The Netherlands

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Introduction

A) *Origins and basic lines of development of national tenancy law*

1) *When was it introduced and where (civil code, special statute, case law)?*

When the Dutch Civil Code (DCC) was introduced in 1838, thirty odd clauses were dedicated to the law of tenancy, most of which were taken directly from the French Code Civil. These clauses contained amongst others a definition of the tenancy-contract as well as a regulation of the obligations of landlord and tenant, the consequences of the transfer of rented property, as well as the termination of the tenancy. These rules, which were in principle non-mandatory, will later be referred to as the general rules of tenancy. As of August 1st 2003, these have been replaced by an entirely new set of rules. Herein after the applicability of these rules is assumed.

2) *Who was and is the political driving force?*

The non-mandatory character of the former general rules of tenancy implied that in a period of severe housing shortage, they would offer the tenant no protection whatsoever, neither against high rents nor against premature termination. A similar situation occurred for the first time towards the end of the First World War. Accordingly, temporary protective measures were introduced and only retracted when, towards the end of the twenties, the equilibrium of the housing market was restored. The Second World War brought further housing shortage, inducing the occupational forces to introduce protective measures. Rents were thereby restricted, and the possibilities of one-sided termination of the tenancy were limited. After the Second World War these measures were retained, and in 1950 they were converted into a regulation, set up - likewise – with a public law character, in the Rent Act. This act covered the tenancy of all types of built real estate.
In 1971 a separate regulation was introduced for one specific type of tenancy meant for businesses, the so-called shop-keepers tenancies, which, once inserted in the DCC, meant the end of the influence of the Rent Act upon this category. The businesses implied are best described as those categories that offer a location open to the public, where goods can be purchased or services rendered. More in general, these businesses are to be dependant on the local public passing by such a location.

In 1979, separate protective rules were introduced for housing tenants; the protective measures were inserted in the DCC, whilst the measures concerning maximal rents were stated in a separate Residential Tenancies (Rent) Act, as well as in numerous implementation

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measures. Other housing subjects were simultaneously regulated, such as subtenancy, exchange of housing, and the legal status of cohabitants.

In order to stimulate the (sub)letting of rooms to students etc. the protection of tenants living in the same dwelling as their landlord has been reduced in 1993 (art. 7:274 par. 1 infra f in connection with art. 7:232 par. 2 DCC). Hereinafter this regulation is disregarded.

On August 1st 2003, an extensive alteration in the law of tenancy was implemented, in which the general rules of tenancy have been entirely restructured. Also the basic rules pertaining to maximal rents for housing tenancies have been inserted in the DCC. The rules for shopkeepers, tenancies and housing tenancies have been only slightly adjusted (art. 7:290 ff). The limited protection for businesses not being shopkeepers businesses has been transferred to the DCC (art. 7:230a), which also meant the end of the Rent Act.

3) *Were these rules based on a particular philosophy (e.g. socialist)?*

As mentioned earlier, the statutory protective measures were mainly prompted by a scarcity of housing, which is still presumed to continue for the time being. On general traits, a communis opinio has always existed implying that whenever housing scarcity arose, protective measures were justified. Within the spectrum of politics, however, some difference of opinion has existed as to just how far such measures might reach. In this respect, left wing and confessional parties were always inclined to go a step further than the more liberal (conservative) parties.

In comparison with labour law, one would get the impression that protection of the economic weaker party had taken place there at an earlier stage and in a more structured form, whilst in the case of the law of tenancy the need of the moment has been decisive.

4) *Was there an influence by the national constitution or international instruments (e.g. ECHR) on tenancy law provisions?*

The national constitution played no marked part in the introduction of the past laws on tenancy, and the same can be said for international instruments nor, in the case of the new law of tenancy, do the parliamentary documents reveal any references to the national constitution or to international instruments.

5) *Were they inspired by another legal system? What were the principal reforms up to the present date? Were there political ideas behind these reforms? What, if any, has been the interplay between statutory and judicial intervention in the development of tenancy law?*

As mentioned earlier, the general rules of tenancy are of French origin. The new general rules, however, build upon a preliminary draft from 1972, which was much more inspired by clauses from the German BGB of the time.
Due to their more general (and not at all very detailed) and regulating character, the provisions of law of tenancy dating from 1838 left ample scope for contractual arrangements (concerning e.g. the costs of upkeep, liability, subtenancy, and availability for occupation). To

an equal degree, they offered scope for interpretation and amplification by the judiciary, often assisted by standards of reasonableness and fairness, as laid down in art. 6:2 and 248 DCC. The ensuing jurisprudence provided for instance detailed instructions as to the obligation of the landlord to take action against inconvenience caused by other tenants. Similarly, the jurisprudence worked out in detail the instances in which the tenant is to allow urgent works such as renovations to be carried out. Finally, the conditions were established wherein no remedy could be sought in divers contractual clauses (e.g. in the case of exoneration, availability, or rent increase).

To a limited degree, the pertaining jurisprudence has been codified in the new general rules of tenancy. Although the legislature repeatedly emphasised their intention that the new general rules should not lead to results different to the old ones, yet this cannot be taken for granted, since the new rules contain more regulations, more detailed regulations, and more mandatory law than did the old rules. One cannot therefore be certain whether the judiciary, however inclined to stick to the old results, will feel free to oppose the system and/or the wording of the new rules.

B) Basic structure and content of current national law

aa) Private tenancy law:

6) Central rules

The conclusion of a tenancy contract

No form is prescribed for the validity of contracts in general; there are no rules that dictate the form in which the consensus is to be stated. It is customary for the rights and obligations of both parties to be regulated extensively, yet parties can also limit themselves to bare essentials, i.e. the object of the tenancy and the amount of the rent. Remaining issues are then filled in by the statutory regulation.

Obligations of the landlord

The landlord is obliged to render available the object of tenancy, and provide the tenant with the use to which he is entitled. If this is not the case, whether the cause is material or immaterial, it is considered to be a deficiency (art. 7:204 par. 2 DCC). In the case of a deficiency, the landlord is in principal obliged to provide a remedy (art. 7:206 DCC). So long as this is not the case, the tenant is entitled to reduction of the rent, proportional to the loss of enjoyment (art. 7:207 DCC). Finally, the landlord can also be held liable for any ensuing damage to the tenant (art. 7:208 DCC).

Obligations of the tenant

The tenant is obliged to pay the agreed rent (art. 7:212 DCC), and use the property in a manner befitting a responsible tenant (art. 7:213 DCC), as well as in accordance with the

intended use (art. 7:214 DCC). Far-reaching alterations may be made only with the permission of the landlord, casu quo of the judiciary (art. 7:215 DCC); the tenant is obliged to tolerate urgent works and reasonable plans of innovation (art. 7:220 DCC). He is also obliged to deliver up the object of tenancy in a condition none other than that described at the time of entering into the agreement, except for normal wear and tear, once the tenancy has expired (art. 7:224 DCC).

The rent

In general, the rent can freely be agreed upon (art. 7:246 DCC). On the other hand, the housing tenant is authorised to have an agreed rent verified by the rent tribunal (art. 7:249 DCC). The rent tribunal will then, according to standards of quality - resulting in the allotment of points to the housing - determine the total number of points, which corresponds with a maximum rent. Should the agreed rent turn out to be higher than the maximum, the rent tribunal will accordingly lower the rent (art. 11 Rent Residential Tenancies (Implementation) Act). Objections against the ruling by the rent tribunal can be brought before the judiciary (art. 7:262 DCC). The score in points of the housing also plays an important part in the question as to whether the landlord is incidentally authorised to increase the rent (e.g. in the case of improvements (art. 7:255 DCC). In principle, the rent can be increased yearly according to a maximum percentage prescribed by the minister of public housing. The rent increase can then be put into effect through a clause in the contract (art. 7:248 DCC), or one-sided, if needed by enforcement by the rent tribunal (art. 7:252-253 DCC). The rent can also be reduced during the rental period on the tenant's initiative, either due to the fact that it has become apparent that the rent exceeds the statutory maximum (art. 7:254 DCC), or because defects have occurred (art. 7:257 DCC). A fitting up that is out of date can mean such a defect, even though the state of maintenance is adequate (art. 7:241 in connection with art. 7:204 par. 2 DCC).

7) Is current tenancy law state law or infra-national law (if legislative jurisdiction is divided: what is the allocation of competencies and for which subject matters)?

The basic rules of the tenancy law, including the manner in which they are to be put into effect, are laid down in acts of parliament (which takes place, according to Dutch law: in collaboration with the government). The minister of public housing establishes the standards for the allotment of points relevant to housing, the value in money that corresponds with these points, and the standards for rent increase, after having consulted the Second Chamber (the approximate Dutch equivalent of the British House of Commons). The minister is held politically responsible for the development of rents.

8) To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive?

The DCC consists of eight odd books; book 3 contains the law of property in general, and book 6 contains de general rules of obligations. Book 7 contains specific contracts, such as purchase, exchange, tenancy, and the labour agreement. Books 3 and 6 regulate the general dogmas of private law, and apply therefore to the law of tenancy, inasmuch as no differing regulation is offered. In the drawing up of the new general rules of tenancy law, the books 3

and 6 of the DCC - which were introduced in 1992 - were taken into account as far as possible. Matters regulated in those books are not again regulated in the general rules of tenancy law. As mentioned earlier, also the general rules of rental law, pertaining to maximum rents, have been inserted in the DCC. The rules for application are to be found in implementational legislation for housing rents (Uitvoeringswet huurprijzen woonruimte). The criteria laid down for the appraisal of alterations of rents are to be found in a ministerial decree on housing rents, and especially in the thereby offered explanatory notes and appendices (Besluit huurprijzen woonruimte).

Mandatory/dispositive

The general rules of the law of tenancy offer only a limited number of mandatory regulations, in which case a contractual divergence detrimental to the tenant has no effect, e.g. the rule that the tenant is authorised to remedy a lasting defect, thereby settling the costs by deducting them from the rent (art. 7:206 lid 3 DCC), as well as the rule that the landlord may not exempt himself from liability for defects known to him at the time of contracting (art. 7:209 DCC). Some other rules to be found in the general rules of tenancy are declared mandatory only inasmuch they pertain to the law of tenancy of housing (enumeration in art. 7:242 DCC). The law of tenancy of housing is generally speaking indeed of a mandatory nature, and even more so the legislation on maximal housing rents.

9) Are there other forms of lawful possession of a premise for housing purposes (e.g. licence vs. tenancy in English law)?

There are in fact no other forms of lawful possession of a premise for housing purposes. In the case of prolonged vacancy, a premise may well be allowed to be occupied free of charge by e.g. students. Such users can be held accountable for the actual costs of water, gas, electric energy, &c. However, as soon as such users are required to pay compensation for the actual use of the premise, they will be considered to have entered into a tenancy agreement, whereby the rent protection of tenure will be applicable. In certain conditions, however, protective rules can be set aside, notably when the stipulated use is by nature limited to a short period of time, as would be the case with a holiday house (art. 7:232 par. 2 DCC), or a house due for demolition (art. 7:232 par. 4 DCC). Finally, a special regulation, the Vacant Property Act (Leegstandwet), provides the possibility of letting under surveillance by the municipal authorities premises awaiting renovation and the like. The rules of security of tenure will then not apply to such tenancy agreements.

10) To what extent does national or European consumer protection legislation play a role?

Consumer protection legislation plays a part only in the assessment of general terms and conditions, i.e. any written clause that has been drafted in order to serve in several contracts (art. 6:231 ff DCC).
Inasmuch as such general conditions do not concern a key element of the contract (such as the rented premise and the amount of the rent itself), they can be declared void whenever so demanded by the tenant, should they be considered unreasonably onerous. In book 6, several clauses are stated as either being generally considered being unreasonably onerous (art. 6:236

DCC), or that they are so presumed to be (art. 6:237 DCC). One might mention here that these clauses were not introduced with any special attention to the practise of the tenancy law, and indeed it has seldom occurred that a tenant-consumer claimed a clause to be void on such grounds. It is to be expected that the importance of the regulation of general terms and conditions will decrease even further now the new tenancy law is implemented, taken into consideration the increased number of mandatory rules, especially where housing is concerned.

11) Does the relationship between general and special rules work properly so as to create legal certainty?

In general, the relationship between general and special rules is clear enough to avoid problems. As mentioned previously, the issue at stake will frequently be: the intention of the legislature that the new regulation should not differ grosso modo from the old one. There are, however, also rules covering matters hitherto unregulated - the significance of which will have to be assessed by consulting the statutory regulations themselves as well as the pertaining parliamentary documents.

12) Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as an obligatory right?

The position of the tenant gives him obligatory rights only. The one exception is the case wherein the landlord transfers his right of ownership (or a restricted right that includes the right of tenancy) to a third party. That third party will then automatically become the tenant's new landlord, and he will obtain all assets and liabilities of the former landlord, at least to the extent wherein those rights are connected to the use of the premise for the rent the tenant is obliged to pay (art. 7:226-227 DCC).

bb) Social regulation affecting private tenancy contracts

13) Regulation on provision of public housing, i.e. houses owned by the State or other public entities

Approximately half of the available housing belongs to entities working in the interest of public housing, consisting mainly of legal persons governed by private law (to be called hereafter: corporations). They are held under surveillance of the minister of (amongst others) public housing, and allow priority to housing persons who encounter difficulty in finding suitable housing, due to their income or other circumstances. In the Subsidised Rented Sector (Management) Decree (Besluit Beheer Sociale Huursector), rules have been inserted concerning their care for the available housing, the liveableness in neighbourhoods and districts, tenancy and sale policy, the participation of inhabitants, and financial continuity.

14) Special public or mixed public/private housing regimes subsidised or promoted by public entities.

The Subsidised Rented Sector (Management) Decree contains regulations that address these corporations. Their tenants are only able to appeal indirectly to these regulations with regard to tenants' participation. Apart from that, the same general rules of tenancy are for them in force. As far as tenants' participation is concerned, the general rules of tenancy also contain a Consultancy Act Landlords and Tenants (Wet overleg huurders verhuurder).

15) Direct subsidies and/or tax incentives for the tenant or the landlord affecting private tenancy contracts.

Under the Rent Allowance Act (including bye-laws), tenants with an income of approx.
E 15.000 to approx. E 23.000, depending upon their personal circumstances, are permitted a rent subsidy, so long as the rent does not exceed a certain amount, again depending upon their personal circumstances, not exceeding E 585 per month. For the claim itself, it is of no consequence whether the landlord is a corporation or a large/small commercial landlord. Corporations are allotted no exploitation subsidies; on the other hand, they are allowed relatively favourable loans for new housing as well as renovation. However, the already limited freedom to increase rents periodically is even more limited for corporations.

16) If data or experiences available: does the national policy favour, e.g. by incentive measures, rented housing and housing property.

Particularly in the more expensive housing category, stiff competition exists with the owner-occupied housing sector. As spending power increases, the well-to-do tenant will be inclined to look out for a house of his own, which is partly the result of the exceptionally favourable opportunity offered for deduction of mortgage interest from one's income. The very opposite is taking place in the present-day deterioration of the economic situation. The policy is being pursued to encourage owner-occupancy, partly due to the greater care an owner tends to take for his own possessions as well as the environment. Due to the rental policy held for more expensive housing, only this particular category is of interest for investors. This same category, however, is the first to feel the market pressure in a deteriorating economic situation: the tenant who is no longer able to pay the rent will look for cheaper housing, whilst the tenant who is still able to do so will look for a house of his own.

17a) Public law measures of assigning houses to people in need (especially to people who would otherwise risk becoming homeless) in potential disrespect of private tenancy contracts.

According to the Subsidised Rented sector (Management) Decree, one of the tasks of the corporations is to, as far as possible, let their housing supply to those with the lowest incomes and in search of housing.

Housing Allocation Act

The Housing Allocation Act (Huisvestingswet) seeks to obtain a well-balanced and righteous distribution of scarce housing. Municipal authorities are qualified to introduce housing regulations to allot low-priced housing. In that particular category, no such housing may be made use of without a housing license. The supervision of the compliance with this regulation lies entirely in the hands of the municipality itself. No action taken at variance with the

Housing Allocation Act will however jeopardise the validity of a tenancy contract. The Housing Allocation Act can help to give priority to those in search or housing that find themselves in a distressing situation.

17b) Public law measures to prevent dwellings from staying empty.

The aforementioned Housing Allocation Act empowers the municipal authorities to claim housing that is found to be vacant. This claim can be made for a period not exceeding 10 years. A valid claim has to be followed by an allocation to those who are going to make use of the premises. The municipality decides on the amount that will have to be paid to the owner. The use of this measure has declined along with the decrease of the housing-shortage.

c) Summary account on -tenancy law in action

18) What is the general situation in regard to housing?

After the Second World War, approx. 4 million new houses have been built. The total number of houses mounts up to approx. 6 million, of which approx. one half consists of rented housing. Of these accommodations, approx. 2¼ million belongs to the corporations. In point of fact, there is now sufficient housing. During the last 20m years, however, the shortage of housing has become one of quality, not of quantity, and therefore the existing supply does not meet the demand. Moreover, there are major regional differences: in the western part of the Netherlands, the Randstad conurbation, there are long waiting periods, especially where cheaper housing is concerned, whilst outside the Randstad we now and again meet with vacant buildings. In some districts within the Randstad there is vacancy as well, but this is due to deterioration of the housing environment.

At the moment, the corporations - united in a co-ordinating organisation (Aedes) - actually have more influence than the tenants themselves. On a national scale, tenants are united in a tenants- association (Woonbond), which is active mainly on a local scale, by supporting groups of tenants.

Housing costs

For years in succession, rents have increased more than incomes, which means that the income percentage to be spent on rent has increased substantially. In order to, nevertheless, keep adequate housing affordable to those with lower incomes, a system of rent subsidy has been developed. The tenant to whom this applies may receive a contribution towards his housing costs. The lower the rent the lower the subsidy and the amount can become higher if necessary due to personal circumstances - such as the size of his family and his income.

19) What is the role of associations of landlords and tenants?

The "constitution" of the corporations, the Subsidised Rented Sector (Management) Decree, dictates that the corporations allow its tenants (organisations) the opportunity to voice their

opinion on matters of policy and management, such as maintenance of the housing and the housing environment and the policy concerning the liveableness of neighbourhoods and districts, the policy concerning purchase and demolition of housing, the allotment policy, the letting policy, the content of tenancy agreements, rents, and the rendering of services. The Act on Consultation Between Landlords and Tenants (Wet overleg huurders verhuurders) offers a generally similar regulation for commercial landlords with a housing supply exceeding 100 dwellings. Up to now, the thus created consultation opportunities have been made use of to a reasonable extent; a frequent problem, however, lies in the superior knowledge of the landlord.

20) What is the role of standard contracts prepared by a tenants, or landlords, association?

Both the social and the commercial landlords have their own standard contracts.

The discrepancies in content are not numerous. Regulations that differ from the general rules of tenancy (non-mandatory) are to be found inasmuch as they do not concern security of tenure and rent control (mandatory), but these have never gone too far. A standard tenancy contract is after all a kind of visiting card, and what's more: extreme deviations have always been rejected by the courts, either with reference to the rules of reasonableness and fairness, or based on clauses concerning the voidability of standard terms and conditions. Due to the increase in the amount of mandatory law in the new law of tenancy, the scope for contracting at variance with these new rules will diminish even further.

21) Is tenancy law often enforced before courts by landlords and tenants, or are there - voluntary or compulsory - mechanisms of alternative dispute resolution? Are they made us of?

Tenancy disputes are brought before the subdistrict courts, wherein one member of the district court makes decisions. Litigation is allowed to take place without legal representation. As in all procedures in the first instance nowadays, experiments are being made with different ADR methods, mediation in particular, but as yet no spectacular progress has been made. In the case of rent disputes, the main rule is that in the first instance the case be submitted to an independent administrative authority, falling under the Minister of Housing, i.e. the rent assessment committee . Only after the case has been investigated and ruled by this committee, which is presided by a jurist, can it be put before the subdistrict court.

22) Are there peculiarities for the execution of tenancy law judgements (e.g. prohibition of or delays for eviction)?

The execution of tenancy law judgements has few peculiarities of its own. In tenancy cases there may be, however, a tendency to more readily assume that there has been abuse of the power to enforce a court decision (in the case of the landlord) or (in the case of the tenant) an emergency, serving as a reason to postpone execution. The number of cases, however, in which such a suspension has been claimed successfully, is very small indeed. Landlords tend to do their very best to avoid the ultimate eviction, all the more so if there is no conceivable hope of another dwelling for the tenant.

23) To what extent does a fair and affective access to courts for tenants exist?

The first court to occupy itself with tenancy cases is the subdistrict court, to the competence of which belong also: labour disputes, as well as other cases with an interest at stake not exceeding an amount of E 5.000. Litigation before the subdistrict courts without a legal assistance counsellor is, however unusual, in itself possible. As soon as there appears to be a serious conflict, the less well-to-do may apply for free legal assistance of a bailiff or, more frequently, of a lawyer. The litigant is due to pay a contribution, which increases according to his income. Litigation is fairly rapid in tenancy cases, de average time involved being from six to nine months. Appeal is allowed against the decision of the subdistrict court, either if the value at stake has not been defined, e.g. in the case of setting aside an agreement, or if it exceeds E 1.750. The appeal is brought to the court of appeal, where legal representation is mandatory

24) How about legal certainty in tenancy law?

For years on end, tenancy law has been considered poorly arranged as well as inaccessible, and one fears this will be no different since the introduction of the new law on August 1st 2003. The question will frequently arise as to what weight the different views of the ministers, voiced in Parliament, actually carry, inasmuch as they do not go hand in hand with the wording of the Act. We must not, however, suppose that contradictory legislation now lies before us, and any legal mind that takes the time and trouble required for adequate perusal, will find both legislation and pertaining literature quite accessible.

2. Questionnaire

Set 1: Conclusion of the Contract

Freedom of contracting applies to all forms of tenancy, as far as the coming into effect is concerned. Once the contract has come into effect, it can happen that the landlord is afterwards confronted with others who have acquired rights, e.g. through marriage of the tenant or registered partnership (art. 7:266 DCC), a lasting common household (art. 7:267-268 DCC), exchange of housing (art. 7:270 DCC), or subletting. The subtenant of an independent housing has a right to security of tenure, to even a quite extensive degree towards the main landlord (art. 7:269 DCC).

Question 1: Choice of the Tenant

L offers an apartment for rent in a local newspaper. T replies and shows a keen interest. However, L rejects T on the grounds that:

a) L has a husband and three children.
b) T is a Muslim, and L is afraid of terrorism.
c) T has a small dog.
d) T plays piano as a hobby and would like to play for 1 hour every evening from 8-9 pm.
e) T does not have full capacity and is under custody.

Does T have a claim against L?

Variant:

In order not to weaken her chances of securing the contract, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages?

A basic assumption is this case is that the landlord is a commercial landlord, and that therefore the tenancy regulations will play no part in the solution of this problem. This would however have been different if the advertisement had been placed by a corporation, as corporations, due to their task description, do sometimes have special contracting obligations (see no. 13 above). According to Dutch jurisprudence, an offer done by advertisement is in general not an offer that by acceptance alone can lead to an obligation, but no more than an offer to commence negotiations (Dutch Supreme Court, further to be quoted as HR, April 10th 1981, NJ 1982, 532 Hofland/Hennis). According to the Dutch Supreme Court not only the price, amongst other conditions, can be of importance for the person placing an offer, but also the person of the interested party in person, which can therefore be essential for his willingness to enter into an agreement. The qualification of an offer by advertisement as an offer only to enter into negotiations (the invitatio ad offerendum) leaves the person placing the offer ample freedom to retract the offer, with or without a reason offered, feigned or not. The so-called pre-contractual good faith can to some extent imply an obligation to negotiate, but these negotiations must then have been initiated on the basis of points of view known to both parties from the beginning. Should the landlord choose to cease negotiations from the moment he receives more information on the tenant-to-be, it is difficult to imagine how ever he, the landlord, could nevertheless be obliged to continue negotiations in such a way that a tenancy agreement might be the possible outcome. All this applies in general, therefore also for the cases stated in a) to e).

b. The Dutch constitution holds in art. 1 a prohibition of any form of discrimination. The penal sanctions on discrimination (especially art. 90 quater and 429 qauter Criminal Code) where in particular inspired by the International Convention of New York of March 1966. This convention - and other conventions as the International convention on Civil Rights and Political Rights of December 1966 - combined with the penal provisions have their effect on the private law. Discrimination on the political, economical, social or cultural field or other fields of public life can give rise to a claim based on tort, either for a injunction or for damages. In so far the constitution and international conventions have to a (un)certain degree horizontal effect (see HR March 30, 1984, NJ 1985, 350 re a Turkish female employee).
Penal or civil discrimination cases are brought before the usual courts; only for discrimination between men and women there is a national Committee which gives non-binding rulings.
In the eighties a discrimination case regarding the allocation of housing reached the Supreme Court (HR December 10, 1982, NJ 1983, 687 Binderen/Kaya). The Supreme Court decided inter alia that as sanction the obligation may be attached to provide adequate housing to the aggrieved party. Since then the matter of discrimination on ethnical grounds, although certainly occurring, has not led to any jurisprudence within tenancy law. Part of the explanation could be that the corporations, who have control of the half rent market, are legally bound to house the less privileged (see no. A 13). Another part could lie in shortcomings of the law.

Directive 2000/43/EC.

A bill is proposed to implement this directive in our General law on equal treatment. In article 7 of this law the definition in Art. 3 par. 1 lit. h Directive 'the offering of goods and services' will be broadened to 'the offering of or the giving access to goods and services'.

Alternative version

The qualification of the offer by advertisement offered above implies that the untrue answer of T as yet will not lead to an agreement. Should that after all prove to be the case, then the landlord would be able to invoke error (article 6:228 DCC) due to the fact that his willingness to contract is established by an incorrect representation made by the tenant.

The next question is then whether circumstances as referred to sub a)-e) can, if indeed incorrectly presented, could justify the invocation of error. There are, speaking in general, imaginable circumstances wherein that would be the case (e.g. the size of the apartment, not sound proof, the type of apartment building, the sort of tenants). An answer of a universal scope is however impossible. Examples of cases in which the validity of the contract was disputed for deceit or damages claimed are not at hand. Most probably the disappointed landlord falls back on the contractual regulations of the manner in which the apartment should be used by the tenant, leading to a claim for performance or for dissolution.

Question 2: Sharing with Third Persons

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.*

d) *her parents.*

Is this possible against the will of L? If not, what are L's remedies?

Variant 1

T dies. The persons listed under a) – c), who were sharing the house with T during the last number of years wish to continue the contract with L under the same conditions.

Variant 2: Students' house

From the outset, and with L's consent, the apartment has been leased to a group of students. However, the contract was concluded between L and T only. Though a student like the rest, T was selected by L as she had the best financial background. One of the students decides to leave the house and T wants to accept another student named A, in his place. Is it possible to do so against the will of L, who does not like A?

Much depends on the contents of the tenancy agreement and the individual circumstances (especially the type and size of the housing)

Article 7:221 DCC states the following:

The lessee is authorised to make the hired object available to another person, unless he had reason to believe that the hirer had reasonable objections against making the object available to such a person.

The importance of article 7:221 DCC is however limited, as it is non-mandatory, whilst the authority of the tenant to make the hired object available to another person, which includes subletting, is more often than not excluded by contract.

Article 7:244 offers a further rule for housing:

In derogation of article 221, the tenant does not have the power to make the housing or a par. thereof available to another person. However, the tenant of an independent living accommodation, who has his main dwelling there, has the power to make a part thereof available to another person.

Also this rule is non-mandatory, and again, more often than not, every form of making the housing available to a third person is excluded by contract.

As ever the rule of article 7:213 DCC also applies:

The hirer is obliged to use the property in a manner befitting a responsible tenant.

In case a) the husband is ipso iure co-tenant, and therefore an injunction against the tenant for making the object available to another person will have no effect (art. 7:266 DCC). The same rule applies to case c with regard to the homosexual partner, inasmuch as he is a registered

partner as referred to article 1:80a DCC. The only possible grievance the landlord could put forward would be the over-occupancy due to the arrival of a co-tenant.
There is no public law requiring what is the minimum available space for each habitant of an apartment. In so far there are no objective criteria for the determination of overoccupancy. The criteria of the Housing Allocation Act (see introduction no. 17) as to being housed too small are of no help here.
The claim for a higher rent on the account of the increased number of persons living there could perhaps be based, as the usage of the apartment will be higher, on the rules of reasonableness and fairness (art. 6:248 DCC), but such a claim does not fit in the rules restraining housing rents. According to these rules only the quality of the apartment is decisive for the maximum rent, not the number of inhabitants. In fact only a contractual clause could support a demand for a rent-increase, assuming that the resulting rent would not exceed maximum, going with the apartment.

Between the cases mentioned b) and d) there are no essential differences. If it is forbidden by contract to let others come and live with the tenant, the landlord will in principle be able to put forward grievances. In doing so, however, the landlord will need to have a clear interest worth respecting. If therefore the housing is suitable to house not only T, but also the persons mentioned sub b) and d), and their presence is not in any other way (objectively) detrimental to the landlord or the other tenants, that interest will not readily be considered present. In an ensuing lawsuit the setting would then be the landlord's claim to termination for breach of contract and in that setting it is the tenant who will have to argue that the landlord has insufficient interest to invoke the prohibition in the agreement. For this claim of the landlord a prior cancellation is not necessary, nor a final notice. An obligation not to overoccupancy the apartment is a so called continuous obligation. The breach thereof is, at least for the past, irreparable and therefore the claim for termination requires no preceding notice (HR Januari 11th, 2002, NJ 2003, 255 Schwarz/Gnjatovic). The termination will only be adjudicated if the tenant does not put forward that the breach is not weighty enough or if the judge decides otherwise.
Less frequent are injunctions whereby the tenant is commanded to terminate the making available of the housing and a penalty is imposed, even though this setting would offer a better opportunity for the appraisal of the interest of the landlord, than termination for breach of contract

In cases wherein making available to other persons is not forbidden by agreement, the burden of proof would be reversed, and the landlord will have to state, and if necessary prove, that either the tenant had reason to believe that there would be objections against the making available to other persons (article 7:244 DCC), or that the situation described in article 7:244 DCC is not at hand. Apart from this, the landlord could claim that the tenant is acting contrary to article 7:213 DCC, but to make this point excessive occupation will have to be established. Also in this situation, the landlord can resort to an injunction, yet he would sooner go for termination of the agreement. Generally speaking, this can take place in two different ways, i.e. by termination for breach of contract (by the judiciary), or by a judicial decision of termination, after the landlord having given notice, on the grounds that the tenant had not used the property in a manner befitting a responsible tenant.

Variant 1

There is here reason to differentiate further the persons referred to sub a)-d).

a) The husband, who had been co-tenant by law under article 7:266 par. 1 DCC, becomes tenant by law after the tenant has deceased, if he had his main dwelling in the rented premises (par. 3).

b) As soon as T and her boyfriend have run a joint household for two years, they are entitled to ask the landlord to accept the boyfriend as T's co-tenant. If the landlord refuses, T and B can ask the subdistrict court to grant an alternative authorisation. Should B have become co-tenant by one of these means, the right of tenancy passes on to him when T is deceased (article 7:267 par. 5 DCC). Should B not have been co-tenant on the day of T's death, he can still, on the grounds that he had run a joint household together with T, request the subdistrict court to allow him to proceed with the tenancy, in which case he skips the phase of becoming co-tenant (article 7:268 par. 2 DCC). Par. 3 of this article offers grounds upon which the subdistrict court can deny the request.

c) In the case T and B have had themselves registered as partners (article 1:80a et seq. DCC), then a) counts as the right answer; if they have not, then the answer sub b) is correct.

d) For a joint household on a long-term basis, there is no need for a (pseudo) marital relationship. It is in itself quite possible for a joint household to exist between T and her parents who have moved in. In this case, however, attention will have to be paid to the element, long-term basis. If for instance the parents were, at the time they moved in with T, already in need of care, and it was to be expected that they would eventually be living in a nursing home, it would be quite possible that their household would not be considered to meet with the requirement: long-term basis (HR April 29th, 1989, NJ 1989, 800 Van der Poel/'s-Gravenhage).

Variant 2

This situation could be qualified as tenancy of the apartment to T, whereby T in turn sublets to the other students. In that case the other students have not contractual right against L and are neither liable for the rent separately. Also possible is the qualification whereby a tenancy agreement exists between L and all the students together, whilst T has taken upon herself to collect and remit the rents. Here the students are jointly and separately liable for the total amount of the rent (art. 6:6 par. 2 DCC and HR October 6th, 1989, NJ 1990, 184). If in the latter situation the tenants are authorised to nominate a new tenant, one would qualify this as the right to appoint person by co-optation. As to the right to appoint a new tenant by co-optation, there is no regulation by law, although extensive jurisprudence of the lower courts does exist, sometimes vesting the right on the content of the agreement, sometimes on reasonableness and fairness. In this jurisprudence more emphasis is found on the interest of the present tenants in sharing the joined facilities than on their capacity to pay the rent. Even though a right of co-optation is assumed to exist, the landlord, if such terms have been agreed, is entitled to lay down conditions for new tenants, such as the capacity of being a student at a particular university or faculty. Considerations of a more personal nature will not be admissible.

Should the situation be qualified as subtenancy, it would be less obvious for the landlord to exercise influence upon the choice of sub-tenants, yet even then the possibility remains that the agreement reserves him this right.

Question 3: Subletting

Does T possess the right to sub-rent a room in his apartment to S? If so, under what conditions? May T make his permission conditional on an increase in rent? What are L's rights if T sub-rents a room without his permission?

The proviso's of sub-renting were mentioned in question 2. Article 7:244 DCC implies that T is entitled to this sub-renting, but that an agreement to the contrary, which is common practice, may prohibit to do so. The agreement can also contain a clause stating that the landlord's permission is required for sub-renting, which may then be given under the condition of an increase of the rent. If this condition should, however, lead to an excessive rent, exceeding the maximum rent allowed by law, T would be able to seek redress through the rent assessment committee. The consequences attached to a violation of a prohibition to sub-rent have likewise been mentioned in question 2. Apart from the actions mentioned there, L could not claim from T the received "subrent" as damages or unjust enrichment. Damages can't be claimed because the subrent in itself does not result in a loss and the unjust enrichment lacks the corresponding impoverishment.

Question 4: Formal Requirements of the Contract

a) Does the tenancy contract require a specific form (in writing, for example) – if so, what is the rationale behind this requirement? What are the consequences if this form is not observed?

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

Must the contract be registered in a public register? What are the consequences in private law, especially in court actions, if no such registration takes place?

a) As mentioned in no. 6, it is customary for tenancy agreements to be put in writing. The document created is, however, not essential for the existence of the agreement, it is not a conditio sine qua non, but no more than an article of evidence.

b) A no more than verbal agreement is valid in law, and can indeed be enforced, if necessary after proof has been presented.

c) There is no public register into which tenancy agreements can be entered.

Question 5: Extra Payments and Commission of Estate Agents

During negotiation of a tenancy agreement, L requests from T, the aspiring tenant, the sum of 100 Euro (the monthly rent being 1000 Euro) for the drafting of the contractual documents. Is this legal?

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;*

b) *because F agrees to leave the apartment one month before the final deadline, so as to allow T to enter at an earlier date.*

Variant 2

Estate agent A, who was first approached by T and has 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?

Article 7:264 DCC declares void any unreasonable (in the meaning of: unjustified) profit stipulated in connection with the tenancy agreement, whether by the landlord himself or by third persons, including the departing tenant. The agreement that T is to pay key money is therefore void and the sum already paid can be claimed as undue payment. However, a modest contribution to the actual costs connected with the lease may, according to some subdistrict judges, be asked by L. The sum of E 100 for the drafting of the contractual documents seems rather high.

Variant 1

a) The agreement that T pays F, the current tenant, E 550 in return for her promise to make L accept T as her successor is a unjustified profit and therefore not legal. (art. 7:264 DCC)

b) If the E 500 is paid against the earlier vacation, as to allow T to move in earlier, the agreement will be valid, if the € 500 can be considered as a reasonable compensation for the extra troubles of F, connected with the earlier vacation. Otherwise, and especially when T found herself in a predicament and F made abuse of the situation (art. 3:44 DCC), the agreement will again be invalid as to art. 7:264 DCC.

Variant 2

No specific rent control regulations are applicable for the remuneration of estate agent A, so if the agency-contract between T and A foresees a commission of two months rent at the conclusion of the contract with L, A is entitled to the E 2.000. The circumstance that L does not pay A is of no importance.

Set 2: Duration and Termination of the Contract

Should the tenant not abide by his contractual obligations, the judiciary can set aside the tenancy agreement if the default is serious enough (art. 7:231 in connection with art. 6:265 DCC). Apart from the case of a default of this nature, the judiciary, and not the landlord, can

terminate the agreement only on a limited number of grounds, after he has given notice. In giving notice, the statutory time limits are to be taken into account. These vary from three to six months. The date at which notice is to be given is in principle the day stipulated for the payment of the rent. This would be different if the tenancy were agreed for a specified period of time, in which case the landlord can only give notice towards the end of that period. The tenant can give notice within periods varying from one to three months, but in the case of a tenancy for a set period of time neither can the tenant give notice towards another date.

Question 6: Contract Unlimited in Time

a) 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 her intention is to renovate the house in order to increase the rent thereafter, or if she wants to use it for her own personal use or for her family members?

b) 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 fails to find another apartment and risks becoming homeless once the title is executed?

In the case of a tenancy agreement for a indefinite period, termination by the landlord is subject to a minimum of three and a maximum of six months' notice, depending on the number of years the tenancy has already run (art. 7:271 par. 5 infra b DCC). Giving notice does not terminate the tenancy, but is a condition for putting the matter before the judiciary, who is then to decide whether one of the statutory grounds for termination is at hand, and whether in casu, it ought to lead to termination. The statutory grounds in art. 7:277 DCC are the following:

a. not behaving in a manner befitting a responsible tenant

b. temporary tenancy, after which the landlord has the desire to take the premise into use (again) himself

c. urgent use by the landlord himself

d. turning down a reasonable offer to enter into a new tenancy agreement referring to the same apartment

e. realisation of a zoning plan.

a) The desire to renovate the dwelling in order to be able to increase the rent later is not considered to be urgent use by the landlord (art. 7:274 par. 1 infra c DCC); neither can it bring about an offer that, when turned down, might lead to a termination by the judiciary. Excluded are offers that aim primarily a rent increase. If the rented housing is in need of renovation, the tenant can be compelled to allow the renovation (article 7:220 DCC), and thereafter pay the increased rent that corresponds with the costs of the improvements (article 7:255 DCC). If the permanence of T is impossible during the renovation works, then T has to vacate the accomodation if the renovation is sufficiently urgent. In any case T has a claim for rent reduction and for damages.

Should L himself wish to live in the rented housing, this could count as urgent use, though his interest would have to appear to be greater than that of the tenant. In addition to this, it would have to be apparent that the tenant is able to acquire other suitable housing, in keeping with his family and financial circumstances.

b) The court decision, whereby T is sentenced to eviction, will be put in the hands of a bailiff, who will serve it to T and demand that she leave the premise, and that, when failing to comply, a judicial eviction will take place within a number of weeks. Should the tenant have failed to leave the premise on time, the bailiff will enter the premise with police support, put all household effects on the pavement, and provide the dwelling with new locks. If T is not present or does not take her belongings with her, the municipality stores them for a limited period. It seldom happens, however, that tenants can find no relief whatsoever, and suspension of execution is seldom claimed (cf. no. A 22).

Question 7: Contract of Limited Duration and Termination

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

As may well appear from the introduction to question 6, the most significant effect of a clause limiting the period of tenancy, is that notice can not be given towards an earlier date; elapse of the period does not in fact mean that the tenancy agreement terminates by law. In no. A9 we explained that cases exist that are not governed by the statutory security of tenure. Finally there are cases in which the general rules of reasonableness and fairness deny an appeal to protective rules as these (art. 6:2 and 248 DCC; HR July 1, 1983, NJ 1984, 149 Herzfeld/Groen).

Question 8: Justification for Time Limit

a) L and T have concluded a contract limited to one year with automatic renewal for an additional 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, respecting the delay of three months before the annual deadline, L gives notice of termination without alleging any reasons. Is this lawful?
Does the restriction of notice under a) (which is possible only once per year) apply equally to T?

a) Whilst the limited period clause is already of limited consequence, article 7:230 in conjunction with article 7:242 DCC determines (in all probability) that an agreement entered into for a limited length of time cannot, in accordance with a contractual clause, be extended for another limited time, but will, after the first limited period has elapsed, be converted into an agreement for an unlimited period.

b) See ad a).

Question 9: Termination in Unusual Circumstances

L and T have concluded a contract with or without time limit.

a) L dies. Can her heirs give immediate notice to T?
b) The house is sold. Has the buyer a right to give anticipated notice?
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?

a) Due to the death of L, all her assets and liabilities resulting from the tenancy agreement pass on to her heirs (article 7:299 DCC). The heirs therefore continue the agreement, and have no special right to termination.

b) If the housing is sold all assets and liabilities that have any connection with making available of housing for a rent to be paid by the tenant, pass on to the purchaser, as mentioned in no. 12. The purchaser has no special authority to terminate the tenancy agreement. Even on the grounds of urgent personal use (cf. the introduction of question 6), he can only give notice to tenants after a period of three years has expired (art. 7:274 par. 5 infra b DCC).

c) The same answer as ad b). It makes no difference to the rights of the purchaser or to those of the tenant whether the sale takes place as a result of bankruptcy or not, or whether the sale is by private treaty or by public auction.

Question 10: Tenancy "For Life"

L rents an apartment to T. The contract contains the unambiguous clause "for life". Is L permitted to give notice before T's death, and if so under what circumstances?

The clause For Life - results in an agreement for a limited period, and is therefore definitely valid. Even everlasting tenancy is possible in principle (art. 7:201 DCC). In both cases the possibility remains that the landlord obtains termination of the tenancy agreement on the grounds of unforeseen circumstances, or alteration of the agreement to the effect that notice can be given, regard being had to a certain period of time (article 6:258 DCC). Beyond the possibilities mentioned here, no notice can be given sooner than the death of T. The real right to reside is a species of the right of usufruct (art. 3:226 DCC). As such it is granted usually for a certain period or for the life of the usufructuarian. Its establishment is recorded in the land register.

Question 11: Immediate Termination under Unusual Circumstances

L and T conclude a tenancy contract with or without time limit. Under what conditions and terms may one party give immediate notice under unusual circumstances? In particular:

a) *May L give immediate notice should T fail to pay the two last monthly rents?*
b) *May L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?*

Is a clause valid according to which the contract is automatically terminated in the event that T fails to pay two consecutive monthly rents or commits any other "gross" breaches of her contractual duties?

From the answers given earlier, it may well have been made clear that notice given by the landlord will only terminate a tenancy agreement if the tenant accepts such notice. If that is not the case, a court decision is needed. Normal litigation, in the course of which the tenant puts forward a defence, will take six to nine months. In urgent cases a provisional measure can be requested, in which the outcome of the action on the substance of the case is anticipated. Under special circumstances, the judge in short term proceedings can even sentence to eviction.

a) Limited arrears in payment of the rent is in general insufficient grounds for a rescission on breach of contract; only an order for payment can be achieved. In the case of arrears of up to three months, rescission will be denied, even by default by the tenant, although the Supreme Court ruled that every shortcoming should lead to a rescission, unless the defendant states that his shortcoming was of too little weight (HR October 22nd, 1999, NJ 2000, 208 Twickler/R).

However, should the tenant be continually too late in paying, the landlord having had to press the matter again and again, this in itself could offer grounds for rescission (HR October 29th, 1971, NJ 1972, 40 Cauter/Stephenson).

b) Causing a nuisance to fellow tenants may constitute non-performance towards the landlord, giving him the right request eviction in interlocutory proceedings. This is not, however, the usual procedure, as the tenant will tend to deny the nuisance, which will then have to be proved by the landlord, who will have to summon witnesses; there is scarcely enough room whilst in interlocutory proceedings to secure this kind of evidence. Therefore, nuisance cases are seldom put forward in interlocutory proceedings, unless e.g. the tenant is down and out, gas and electricity have been cut off, and the tenant seeks warmth before an open fire, causing a serious fire hazard.

c) A contractual termination clause is not valid. Art. 7:230 DCC in connection with art. 7:271 par. 7 DCC withholds effect to any clause that intends to terminate the contract, passing over the judiciary.

Set 3: Rent and Rent Increase

See no. 6 for the main features of rent law.

Question 12: Settlement Date and Modes of Payment

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

Rent is to be paid on the due date agreed. It is usual, and allowed by law, for the landlord to stipulate that the rent be paid in advance. Almost without exception, rent is paid by giro transfer. The old system, in which the landlord sent somebody around to collect the rent, exists no longer in usual tenancies.
With the renewal of our Civil code and the law on seizure in 1992, the special right of distraint for rent, which had largely passed into disuse, was abolished.

Question 13: Requirements for Rent Increase

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

The applicable rent may be increased once a year by a percentage determined by the Minister of Housing. These yearly increases of rent may have been adopted in the form of a rent increase clause, which is tied to an index, or to the above-mentioned percentage (art. 7:248 DCC). A yearly increase can also take place based on a unilateral proposal, which is for the present the more usual method. This rent increase proposal should be sent to the tenant two months before the effective date, and should include data pertaining to the present rent, the percentage of the increase and the new rent as resulting from these data. If the rent increase is above the annually determined inflation percentage, the landlord is obliged to provide extra information, such as the number of points allotted to the housing, and information about his maintenance and tenancy policy (art 7:252-253 DCC). Should the tenant lodge a complaint against the proposed rent, the landlord can ask the rent assessment committee to determine the fairness of the proposed increase, which the committee will refuse to do if the proposal either exceeds the maximum percentage for that year or exceeds the maximum rent that applies to that particular housing. If the tenant does not lodge a complaint, but nevertheless fails to pay, the landlord will have to send a reminder (unless the proposal was sent by registered mail) before calling in the rent assessment committee. Although a rent exceeding the maximum can always be reduced to the maximum allowed for that particular housing at the initiative of the tenant, and through the rent assessment committee, asking in a contract for a rent exceeding the maximum is also an offence under the Economic Offences Act. Prosecution under that act does not take place.

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 (or similar index) as established by official statistics?

Variant:

Is a progressive rent arrangement, providing for an annual increase of X percent, considered lawful?

a) This question has been answered with question 13

b) Article 7:248 DCC limits the effect of rent increase clause to the yearly-determined rent increase percentage. According to the very letter of this regulation, a yearly rent increase

of a greater percentage would therefore be void. Here it must be stated the deviations from rent law are, strictly speaking null and void, and not, as in the case of other protective measures, subject to annulment. In the last case, ultimately, we mention the fact that only deviations detrimental to the tenant are void, and the courts will be bound to conclude thus on their own initiative, ex officio. It is however imaginable that the said clause is to the advantage of the tenant. If necessary a different construction ought to be found, e.g. that of a loan agreement.

Question 15: Unlawful Rent Increase

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

Parties are in principle free to agree to the rent increase such as they wish (art. 7:246 DCC). The same goes for a rent increase: the contractual amendment according to General Contract Law is possible and in that sphere the payment of a rent increase for three months may constitute a valid tacit acceptance of a offered contractual agreement. A proposal for a rent increase must however, in order to qualify for adjudication by the rent assessment committee, comply with legal requirements, and there the effects of special regulation come in. From article 7:252 par. 5 DCC it must be deduced that if the written proposal did not meet the requirements of form and content, prescribed in the previous par.s of this article, an agreement as to the proposed rent increase is not binding, unless L proves that T was not affected by the omission. If the proposal exceeded the annually determined inflation percentage and the proposal fell only short on the extra information mentioned at question 13, the rent increase is restricted to the said inflation percentage (art. 7:252 par. 6 DCC). If a rent increase was unduly paid, these amounts can , as due and claimable counter-claims, be deducted from the future rent instalments, with in principal without judicial intervention (art. 6:127 ff DCC).

Question 16: Deposits

What are the basic rules on deposits?

A deposit of two or at the most three months rent is customary. In the case of a lower rent, a deposit of three months is more likely to be permissible than in the case of a higher rent. The landlord need not pay interest over the deposit, yet the circumstance that he indeed does not can play a part in judging whether the sum of the deposit is reasonable.

Question 17: Utilities

What are the general rules on utilities? Which utilities may the landlord oblige the tenant to pay by contractual stipulation? Is it lawful to provide by contract for payment of a monthly lump sum to cover certain or all utilities?

It is customary for the tenant himself to contract suppliers of gas, water, and electricity, the public utility companies. If the delivery takes place in the name of the landlord, then he, the landlord, is permitted to charge the actual costs to the tenant, with an increase of at most 5% for administrative expenses. The determination of the part to be paid by the tenant should by preference take place by his own meters, yet an apportionment can be made based on the amount of square or cubic metres. In should be noted that in passing on the charge, the landlord only has a right to the actual costs if the energy supply is adequate. If an obsolete heating apparatus uses energy beyond proportion, this could give cause for a cut in the actual costs that are to be passed on.
The contractual establishment of a monthly lump sum to cover curtain or all utilities is in so far not legal that it can not withhold the T from asking a specification and a settlement of the actual costs involved (art. 7:259 DCC), if need be by intervention by the rent assessment committee (art. 7:260 DCC).

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

A short general introduction is to be found in nos. A10 and A20.

Question 18: Control of Standard terms

What type 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)

In no. A10 we explained that the DCC contains, in accordance with Directive 93/13/EC, regulations meant to counteract unreasonably onerous clauses in standard agreements (the art. 6:231-247 DCC). There are three ways of controlling standard terms. The first is the open standard of art. 6:237 sub a DCC: a clause is subject to annulment when it is unreasonably onerous to the other party. The second concerns situations in which the other party of the consumer deals in a commercial capacity. For this category the regulation offers examples of clauses which either are unreasonably onerous (art. 6:236 DCC) or are presumed to be so (art. 6:237 DCC). In the jurisprudence, this regulation has reached further due to the fact that - by analogy - it has also been applied in cases in which the other party dealt in a non-commercial capacity. The regulation is however of minor importance for tenancy law, as the most onerous clauses concern key elements of the contract (to which the regulation on standard terms does not apply) and which are counteracted by mandatory rules of tenancy law or of civil procedure. In the scarce jurisprudence up to now, the question as to when we are dealing with a non-commercial landlord, has not yet arisen. The third way of controlling standard terms is the judicial review on request of an interest group (art. 6:240 DCC).

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.*

b) The cost of small reparations, up to 100 € per annum, must be met by the tenant.

c) Once the period of tenancy concludes the apartment must be repainted by a professional painter at the expense of the tenant.

d) 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?

a) A clause that forbids the tenant to withhold rent or offset rent instalments against any alleged claims of her own except if authorised by a judge, is in principle valid. This is however not the case in instances as described in article 7:206 DCC, wherein the landlord is obliged to repair any defects of the housing, material or immaterial. Is the landlord in default de iure then the tenant is authorised to see to the repairs himself, after which he can recover the amount, as far as reasonable, from the landlord, if desired by deducting it from the rent. No deviation from this rule is allowed to the detriment of the tenant.

b) According to article 7:217 DCC, the tenant is obliged to bear the cost of minor repairs, unless they became necessary due to the non-performance of the landlord in his duty to repair defects at his own expense according to article 7: 206 DCC. Pursuant to article 7:240 DCC, the minister of housing has made up a list of small house-repairs that are for the account of the tenant. Other repairs than those that appear on the list cannot be passed on by contract to the tenant.

c) Article 7:224 DCC differentiates as to whether a description of the housing was made at the beginning of the tenancy. In the affirmative the tenant is obliged to deliver the hired object in the same state as in which it was accepted according to the description, with the exception of changes and additions that were allowed, and all that has come to nothing or was damaged due to age. If no description was made, the tenant is considered to have received the housing in the state in which it is at the moment the tenancy agreement expires, notwithstanding proof by the landlord to the contrary. In the case of housing, this rule is mandatory (article 7:242 par. 2 DCC).

Should the description have stated that the housing had been freshly painted at the time of acceptance, and that at the end of the tenancy it should again be delivered freshly painted, this would seen to me a valid clause, but two marginal notes can be made. In the first place, if the tenancy ends after, say, a year, and the paint were still in the original good shape, the landlord would have insufficient interest in invoking the clause. In the second place, it may well be said that the obligation to deliver in the original state minus the customary wear and tear implies that the paint clause clashes with mandatory law. In my opinion, the restriction concerning customary wear and tear rather more concerns architectural aspects than the painting. In connection with this subject, I might remark that the Small Repairs decree (see b) states that whitewashing of inside walls and ceilings and the painting of interior woodwork are for the account of the tenant.

d) The clause would not be effective as ground for termination, as article 7:274 DCC gives a comprehensive enumeration of these grounds. Neither will it serve as ground for dissolution, as it clashes with the right to freedom of association with others (article 8 of the Constitution). Apart from this, it would probably be unreasonably onerous and therefore voidable (article 6:233 par. a DCC).

Collective Action

Since 1992, article 6:240 et seq. DCC contains a regulation that allows consumer organisations to have clauses in general conditions declared unreasonably onerous by the judiciary. In matters of tenancy law, no use has been made of this possibility as yet. Directive 98/27 EC has also lead to the art. 3:305a and 305c DCC concerning the representative or group-action.

Question 20: Changes to the Building by the Tenant

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

Variant 1

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

Variant 2

On his balcony, T exhibits an enormous poster with the slogan "Peace in Palestine and Iraq". Can L force him to remove it?

This question was given explicit attention when article 7:215 DCC was introduced. This rule gives the tenant the right to effect limited alterations on the housing; he would need the landlords permission for farther-reaching changes. When withheld, the landlord's permission can be replaced by authorisation of the subdistrict court. Deviation from this rule in a manner detrimental to the tenant is not allowed inasmuch as the inside of the housing is concerned; for the outside of the building, where limiting contractual rules concerning the looks and habitability are allowed, the case would be different. Parliament has even voiced the expectation that a landlord would continue to be able to forbid the installation of a parabolic TV antenna that would deface the view of the house, if the building in question already had its own cable connection; this in spite of the rule stated in article 10 ECHR (cf. Netherlands Supreme Court November 3rd 1989, NJ 1991, 168)

Variant 1

In principle, the answer given above also applies for this variant. If more tenants with the same interest live in the building, and if it were practicable to insert one or more Turkish programmes into the cable programme, then such a claim could well be made.

Variant 2

The freedom of speech guaranteed by article 7 the Constitution will probably prevail, even even though the size of the poster could lead to practical, e.g. architectural, problems. Should the hanging up of the poster be meant as permanent, then the landlord would eventually be able to have it removed, either on the grounds of a specific clause in the tenancy agreement, or based on the general obligation of a tenant to use the property in a manner befitting a responsible tenant (article 7:213 DCC).

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

Does L have a right to possession of one set of keys to the apartment rented to T? Under what conditions will L be allowed to enter the apartment without T's prior permission? If these conditions are not met, will L commit a criminal offence if he enters the apartment without T's prior permission?

There is no definite answer to the question whether L has the right to keep one set of the keys of the apartment rented to T. When a villa is rented, it would be unusual for L to keep a set of the keys, whilst it would be more obvious to do so in case of a rented apartment, especially when the meters and/or the controls of water, gas or electricity are placed in that apartment.
Having a key does of course not permit L to enter the apartment without T's permission. Only in necessity, such as fire or leakage, would L be justified to enter without even trying to obtain permission. In other cases such entering would be unlawfully and constitute a minor offence, even if the object would be to perform an urgent repair.

Question 22: The Landlord's Liability for Personal Injury

The stairs to the house are poorly maintained and in a slippery state. As a consequence, C, a child of T, falls and breaks her leg.
Is L liable, and if so under what legal basis?

If a defect of the house which causes damage to T or his household has risen during the contract, L is liable when the defect attributable to him (art. 6:208 DCC). What is attributable, is decided by common opinion (art. 6:75 DCC). As the maintenance of the stairs (supposedly) is the task of L, the defect will most probably be attributed to him. If the maintenance is not only his task but L was moreover in default with its fulfilment, that alone would be sufficient ground for his (contractual) liability.
Would the victim be just a visitor or the postman, the liability would be have to be based on tort. Art. 6:174 DCC holds responsible the owner (holder) of a structure, which does not meet the requirements, which can be expected in the give circumstances and thus causes danger to persons or goods. The risk of slipping must then be such that a normal user of the stairs, proceeding with usual care, could have slipped and fallen (HR April 18th, 1940, NJ 1941, 130).

Set 5: Breach of Contract

In case of breach of contract Tenancy Law offers specific elaborations of the general contract law actions or performance (art. 7:206 DCC) and damages (art. 7:208 DCC) as well as a regulation for partial rescission/rent reduction (art. 7:207 DCC). These regulations contain different elaborations amongst themselves of general notions as impossibility, delay and attribution (see no. A6 and questions 25 and 26). The landlord can obtain a rescission of the contract on account of default only through the judiciary (art. 7:231 DCC).

Question 23: Destruction of the house

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

b) *Does it make a difference if the apartment is destroyed after transfer of possession to the tenant?*

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?*

a) The fire caused a defect to the property. To assess the rights and obligation of both parties, it is of considerable importance whether the apartment can be repaired and what the cost of that would be. If repair is impossible or implies costs that, in the given circumstances, the landlord could not in reason be expected to pay (article 7:206 par. 1 DCC), then both landlord and tenant are authorised to terminate the agreement out of court (article 7:210 par. 1 DCC). Otherwise the contract continues to exist and T has a claim for repairs. In the given situation T will only have a claim for damages when the cause of the fire would, according to common opinion, be for the risk of the landlord (art. 7:208 DCC).

b) It is of no consequence whether the fire started before or after the transfer of possession to the tenant.

c) The difference is that now both parties are able to terminate the agreement on the grounds of error on both sides.

Question 24: "Double Contracts"

L concludes a tenancy contract with T1. Shortly afterwards, he concludes another tenancy contract for the same apartment with T2, who is not aware of the earlier contract concluded with T1. Equally unaware of the second contract concluded with T2, T1 takes possession of the apartment. The existence of both contracts is only discovered when T2 aims to take possession of the apartment. What are the legal consequences of both contractual agreements and what are the rights of the parties?

Both contracts are valid. T2 will have to be satisfied with damages (the extent of which is to be stated by him, and proven if so required); a claim to performance would be turned down, because due to the tenancy and taking into use by T1, performance by L towards T2 has

become permanently impossible (Netherlands Supreme Court June 27th 1997, NJ 1997, 641 Budde/Toa Moa).

Question 25: Delayed Completion

L is an investor and buys an apartment from a major building company. According to the contract, the apartment should be ready to occupy from 1/1/2003. However, the purchase contract contains a (lawful) clause which provides that the builder cannot be held liable for any delay unless directly responsible. L rents the apartment to T from 17/1/2003 without any special provision for a case of delay.

Though the action is ultimately unsuccessful, as a result of a legal challenge by neighbour N - who attacks the building permit granted by the competent authority to B in an administrative law procedure - the apartment is not available until 1/1/2004.

Due to the fact that the tenant does not have the use to which he is entitled according to the, in itself valid, tenancy agreement, there is a defect as referred to in article 7:204 par. 2 DCC. The tenant may suspend his obligation to pay rent (art. 6:262 DCC). Eventually he may claim with the judiciary the reduction of the rent to nil (article 7:207 DCC). If he incurs damages- as e.g. the costs of alternative housing - he can claim these, in case the landlord was, at the time of the conclusion of the agreement, familiar with the administrative law procedure or if the delay is, according to common opinion, for the risk of the landlord (article 7:208 DCC). In principle L has no claim against N because of the administrative law procedure (except for, inasmuch as the rules of that particular procedure open the possibility, compensation for costs incurred in connection with the procedure). Only if L can prove that litigation had taken place with the sole purpose of causing him damage, he could, on the grounds of tort (abuse of authority) claim damages from N.

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

L rents an apartment to T. Mildew stains have been found in certain corners and, as a result, T wants a reduction in the rent.
Variant 1: By letter, T asks L to renovate the walls affected by mildew within 2 weeks. As L does not reply, T has the repair work completed by a specialist and wants to off-set the costs from the monthly rent rates. Is this lawful?
Variant 2:
a) T failed to notice the mildew stains when inspecting the house prior to entering into contact, despite the fact that they were already present. Does this preclude her from claiming a rent reduction?
b) A noisy building site for a main road is opened by the city administration next to the apartment.
c) Despite T's complaints, the tenants of the neighbouring apartment have repeatedly organised loud nightly parties from 11 p.m. to 5 am.
To the extent that the landlord is held liable under a)- c): Could his liability have been lawfully excluded by a disclaimer clause contained in the contract?

a) In the case of diminished use of housing due to a defect, the tenant can, according to article 7:207 par. 1 DCC, claim a proportionately reduced rent at the subdistrict court. The determining factor is whether the stains of mildew - that have been found in the corners - result in a reduction of the use of the housing, and if so, to what extent. In the case of serious dampness or mildew stains as a result of extreme moisture, the tenant can request a reduction of the rent by the rent assessment committee, even to 40 % of the maximum rent allowed (not, therefore, 40% of the actual rent).

Variant 1: According to article 7:206 DCC, the landlord is obliged to repair the defect unless this is impossible or would imply expenditures that in the given circumstances could not reasonably be required of the landlord. The latter will not readily be the case (Netherlands Supreme Court June 4th 1993, NJ 1993, 582 Kruisinga/SWA). If thus a claim to repair exists, and would the set time limit of two weeks be reasonable in the given circumstances, then the landlord will be in default once the term has expired, and the tenant will be authorised to have the repair done, and inasmuch reasonable, recover the costs from the landlord, and if so desired, deduct these costs from the rent (article 7:206 par. 3 DCC).

Variant 2: as far as claims of T are concerned, it is of no consequence whether or not she noticed the mildew. According to article 7:204 par. 2 DCC a defect, to be repaired by the landlord, is already the case if that defect brings about that, the property cannot provide the tenant the use that the tenant had a right to expect, when he entered into the agreement, of a well maintained property of the kind related to the agreement.

b) According to article 7:204 par. 3 DCC, the landlord need not guarantee absence of disruption of quiet enjoyment. The noisy building site is therefore not a defect of the property itself. When assessing the maximum rent noisiness can, however lead to subtraction of points of appraisal of the housing (see par. rent in no 6). Within the framework of the appraisal of the initial rent (article 7:249 DCC) or of a proposition to lower the rent (article 7:254 DCC), the maximum rent for the housing concerned can therefore, as a result of the building site as well as of the road itself, end up lower than without the noisiness.

c) In spite of the fact that according to the wording of art. 7:204 par. 3 DCC the landlord has no obligation concerning disruption of quiet enjoyment, the view is held (also in Parliament) that this is different in the case of other tenants of the same landlord being the cause of the disruption; the landlord would then be obliged, towards the complaining tenant, to investigate the annoyance and if necessary take measures against the perpetrators (see question 28). Should the landlord fail to do so, then this would constitute a defect in the meaning of art. 7:204 par. 2 DCC, which in turn could lead to a rent decrease as in article 7:207 DCC.

Disclaimer Clause

a) The quoted rules are all mandatory, inasmuch as they pertain to housing; a disclaimer clause has therefore no effect whatsoever. This would only be otherwise if the nature of the rented housing were to imply that it showed certain defects, as in the case of houses due for demolition.

b) Here as well, the mandatory nature of the quoted rules would prevent a disclaimer clause from having any influence at all.

c) Even here a disclaimer clause will in principle have no effect, although one could perhaps imagine cases in which that could be different (even without a disclaimer clause), e.g. in the case of that the apartment is part of a student flat.

Public law mechanisms

The Woningwet (Housing Act) contains regulations concerning the building, the demolishing, the use and the maintenance of housing and other buildings. More specific rules are given in the Bouwbesluit (Buildings Decree); every municipality has to work out these rules in municipal building regulations (art. 8 Woningwet). The Building and Housing Inspectorate controls the compliance with these regulations. In case of non-compliance the inspectorate serves a notice to the owner of the building to carry out the necessary repairs (art. 14 Woningwet). If the owner fails to do so, the municipality may apply administrative coercion and carry out the repairs herself (art. 26 Woningwet). In case of defects the tenant may therefore resort to the municipal inspectorate to go after the owner, but in the end municipalities are reluctant to take over the repairs if recoverableness of the costs is not certain.

Question 27: House to be used for a Specific Purpose

L rents a large apartment to T under the assumption, shared by both parties but not explicitly stipulated in the contract, that a number of rooms will be used by T as a surgery. However, basing their decision on fire protection and zoning law concerns, the local authorities deny permission for a surgery to be opened in the studio. What are T's claims?

It is by no means out of the question that a defect in the meaning of art. 7:204 par. 2 DCC could exist if external circumstances prevent the intended use. If this be the case, then the tenant would have the usual resources, such as decrease of the rent and even damages, if the landlord knew, at the moment of entering into the tenancy agreement, that the intended use would never be allowed. It is then essential that the intended use be explicitly laid down in concrete terms, and that the landlord actually has a responsibility, e.g. due to the fact that he had alleged that the rented housing was suitable for that intended use (customary is that the landlord exempts himself from such responsibility).

If the absence of permission does not constitute a defect as mentioned, the tenant can be held to comply with his obligations originating from the tenancy agreement. The one thing worth trying for the tenant is an action to set aside or adapt the agreement due to unforeseen circumstances (article 6:258 DCC). For the application of this rule is essential that the circumstances lie in the future, seen from the moment of entering into the agreement. Furthermore, application can only take place if the unforeseen circumstances are of such a nature that the opposite party should have no reason to expect, according to rules of reasonableness and fairness, the agreement to remain intact. This requirement will not easily be fulfilled; reasonableness and fairness, after all, demand being true to one's word, and deviation from this principle is seldom admissible (Netherlands Supreme Court, February 20th 1998, NJ 1998, 493 Briljant Schreuders/ABP).
A mixed "private-professional" tenancy of this sort may give rise to the question which tenancy regime is applicable, that of housing or that of businesses. The criterion differs

slightly be it business tenancy as in art. 7:290 ff DCC or that in art. 7:230a DCC (see no 2 and HR October 3rd 2003, Al 1596, R02/09HR).

Set 6: Relationship between the Tenant and Third Persons

Question 28: Neighbour Relations

T and N are tenants in adjoining rooms in a shared apartment. How can T react if N continuously plays excessively loud music or is responsible for T's room being pervaded by intolerable odours?

As mentioned at question 26b the legislator has up till now concerned himself less with neighbour relations than the judiciary. The Dutch Supreme Court has, in a series of decisions, composed system of obligations in case of neighbour nuisance, ranging from the obligations to foresee and to prevent possible nuisance by contractual stipulations (HR October 2nd, 1992, NJ 1993, 166 Brunssum/Szlanina) to inquiry and to institute adequate (judicial) measures (HR September 27th, 1991, NJ 1992, 131 Amsterdam/Rienks and HR October 16th, 1992, NJ 1993, 167 Van Gendt/Wijnands).
On the grounds of tort T can demand - if required before the judge in interlocutory proceedings - that N be sentenced to refrain from being a nuisance under forfeiture of a penalty (art. 6:162 DCC). Such actions are not often effective, mainly due to problems in gathering proof - as other tenants are sometimes afraid to testify -, the execution of the sentence can offer problems, and in general the claim only causes the problem to escalate. The judiciaries have therefore accepted the fact that is rather a matter for the landlord to take action against a tenant creating a nuisance. Should the nuisance prove serious enough, then the court can set aside the tenancy agreement (HR, October 16th 1992, NJ 1993, 167 Van Gendt/ Wijnands). According to the last mentioned ruling the landlord can also be obliged to take these steps if his tenant gives nuisance to other neighbours, which are not his tenants. They all could report with the police for disturbance of the peace, but especially in the more persistent cases this is of little help.

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged negligently by a lorry during construction work undertaken at a neighbour's house, which necessitates repair costs of 10000 € and entails T being unable to use two rooms for two weeks. The lorry has been driven by E, an employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?

In the end B is the most qualified party to bear the costs of the repairs and to compensate for the partial loss of T's use of the house. T could make a claim against B on the ground of tort, being liable for the present fault of his employee E (art. 7:170 DCC). The fact that T is not the owner of the house does not preclude that she has a claim against B for damages and compensation, the costs of the repair to restore her subjective right on the undisturbed use of the house.

In practice T will inform L and L will contact B. If this does not lead to immediate action, T will - in her relation with L - be entitled to order the repairs (L will assumed to be in default, art. 6:83 sub c infra c DCC) and T will have the right to the repayment of the costs - in reasonable - by L. T may effect that right by setting the costs off with the monthly rent-instalments (art. 7:206 par. 3 DCC). Thus it is more convenient for T to rely on her claims for repair (art. 7:206 DCC) and partial rent-deduction (art. 7:207 DCC) against L, than claiming with - and perhaps having to sue - B. For both claims the imputability of the incident to L is of no importance; only the result, the partial loss of the use of the house, counts.
Inasmuch as T has suffered other damages, she will not be able to claim them from L, as he was not responsible for the incident and common opinion does not indicate the incident to be for his risk (art. 7:208 DCC). These damages could only be claimed with B.

Question 30: Unwelcome Help from Neighbours (Negotiorum Gestio)

Shortly after T leaves his rented apartment for a holiday, neighbour N detects a strong gas-like smell coming from T's door. Assuming that the gas pipe in T's apartment has a leak and that there is an imminent threat of an explosion, N breaks open the apartment door, thereby destroying his chisel worth 10 € and causing damage of 200 € to the apartment door. Having entered the apartment, N discovers, however, that the gas-like smell stems from the garbage bin that T had forgotten to empty before leaving. Does N have a claim against T or vice-versa?

This question has little to do with tenancy-law, but more with the management of the business of another (art. 6:198 DCC). Much depends on the circumstances. Could indeed the smell be (mis)taken for gas? Did the landlord have the keys of the apartment and was there enough time to contact the landlord? Could the gas in the building be turned off in another way? These and other questions decide whether the management was proper or not. This in turn decides whether N has a claim against T for the costs of the new chisel or T has a claim against N for the repair of the door. If the management would be deemed to be proper N could claim the costs of a new chisel also with the landlord, as preventing a gas leak would be a business of both T and L.