

Final Project Plan

1. Introduction

The introduction of each national report should give general background information on the national rules in tenancy law and procedure. Points to be mentioned include:

a) Origins and basic lines of development of national tenancy law:

- *when was it introduced and where? (civil code, special statute, case law)?*
- *who was / and is the political driving force?*
- *were these rules based on a particular philosophy? (e.g. socialist)*
- *was there an influence by the national constitution or international instruments (e.g. ECHR) on tenancy law provisions?*
- *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 ?*

b) Basic structure and content of current national law:

aa) Private tenancy law

- *give a very short and basic overview over central rules such as requirements for conclusion, conditions for termination of contracts by the landlord, for rent increase etc.;*
- *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)*
- *to what extent is the legislation divided up into general private law and special statutes? to what extent are these rules mandatory and dispositive?*
- *are there other forms of “lawful possession” of a premise for housing purposes (e.g. licence vs. tenancy in English law)?*
- *to what extent does national or European consumer protection legislation play a role?*
- *does the relationship between general and special rules work properly so as to create legal certainty?*
- *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?*

bb) Social regulation affecting private tenancy contracts

- *regulation on provision of public housing, i.e. houses owned by the State or other public entities*
- *special public or mixed public/private housing regimes subsidised or promoted by public entities*
- *direct subsidies and/or tax incentives for the tenant or the landlord affecting private tenancy contracts*
- *if data or experiences available: does the national policy favour, e.g. by incentive measures, rented housing and housing property*
- *if existing: 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*
- *if existing: public law measures to prevent dwellings from staying empty (such as fines against owners unwilling to rent their houses in Germany, or tax incentives as in France)*

c) Summary account on "tenancy law in action":

- *what is the general situation in regard to housing? (i.e. is there a housing shortage? does a substantial part of the population own their own home? ... local market divergences?, attractiveness of renting houses for landlords-investors? do rents consume large parts of average salaries?)*
- *what is the role played by associations of landlords and tenants?*
- *what is the role of standard form contracts prepared by a tenants' or landlords' association?*
- *is tenancy law often enforced before courts by landlords and tenants, or are there - voluntary or compulsory - mechanisms of alternative dispute resolution? Are they regularly employed?*
- *are there peculiarities for the execution of tenancy law judgements (e.g. prohibition of or delays for eviction)?*
- *to what extent does a fair and effective access to courts for tenants exist? (what is the situation concerning legal fees, legal access, legal aid, the average length of procedures; is there a special jurisdiction for tenancy law or are the ordinary courts competent? What are the possibilities of appeal?)*
- *how about legal certainty in tenancy law (are there contradicting statutes, is there secondary literature usually accessible for all lawyers, etc)?*

To avoid repetition, only basic features should be stated in the introduction, and references to the following part are of course possible.

Set 1: Conclusion of the Contract

Short General Introduction

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?

Note: Directive 2000/43/EC (OJ 2000, L 180/22) on the principle of equality, prohibiting discrimination on ethnical grounds, to be implemented by 19/7/2003, covers also equal access to housing (Art. 3 para. 1 lit. h). It should therefore be examined in relation to sub-question b) if and how the national legislators have implemented this directive (or are planning to implement it) - as well as if and how the implementation provisions might restrict the landlord's discretion in choosing the tenant.

Notes for the solution:

The answer should contain remarks on:

- the possible horizontal effect in private law relationships of fundamental rights from the national constitution and/or the ECHR*
- the treatment of discrimination issues in the national private law system (if possible illustrated also by some famous cases outside tenancy law)*
- which court would be competent to deal with a violation of the constitutional equality rule – a constitutional court, ordinary courts, special commissions etc*

- if you want to make remarks on the fact that the newspaper offer is only an *invitatio ad offerendum*, these should be very brief; at any rate, it seems to be clear that the mere fact that there is no formal offer (but only an *invitatio*) here, should not prevent a discrimination from occurring.

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?

Notes:

- *are the other students automatically assigned contractual right against L and are they liable for the rent separately, even though the contract was stipulated among L and T only?*
- *might the contract be interpreted as to contain an implied clause according to which the landlord – who knows that the students can only pay the rent if their number remains the same – must accept a successor student chosen by the other students unless he has an important objective reason against a certain candidate?*

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?

Note:

- as regards remedies, please note in particular: if the sublet is illegal, does T owe the rent received from S to L (as damages, unjust enrichment or under another legal basis)?

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?

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?

Set 2: Duration and Termination of the Contract

Short General Introduction

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?*

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?

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?

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?*

Note: Please check if one of these grounds, if sufficient for termination, is abused in practise to circumvent the protection of the tenant.

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?

Note: Please distinguish this case from a "real right of residence" to be registered in the land register (if such a right exists).

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?

Set 3: Rent and Rent Increase

Short General Introduction

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?

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)

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?

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?

- Notes:

- *is a rent increase by contractual amendment according to general contract law possible, or is the issue of increase dealt with exhaustively by special regulation?*
- *if the rent increase according to general contract law is possible, may the present situation be interpreted as a valid contractual amendment?:*
 - *is the announcement of a unilateral rent increase a valid offer for the amendment contract?*
 - *does the fact that T pays the increased rent for 3 months without any reservation constitute a valid tacit acceptance of the offered contractual amendment?*

Question 16: Deposits

What are the basic rules on deposits?

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?

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

Short General Introduction

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)

Note: Directive 93/13/EC (OJ 1993, L 95/29) on Unfair Terms in Consumer Contracts prescribes a mandatory control of standard terms which is however restricted to contracts among consumers and commercial parties. However, this control or parts of it might have been extended to contracts among two non-commercial parties either by the national legislator (as it is the case in Germany) or by national case law. Please note, moreover, that, according to the Directive, a landlord acting in a non-commercial capacity is someone who is not renting apartments on a professional basis. Thus, whilst the objective of seeking profits alone does not disqualify someone as a non-commercial landlord, renting out more than 3 apartments would probably do so.

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?

Note: *Please mention whether the tenant's right of joining an association is covered by a constitutional fundamental freedom right.*

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

Please note: Directive 98/27/EC (OJ 1998, L 166/51) provides that certain "qualified institutions" promoting consumer rights (Art. 3) shall be given the right to file collective actions inter alia against abusive terms in consumer contracts as defined in Directive 93/13/EC. It should, therefore, be examined if and how the national legislators have implemented this directive (or are planning to implement it).

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?

Note:

- *If antennas and posters have not played any role in your legal systems up until now, please give a very brief description of the legal treatment of other changes to the building by the tenant which have been of relevance in your country.*
- *Are there any public law mechanisms to which L might turn?*

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?

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?

Note: This case is supposed to deal with the distinction among contract and tort liability for general "security obligations" (Verkehrssicherungspflichten) of the landlord.

Set 5: Breach of Contract

Short General Introduction

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?*

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?

Note: Please distinguish the contract and (possible) real property law side of this case.

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.

Note: Please note that T's possible claims against N might be governed by administrative law.

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 offset 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?

Note: Are there any public law mechanisms to which the tenant may resort when trying to ensure an adequate quality of the rented premises?

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?

Note: Please mention whether there are special rules applying to such a mixed "private-professional" tenancy?

Set 6: Relationship between the Tenant and Third Persons

Short General Introduction

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?

Notes: In the solution to this case, it should be briefly outlined whether

- it makes a difference if T is not the tenant but the owner of the apartment;
- it makes a difference if T and N are tenants of the same landlord and owner;
- there are any public law mechanisms to which the tenant may resort?

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?

Notes:

- the principal problem is whether T may request damages despite the fact that he is not the owner of the house; possibly, he may request compensation for the fact that his full possession and use of the house was disturbed by the accident; if this is the case what is the legal basis?;
- another problem is whether the building company and/or the neighbour are liable under tort law for the fault of the lorry driver (employee of the building company)?

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?