. The provisions on tenancy contracts refer to the rules of ex lege rescission in case the rented property perishes completely or partially. Thus, the perishing of the property leads to an impossibility to perform and therefore to excused non-performance. The provisions on tenancy law deal only with this hypothesis of impossibility. Nevertheless, in my opinion, the rules on rescission due to impossibility of performance should apply by analogy to any

[70] On the difference see Kalaidzhiev, op. cit, supra note 22, p. 276 – 277 and the literature cited there.
[71] Decision 1138 –1953 II GO.
[72] See L. Dickov, " Course on Civil Law, Law of Obligations, General Part, Volume 3." S, 1934, at p. 367, Mevorah, N., Lidzhi, D. and Farhi. L "Commentary on the Law on contracts and obligations " S, 1924, p 261-263; Kalaidziev, op. cit, supra note 22, p. 274.
[73] Argument based on article 89 of the LCO.

other conceivable hypothesis of impossibility of performance, as far as the impossibility is a result of unforeseen circumstances.

Given that Bulgarian law provides for the rescission of a contract ex lege, there is no need for notice to be given. As such, Bulgarian law does not contain a requirement, modelled on article 8:108 (3) of PECL. In the event that notice is served, this will have no legal effect or consequence different from that which results from the ex lege rescission of the contract.

However, neither of the conditions enumerated in situations (a), (b), (c) could be classified as "unforeseen circumstances" and ex lege rescission would not be possible. Nonetheless, parties to a contract are free to arrange the conditions under which immediate notice can be served. Provided that the parties have explicitly agreed that the tenant's failure entitles the landlord to serve immediate notice, the latter would be able to do so. A clause in a contract such as that outlined under situation (c) would be legal. The only limitation provided by the law is that the contract cannot be rescinded, i.e. terminated automatically where the unperformed part is immaterial with regard to the creditor's interest. Obviously, non-payment of two-months rent is not immaterial to the landlord's interest.

Set 3: Rent and Rent Increase

One of the essential elements of tenancy contracts is the rent. Actually, in the absence of detailing of the rent, the contract would is deemed not to constitute a tenancy contract. Likewise, it is impossible for the parties to agree that they will decide on the rent at a later stage, following the conclusion of the contract[74]. Such a stipulation would render the nature of the agreement to be another form of contract. For instance, if the tenant, for whatever reason(s), has used the premises before an agreement on the rent payments is reached, the relationship will be governed either by the rules on unjust enrichment or will be considered as a loan contract for the use of a premise.[75] The tenancy contract is deemed to be concluded only when the rent is determined or at least the methods and/or the criteria for its determination are clearly specified at the outset. The rent should be either determined or be determinable according to objective criteria agreed by the parties. Usually the rent is pecuniary, but there is no legal obstacle to agreeing on a non-pecuniary form of rent.[76] Parties are free to determine the amount and the currency of the due rent. Until recently parties' freedom to decide on the currency of the rent used to be subject to restrictions.[77] Stipulations providing for rent payable in foreign currency used to be void as being contrary to mandatory

[74] Such a stipulation is possible under article 436 of the Hungarian Civil Code.
[75] Borissov, op.cit, supra note 47, p. 86.
[76] For instance, instead of money the Tenant may undertake an obligation to perform a particular activity. However this leads to some specificity in case of non –performance; see Borissov, op. cit supra note, 47, p.87-88.
[77] Formerly article 10 (1) of the LCO.

provisions.[78] This restrictive norm has been repealed by the Law on foreign currency[79].

Question 12: Settlement Date and Modes of Payment

When is the rent due? Is there any restriction on modes of payment? Does and if yes, under what conditions, have L a right of distraint (pledge) on T's furniture and other belongings to cover the rent and possible other claims against T?

Parties are entirely free to determine the terms and conditions for the payment of rent. Normally parties agree that the rent is due on a monthly basis, on a particular day of the month. Parties may agree on an advance payment or on subsequent payments, following the use of the property during the preceding month. Seldom do parties agree on payment on a quarterly basis and even more seldomly do they arrange for an annual payment. It could be agreed that payment be made at a time that favours one of the parties only.

However, if the contract does not stipulate a due date for the payment of the rent, the general rules applicable to contracts will apply. Article 69 (1) of the LCO provides that if there is no fixed time period for the performance of an obligation, the creditor is entitled to demand its immediate performance. There is debate in the literature with regard to the meaning "immediate" performance. Some authors claim that immediate performance implies the necessity of serving an invitation for payment. By the invitation the creditor should give reasonable time for subsequent performance[80]. However, the predominant view is that an invitation is not necessary, but the demand for "immediate performance" should not be unreasonable.[81]

There are no any restrictions on the methods of payment.

According to article 90 LCO a debtor who has an executable claim against his creditor arising from the same legal relationship as his own obligation, may refuse performance of that obligation until the creditor performs his obligation. In that case the court shall rule that the defendant is obliged to perform simultaneously with the plaintiff. Likewise, a person who has an executable claim in connection with the preservation, maintenance, repair or improvement of the movable chattel of another, or for damages caused by such a chattel, he/she is entitled to retain the said chattel until satisfied, unless he has acted in bad faith[82]. Following this logic, L would be entitled to retain chattels or money received pursuant to the tenancy agreement. He is entitled to retain the deposit for instance. However, L does not obtain any rights over T's furniture or his/her belongings by virtue of the contract. This is true, although L may have a key to the T's flat and can easily get access to these items. L is not

[78] In the past, due to the high percentage of inflation, parties were willing to fix the rent in foreign currency, normally in US dollars. In order to escape the restrictive provision, the contractual clauses were normally formulated in the following mode " Rent in BG leva at the amount equivalent to X US dollars".

[79] See § 7 of the Law on Foreign Currency, promulgated in State Gazette 83/ 21.09.1999.

[80] See Kozhuharov, "Law of Obligations. General Part. Book I" edited by Gerdzikov, O. See VAD 63/2000; the proponents of this position claim that this solution is better aligned with the good faith and good moral principles.

[81] See Kalaidzhiev op. cit supra note 22, p. 224; arguments in support of this position can be deduced from the rules on Limitation.

[82] See article 91 LCO.

entitled to a pledge over T's furniture unless such a right has been explicitly stipulated in the contract. However, such a clause would be very unusual. Normally the deposit is used to cover unpaid rent or other claims (see answer to question 16)

Question 13: Requirements for Rent Increase

What are the ordinary substantive and procedural requirements for an increase in the rent? Are there rules on a maximum increase in private and criminal law (e.g. on profiteering)? By whom are these rules enforced? (public ministry or national or local administrative agency etc)

There are no substantive or procedural requirements for an increase in the rent. Provided that the parties agree on the amount and/or the methods of increase, the increase is lawful. However, if the price is extremely high, the contract might be avoided on the grounds of duress and unfair advantage pursuant to article 33 of the LCO. The rationale behind this provision is similar to the rationale of Article 4:109 of the PECL. However, unlike article 4:109, the LCO neither specifies when a party would be deemed to be in a state of duress, nor when the advantages achieved would be deemed to be unfair. Scholars maintain that several conditions ought to be met in order for the rules to be invoked. First, the party should be in such a difficult situation that she is forced to conclude the contract. Normally, the situation of duress relates to financial hardship[83], but in my view it may also be related to other circumstances. Secondly, there should be a causal link between the difficult situation and the conclusion of the contract. Third, the contract should have been concluded under overtly unfavourable conditions for that party who finds him or herself in a difficult situation. Where the agreement between the parties contravenes the principle of equivalence, it is likely that the conditions will be seen as unfavourable to one of the contracting parties. However, there should be an obvious discrepancy between the conditions under which the contract has been concluded and the conditions under which similar contracts are normally concluded. It is not necessary that the party who takes unfair advantage of his fellow contracting party has acted with malice or with a particular agenda or motive. The bald fact of disadvantage for either party is sufficient.

These rules may apply to situations where the tenant, for instance, has for whatever reason been unable to find accommodation for his or her family and out of sheer desperation is compelled to enter into a tenancy contract under unfair conditions, agreeing to pay an extremely high rent.

The tenant can file a claim to have the contract set aside within one year from the date of concluding the contract. The court may set aside the contract in its entirety or for the future only. The contract may not be set aside, however, if the other party offers to repair the damage. Setting a contract aside on the grounds of duress does not affect the rights of third parties that have been acquired prior to the filing of the claim.

Question 14: "Index-clause"

Is it possible to contractually link the annual increase of the rent with the annual average increase of the cost of living as established by official statistics?

[83] The reasons for such a situation arising may be various. Professor Tadger provides the following examples: a person may need money for medical treatment, for the payment of a debt, for meeting his/her family needs or for the payment of allowances, support money, etc; see Tadger V. "Civil Law of NRB. General Part, Section II " second edition, Sofi –R, 2001, at p. 543.

A term in a contract which links the annual increase of the rent with the annual average increase of the cost of living as established by official statistics would be lawful.

<u>Variant</u>: Is a progressive rent arrangement, providing for an annual increase of X percent, lawful?

Provided that parties agree on such a method of determination of the rent, the arrangement will be lawful. However, the rules on duress may apply.

<u>Question 15: Unlawful Rent Increase</u>

By ordinary letter, L tells T that the rent will be increased by 10% in three months time to compensate for the general increase of the cost of living. No further justification is provided to support this claim. Without protesting, T pays the increased rent for 3 months* without any reservation. *After this time only, she gets doubts and consults a lawyer. Can T get some money back? If yes, can T off-set the sum to be repaid against future rent instalments on her own motion without judicial intervention*?*

It is a well-established principle under Bulgarian law and practice that landlords may not unilaterally amend rents or other conditions of payment. The question in the present case, however, is whether the payment made by the tenant was intended to fulfil an obligation pursuant to the contract i.e. whether it can be considered as an act that implies the tenant's consent to the offered higher price. The solution will depend to a great extent upon the conditions and upon the form of the already concluded contract between the parties. If the contract has been concluded in writing and it stipulates that any amendments to the contract shall be executed in writing, or it simply stipulates that the parties accept that the form in writing shall be a form for validity, then the act of payment of the higher rent price may not be considered a valid acceptance of the increased rent. Such being the case, the tenant may claim the money back citing unjust enrichment. The tenant can further off-set the sum against future instalments. Article 103 LCO provides that where two persons owe each other reciprocally either money or tangibles, either party may off-set a claim against an obligation. Off-setting is possible even where the claims derive from different legal relationships. Thus a claim based on contractual grounds can be off-set for a claim predicated on unjust enrichment. However, since one of the requirements is that the claim is **executable**, in order to make a claim based on unjust enrichment executable, the tenant should make sure that prior to the set off, he/she has sent an invitation requesting payment within a reasonable period of time. Once this reasonable period of time has elapsed, the tenant may off-set. He may do so with a mere statement to the other party as no judicial intervention is required to validate such an action[84]. The two opposing claims are deemed to be extinguished to the amount of the smaller, from the date when set-off ought to have been performed.

[84] See for instance decision 238-1995 –GO.

In the absence of such provisions in the contractual document, or if the contract has been concluded orally, the act of payment may be interpreted as tacit agreement to the increased rent. As has been previously highlighted, academic opinion accepts that a valid tenancy contract may be inferred by the mere actions of the parties.[85] By way of analogy, an agreement on new obligations or on any new amendments to the contract may similarly be inferred objectively by the actions of the parties. This principle may also be distilled from article 236 (1) LCO, which provides that if the tenant continues to use the premises after the contract has expired with the full knowledge of, and without any objection on the part of the landlord, the contract shall be considered to have been extended for an indefinite term. As such, a landlord's failure to object is equated with a declaration of consent.

In the event of litigation proceedings, the tenant may still argue that the payment was not an expression of her acceptance; she may attempt to persuade the court that she has made the payment in fulfilment of another obligation or for any other reason, unrelated to the contract. If she insists that the payment was made to satisfy another obligation she will not be able to claim her money back, but she will release herself form the obligation to pay the higher rent monthly.

Question 16: Deposits

What are the basic rules on deposits?

There is no special provision relating to deposits in the law of tenancy. However, the rules on 'earnest' (arrha)[86] provided for in the general part of the LCO[87] are similarly applicable to tenancy relationships.

According to these rules, parties may agree that one will give to the other an 'earnest' as proof that the contract has been concluded. If the party that has given the 'earnest' does not perform his obligations, the other party is entitled to withdraw from the contract and retain the 'earnest'. If the party that has received the 'earnest' fails to perform his obligations, the other party may claim double the amount of the 'earnest' if he withdraws from the contract.

The 'earnest' is an accessory contract, which may be incorporated into the main agreement or concluded at a later stage. It may also be a unilateral contract, conferring obligations on one of the parties only.

Depending on the particular agreement the 'earnest' may have several functions: (i) it may serve as proof that the contract has been concluded (arrha confirmatoria); (ii) it may serve as compensation in favour of the non-defaulting party; (iii) it may give the party who has provided the 'earnest' the right to withdraw from the contract (arrha poenitentialis); (iv) if in addition the contract provides that the defaulting party who has given the earnest, will be further obliged to meet the cost of all damages, the 'earnest' has a penalizing function; (v) it may function as an advanced payment, in which case it constitutes partial performance.

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[85] Borissov, op. cit, supra note 47,p.69.
[86] This is a reception from the Italian and the Austrian law.
[87] Art. 93 of the LCO.

The primary function of the 'earnest' is, however, its role in guaranteeing compensation for a non-defaulting party, covering all or part of the damages suffered by the breach. Nonetheless, if the non-defaulting party prefers to seek performance of the contract, compensation for damages are determined in accordance with the general rules on non-performance.

It should be noted that in modern tenancy contracts normally the word 'deposit' is used instead of 'earnest'[88]. It is widely accepted in practice that tenants provide landlord's with a deposit equivalent to one-month's rent. Certainly, other arrangements are also possible. A deposit is normally given prior to, or at the time of the hand-over of the property to the tenant, but there is no absolute rule. The parties may ascribe to the deposit any of the functions enumerated above. Typically the deposit performs the typical role, i.e. it serves to ensure compensation for the landlord if the tenant fails to perform her obligations. Practice reveals that the most frequent breaches on the part of tenants are either, a failure to make payment on time or a failure to return the property on time or in the same state as he/she found it when entering into the contract. As such, deposits are most often used to compensate landlords for unpaid rent or delayed payment or to cover repair costs. These arrangements are an effective solution, which help reduce court proceedings. Landlords, who receive even partial compensation, have little incentive to spend additional time and money on litigation.

Question 17: Utilities

What are the general rules on utilities? Which utilities may the landlord make the tenant pay by contractual stipulation? Is it legal to establish in the contract a monthly lump sum to cover certain or all utilities?

The principle of freedom of contract applies to the rules on utilities. The provisions in the LCO, relating to expenses on utilities are of non-mandatory nature and parties are free to deviate from them. Nevertheless, parties normally apply these rules, which state that the tenant is obliged to pay all the expenses that arise through the use of the premises – e.g. water, heating, electricity. The parties may agree that these expenses are payable by the tenant directly to the companies that supply water, heating and/or electricity, etc or directly to the landlord with the bills. Where the rented apartment is in a shared building, the tenant will be obliged to pay maintenance expenses for the common areas of the building, e.g. stairs, elevators, porter, electricity and heating in the common parts of the building etc.[89] A term which provides for a monthly lump sum to cover certain or all utilities would not be usual, rather it would be entirely legal.

In addition, according to article 231, the tenant bears the expenses for any "small repairs" that result through conventional use of the apartment, e.g. "dirty walls in rooms, corrosion of faucets and door locks, clogging of chimneys, etc". In sum, the tenant is obliged to repair damages, caused as a result of the normal use of the premises.

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[88] 'Earnest' is an old word, which has been used in the Bulgarian legislation during the fist half of the century (in the former Commercial Code and LCO) and which was subsequently adopted in the current Law. In the modern era, outside of the legal profession, few would be familiar with this term.

[89] The rules prescribing how the expenses are shared among the persons sharing the building are provided for in article 9 of the Regulation on management, order and control in condominium.

However, the law explicitly provides that the repair of all other damages, provided they are not caused through the fault of the tenant, shall be met by the landlord. If the landlord fails to make such repairs, the tenant is entitled: (i) to file a claim demanding that the repair be performed or (ii) to claim a proportionate reduction in the rent, or (iii) to rescind the contract. If the tenant makes the repair himself or pays for the repair work, he is entitled to deduct the cost of the repair from the rent.

Similarly, where the rented apartment is in a shared building, major repair of the common parts of the building must be met by the landlord. This may include, repair of the roof, renovation of pumps, repair of the heating, etc. The rationale is that these types of repairs constitute long-term investments and the landlord will benefit from such work long after the individual tenancy contract has expired.

Set 4: Obligations of the Parties in the Performance of the Contract and Standard Terms

A standard tenancy contract would normally reproduce the legal provisions of the LCO, relating to the rights and obligations of the tenant and the landlord. Normally, the contract would be divided into four parts: landlord's obligations, tenant's obligations, conditions for termination, compensations and payment of liquidated damages. However, it should be noted that there is no organisation or association entrusted with the task of drafting standard contracts, nor are there any rules outlining what terms a standard tenancy contract should contain. In practice a standard tenancy contract would mean a short and simple contract, which reproduces the basic rights and obligations of both parties under the law. Occasionally parties may only specify the object of the contract and the rent and then simply include a clause reading that all rights and obligations, which are not explicitly stipulated in the contract, will be in accordance with the LCO. However, it should be noted, that the principle of freedom of contract allows the parties to deviate from the non-mandatory provisions of the LCO. No specific control of standard tenancy contracts is established.

Question 18: Control of Standard Terms
What kind of control exists for clauses contained in standard contracts used by a landlord acting in a non-commercial capacity? **(presupposing that the national implementation legislation of the Unfair Terms Directive applies to commercial landlords)**

Question 19: Frequent Standard Terms
The terms of a standard contract used by L (acting in a non-commercial capacity) provide that:

a) The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorised by a judge. The cost of small reparations, up to 100E per annum, has to be met by the tenant.

b) At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.

c) If the tenant becomes a member of a tenants' association, the landlord has the right to give notice.

Are these clauses lawful? If not, may the standard terms be challenged by a tenants' association, too?

The clauses under a) and b) deviate from the provisions set forth in the LCO, however they are not in breach of mandatory norms. Thus, if the parties have agreed on these conditions, the contractual stipulation would be lawful[90].

With regard to (c), it should be noted that there are no legal provisions dealing with tenants' association. To my best knowledge, tenants' associations do not exist in Bulgaria. However, in my view, given that the right of association is a constitutionally recognised right[91], contractual restrictions on this right would be unlawful. Such restrictions would be void under article 26 (1) of the LCO as being contrary to the law.

Question 20: Changes to the Building by the Tenant

T is a tenant in a building with 4 flours and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses the permission by alleging that otherwise, he would have to give the permission to every tenant, which would ruin the view of the house esthetically. In addition, he argues that 15 TV programs are already accessible via the cable TV connection of the house, which should be more than sufficient to satisfy the tenant's demand.

The landlord's refusal to grant his permission for the installation of a parabolic TV antenna would be lawful, provided that it is predicated on administrative regulations, rules on construction, or on any other normative rules, establishing particular requirements. However, if the refusal is based on the landlord's purely subjective taste, the refusal will be unlawful. By installing a parabolic TV antenna, the Tenant will not breach any of her obligations pursuant to the contract. Given this state of affairs, in my view, the landlord's permission may not even be necessary, unless explicitly provided for by the contract.

Variant 1: Assuming that no Turkish programs can be received through the existing cable TV connection, does it matter if T is a Turkish immigrant who does not speak the national language well?

This scenario would not trigger a different solution from that previously outlined.

Variant 2: ***On his balcony, T exhibits a huge poster with the slogan "Peace in Palestine and Iraq". Can L force him to remove it?***

The rules under Variant 1 will apply. Provided that the exhibiting of posters does not breach any norms and rules, relating to the use of the premises, the landlord may not object. Exhibiting slogans will not breach any contractual obligation.

Question 21: The Landlord's Right of Possession of the Keys

Does L have the right to keep one set of the keys of the apartment rented to T? Under which conditions is L allowed to enter the apartment without T's previous

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[90] With regard to the waiver of the right to compensate, see Kalaidziev, op.cit, supra note 22, who maintains that compensation is a right that can be waived.

[91] Article 44 (1) of the Constitution reads: *"Citizens shall be free to associate"*.

permission? If these conditions are not fulfilled, does L commit a criminal offence when entering the apartment without T's previous permission?

Although, there is no explicit legal provision detailing whether or not a landlord may or may not retain a set of keys, in practice the landlord does retain a set of keys. This can be explained, and probably justified, by the fact that the landlord is responsible for substantial repair work on the rented premises, and moreover, the landlord is under an obligation to ensure the tenant's undisturbed use of the premises. It could be argued that the fulfilment of these various obligations requires the landlord to retain a set of keys.

However, the landlord is not permitted to enter the premises without the tenant's permission. He is entitled to request entry in order to make repairs or to showcase the premises to potential buyers. Should the tenant refuse entry, the landlord is entitled to request a court order to gain access. [92]

In my view, even where there is an explicit provision in the contract that prohibits the landlord from retaining a set of keys; if the landlord was to breach these obligations it would be difficult to argue one's case in court. Theoretically, such behaviour may fall under article 170 of the Criminal Code, which prohibits trespass using force, intimidation, deceit, etc[93]. Alternatively, article 323 of Criminal Code could be invoked. The provision incriminates someone who exercises his own or someone else's actual or presumptive right by deviating from the rules and procedures set by law.

Question 22: The Landlord's Liability for Personal Injury

As the stairs in the house are not well maintained and in a slippery state, C, T's child, falls and breaks her leg. Is L liable, and if yes under which legal basis?

If the landlord can be held liable at all, it will be under the law of tort. Firstly, landlords rarely ever undertake an obligation to maintain the stairs of the house. Even where they do, a failure to maintain the stairs would not result in liability for the child's broken leg. Under Bulgarian law contractual liability covers only material damages. Compensation for non-pecuniary damages, such as the child's injured leg can be sought only via a claim in tort. However, even under the rules of tort, it will be necessary to establish a causal link between the failure to maintain the premises and the resulting accident.

Set 5: Breach of Contract

Under Bulgarian law, a party will be held in breach of a contract whenever he/she fails to perform any obligation arising under the contract, or when performance is defective, or if the obligations are not performed when due. There may be several reasons for breach of contract - a party's faulty behaviour; third party's acts, administrative acts, natural events, etc. The legal consequences and remedies vary much depending upon the reasons for the breach. One of the most important questions relates to the negative effects, which arise from the failure to perform. Legal theory

[92] See article 422 of Civil Procedural Code.
[93] A key will fall into that category.

offers several guiding principles for the sharing of negative consequences, deriving from breach of contracts. These principles aim at ensuring economic expediency and justice and can be summarised as follows: (i) the party who benefits from the breach will be obliged to cover the damages; (ii) the party who creates risks of injury must bear the damages resulting from any injury; (iii) the negative consequences of a particular act or activity must be corrected by all those who have benefited from the act or activity in question; (iv) the negative consequences are to be borne by the one who is economically more powerful etc; [94]

These principles are not explicitly laid down in law, rather they are implied in the legislative provisions. Thus, where breach is due to the faulty behaviour of an individual party, that party bears the resulting consequences. The non-defaulting party is entitled to several alternative remedies:
(i) Under article 79 ph (1) a party may claim strict performance (execution en nature; Naturalherstellung); this option is available provided that performance is still possible; the non-defaulting party is moreover entitled to additional compensation for the damages suffered as a result of the delayed performance;
(ii) a party may claim compensation for non-performance;
(iv) where the non-performed obligation is an act which can be performed by another person, the non-defaulting party is entitled to claim permission for the act to be performed at the debtor's expense;
(iii) where the breach arises through particular acts, the non-defaulting party may request permission to correct at the debtor's expense what has been done in violation of an obligation;
(iv) where performance is impossible or the non-defaulting party has no interest in delayed or partial performance, he/she is entitled to rescind the contract and claim damages for non-performance.

Under article 82 of the LCO compensation of damages covers the loss suffered and the loss of profit insofar as they constitute a direct and immediate consequence of the failure to perform and were foreseeable.[95] However, if the defaulting party has acted in bad faith, he/she is liable for all direct and immediate damages. Article 83 of the LCO provides that where non-performance is due to a breach on the part of the creditor, the court may reduce the damages or exempt the debtor from liability. Likewise, the debtor shall not owe damages for losses which the creditor could have avoided by acting with due diligence. The rules relating to repair of damages are based on the same principles on which the provisions on “Damages and Interest” of the PECL are based. There is no substantive difference between the two sets of rules. The provisions in the Bulgarian law are briefer in wording, but the case law and the legal doctrine interprets them according to legal logic implied in the PECL.

In order to avoid the burden of establishing all the particular damages suffered, parties often agree on liquidated damages. Such an arrangement secures the performance of the obligations and serves as compensation for damages caused as a result of non-performance. A clause on liquidated damages does not prevent the creditor from claiming compensation for losses exceeding the amount of the liquidated damages. However, where the liquidated damages are excessive as compared with the damage

[94] See Kalaidziev, op. cit, supra note 22, p. 269.
[95] The provision is a transplant from the French Civil Code.

sustained or the obligation has been performed improperly or only in part, the court may reduce the amount of damages.[96] Similar to the functions of the 'earnest', the arrangement for liquidated damages has compensatory, penalising and guaranteeing functions.[97]. The rules on liquidated damages under Bulgarian law are similar in purpose and function with article 9:509: Agreed Payment for Non-performance of the PECL.

The LCO provides for three types of guarantees, personal guarantee, pledge and mortgages. These forms of guarantee are, however, seldom used - if at all - to guarantee rights under tenancy contracts. Entering into these forms of ancillary contract requires much effort and expense, which would render the guarantees excessive and disproportionate to the interests they are meant to ensure.

Question 23: Destruction of the House after Conclusion of the Contract

a)L and T conclude a tenancy contract. Before T takes possession of the apartment, it is destroyed by a fire for which neither party is responsible

Article 231 of the LCO provides that where rented property 'perishes' the rules on ex lege rescission will apply. If the house is destroyed - and so can no longer be used for the purposes of renting - the contact shall be considered as rescinded ex lege. The landlord will not be liable for non-performance, as the failure to perform the contract is as a result of circumstances beyond his control. Where only part of the building is destroyed - and a partial performance of the landlord's obligation is still possible - the tenant may choose between two alternatives:
(i) to seek a proportionate reduction of the rent and to continue to use the apartment, or
(ii) if he is not interested in partial performance, he may rescind the contract through the courts. To do so, he must file a "constitutive claim for rescission". An additional argument in favour of this solution can be deduced from the rules relating to transfer of title[98] and the rules on sale contracts[99]. Legal theory and case law provides that the risk that property may be destroyed, or in whatever way unfit for the purpose of renting, is borne by the owner.

b) Does it make a difference if the apartment is destroyed by fire after transfer of possession to the tenant?
As has been explained above, the tenancy contract is a consensual contract. Therefore, it would be deemed to be concluded irrespective of whether possession of the property has been delivered or not. The hand over of the property (see the explanation on "possession" in the answer to question 24 below) does not establish real rights for the tenant. Therefore, the solution will be the same as under situation (a).

c) Does it make a difference if the apartment has already been destroyed at the time of the conclusion of the contract without the parties' knowledge?

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[96] See article 92 of the LCO.
[97] However it does not serve as a confirmation of the conclusion of the contract and unlike the 'earnest', which may favour both parties, liquidated damages benefits the non-defaulting party only; see Kalaidzhiev, op. cit, supra note 22, at p. 407.
[98] Article 24 (1) of the LCO.
[99] 196(1) LCO; Article 205 (1) LCO see Kalaidzhiev, op. cit, supra note 22, p 285-286.

If the apartment has been already destroyed at the time of the conclusion of the contract, there will be no valid object of the agreement and the contract will be null.

Question 24: "Double Contracts"

L concludes a tenancy contract with T1. Shortly after, he concludes another tenancy contract over the same apartment also with T2, who is not aware of the earlier contract concluded with T1. Equally unaware of the second contract concluded with T2, T1 then takes possession of the apartment. The two contracts are only discovered when T2 wants to take possession of the apartment as well. What are the legal consequences for both contracts and the rights of the parties?

Both contracts will be valid and the landlord will be liable under both. However T1 will be in a more favourable position than T2 due to the fact that T1 is in possession of the premises. One of the primary obligations placed on the landlord is to deliver the property to the tenant. Upon receiving the property the tenant obtains the status of a "holder" of the property, which is different from the status of a "possessor". Bulgarian law in this respect preserves the distinction made by the Roman jurists between possession and holding. According to article 68 of the Law on property, possession is the exercise of de facto power over a property, which the possessor holds either personally or through another, as his own. Whereas, holding means exercising de factor power over a property which the person does not possess.

The similarity between possession and holding is that in both cases there is a de facto power exercised over property. The major differences between the two are:
(i) the ground on which the de facto power is obtained (causa possessionis); the holding is obtained by virtue of a contract;
(ii) the intention towards the property (animus domini, animus sibi habendi); the possessor holds the property as its own, while the holder holds it for another. For instance, the Tenant holds the rented property for the Landlord, not as his own property[100].
This distinction between "holder" and "possessor" is also upheld by case law[101]. However, article 76 of the Law on property entitles both possessors and holders, whose property has been taken through violent means or through concealment, to file a claim against the person who has taken it and require return of the possession or the holding of the property. A claim must be brought within six months[102]. The tenant who already holds the property can rely on this provision. On this ground T1 would be able to object to T2's attempts to obtain power over the apartment.

In addition, T1 will be entitled to claim compensation for the landlord's non-performance. The Landlord is obliged to deliver the property to the tenant for a given period of time. His obligation is for continuous and scheduled performance. It has been established in the literature that this obligation assumes that the landlord is also obliged to guarantee an undisturbed use of the property. According to the case law the landlord is obliged to abstain from any actions, which might prevent or obstruct the

[100] See Venedikov, P., "Law on Property", SIBI, 1995 p.37-51.
[101] Decision 143-55- IV.
[102] This claim derives from the canonical actio spolii (redintegranda).

undisturbed use of the premises by the tenant[103]. If the landlord fails to do so by trying to restore possession of the property temporarily, the tenant may rely on a claim under article 76[104]. In the present case, however, the landlord does not attempt the restore the possession himself and therefore this claim cannot be exercised against him. Nevertheless, by concluding a second contract the landlord fails to fulfil his obligation to guarantee the undisturbed use of the property and therefore the tenant may exercise all rights that are available to him for his non-performance. Thus, he can:
(i) claim due performance along with compensation for damages suffered;
(ii) claim compensation instead of performance;
(iii) rescind the contract and claim damages for non-performance; The Tenant may also withhold payment of the rent until the landlord performs. If the Tenant claims performance along with compensation for damages, she can off-set the due compensation against the rent.

If T1 prefers not to rescind the contract, the landlord will evidently be unable to perform his obligations towards T2. As such, the only option for T2 would be to rescind the contract and claim damages.

Question 25: Delayed Completion

L is an investor and buys an apartment from a big building company. According to the contract, the apartment should be ready from 1/1/2003. However, the purchase contract contains a (lawful) clause according to which the builder is not responsible for delay unless caused by him. L rents the apartment to T from 17/1/2003 without any special arrangements in the case of delay. However, as the neighbour N challenges, though unsuccessfully in the end, the building permit granted by the competent authority to B in an administrative law procedure, the apartment is not available until 1/1/2004. Has T any claims against L? Has L claims against N?

The landlord shall be liable for delayed performance. The landlord's liability arises irrespective of the specific arrangements in his contract with the builder. The Landlord's delayed performance could not be excused, because having acted with due diligence, he could have foreseen the eventual delay. The tenant will be entitled to claim:

(i) compensation for damages suffered as a result of the delay; or

(ii) if the date for performance has been crucial for the tenant, he can rescind the contract and claim damages for non-performance.

As far as the Neighbour is entitled by law to challenge the building permit, the landlord cannot sue N for exercising this right. This will be the case, even if the court subsequently rejects the Neighbour's claim. Although highly unlikely in practice, in theory the landlord may attempt a claim in tort against the Neighbour based on a misuse of rights[105]. In eventual proceedings the landlord will have to prove: (i) that the Neighbour has misused his procedural right, (ii) the damages suffered, (iii) the causal link between the misuse of the right and the damages suffered. However, these elements are difficult to prove, especially the 'misuse' of rights. Moreover, in my view

[103] See decision 2024-54 IV.
[104] See Kozhuharov, op. cit, supra note 7, at p.216.
[105] The notion of a misuse of rights is implied in several norms, which establish a requirement to act in good faith – see article 63 of the LCO and article 3 of the Civil Procedural Code; article 289 of the Commercial Code.

it would be impossible to prove if the court has found the Neighbour's claim admissible in previous proceedings, thereby recognising the Neighbour's procedural right to challenge the permit.[106]

Question 26: State and Characteristics of the House (Guarantees)

L rents an apartment to T. T wants to diminish the rent because

a) Stains of mildew have been found in some corners.

According to article 230 of the LCO, the landlord is obliged to deliver the property to the tenant in an appropriate state for use, unless otherwise agreed.

If the property is not in such an appropriate state, the tenant may either require the landlord to make repairs, or claim a proportionate reduction in the rent. He may alternatively seek to rescind the contract. However, rescission will not be admissible if the breach is immaterial to the tenant's interest. In all cases the tenant is entitled to compensation for damages.

If stains of mildew appear following the conclusion of the contract, the tenant shall be entitled to pursue the various claims outlined.

Variant 1: By letter, T asks L to renovate the walls affected by mildew within 2 weeks. As T does not reply, T has the repair done by a specialist and wants to off-set the costs from the monthly rent rates. Is this lawful?

The LCO explicitly entitles the tenant to off-set the costs of repair work, if he himself makes the repairs with **due diligence**. Case law confirms that the tenant is entitled to carry out repairs himself if the landlord has not done so after having been encouraged to do so by the tenant.[107] This solution can be deduced also from the general provisions relating to non-performance, according to which if the obligation is for performance of an act that can be performed by another person, the creditor shall be entitled to request permission to perform that act at the debtor's expense [108]

However, one should note that repairs must be made with due diligence. This implies that the Tenant may not spend more than what the diligent person would spend. He would not be able to claim or to off-set excessive expenses.

Variant 2: T did not discover the mildew stains when inspecting the house before entering into the contact, even though these had already been present. Does this preclude her from claiming a rent reduction?

Article 230 of the LCO discharges the landlord from liability for any defects in the property, which the tenant was made aware of, or which he could easily detect if he had been normally attentive upon entering into the contract. As such, the solution would be contingent upon the concrete facts of the case - i.e. how noticeable the stains were at the time. If the tenant can prove that that they were not sufficiently noticeable so that even a reasonable person could not have detected, them he/she will be entitled to a proportionate reduction in the rent.

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[106] The Court might have rejected the claim as unfounded, but have found it to be admissible.
[107] Decision 6- 55 OS.
[108] Article 80 (1) LCO.

It should be pointed out, however, that the LCO does not exonerate the landlord from liability under any circumstances, if the defects of the property endanger the health of the tenant or members of the household. The latter rule applies irrespective of whether the tenant knew or could have detected the defects had she paid normal attention. Thus, if T can prove that mildew endangers T's health and the health of members of T's household, T will be able to claim a rent reduction.

a) ***A noisy building site for a big road is opened by the city administration next to the apartment.***

A building site for a major road can be opened only if the rules on noise pollution are met. Therefore, the presumption in this scenario is that the noise is within the admissible norms. In my view the subjective assessment of the tenant cannot be decisive. It is true that the landlord is under an obligation to ensure undisturbed use of the apartment. It is also true that the comfort of the tenant would be reduced due to the noise. However, the solution in this scenario cannot be equated with the solution under (a). The noise is not a defect of the property. Moreover, the inconvenience, resulting from the noise is irreparable, because it results from a lawful act. Thus, the solution under (a) is inapplicable.

The tenant would be able to hold the landlord liable for non-performance if the noise is so unbearable that the apartment cannot be used for living purposes i.e. the apartment cannot be used for the purpose it has been rented for. However, objective criteria would be invoked to determine whether the noise is admissible.

In view of the above, I am likely to take the position that in the absence of an explicit stipulation determining the degree of noise that the Tenant is willing to bear or in the absence of any stipulation suggesting that the conditions of the noise were so important to the tenant as to be decisive in his entering into contract, the tenant would not be able to claim a reduction in rent.

b) ***The tenants of the neighbouring apartment in the house have repeatedly and despite T's complaints organised loud nightly parties from 11 p.m. to 5 am.***

The *Regulation on management, order and control in condominium* establishes rules which all inhabitants of shared buildings ought to comply with. One of the provisions reads that the inhabitants may not perform in their apartments, activities that may cause abnormal disturbance for other residents. The General Meeting of the owners of the Building makes all decisions relating to the management, control and order of the building. The management decisions are entrusted to a board of the condominium or to a manager. Article 235 of the LCO provides that if tenants fail to comply with the rules of the Regulation they may be evicted from the rented premises upon a motion of the Board of the condominium.

Thus, the tenant may complain to the Board of the condominium. The latter may first decide to warn the noisy tenants or to impose a penalty. If the tenants persist in failing to comply with the rules of the condominium, the Board may propose an order for eviction be made to the regional court.

Question 27: House to be used for Specific Purpose

***L rents a big apartment to T under the assumption shared by both parties that some rooms will be used by T as a surgery. However, the local authorities deny the permission for the surgery to be opened in the studio for fire protection and zoning law reasons. What are T's claims*?**

Article 232 requires that the tenant use the property according to the terms of the contract, or in the absence of clarity in the contract, in accordance with the purpose for which the property has been rented. However, in order for the tenant to comply with this obligation, the landlord must have firstly fulfilled his obligation to deliver the property in a due state, which will allow the tenant to use the property accordingly. Thus, the tenant's performance is contingent upon the landlord's performance. Article 95 of the LCO provides that the creditor shall be considered to be in default when he fails to render assistance without which the debtor would be unable to perform his obligation. This principle applies to the present situation. The tenant cannot fulfil his obligation without the landlord's assistance. Default by the landlord's will trigger subsequent default by the tenant. An additional solution may be found in article 96 of the LCO, which establishes the consequences of default. The provision reads that where a creditor is in default, the burden is to be met by him; if the debtor has also been in default he is discharged from the consequences thereof. The necessary expenses incurred due to the creditor's default are to be borne by him.

Thus, irrespective of whether the present situation would be qualified as default by the landlord or concurrent default, the consequences would be the same – the tenant would be exonerated from the consequences of his own default. The rejection of the idea of a surgery under zoning law ought to have been foreseeable and as such the landlord's inability to honour the contract would not be tolerated. As such, the tenant could rely on the landlord's default, and bring forward a claim against L.

Set 6: The Relationship among the Tenant and Third Persons

Legal relationships between the tenant and third persons will usually arise as a consequence of third parties' actions against the rented property.

The LCO obliges the tenant to inform the landlord immediately about any damages to the property or infringements committed against it. This obligation is predicated on the general obligation imposed on tenants to take care of the property with due diligence. The underlying rationale is that the tenant should assist the landlord, so that the landlord can take all measures against any third person who damages the property or commits infringements against it. The requirement for assistance is logical because the landlord bears all negative consequences, including the negative consequences of the rescission of the contract, if the property is destroyed wholly or in part.

The Tenant has a claim against any third person who attempts to take the rented property through violent means or through concealment (see the answers to question 22 above).

Finally, a tenant, who lives in a shared building may enter into an agreement with the remainder of the residents that all will observe the rules established by the *Regulation*

on management, order and control in condominium or by decisions of the General Meeting of the owners.

Question 28: Neighbour Relations

T and N are tenants of neighbouring apartments in the same house. How can T react if N continuously plays excessively loud music or constantly produces bad smells penetrating into T's apartment?

The tenant should inform the manager or the Board of the condominium. The manager or the Board respectively, may impose a penalty on the tenant's neighbour. If following the imposition of the penalty, the neighbour continues to breach the rules, the Manager or the Board may request the court issue a decision for eviction. The same rules apply irrespective of whether T and N are tenants of the same landlord or not. Moreover, the same complaint may be filed against L if he himself inhabits the shared building. Any person, being a tenant or an owner, is obliged to abide by the rules of the condominium.

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged by a lorry during construction work undertaken at a neighbour's house. Does T have claims against the building company or the neighbour?

Undoubtedly, T has suffered damages as a result of careless construction work. Under tort law everyone is obliged to redress damages caused by the fault of another. The tenant has therefore two alternatives: either to file a claim against the neighbour or against the Construction company. The claim against the neighbour would be based on article 49 of the LCO, which provides that a person who assigns work to another shall be liable for damages caused by the latter in connection with the performance thereof. Given that the neighbour has assigned the work to the Building Company, he would be liable for the damages caused by the latter. The neighbour on his part would have a counter-claim against the company based on article 54 of the LCO, which provides that the person liable for damages caused by another shall have a claim against the latter for what has been paid. Alternatively, the tenant may rely on the general rule in tort that everyone is obliged to redress damages caused by fault and file a tort claim directly against the Construction company. Case law reveals that normally the first alternative is preferable. In a litigation procedure initiated by the tenant against the neighbour, the neighbour would normally argue in proceedings that the Construction company acted as an "assisting third party". Viewing the company as an assisting third party would allow the neighbour to file a counter-claim, which would be valid provided that the first claim was valid (an eventual combination of claims).

However, where property is destroyed, it is typically the landlord who will instigate court proceedings either against the neighbour or against the company. Since the damages caused to the tenant and to the landlord, although being different in nature

and amount, derive from the same facts, the tenant may join the proceedings as a claimant alongside the Landlord.[109]

Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

When T has left his rented apartment for holidays, neighbour N notices a strong gas-like smell coming out of T's door. Assuming that the gas pipe in T's apartment has a leak and that a danger of explosion may be imminent, N breaks open the apartment door, thereby destroying his chisel worth 10 € and causing a damage of 200 € at the apartment door. After entering the apartment, N discovers, however, that the gas-like smell stems from the garbage bin, which T had forgotten to empty before leaving. Has N a claim against T or vice-versa?

Bulgarian law recognises "*Negotiorum gestio*" as a source of obligatory relationships.[110] The rules on negotiorum gestio apply provided that several conditions are satisfied.

First, it is necessary that a person, (hereinafter "gestor") intervene to manage ***affairs of another***. Secondly, it is necessary that the intervention be undertaken ***in the interest of another*** (hereinafter "interested party"). Thirdly, it is necessary that the gestor has an ***intention*** to intervene to manage someone else's affairs in the interest of the latter. Fourthly, a negative pre-condition should be satisfied*:* the gestor should not have been assigned to perform the activity. If he has been assigned a role the rules on contracts, rather than negotiorum gestio, will apply.[111] It should be pointed out that the rules on "*Negotiorum gestio*" will not apply if the intervention is undertaken in the gestor's interest only. However, they will apply if the intervention has been undertaken in the interest of the two – the gestor and the interested party.

"*Negotiorum gestio*" engenders obligations for both the gestor and the interested party. Pursuant to article 60 of the LCO, a person who intervenes to manage the affairs of another, without having been asked to do so, must take care of such affairs until the interested person takes over control. He must take care of the affairs as if he is authorised to do so. Thus, the gestor should manage the activity of the other with even more diligence than the care he takes when managing his/her own affairs. The law however provides that his responsibility may be reduced to take account of the specific circumstances under which he undertakes the other's affairs.

Obligations arise also for the person in whose interest the gestor has intervened. The interested person is obliged to compensate the gestor for all expenses made. The amount of compensation depends on:
(i) whether the gestor has performed the work in the interest of the other person only, or in the interest of himself as well;
(ii) whether the work has been undertaken appropriately with due care;

Three possible scenarios can be distinguished:

(i) the gestor intervenes appropriately in order to serve the other's person interest and manages suitably the other's affairs;

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[109] The tenant and the landlord will be 'comrades' in the proceedings.
[110] Article 60-62 of the LCO.
[111] See Goleminov, Ch. "Civil Law Sources of Obligations" 1999, TILIA OOD.

(ii) the gestor intervenes not only in the interest of the other, but in his own interest as well;
(iii) the gestor intervenes against the will of the other.

It must be pointed out that it is considered that the gestor manages well the other's affairs if he acts in accordance with the will of the other. If the will of the other has not been made explicit, the management should be made in accordance with the presumed will of the interested party. If these conditions are not met, the gestor is considered to have acted against the will of the other, however, still in the latter's interest.

If the conditions of the first scenario are met, the interested party must fulfil the obligations assumed on his behalf by the gestor, compensate the gestor for the personal obligations the latter has assumed, and must reimburse him for reasonable expenses. In addition, the interested party is obliged to pay interest from the date the expenses were incurred.

Under the second scenario the interested party is liable only up to the amount of his/her own enrichment as a result of the gestor's intervention.

Under the last scenario, the rules on unjust enrichment apply[112], which means that the interested party shall be liable to return any enrichment up to the amount of the gestor's loss.

Undoubtedly, the present case satisfies all the conditions for the application of the rules on negotiorum gestio. It is also clear that the case does not fall under the first scenario outlined above. Firstly, the intervention was obviously not undertaken in the tenant's interest only. The neighbour attempted to prevent an explosion that could have destroyed his own flat and therefore he acted to protect a common interest. Secondly, given the final outcome, it seems that the work has not been undertaken appropriately and has not been managed well.

However, whether the case falls within the second or the third scenario is difficult to judge. It could be argued that the neighbour has intervened in the interest of the two but it may also be argued that the intervention has been undertaken against the will of the tenant. Theoretically, if the neighbour's intervention was appropriately undertaken in the interest of the two, the tenant would have to compensate the neighbour to the amount that the tenant was enriched. Alternatively, if it is assumed that intervention was against the interested party's will, then the compensation due would be only to the amount of the neighbour's loss.

In this case, neither the Tenant is enriched nor does the neighbour bear a loss. The tenant would therefore not have to pay any compensation under the rules on negotiorum gestio.

Given that instead of preventing an accident the neighbour has caused damages, it may be possible for the tenant to file a claim in tort against the Neighbour. However,

[112] Pursuant to article 59 LCO whoever has enriched himself, without merit, at the expense of another shall be liable for the return of the enrichment, to the amount of the other person's loss.

such a claim may be difficult to sustain if the neighbour can prove that he has intervened with the intention of serving the tenant's best interest. Moreover, in my view in this scenario it would be difficult to argue that the neighbour acted with fault - fault being a necessary element for a valid claim in tort. Moreover, even if a tort claim is successful, the compensation due would be reduced under article 51 (2), which provides that if a person that suffers damage has contributed to its occurrence, compensation may be reduced. In the present case, the fact that the tenant has left his/ her garbage bin unclean may be held to have contributed to the damage.

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