Portugal

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Introduction

According to Portuguese Law, a lease is a contract by virtue of which someone grants the use of a thing for a certain period of time in return for money.

The general regime of lease (*locatio*) can be found in the Portuguese Civil Code of 1966 (hereinafter CC), Book II [Obligations], Title II [Specific Contracts], Chap. IV [Lease], from Articles 1022 to 1063; and is structured according to the fundamental distinction between moveable and immovable property.

The three specific regimes of tenancy are *Rural Tenancy Regime* provided by Decree Law 385/88, of 25.10; *Forester Tenancy Regime* provided by Decree Law 394/88, of 8.11; and *Urban Tenancy Regime* [Regime do Arrendamento Urbano], provided by Decree Law 321-B/90, of 15.10 (hereinafter RAU), amended by the Decrees-Law 278/93, of 10.08, 257/95 of 30.09, 64-A/2000 of 22.04, and 329-B/2000 of 22.12.

The RAU is shaped in the following way:

Chapter I – Urban Tenancy in General (Articles 1 – 73)

Chapter II – Urban Tenancy for Residential Purposes (Articles 74-109)

Chapter III – Urban Tenancy for Commercial and Industrial Purposes (Articles 110-120)

Chapter IV – Urban Tenancy for Professional Purposes (Articles 121-122)

Chapter V – Urban Tenancy for Others Purposes (Article 123)

The legal regime underpinning the leasing of housing accommodation is provided for by the general rules on lease (Articles 1022/1063 CC), by the general provisions of RAU (Articles 1-73), and by specific provisions relating to residential contracts (Articles 74-109).

The tenancy law regime, having adapted to continuous changes in social demands (e.g. rights given to spouses are extended to cohabitees and partners) remains relevant to contemporary Portuguese society. The main feature of the regime is the protection of the tenant, considered to be the weaker party to the contract. However, the principal reforms up to the present have been aimed at striking a just balance between landlord and tenant positions, in order to revive the housing market. The revision of the RAU in 1991 had a double purpose: to increase as much as possible the stability between tenants and landlords without creating an imbalance in their contractual relationships; and to ensure an adequate protection of the tenant with respect to his family housing.

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

I. Historical background

The first Portuguese Civil Code of 1867 was the product of a society based on the liberal principle that once the individual was freed from the traditional constraints and authorities of a feudal, political or religious nature, he was a reasonable person capable of determining his fate;[1] the individual should be put into a position to decide for himself whether or not to make a contract. The Code provided a liberal tenancy regime: tenancy was a temporary arrangement; the default duration was of 6 months; the rent was freely agreed upon by parties; the contract was renewed if none of the parties give notice and passed to family members upon the death of the original tenant; the landlord was obliged to repair the building and could evict the tenant if he did not pay the rent or if he used the premise for a different purpose from the one established in the contract.

At the beginning of the twentieth century and in particular, with the establishment of the Republican regime (5th October, 1910) the political direction of the country required the allegiance of the people. Moreover, the Portuguese socio-economic structure was characterised by growing urbanization and the unavoidable effects of the World War. These facts gave rise to successive legislative interventions regarding tenancy contracts, aimed at a powerful tenant protection regime and a vigorous housing control policy. I will outline some of the main Acts enacted, in order to give a general overview of the historical evolution of the Tenancy Law regime since the beginning of the century:

- Decree of 11.1.1910 blocked the increase of rents for a year;
- Decree 1079 of 23.11.1914 blocked the increase of the rents in general, both for contracts previously agreed and for new ones. If the landlord entered into a new tenancy contract for the same property, he was required to fix the same rent as for the previous contract (this would avoid landlords from giving notice). The landlord was also obliged to rent empty buildings. This system was temporary; and was intended to be in force only for as long as the crisis that motivated endured.
- Law 828, 28.09.1917 forbid landlords to evict tenants arbitrarily. This law was to be enforced throughout the war and for six months after the signing of the Peace Treaty.
- In order to clarify the legal regime, Decree 5411, of 17.04.1919 made a distinction between permanent rules and transitory rules. Temporary rules included the blockage of the increase in rents, the prohibition of giving notice and the duty to rent empty buildings. The Government would revoke these provisions as soon as the economic and financial circumstances, that motivated Decree 1079, of 23.11.1914, changed.

[1] Mário Júlio Almeida Costa, *História do Direito Português*, Almedina, Coimbra.

Meanwhile, Portugal would face the so-called "rent problem". Increases in rent were blocked for several years and this provoked significant social reaction. Successive legislative acts tried to solve this problem, but without success.

- The next reform was made only in 1948 (by Law 2030, 22.06.1948). The tight control of the housing market continued: the automatic renewal of contracts was maintained; the adjustment of rents was allowed only to a limited degree, though dwellings located in Lisbon and Porto were exempt.
- The Portuguese Civil Code of 1966 allowed for the free stipulation of rents in new tenancy contracts. The right of landlords to give notice was limited, so tenancy contracts started to become non-temporary contracts. The increase and adjustment of rents remained the central problem – a problem that was not resolved by the Civil Code.

The socialist-inspired Revolution of 25 April, 1974 had a strong effect on the tenancy law regime. Much legislation was enacted in order to protect the weakest party in tenancy contracts, namely the tenant.

- Decree 445/74, of 12.09.74, extended the suspension of the fiscal valuation of buildings (before it was suspended only in Lisbon and Porto) to the entire country. This Decree also imposed the owners' obligation to rent empty buildings and established a maximum rent that could be stipulated for old buildings.
- Law 155/75, of 23.03 suspended the right of the landlord to give notice of the tenancy contract even if he wanted to extent the building or needed the dwelling for his own use.
- Immediately after the Revolution of 1974, a social phenomenon of occupying empty houses began to occur. Decree 198-A/75, of 14.04, allowed such squatting to be legalised, obliging the owner to stipulate compulsorily tenancy contracts, if the dwellings were used for residential purposes.

After the Portuguese Constitution of 1976, the legislator tried, in small steps, to normalise the situation. Sufficient housing availability from private investors would only emerge if the return on investments became profitable and higher rents could be stipulated. Previous state regulation efforts had caused more harm than good to the housing market. Determined to put an end to the housing crisis, the legislature hammered out a new provisional legislation.

- Law 46/85, 20.10, admitted the annual increase of rents according to coefficients approved by the Government. Also, it allowed an extraordinary adjustment of rents established before 1980, according to variable coefficients (depending on the condition of the building and the date of the last adjustment). A rent subsidy for tenants with a low income was created to compensate for the increase of rents.
- Five years later, the Portuguese Tenancy regime was totally renewed, ameliorated and aggregated by Decree 321-B/90, 15.10. This Decree continues to shape the current regime.

For historical reasons, already referred to above, the tenancy market was almost paralysed. The preoccupation with old buildings was one of the main problems.

Houses rented for 30-40 years ago had never been repaired because landlords had no economic incentive for doing so: the rents could not be increased nor would the dwellings be let unoccupied at short date.

Nowadays, the legislator attempts to give guarantees to proprietors, by ensuring them a balanced position in tenancy contracts, so as to create incentives and promote the revival of the tenancy market. This re-balancing between landlord and tenant's positions is being done in a cautious way, by reasons of a political and social order. But, the Portuguese regime remains tenant protective, actually the housing market is already characterized by an emergent vitality.

II. Constitutional Influences

The Portuguese[2] Constitution of 1976[3] provides for house and urban planning. Article 65 is formulated as follows:

> ***1.*** *Everyone has the right, both personally and for his or her family, to a dwelling of adequate size, that meets satisfactory standards of hygiene and preserves personal and family privacy.*
> ***2.*** *In order to ensure the right to housing, it is the duty of the State to:*
>
> ***a.*** *Draw up and implement a policy for housing as a part of general national planning and to support plans for urban areas that guarantee an adequate network of transport and social facilities;*
>
> ***b.*** *Promote, in conjunction with local authorities, the construction of economic and social housing;*
>
> ***c.*** *Promote private building, when in the public interest, and access to privately owned or rented dwellings.*
>
> ***d.*** *Encourage and support the initiatives of local communities for the resolution of their housing problems and for promoting the establishment of housing co-operatives and their own building projects;*
>
> ***3.*** *The State shall adopt a policy for the institution of a system of rents that are compatible with family incomes and for individual ownership of housing.*
> ***4.*** *The State, the autonomous regions and the local authorities shall determine the regulations on occupancy, use and transformation of urban land, specifically by way of planning instruments, within the framework of laws relating to national planning and urban planning and shall compulsorily acquire such land as is necessary to satisfy the purposes of urban public utility.*
> ***5.*** *Interested parties shall be guaranteed participation in the drawing up of urban planning instruments and any other instruments for physical planning of the territory.*

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[2] According Article 16, the fundamental rights contained in this Constitution shall not exclude any other fundamental rights provided for in the laws or resulting from applicable rules of international law (1). The provisions of the Portuguese Constitution and of laws relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights (2).

[3] The English version of the Portuguese Constitution can be consulted in http://www.parlamento.pt

The rights to housing and urban planning are fundamental rights of a social nature, which are established in Chapter II (Social Rights and Duties), Title III (Economic, Social and Cultural Rights and Duties) of the Portuguese Constitution.[4] They are rights to a contribution or action of the State; their content, rather than being concretized in the Constitution, presupposes a concretization and mediation by the ordinary legislator. Their effectiveness is dependent on the Best Possible Reserve (*Vorbehalt des Möglichen*).

The Portuguese Constitution contains a guarantee of private property[5] in Article 62:

> ***1.*** *Everyone is guaranteed, under this Constitution, the right to private property and to transfer it during his or her lifetime and on death.*
> ***2.*** *Requisitioning or compulsory acquisition of property for public purposes shall be carried out only under the authority of law and on the payment of fair compensation.*

Also the constitutional right guaranteeing the protection of marriage and the family plays an important role in tenancy law:

- Article 36,[6] number 1, provides that: *"Everyone has the fundamental right to found a family and to marry on terms of full equality";*

- And Article 67, dealing with family as a social right, establishes that*:*

> ***1.*** *The family, as a basic component of society, has the right to protection by community and the State and to the creation of all the conditions that permit the personal fulfilment of its members.*
> ***2.*** *The State has the duty of protecting the family, in particular by:*
> ***a.*** *Promoting the social and economic independence of family units (…)."*

Anticipating a number of problems that may present themselves when completing this questionnaire, two fundamental rights in particular should be mentioned. First, the right of freedom of expression and information protected[7] in Article 37;[8] second, the principle of equal treatment, embedded in Article 13.[9]

Article 18 states that the constitutional provisions relating to rights, freedoms and guarantees shall be directly applicable to, and binding on, both public and private bodies. So, in Portugal, fundamental rights are an effective system in all areas of the legal system, they bind private actors directly and deploy a direct (vertical) effect.

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[4] Gomes Canotilho/Vital Moreira, *Constituição da República Portuguesa Anotada*, 3rd ed., Coimbra Editora, 1993, p. 344 ff.

[5] The right to private property is also a fundamental right of a social nature.

[6] Gomes Canotilho/Vital Moreira, *Op. cit.*, p. 219.

[7] Gomes Canotilho/Vital Moreira, *Op. cit.,* p. 225 ff.

[8] See question 20.

[9] See question 1.

The Constitutional Court plays an active and dynamic role in the control of the Portuguese Tenancy regime.[10] It has been called upon multiples times to determine the constitutionality of many legal provisions and an established case-law has emerged.[11]

b) Basic structure and content of current national law

I. Private tenancy law

Today, the Portuguese urban tenancy regime is ruled by three groups of norms: general rules of lease (1022/1063 CC), general dispositions of RAU (articles 1-73) and specific provisions for each purpose: residence (74-109), commercial and industrial activities (110-120), professional activities (121-122) and other purposes (123). The legislative structure goes from the general to the particular, and it works effectively to ensure sufficient legal certainty.

Apart from the civil rules, there is an entire corpus of public law rules, *e.g.* the General Regime of Urban Buildings [RGEU – Regime Geral das Edificações Urbanas] and many tax law provisions.

There are more mandatory than dispositive rules in the Portuguese regime of Tenancy Law. The general criterion can be the following: every rule aimed at protecting the tenant is mandatory. For example, Article 1030 CC states that charges relating to the building are to be borne by the landlord, even if parties agree differently; and Article 51 RAU states expressly that rules about termination are mandatory.

Some central features of the Portuguese tenancy law regime can be emphasised:[12] the contract should be written; there is a rule of automatic renewal of the contract; the landlord can rescind the contract or give notice only in situations foreseen by law; time-limited contracts are admitted only if they have a duration of at least five years; the increase of rents is ruled by law in most cases; and the stipulation of the regime of free rent is not always possible.

There are some other forms of "lawful possession" of a premise for housing purposes.

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[10] Armindo Ribeiro Mendes, "O Regime do Arrendamento Urbano (RAU) no Tribunal Constitucional", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 615.

[11] There is a substantial body of jurisprudence of the Constitutional Court on tenancy law matters. We can mention Decision 97/2000, of 17.03; Decision 533/99, of 7.07; Decision 55/99, of 19.02; Decision 54/97, of 23.01; Decision 1080/96, of 26.12; Decision 712/96, of 22.05; Decision 33/96, of 17.01; Decision 575/95, of 18.10; Decision 466/95, of 11.07; Decision 128/92, of 01.04, among many others.

[12] Pinto Furtado, "Evolução e estado do vinculismo no arrendamento urbano", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 647.

In Portugal a licence has no significance. Traditionally, it was used by landlords as a means to escape from the mandatory legal regime of tenancy law. The landlord would provide a dwelling to another person without celebrating a valid lease contract and would refuse to accept the rent. By doing so, he didn't have to pay taxes and was not subject to the mandatory legal regime of tenancy. If there was any inspection, he could argue that there was no lease contract, but simply a licence. The legislature has always considered such situations as examples of fraudulent behaviour and has sough to protect tenants; for instance, Law 13/86, of 23.01, and 1029, 3, CC presumed that the failure to observe the need for a written form was imputable to the landlord; hence, it stated that only the tenant could invoke nullity; the contract could be proven by receipt, witness, or by any other means. This provision remains in force for contracts concluded before RAU entered into force (Article 6 DL 321-B/90, 15.10).

If one considers that a licence is somehow different from *commodatum*, one can also refer to this type of contract.[13] The *commodatum* is a contract by which one party gives a thing to another who uses it and gives it back to the other just after the use (Articles 1129-1141 CC), and is essentially free.

There are other forms of "lawful possession" which provide property rights to the possessor, but they are quite different from what we call "tenancy". One of them is the right of residence: it confers a right to enter a property, but is limited to the holder of the right and his family (Article 1484 CC), according to their social conditions (Article 1486 CC). The right to housing is subject to the same regime as usufruct and should be registered in the land register.

There is a debate in the doctrine on the position of the tenant. Some Authors (Oliveira Ascensão,[14] Menezes Cordeiro[15]) consider the position of the tenant as a property right, but it is a minority position. The majority (Pires de Lima/Antunes Varela,[16] Pereira Coelho,[17] Manuel Henrique Mesquita,[18] Pinto Furtado[19]) considers that the tenant has only an obligatory right and this position is supported by case-law.[20]

Tenancy contracts do not confer property rights or any other real rights upon tenants. The rights and obligations created by virtue of the contract are purely obligatory. For this reason, there is no requirement for the landlord to be the owner of the rented premise. Persons having a real right of usufruct (1439 CC) or to use (1484 CC) the property or even only a right to administer the property, can lawfully celebrate

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[13] Pereira Coelho, *Arrendamento*, Coimbra, 1988, p. 32.

[14] Oliveira Ascensão, *Direitos Reais*, 1971, 519 ff and "Locação de bens dados em garantia", *ROA*, 1985, p. 346 ff.

[15] Menezes Cordeiro, *Direitos Reais*, 1993, (reprint, 1979) 665 ff and "Da natureza jurídica do direito do locatário", *ROA*, 1980, 61 ff.

[16] Pires de Lima/Antunes Varela, Código Civil Anotado, III.

[17] Pereira Coelho, *Arrendamento*, Coimbra, 1988, p. 205 ff

[18] Manuel Henrique Mesquita, *Obrigações Reais e Ónus Reais*, Coimbra, 1990, p. 131 ff.

[19] Jorge Pinto Furtado, *Manual do Arrendamento Urbano*, Almedina, Coimbra, 2001, p. 64.

[20] *V.g*. the Decision of the Supreme Court of 27.11.2003.

tenancy contracts. Still, the type of rights the landlord enjoys over the property is important with regard to the determination of the maximum period of time for which he is allowed to conclude the contact (Article 1051, c) CC).

Despite having only an obligatory right, the tenant's position is strongly protected. For example, he has possessor's protection. Article 1037 CC states that the tenant has the same protection as the possessor, when he is deprived or disturbed in the exercise of his rights, even against the landlord. The CC does not, however, say that the tenant is a possessor; it simply states that he can use the same means as a possessor to protect his possession. The doctrine defines this as an extension of possessory protection to non-possessors.[21]

Regarding consumer protection,[22] the tenant is considered a consumer only when the landlord is acting in a professional capacity. The Portuguese Civil Code does not mention consumers, but there is a specific *Consumer Protection Act* [Lei da Protecção do Consumidor] of 31.07 1996. It offers the tenant protection if flats are leased by entrepreneurs who act as brokers or as professional landlords. If the tenant is a consumer and the landlord is an entrepreneur in the sense of Article 2, number 1, of Law 25/96, of 31.07, several special protective rules come into play which have been strongly influenced by EC consumer protection directives.

II. Social regulation affecting private tenancy contracts

The Portuguese Tenancy Law regime can be characterised as a welfare regime; the role of the State can be considered as very important and decisive.

State intervention is regulation endorsed and detailed in basic aspects of this regime. For example, how tenancy contracts are made: their celebration (form, content and duration); the fixing and increasing of rents; and modes of termination.

State intervention also exists with regard to access to tenancy. The tenancy relation can be created by:

a) judicial decision:

- The beneficiary of the right to a new tenancy contract under Article 90 RAU can ask for specific performance – Article 95, 2 RAU
- Under Article 1793 CC, in the case of divorce, if the family house is owned by one of the spouses or if it is owned by both, in joint ownership, the

[21] Manuel Henrique Mesquita, *Obrigações Reais e Ónus Reais*, Coimbra, 1990, p. 148 ff.

[22] Article 60 of the Portuguese Constitution deals with consumer rights: *1. Consumers have the right to goods and services of good quality, to guidance and information, to the protection of their health, safety and economic interests and to compensation for injury. 2. Advertising shall be regulated by law; all forms of concealed, indirect or fraudulent advertising are prohibited. 3. Consumer associations and consumer co-operatives are entitled, in accordance with the law, to State support and to be consulted on questions concerning consumer protection. Their capacity to institute legal proceedings in order to defend their associates or collective or general interests shall be recognised*. See Gomes Canotilho/Vital Moreira, Op. cit., p. 322.

Court can rent the house, under request, to the other spouse, taking into consideration the necessities of each spouse and the interest of their children. This contract is ruled by the general legislation of tenancy contracts for residential purposes, but the Court can define special conditions of the contract and terminate it, at the request of the landlord, when this is justified by supervening circumstances.

b) or by public authority:

- If coercive repairs are carried out on an empty building by public authority, according to public law (Articles 91 and 107 of Decree-Law 55/99, of 16.12), and the owner refuses to pay them, the public authority can rent the premises (Article 15 RAU) in order to be compensated by receiving the rents. The contract lasts for between three and eight years.

State intervention can be found also in the modes of transmission of the tenancy contract. Tenancy contracts are transmitted:

- By death of the tenant (see question 2)
- By divorce. The Article 84 RAU states that in the case of divorce or judicial separation, spouses can agree about the transmission of the position of a tenant. If the parties do not reach an agreement, the Court should decide taking into account the patrimonial situation of the spouses; who is in fact occupying the house; the interest of their children; if the tenant was guilty for the separation or the divorce; if the tenancy contract has been concluded before or after the marriage; and other relevant grounds.

The State also intervenes in determining how the market operates:

- The tenant has a pre-emptive right in the case of the sale of the property (47 RAU);
- Rules regarding termination are mandatory (51 RAU);
- The contract is automatically transferred under special circumstances (84, 85 RAU) [see questions 2 and 10];
- The landlord can give notice to extend the building when it is degraded – The legislator supposes that the landlord will repair it and then conclude a larger number of tenancy contracts -, according Article 69 RAU and Law 2088, 03.06.57 (modified by Articles 42 and 43 of Law 46/85, 20.09).

The State also intervenes over rents:

- There are three specific forms of rent stipulation: freely agreed, conditioned and supported rent. Conditioned rent is mandatory in many situations (81 RAU) [See introduction to set 3].
- The rents are not freely increased (30 RAU) [See question 13].
- In practice, the non payment of the rents rarely leads to eviction [See question 11].

State intervention affects remedies**:**

- The action of eviction has a special regime and is regulated by Articles 55-61 RAU, not by general procedural legislation;

- Suspension of eviction is possible in various situations [See question 6b];
- The tenant has possessor's protection (1037 CC).

The regime of private tenancy is more important than the regime of public tenancy. The percentage of leases by public authorities is not significant[23] for various reasons, one of which is that after a few years the public authorities tend to sell to tenants the dwellings, at a low price. However, 24 000 premises were built (in cooperation with 128 local authorities) between 1995 and 2000.

The tenancy contracts concluded by the State and by Autonomous Services with the aim of establishing the official seat of any public entity are ruled by Decree-Law 228/95, of 11.09. Tenancy contracts concluded by public authorities as landlords are ruled by Decree Law 139-A/79, 24.12; expressly, it determines that the civil solutions shall always be respected, except in very extremes cases (*e.g.* urgent need of the building to establish a public service).

Financial support from the State underpins social habitation policy: the cost-controlled construction of new buildings depends upon credit provided by the State at a more favourable rate than found on the market, and upon tax benefits; some construction companies owned by the state develop housing premises which can be rented only by people in need; the rent is fixed in accordance with the tenant's income, the cost being borne by the central government through the IGAPHEs [Instituto Gestão e Administração do Património Habitacional do Estado]. It should be noted that strict conditions must be satisfied in order to benefit from such assistance, thus reducing the number of successful applicants.

Housing is also an important matter under the National Plan for Inclusion (Council Ministers Resolution 91/2001, of 6.08). Housing is considered to be important for social cohesion, and the concept of "social citizenship" entails the right to live in dignity. The legislature is involved in the management of housing programs, especially for larger urban areas: in this regard the special program of lodging in Lisbon and Porto (Decree-Law 1/2001, of. 4.01) should be highlighted. And Law 91/95, of 2.09 amended by Law 64/2003, of 23.08.2003, deals with urban developments constructed illegally: its purpose is to move people from slums to homes with improved conditions.

There are also specific, dynamic programs:

- RECRIA – [Regime Especial de Comparticipação na Recuperação de Imóveis Arrendados], created by Decree-Law 197/92, of 22.09, and amended by Decree-Law 104/96, of 31.07 and Decree-Law 320-C/2000. This program deals only with leased premises and with the recuperation of degraded leased properties. The underlying rationale is that owners will again lease premises after works of reconstruction have been completed.

[23] 3 % of total housing stock, according to *European Public Policy Concerning Access to Housing*, p. 19.

- REHABITA – created by Decree-Law 105/96, of 31.07, deals with the support of housing rehabilitation in old urban areas (especially, historic centres).

There are several incentives from the State:

- Rent subsidy – 12 DL 321-A/90, 61 RAU; Law 46/85, 20.10; Decree Law 68/86, 27.03 (modified by Law 21/86, 31/07 and Decree Law 329-B/2000, 22.12)
- Supported Rent – 82 RAU, Law 166/93, of 7.05.
- Decree-Law 7/99, of 8.01, that deals with financial support for repairs carried out on dwellings belonging to families in need.
- The IAJ [Incentivo ao Arrendamento por Jovens] created by Decree-Law 162/92, of 05.08. is a program to support the celebration of lease contracts by youths under thirty years (Article 2, number 1). There were 24.000 beneficiaries in 2001.[24] This has been a very important instrument for the revival of tenancy markets.

Tax Benefits:

- Some of the amount of rent paid is deductible in IRS [Singular Income Impost], according to Articles 78 g and 85 1 c of Decree-Law 422-A/88, of 30.11 (IRS Code).
- Costs arising from the maintenance of the building are deducted from the incomes provided by rents (Article 41 of IRS Code).
- Exemption of payment of the municipal tax for 10 years to someone who rents a house stipulating conditioned rent (Article 41 of Decree-Law 215/89, of 01.06 [Fiscal Benefits Regime] as amended by Decree-Law 287/2003, of 12.11).

III. Summary account on "tenancy law in action"

The last decade in Portugal generated relatively good political and economic? conditions for the acquisition of housing property.[25] Most Portuguese own their own house.[26] Tenants are frequently elderly and, nowadays, because of public policies, they are also typically young people. Rents use up large parts of average salaries, so people prefer to ask banks for a loan to buy their own house; they often pay, on a monthly basis, little more than the level of a rent for the loan. Furthermore, young people under 30 and those with a low income can apply for state aid for the payment

[24] http://www.mes.gov.pt/novidade_habit/_private/17.htm

[25] In Portugal, the period from 1995 to 2000 was marked by an exceptionally high construction level of new housing units. Mainly aimed at the home ownership market, this development led to the building of the nearly 400,000 housing units intended to meet the urgent needs of a large housing deficit. See, *European Public Policy Concerning Access to Housing*, p. 53.

[26] The privately owned rental units were 17, 4% of total housing stock in 1991, according to the *European Public Policy Concerning Access to Housing*, p.29.

of the interests of the loan (these interest payments are made directly to the bank by the Government department).

Landlord and Tenant associations aim to provide legal and technical support to their members. Landlords' associations[27] usually oversee practical functions: writing contracts; receiving rents, mediating in some small conflicts between landlords and tenants. Their role varies from association to association, as well as from city to city.

Both tenant and landlord protective associations can offer their members consultations which are free of charge.

Tenancy contracts elaborated by associations do not have any specific value, in the sense that they are not considered as adhesion contracts. The Portuguese regime on tenancy law is strongly mandatory; there are rarely problems with respect to the content of contracts. If a clause is illegal, it will be considered void (295 CC), and the contract integrated by a default rule.

Representatives of tenant protective associations are allowed to come into courts. The tenant's associations created according to Law 24/96, 31.07 (Consumer's Protection Act), have the legitimacy to assure the judicial defence of their members in housing matters (Article 17 of Law 24/96), when expressly authorized by interested parties.

Tenancy law often has to be enforced before the courts by landlords, because the legislator considers judicial procedure as a way of ensuring the best protection of the tenant's rights (for example, resolution of the contract depends on a judicial declaration [See introduction to set 2]).

There are no compulsory mechanisms of alternative dispute resolution and only a few instruments for voluntary alternative dispute resolution,[28] but actually they are not used. For instance, if the parties do not agree about the application of the coefficients to increase a rent they could refer the definitive establishment of the amount of rent to a special commission (36 RAU). However, the composition and operation of this commission has not yet been decided, so Article 36 cannot be considered in force. Also the association's role in alternative dispute settlement is a limited one.

Fair and effective access to courts for tenants is constitutionally guaranteed[29] and is ruled by Law 30-E/2000 (Access to Law and to Courts), amended by Law 231/99, of

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[27] The most famous landlord's association is *Associação Lisbonense de Proprietários*, sited in http://www.alp.pt

[28] António Marques dos Santos, "Arrendamento urbano e arbitragem voluntária", in *Estudos em Homenagem ao Prof. Doutor. Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 573.

[29] Article 20 of the Portuguese Constitution deals with access to law and effective judicial protection: *1. Everyone is guaranteed access to law and to the courts in order to defend his or her rights and legally protected interests; justice shall not be denied to a person for lack of financial resources. 2. Everyone has the right, in accordance with the law, to legal advice and information, as well as to legal aid, and the right to be assisted by a lawyer before any*

24.06. Article 4 provides for legal information; Article 7 (and Decree-Law 391/88, of 26.10) provides for legal protection; Article 11 deals with legal council and Article 15 deals with legal aid.

There is no special jurisdiction for tenancy law; the average length of procedures depends upon the particular court but the fairness and utility of the decision is paramount and must be safeguarded. The tenant can always appeal to the Court of Appeal regardless of the value of the matter in controversy (57 RAU).

There is one jurisdiction competent for tenancy issues, the "Justice of the Peace" (Law 78/2001, of 13.07). Its competence includes small claims, family law issues, disputes involving neighbours, etc (Articles 8 and 9). The parties are encouraged to solve their differences through arbitration (Articles 49 ff.) but there is no legal obligation to do so (Articles 54 and 55). The decision of the "Justice of the Peace" has equal value to a decision of the Court of First Instance. Either party may appeal a decision according to the general rules.

The Courts have been particularly active in interpreting and applying tenancy law provisions. For example, the courts play an important role in respect of Article 12 RAU (which states that ordinary repairs carried out on leased property is a matter for the landlord), assessing if the claim for repairs grounded in this provision is abusive in a given case.[30]

One final note on tenancy law in action: there are no contradicting statutes and there is secondary literature that is usually easily accessed by all lawyers. Importantly there is also free access to a number of databases containing collections of case law.[31]

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authority. 3. The law shall provide for the definition and proper safeguarding of the secrecy of the investigation in the criminal proceedings. 4. Everyone shall have the right to have a cause which affects him determined in a fair trial within a reasonable time. ***5.*** *In order to defend personal rights, liberties and guarantees, the law shall provide citizens with legal procedures that are characterised by swiftness and priority, so that there is effective and timely protection against threats or violations of these rights*. See Gomes Canotilho/Vital Moreira, *Op. cit*., p. 161.

[30] The Supreme Court (Decision of 28.11.2002), considered abuse of right to exist where the dwelling needed reparations on the amount of twelve years of rent; the Court of Appeal of Lisbon considered a claim for works of 10 000 Euros when the rent was 30 Euros (Decision of 29.09.2000) and a claim for works of 3000 Euros when the rent was around 20 Euros (Decision of 18.12.2002) an abuse of right.

[31] National decisions are available at http://www.dgsi.pt/. All the mentioned Case law in this report was provided by this service.

Questionnaire

Set 1: Conclusion of the Contract

Short General Introduction[32]

In accordance with the rules of the General Part of the Portuguese Civil Code, in order to form a tenancy contract two coinciding declarations of intent (offer and acceptance) are required.

A contract does not have to be in writing to be valid (219 CC). An exception applies, *inter alia*, for lease contracts on housing premises [see question 4].[33] It can be concluded in electronic form using an electronic signature, according to Decree-Law 62/2003, of 3.04.

The essential terms of an agreement for a lease are the identification of the landlord and tenant, the premises to be leased, and the rent. According to Article 8 RAU, a tenancy contract should identify the parties and the property leased, specify the rent and the date, and most critically include a "permit to use" the building (Article 9 RAU).[34] The "permit to use" is a certification, granted by a public authority, that the building is adequate for the purpose of the contract and is in good condition. In general, the lack of agreement on other elements of the contract will not obstruct its validity and efficacy. In the absence of expressed agreement, for example, with regard to the duration of the contract, legal default rules will be applied.[35]

Question 1: Choice of the Tenant

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

a) has a husband and three children.

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

c) has a small dog.

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

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

Does T have a claim against L?

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[32] Carlos Lacerda Barata, "Formação do contrato de arrendamento urbano", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Lisboa, 2002, p. 49 ff.

[33] Jorge Pinto Furtado, *Op. cit.,* p. 368.

[34] Jorge Aragão Seia, *Op. cit.,* p. 197 ff.

[35] Jorge Pinto Furtado, *Op. cit.,* p. 342 ff; Jorge Aragão Seia, *Op. cit.,* p. 188 ff.

An agreement for a lease is an ordinary contract and, in accordance, with the general principles of contract law it will not be binding on parties until one is able to identify an offer by the landlord to let, and an acceptance by the tenant of this offer.

The offer of a contract constitutes a unilateral proposal that is concrete and complete (in the sense that it must determine all the essential elements of the contract). An offer only exists if is precise enough, if demonstrates the will of the offerer to be bound. When an offer is directed to an undetermined number of persons it is usually a proposal and not an offer. An announcement for renting, published in newspapers normally would not amount to an offer. They normally express only offeror's intention to negotiate, rather than her intention to conclude a contract - the landlord wants to reserve him the final decision.[36] Portuguese doctrine unanimously treats newspaper advertisements, shop window displays or prospectuses as invitations to treat (*invitatio ad offerendum*) and not as binding offers. Thus, in the cases at hand, T makes the offer by showing interest, and L rejects. As result, a contract was not concluded.

The question is whether T has a claim against L to enter into a lease contract.[37] Contract law is based on the principle of private autonomy. More precisely, the notion of freedom of contract (Article 405 CC) comprehends the freedom to enter into a contract and the freedom to fix its conditions.[38] L can, lawfully, refuse to conclude the contract, according to the principle of freedom of contract; only when his refuse is unlawful it will be possible to obtain condemnation from the Court.

a) has a husband and three children

Portuguese Law does not restrict the number of persons who sleep in the same room nor applies a space standard to the number of persons entitled to occupy the building. However, the proprietor can, lawfully, ask to the tenant if he his married and has a family and definitively, he will decide according to the number of persons he wants to live in the house. The landlord decision not to rent a single-room house to a family with three children is reasonable.

If the landlord and the tenant do not discuss about who will live in the house, are allowed to live in the building as well as the tenant everybody that lives with him in domestic economy [see question 2]; and up to three guest, unless there was a prior agreement precluding this[39], according to Article 76, 1, RAU.

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

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[36] Carlos Alberto da Mota Pinto, *Op. cit.,* p. 443.

[37] This hypothesis is a very theoretical because cases where it will be possible to bring out the unreasonable nature of the refusal or where the cost of the procedure will justify legal action will be rare.

[38] Carlos Alberto da Mota Pinto, *Teoria Geral do Direito Civil,* Almedina, Coimbra, 1990, p. 95 ff; João de Matos Antunes Varela, *Das Obrigações em Geral,* I, 7th ed., Almedina, Coimbra, 1991, p. 240; Mário Júlio Almeida Costa, *Direito das Obrigações*, 7th ed., Almedina, Coimbra, 1998, p. 215 ff; Luís Carvalho Fernandes, *Teoria Geral do Direito Civil*, I, 2nd ed., Lex, Lisboa, 1995, p. 74; Heinrich Hörster, *A parte geral do Código Civil Português,* Almedina, Coimbra, 1992, p. 57 ff.

[39] Jorge Aragão Seia, *Op. cit.,* p. 546 ff.

Questions concerning territory of origin or affiliation to a religious group (in this situation the question whether the tenant is or not a Muslim) can disclose a discriminative situation. The Portuguese Constitution lays down the principle of equity in Article 13:[40]

> ***1.*** *All citizens have the same social rank and are equal before the law.*
>
> ***2.*** *No one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances.*

The constitutional provisions relating to rights, freedoms and guarantees shall be directly applicable to, and binding on, both public and private bodies (Article 18). Hence, the landlord is directly bound by Article 13 of Portuguese Constitution[41] and he cannot refuse to celebrate the contract with L because he is a Muslim; the principle of equity lays down an external limit to private autonomy and contractual freedom.

Ordinary Courts are competent to deal with the violation of the constitutional equality rule. If L refused to celebrate the contract, L could ask for specific performance.

c) has a small dog

According to the principle of contractual freedom, parties can agree that small dogs and cats will not live in the apartment. If they do not agree on it, having a dog in the apartment is considered a normal use of the dwelling and therefore is lawful.

In a condominium, internal rules can impose certain limitations or special prohibitions. These rules, if approved unanimously by the owners, can forbid pets in the building. The landlord has the duty to respect them and shall include in the tenancy contract a clause prohibiting pets in the apartment.

The Portuguese Law grants *a posteriori* remedies, based on personality rights protection. Everybody that is affected by a concrete disturb of a dog, *e.g.*, by its bark can claim to the Court an order to keep the dog away from the apartment. The judicial decision is not abstract, it is grounded on a concrete disturb of a personality right (right to quality of life, right to silence, among others). The protection granted depends upon the concrete person affected. For example, if there is a baby or a sick person living in the building, a dog that could be tolerate by a normal person will be forbid to stay in there.

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

In Portugal it is lawful to play the piano from 8 to 9 pm. Further, playing the piano is considered a normal use of the dwelling, so the landlord cannot prohibit it. However, it depends on him to celebrate or not a tenancy contract with a piano player and he can lawfully refuse it.

e) does not have full capacity and is under custody

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[40] Gomes Canotilho/Vital Moreira, *Op. cit.,* p. 131.

[41] Gomes Canotilho/Vital Moreira, *Op. cit*, p. 147. Directive 2000/43/EC (OJ 2000, L 180/22) on the principle of equality, prohibiting discrimination on ethnical grounds, was not implemented; however, it would not be innovative in Portuguese Law.

Nobody can discriminate a handicapped person because of her disability, or social condition in general (Article 13 Constitution). So, the landlord cannot refuse to celebrate the tenancy contract with T because he does not have full capacity or is under custody. [42]

According to Article 122,[43] the acts of a minor are voidable. He has to be represented by his parents or by a tutor. The minor can only validly act in the following situations: disposition or administration of the gains of his work; business of quotidian life that deal with small amounts of money; and business related to his job or occupation (Article 127 CC).

According to Article 138 CC, interdiction[44] is the adequate regime for a person suffering of full insanity, deafness, dumbness, blindness. Interdicts are represented by parents or by a tutor.

Inabilitation is used for people suffering of insanity, deafness, dumbness, blindness, but that still can manager their patrimony and people suffering of prodigality, people using alcohol drinks or drugs and that are not able to manager their patrimony (Article 152 of CC). Their acts need to be authorized by an assistant (Article153).

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

As mention before, the questions b) and d) made by T were unlawful. Usually, a lie to questions that the landlord is not allowed to ask is accepted. The tenant has a kind of "right to lie", and in these cases the landlord cannot avoid the contract for deceit. It would be of no consequence if T were to lie about questions of religion or affiliation to a political party. Questions on race and ethnic origin are illegitimate since a landlord cannot refuse potential tenants on these grounds.

If the landlord wants to rent out the apartment only to a certain group of people (non-smokers, handicapped people, couples, non musicians, pet lovers or pet haters) he can lawfully ask questions related to these attributes. If the tenant lies, the landlord can avoid the contract if his error is essential; without the error the contract would not have been concluded by the parties. An error with regard to the identity of the other party is essential only in a kind of contract where it makes a difference with which one contracts. More specifically, Article 251 CC provides that a person who, when making a declaration of intention, is in error as to the identity or to essential characteristics of a person[45] may rescind the declaration if the receptor knew that the characteristic was essential.

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[42] Pereira Coelho, *Arrendamento*, Coimbra, 1988, p. 98 ff; Jorge Pinto Furtado, *Op. cit.,* p. 314 ff; Jorge Aragão Seia, *Op. cit.*, p. 99 ff; José Dias Marques, *Noções Elementares de Direito Civil*, 7th ed., Lisboa, 1992, p. 20 ff; Luís Carvalho Fernandes, *Teoria Geral do Direito Civil*, I , 2nd ed., Lex, Lisboa, 1995, p. 201 ff.

[43] Carlos Alberto da Mota Pinto, *Op. cit.* p. 222 ff.

[44] Carlos Alberto da Mota Pinto, *Op. cit.,* p. 228 ff.

[45] Pires de Lima/Antunes Varela, Código Civil Anotado, I, Coimbra Editora, Coimbra, p. 235. Carlos Alberto da Mota Pinto, *Op. cit.*, p. 509 ff and 518.

Further, according to the CC a person who has been unlawfully induced to make a declaration by fraud (Article 253) or by threats (Article 255) may rescind the declaration.

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?

As I mentioned in question 1, a), Portuguese Law does not restrict the number of persons who sleep in the same room nor applies a space standard to the number of persons entitled to occupy the building.

T can take into the apartment these persons even against the will of L. Article 76, 1 RAU states that are allowed to live in the building, as well as the tenant:[46]

- Everybody that lives with him in the domestic economy;

- Up to three guest, unless there was a prior agreement precluding this.

The domestic economy presupposes intimacy and interdependence; it includes family life and people sharing the place because of a special affection or relationship between them. Article 76, 2, presumes that relatives (including relatives by affinity) in direct line, or to the third degree in a collateral line, live in the domestic economy with the tenant, although they pay any kind of retribution. Other people can live in domestic economy with the tenant, but it is his responsibility to prove this.

Under Article 76, 3 RAU, one is considered guest only if the tenant provides onerously housing and services related to housing, or food.

Close family members of the tenant, such as a spouse,[47] registered same-sex partner, parents or children, are not considered as third persons respecting to tenancy contract. Taking them into the apartment does not constitute sublease but falls within the scope of an appropriate use of the premises. Thus, permission is not necessary, the tenant has not to notify the landlord that he intends to take family members into the premises, and the landlord cannot ask for a higher rent as the usage of the apartment will be higher on account of the increased number of persons living there.

[46] Jorge Aragão Seia, *Op. cit.,* p. 546 ff.

[47] The spouse is not *ipso iure* party to the contract (Article 83 RAU).[47] However, as a family member, he is allowed to live in the premise.

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

On the death of the tenant, the general rule is stated by Article 1051, 1, d CC: the tenancy contract expires. However, Article 85 RAU establishes that the tenancy contract does not terminate by the death of the tenant if supervene him:

a) The spouse not separated, either judicially or in fact;

b) The descendent which is minus than one year old or which was living with the tenant for more than one year;[48]

c) When the tenant is not married or he is judicially separated, the partner (if they had lived together for at least two years before the decease);

d) The ascendant living with him for more than one year;

e) Relatives by affinity in direct line, in conditions referred b) e c);

f) People living with tenant in domestic economy for two years ago.

In the above mentioned situations the contract is transferred, from tenant to a supervene person (it is the same contract, not a new one) and it continues under the same conditions.

The transference of the tenancy contract is possible only once, unless the first transference is for the supervening spouse: in this case, when he dies, the contract can be transferred again.

Article 86 RAU states that the beneficiaries do not have the right to transfer the contract if they already have residence in the judicial districts of Lisboa or Porto or surrounding areas;[49] If the tenant lives in another part of the country, he does not has the right to transmission of the contract if he has another residence or is the owner of immovables in the same judicial district where he lives, and these can satisfy his housing needs.

The right of transmission can be renounced – the beneficiary should communicate this to the landlord during the 30 days after the death of the tenant (Article 88 RAU).

If the beneficiary wants to accept the contract, he should communicate to the landlord, by registered letter, with acknowledgment of receipt, the death of the first tenant or of the outlived spouse, in 180 days. To this communication should be added the public documents that prove the right of the beneficiary. If he does not do so, he still has the right to the contract but he is liable for damages (Article 88).

I will now analyse, separately, each situation.

a) her husband and children.

[48] A link of interdependency between the members of the family might exist in a situation of common domestic economy. The Court of Appeal of Porto considered that it does not exist when the descendent comes to the house only at weekends and during holidays (Decision of 16.05.2002).

[49] Law 44/91, 2.08 establishes the surroundings areas of Lisboa and Porto.

Article 85 a RAU establishes that the tenancy contract does not terminate by the death of the tenant if outlives him spouse not separated, neither judicially nor in fact.

The quality of spouse comes into existence through the marriage; no time of living together is required to render this article efficace. Even in an *articulo mortis* marriage the spouse benefits from this transmission right.

For the application of 85 RAU it is essential that the couple maintained a joint household at the time of demise. If the surviving spouse had moved out prior to the demise in order to terminate the relationship, he or she cannot become a party to the contract. The separation of spouses means a breach of the marriage.

When the outlived spouse dies, the tenancy contract can be transferred again, in a degree (once), to relatives, also by affinity, of the first tenant. It is not possible to transfer the contract to the new spouse if the outlived spouse got married in the meantime.

The surviving spouse can declare within a month after notice of the death that he or she does not want to continue the contract.

Article 85 b RAU establishes that the tenancy contract does not terminate by the death of the tenant if outlives him descendent that is less than one year old or was living with the tenant for more than one year.

When the tenant dies, the tenancy contract is transferred to the descendent that is less than one year old, whether or not he lived with the tenant, and to descendents that lived with the tenant for more than one year. The doctrine considers that this disposition is also applied to unborn children and to adoptive descendents, at least when the adoption is full.

So, T's husband can continue the contract. If he declares that he does not want to continue the contract, the right passes to the oldest child.

a) her boyfriend and d) her homosexual partner

Article 85, d) of RAU[50] establishes that when the tenant is not married or he is judicially separated, the partner can continue the contract, if they had been living together for at least two years before the decease.

Whether the partner is or is not homosexual, a *de facto* union can exist (under Portuguese Law it is a para-familiar situation,[51] analogous to marriage).

However, if there are supervening descendents, minors of less than one year old or descendents who have been living with the tenant for more than one year does not exist, or if they are not interested in the tenancy contract, the person who lived in *de facto* union is treated as the spouse.

[50]Amended by Law 7/2001, of 11.05. See João Sérgio Telles de Menezes Leitão, "Morte do arrendatário habitacional e sorte do contrato", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, 328.

[51] Francisco Manuel Pereira Coelho/Guilherme Oliveira, *Curso de Direito da Família*, I, 2nd ed., Coimbra Editora, Coimbra, 2001, p. 31 and p. 81 ff.

A de facto union is a situation analogous to marriage. If the relationship between T and her boyfriend cannot be considered as such, the boyfriend would be protected under Article 85 RAU, f), as people living in domestic economy.

Law 6/2001, of 11.05, which established means of protection to people living in domestic economy for more than two years, added paragraph f) to Article 85 RAU. Domestic economy is defined as two people sharing board and lodging for more than two years, and that have established a life in common. So, even if the boyfriend could not be considered as living in *de facto union*, according to Portuguese Law, because they did not live in a situation analogous to marriage (with the same duties: respect, loyalty, co-habitation, cooperation and assistance)[52] he could be considered as living in domestic economy; therefore he has the right to transfer of the contract.

What was said is valid, *mutatis mutandis*, to the homosexual partner.

b) her parents

According to Article 85 d RAU, the tenancy contract does not terminate when the tenant dies if there is a supervening ascendant that lived with the tenant for more than one year.

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

The other students automatically did not assigned contractual right against L and are they are not liable for the rent. They are third parties of a contract that was stipulated between L and T.

The contractual relationship between the parties can be described as follows: T contracted with L renting the whole apartment. Then, T sublets the free rooms to his fellow students with L’s permission according to Article 1060 CC and 84 RAU. Thus, T has both a contractual relationship with L and with the other students.

Under the Portuguese Tenancy regime, the tenant is not entitled, without the permission of the landlord, to transfer the use of the leased premises to a third party, particularly to sublet the premises. Hence T has to demand of the landlord to approve a sublease of a part of the premises, *e.g.*, a room, to a third person [See question 3].

The answer to the question depends on whether the landlord’s consent was a partial or a total one; or was a general consent or only for those specific persons.

The contract might 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. The contract between L and T would permit T to replace any departing student with

[52] Article 1672 CC.

another student of his choice. This implied contract agreement can be inferred from L's first permission to a flat sharing community formed by students to live in his apartment. L's refusals to accept a new student can be considered *venire contra factum proprium.*

A could be considered as a guest. [53] As mention above, Article 76 RAU allows up to three guests in the apartment, except if parties stipulated in the contract differently. So, if T provided his friends with laundry or cleaning services, they would be considered guests and the landlord could not react against it.

Question 3: Sub-renting

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

Unless the law allows or the landlord authorizes, the tenant cannot provide to anyone the total or partial use of the building, by ceding him his position, for free or by payment; by subletting; by loaning for use (Article 1038, f CC).

The authorization of landlord to sublet, which can be partial or total, should be written and rends the subletting efficace to the landlord. (Article 44-46 RAU). [54]

If authorized, the tenant should communicate to the landlord, within 15 days, which he provided the use of the building. This communication can be informal but if the tenant does not do it, the landlord can terminate the contract (64, 1, f RAU).

The sub-let terminates with the termination of the principal contract (Article 45 RAU), but if the tenant dies the sub-tenant has a right to a new contract (Article 90 RAU).[55]

The tenant can receive a rent from the sub-tenant but only to the limit: initial rent plus 20 per cent (Article 1062 CC). If he receives more than this amount, the landlord has the right to resolve the contract (Article 64 g RAU)

Question 4: Formal Requirements and Registration

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

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[53] Jorge Pinto Furtado, *Op. cit.*, p. 246 ff; J. A. Santos, *Regime do Arrendamento Urbano Anotado,* Dislivro, 2003, p. 206 ff.

[54] Pereira Coelho, *Arrendamento*, Coimbra, 1988, p. 228 ff; Jorge Aragão Seia, *Op. cit,*. p. 290; Pedro Romano Martinez, "Subarrendamento", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 237.

[55] If the tenancy contract expires because of the death of the tenant, the sub-tenant does not have the right to a new contract if the sub-let was not efficace before the landlord (Decision of the Supreme Court of 30.11.1994).

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

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

Article 7 RAU states that the tenancy contracts should be written. The written form is an *ad probationem* formality, which provides for an easier proof. The contract remains valid if it is not written; however, he has to be proven with a receipt and implies the application of conditioned rent regime (see introduction to set 3).

Both the tenancy contracts for residence, with a duration superior to six years and all other tenancy contracts for commercial, industrial or to professional activities require registration.

If the tenancy contract with residence purpose is not registered, but is written, it is still effective for six years.

If the landlord or the tenant invokes a verbal tenancy contract, the judge should serve a writ. The tenant can prove the contract by presenting the receipt with the articulated pleading or exhibiting it till the end of first instance discussion, which is to say, till the end of discussion of facts.

The judge can also order himself the presentation of receipts, when examines the initial pleading or in the later phase of curative acts and cleanse of the process.

Question 5: Extra Payments and Commission of Estate Agents

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

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 move in earlier.

Ask for "key money" was a usual practice in Portugal till Decree-Law 321-B/90, 15.10, entered in force. Article 14 states that landlords who receive a rent that is higher than that fixed by law, refuse acquitance or receive a collateral sum of more than a month of rent [see question 13], and the tenants that receive an amount not due in order to quit the leased dwelling, when the tenancy contract has terminated, are committing a crime of speculation (prison 3 to 6 mouths and fine not lower than 100 days).

In certain cases there are extra money payments from the future tenant to the current tenant; often, payments are made to buy certain objects in the property of the current tenant, e.g. fitted kitchen, curtains or furniture. These are lawful agreements.

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

The Law on Regulation of Estate Agencies, Law 77/99, of 16.03, contains rules on contractual relationship between tenants and estate agents.

An Estate agent who acts as an intermediary in the conclusion of the contract can receive a commission; only form one party of the contract, the one who has first contacted the agent (Article 7). *In casu*, T was the one who first approached the Estate agent, so the estate agent could awfully claim from the tenant a commission of two monthly rents.

Set 2: Duration and Termination of the Contract

Short General Introduction

Under Portuguese Tenancy Regime, there is a fundamental distinction between lease contracts concluded for less than five years and lease contracts concluded for more than five years.

Contracts limited in time have to be concluded, at least, for five years (Article 98 RAU). If they are celebrated for less than five years, they are automatically renewed and only the tenant can give notice. It means that, in practice, they will become unlimited in time. For this reason, since RAU entered into force, most of the tenancy contracts are being celebrated for five years.

In these contracts, the transfer of the contractual position does not imply either the suspension or the interruption of the duration, and does not lead to any changement of the contractual content (Article 99 RAU).

Contracts limited in time do not expire without notice at the end of the time limit. Notice might be given by the landlord, with a judicial declaration, one year before the deadline; the tenant can always give notice in writing, its declaration will become effective after 90 days.

If none of the parties give notice during the five years, the contract will be automatically renewed for three years more.

About termination, the RAU provides an extensive body of mandatory law. The grounds for termination are mutual agreement [revocation], expiration [caducidade],[56] resolution [resolução][57] and specific notice [denúncia].

According to Article 62 RAU, parties can, at any time, revoke the contract.

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[56] Jorge Pinto Furtado, *Op. cit.*, p. 491 ff; Jorge Aragão Seia, *Op. cit.,* p. 408 ff.

[57] I will use the term "resolution" meaning termination of a bilateral contract as a sanction for the breach of a party's obligations. The expression rescission, which was also possible, is used in Portugal for public and labour contracts.

The tenancy contract terminates in the following situations (1051CC)

a) When the duration agreed on by parties or fixed by law expires [see question 6].

b) If the contract has a suspensive condition, when it is certain that the fact will not occur; if the condition is resolutory, when occurs the fact, to which parties subordinate the end of the contract (in this latter case, only if the contract is not automatically renewed);

c) When the right (e.g. usufruct) or the administration powers of the landlord, based on which he concluded the contract, expire. In this situation, the tenant has a right to a new contract (66, 2 RAU).

d) When the tenant dies, or if it is a corporate body, when it is extinguished [See question 2, variant 1].

e) With the loss of the building;

f) When the building is the object of a taking by public utility, unless the subsistence of the tenancy contract might be compatible with the taking.

Concerning resolution different regimes are set for the parties. The tenant can resolve the contract in every situation where the breach of a contractual duty by the landlord shatters the relationship between them, in the sense that is not just and reasonable for the tenant to hold on to the contract (Article 63, 1). On the contrary, the landlord has relatively few possibilities to terminate the contract. Landlord's resolution always has to be based on a specific reason, prescribed by Article 64 RAU:

a) does not pay the rent in time;

b) uses, or allows someone else to use, the premise for a purpose different to the one agreed;

c) uses the building for unlawful, indecent and dishonest practices;

d) makes works that change substantially the structure of the premise or the internal disposition of its divisions; or works that cannot be considered for his own comfort and commodity;

e) accepts more than three guess in the building;

f) sub-lets or loans, totally or partially the building, without landlord's authorisation;

g) receives form the sub-tenant an unlawful rent (the rent cannot be more than the rent paid plus 20%, according to Article 1062 CC);

h) does not live in the premise for a year, except if there is a *force majeur* situation, or the absence is due to disease or the exercise of public functions, and the family stays in the building;

i) fails to perform the service that motivated the contract to the landlord.[58]

The termination of the contract in the cases described as taxative in Article 64 RAU must be decreed by the Court. The action of eviction shall be proposed during the year after the knowledge of the ground that caused eviction, or the ground will expire (Article 65).

The distinction between resolution and specific notice is the following: resolution requires other party's fault (breach of contract); specific notice does not depend on fault, but on objective and simple facts specified by law. Tenancy Law identifies two situations: when the landlord needs the premise for himself or for his family and when he intends to renovate or reconstruct the dwelling [see question 6].

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 she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?

The stipulation of duration is not an essential element of tenancy contracts, so the contract celebrated by T and L is valid. Article 10 RAU states default duration for tenancy contracts of six mouths.

The contract terminates when the duration agreed by parties or fixed by law expires; however, the contract is automatically renewable for successive periods. The renewal duration is the same as the one of the original contract, but if the contract last for more than a year the period of renewal is only for one year (1054CC).

The tenant can stop the automatic renewal of the tenancy contract by giving notice. He does not need a justification for giving specific notice; he just has to comply with a certain anticipation (Article 1055 CC): six mouths, if the contract lasts for more than six years; sixty days, if the contacts has a duration between one and six years; thirty days, if the contract lasts for three months to a year; a 1/3 of the duration, if the contracts lasts less than three months.

Landlord can only give specific notice. Specific notice supposes that the landlord has a legitimate interest in the termination of the lease contract: he needs the premises for himself or his family or has the intention to renovate or reconstruct it.

Article 69 RAU states that the landlord can give notice (for the term of the duration or of renewal) when:

a) he or his descendents in first degree need to live in the premise;

[58] If the landlord dies and the tenant cannot continue to perform him services, landlord's heirs can resolve the contract, because the cause that motivated the contract does no longer exist (Cf. Decision of the Supreme Court of 30.10.2003.

b) he needs the premise to construct a residence for him or for his first degree descendents;

c) he wants to extend the building or to construct in it, to increase the number of leased premises. In this case, he must already have an architectural plan approved by the competent public authority;

d) the building is degraded and, technically or economically, is not recommended to be improved. Also in this case, the landlord must have an architectural plan approved by the competent public authority.

The right of the landlord to give notice depends on the following:

- Residential Purposes - (a) and (b)

a) He must be owner, co-owner or usufructuary of the building for more than five years (except if he acquired it by hereditary succession)

b) He (or his first degree descendents) cannot have, in the area of the judicial districts of Lisboa or Porto or their surrounding areas, or, for another part of the country, in the same city, another house (owned or rented) that provides for him or his descendents in first degree residential needs.

The landlord that has celebrate several tenancy contracts, respecting several houses, can give notice only to the one that, providing his residential needs, is the most recent.

The tenant has the right to receive compensation (Article 74 RAU), two years and half (30 x) the rent in the eviction date.

If landlord does not move in within 60 days after the eviction, or if he maintains the building empty for more than a year, or does not stay in it for more than three years or, also in three years, has not done the repairs that motivated the notice, the tenant has the right to be compensated (more two years of rent) and he can return to the building. This right does not hold if the landlord died or had to move unexpectedly.

The landlord has no right to give notice of a contract with residential purposes if:

- the tenant is more than 65 years old; is retired by incapacity to work; or has not capacity to work, even if he is not retired;

- has a disease that implies more than 2/3 of incapacity;

- or, has lived in the building for more than thirty years.

- Extend of the building or reparation – (c) and (d)

The conditions are expressly established by Law 2088, 03.06.1957 (modified by Articles 42 and 43 of Law 46/85, 20.09).

The landlord shall give notice by judicial procedure, six mouths before the end of the contract. Eviction only takes place three months after the definitive judicial decision (70 RAU).

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 does not find another apartment and risks becoming homeless once the title is executed?

The action for eviction[59] is ruled by Articles 55 to 61 RAU. It is both the means to declare the termination of the contract and the mean for executing eviction; has a bipartite character: declaratory and executive.

Article 60 RAU states that the executor shall refrain from eviction when the withholder, who has not been heard before,

- Exhibits a tenancy contract or another entitlement for the use of the building from the landlord;
- Exhibits a contract of sub tenancy or ceasing of contractual position, from the judgement debtor, and proves that the legal requirements were fulfilled (communication to the landlord within 15 days, special authorization or recognition by the landlord).

The executor shall also discontinue eviction when a medical certificate proves that, because of a serious disease, it may risk the life of someone living in the place (61 RAU). These rules apply to all tenancy contracts.

If a time-limited contract expires, Article 102 RAU states that eviction can be delayed for social reasons. The postponement is decided by the Court, in the eviction action, when:

a) An immediate quit causes greater prejudice to the tenant than benefits the landlord.

b) When it is the tenant's poverty that motivates the lack of payment of rent.

To decide, the Court should take into account: good faith, the fact that tenant may become homeless, the number of persons living with the tenant, his/her age, his/her health and, in general, the social and economic condition of the people involved.

Quit can be postponed by only one year, counted after the *transit in rem judicatam* of the decision of the eviction.

Article 114 RAU, for commercial and industrial tenancy contracts, and Article 121 for professional activities tenancy contracts, state that when the tenancy contract has lasted one or more years and terminates by expiration or notice of the landlord, the tenant only has to quit the building one year after the end of the contract or of its renewal/ deadline of the contract. If the contract has lasted two or more years, the tenant takes two years over quitting.

[59] Jorge Aragão Seia, *Arrendamento Urbano*, 7th ed., Almedina, Coimbra, 2003, p. 340; Cardona Ferreira, "Breves Apontamentos acerca de alguns aspectos da acção de despejo urbano", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 593 ff; Fátima Ribeiro Ferreira, *Arrendamento, Extinção da Relação*, Dislivro, 89 ff.

Question 7: Contract Limited in Time

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

Formally, it is possible to conclude a contract limited to one year; however, this contract is subject to automatic renewal, as mentioned in question 6.

The Portuguese Tenancy Law established by RAU in 1991 allows parties to stipulate urban tenancy contracts with a time limitation, but never less than five years.[60] This time limitation clause should be inserted into the written contract, and signed by the parties.[61]

It is also possible to conclude time limited tenancy contracts for commercial, industrial, professional or other activities (117, 121, 123 RAU). Again, the duration cannot be less than five years – 98, 2 *ex vi* 117, 2.

Question 8: Justification for Time Limit

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

b) Does the restriction of notice under a) (which is possible only once per year) apply to T, too?

As I mentioned above, in this case only T can give notice (see question 6).

We are before a time-limited contract that might have a duration of five years minimum (Article 98, 2 RAU). Therefore, the contract celebrated between L and T is ruled by the general rules of housing tenancy. This means that the contract does not expiry after one year but it's automatically renewed (Articles 68, 2 RAU and 1055 CC). Further, only the tenant can give notice without alleging any reason, sixty days before the annual deadline, according to Article 1055. The landlord can give notice only in situations foreseen by law [see question 6 a].

Question 9: Termination in Special Cases

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

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[60] Luís de Lima Pinheiro, "Arrendamentos de duração limitada", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles,* Almedina, Coimbra, 2002, p. 391.

[61] Exceptionally, Companies of Management and Investment of Property and Property Investment Funds can conclude tenancy time limited contracts, at least for three years.

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?

The general principle is stated in Article 1057 CC: the acquirer of the right of the landlord will succeed in his rights and duties, without prejudice of registration provisions. Hence, tenancy contracts are transferred with the passing of the building. The tenancy contract is transmitted to the acquirers of the building in the three conditions referred to: when the landlord dies; when the house is sold; or when the house is auctioned off.

a) According to the principle of universal succession laid down in Article 2024 CC, upon the death of a person, the property passes in its entirety to one or several persons (heirs). Thus, upon the death of the inheritor, the heirs enter into the lease contract. The death of a party does not automatically annul the lease and L' heirs have no special rights to terminate the contract. They can terminate the tenancy contract only according to the general rules, set out above.

b) The rule "*emptio non tollit locatum*" set forth in Article 1057 CC applies: the buyer of the house will succeed in the rights and duties of the landlord.

c) If a bankruptcy and an auction[62] of the house occur (according to the Recovering of Enterprises and Bankruptcy Special Code approved by Decree-Law 132/93, of 23.04 and amended by Decree-Law 315/98, of 23.04), the solution is not different from a) and b).

Question 10: Tenancy "For Life"

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

Under the Portuguese regime, it is not possible to conclude tenancy contracts lasting for over 30 years.[63] "For life" clause would be null but would not lead to invalidation of the entire contract. Article 1025 CC foresees that when the parties stipulate a duration longer than 30 years, the contract is reduced to that limit.

It should be noted that 30 years are a limit to the conclusion of a tenancy contract not a limit on its duration, after renewal.

[62] According to the Decision of the Court of Appeal of Lisboa [Tribunal da Relação de Lisboa], 2/11/2000 the tenancy contract of a building concluded before the adjudication does not frustrate creditors' expectations and does not expires with sale at a public auction.

[63] According to Article1443, ex vi 1485 CC, the real right of residence can be "for life".

After the 30 years, the contract would be automatically renewed for one year (Article 154, n 2) and only the tenant could give notice, under general conditions (see question 6 a).

Question 11: Immediate Termination under Unusual Circumstances

L and T have concluded 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) Can L give immediate notice if T did not pay the two last monthly rents?

b) Can L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?

c) Is a contractual clause ("clause résolutoire") valid according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents or commits any other "gross" breaches of her duties?

Article 64 RAU foresees, restrictedly, the causes for termination of tenancy contracts, so it avoids exceptional notice even in unforeseen circumstances.

As mentioned in the introduction to set 2, not every breach of a contractual duty may constitute an important reason for grounding resolution. Due to the severe consequences for the tenant, who will lose his place to live, only manifest and grave breaches, which endanger the maintenance of the contractual relationship, may allow the landlord side to terminate the contract.

So, in particular:

a) Can L give immediate notice if T did not pay the two last monthly rents?

When the tenant does not pay the rent on time, i.e., in the day stipulated in the contract, he can cease the delay within 8 days (1041, 2 CC). During this time, if the landlord denies receiving the rent, the tenant can deposit it. After that, the tenant can also annul the right of the landlord to terminate the contract grounded on the non-payment of the rent (1048 CC). This faculty supposes that there is an action of eviction caused by the non-payment of rents. If there is a suit pending, the right to terminate the contract expires if the tenant deposits the rents due and the compensation of 50% by the deadline for the defence. Tenant also will pay legal costs.

b) Can L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?

Such a ground is not foreseen by Portuguese Law. One might try to interpret c) (use of the building for indecent and dishonest practices) in order to comprehend the repeatedly insulting of neighbours, but it would seem very artificial and unusual.

c) Is a contractual clause ("clause résolutoire") valid according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents or commits any other "gross" breaches of her duties?

Article 64 RAU, that foresees the grounds for resolution of a tenancy contract, is a mandatory rule (Article 51 RAU). A "clause résolutoire" will not be admitted.

Set 3: Rent and Rent Increase

Short General Introduction

The negotiation of the rent is up to the private autonomy of contracting parties.[64] The rent must be settled in euros (19 RAU), should be of a fixed value, and it is an essential element of the tenancy contract. Particularly the rent has to be quoted in money; it cannot be quoted in other recurring performances, like a performance in kind or by work performances.[65]

In tenancy contracts it is possible to establish three rent regimes (77 RAU): free rent, conditioned rent and supported rent.[66]

In the free rent regime, the initial rent and its posteriors increases are freely stipulate by the parties. In time-limited tenancy contracts for residence, with duration till eight years (99, 2 RAU) and in tenancy contracts for commercial, industrial, professional and other activities with duration till five years (119, 121, 123 RAU), parties can only agree upon the initial rent; they cannot agree on the annual increase of rents.

In the conditioned regime, the original rent/the first rent can not exceed, monthly, 1/12 of the result of [tax (actually, 8%) x the actual value of the place].

In general, the choice between a free rent regime and a conditioned rent regime usually is agreed upon by the parties. However, the conditioned rent regime is mandatory for the following contracts:

- When the right (e.g. usufruct) or the administrative powers of the landlord, based on which he concluded the contract ceases, the tenancy contract expires. In this case, the tenant has the right to a new contract (1051, CC, 66, 2 RAU) with conditioned rent.
- When the tenancy contract expires because of the tenant's death, people who lived with the tenant in domestic economy, guests and sub-tenants

[64] Jorge Aragão Seia, *Op. cit.,* p. 234 ff; António Sequeira Ribeiro, "Renda e encargos no contrato de arrendamento urbano", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 87 ff.

[65] Pereira Coelho, *Arrendamento*, Coimbra, 1988, p. 13; Jorge Pinto Furtado, *Op. cit.*, p. 42 ff.

[66] For an economic analysis of the rent, see Fernando Araújo, "O problema económico do controlo das rendas no arrendamento para habitação", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 177 ff.

have the right to a new contract (90 RAU)[67] and a conditioned rent is applied;

- Article 7 RAU imposes the conditioned rent regime when the contract is not in writing;
- When the tenant dies and the contract is transferred to descendents and relatives by affinity in direct line, the conditioned rent can be applied; the criterion is age or physical limitations (87, 1, 2, 4 RAU);
- When the first contract is concluded because someone has a right to a new tenancy contract (92 RAU);
- When the State, its autonomous organisms, public institutes, municipalities, mercies, and institutions of providence, build residential dwellings and then sell these places to the tenants. The posterior tenancy contract is concluded under the conditioned rent regime (81 RAU).
- Dwellings built by cooperatives, when these are subsidised or financed by the State.
- In other cases defined by special legislation.

In supported rent regimes, the rents are subsidised and there are also specific rules for calculation and increase (Article 82 RAU and Law 166/93, 7.05.)

This regime is applied to places built or bought by the State and by his autonomous organisms, public institutes, municipalities and private institutions of social solidarity with the financial support of the State.

With regard to the lease of housing premises one has to distinguish between the net-rent as consideration for the charges imposed upon the object of the lease, and accessory charges, such as charges for the consumption for water, heating and electricity. According to Article 1030 CC, the former have to be borne by the landlord; the latter can be supported by the tenant, if parties agree on it.

Under Portuguese tenancy regime, there is a complicated set of mandatory rules to control rent increases. The rent can be increased (i) every year, by the application of the coefficient determined by Article 32 RAU (average rate of consumer index prices, without housing over the previous 12 months); (ii) every year, by agreement of the parties, if allowed by law;[68] (iii) the rent can be increased as a result of works of conservation and improvement in the building, according to Article 38 RAU (this increase is cumulated with the annual increase);[69] (iv) when the tenant has other residence (81-A RAU).

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[67] Luís Manuel Teles de Menezes Leitão, "Direito a novo arrendamento", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Almedina, Coimbra, 2002, p. 373.

[68] When the tenancy contract has a duration longer than 8 yeas and parties agreed on free rent regime (Article 99, 2 RAU).

[69] António Pais de Sousa, "Obras no locado e sua repercussão nas rendas", in *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles, III,* Coimbra, 2002, p. 159 ff.

Question 12: Settlement Date, Modes of Payment, Right of Distraint

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

Article 10 RAU states a default rule: if the payment of the rent is to be done according to the months of the Gregorian calendar, the first rent will fall due at the moment of the celebration of the contract; the following in the first working day of the month before the one due. In practice: if I conclude a contract on 1st June 2004, the maturity date both of the first rent and of July rent is the 1st of June.

If the tenant does not pay the rent on the maturity date he is in delay, but he can still pay within 8 days. If he does not pay, the landlord can demand compensation (50% of the rent due).

There are no restrictions on modes of payment. It is common that the parties agree on bank transfer. The deposit of rents in the landlord's bank account, stipulated by the parties, has the same value as direct payment and the bank receipt is equivalent to acquittance. An unrejected deposit means that landlord knows about and has accepted the deposit. Only when the landlord's bank account is credited is the rent considered to be paid.

Otherwise, the tenant can deposit the rent

a) When consignment is possible

   There are two conditions for consignment (841 CC): When, without fault, the tenant cannot pay the rent or cannot safely pay, by any reason related to the landlord; when the landlord is in delay. [70]

b) When tenant can stop the delay [see question 11b]

c) When he can cease the landlord's right to resolve the contract caused by the non-payment of the rent (1048 CC) [See question 11b]

d) When a suit is pending.

Deposits can be definitive or conditionals (1042, 2 CC and 28 RAU).

They are definitive when they include rents and/or legal compensation and the tenant declares that the deposit was definitive or he does not declare anything.

They are conditional when they include rents and/or legal compensation and the tenant declares their conditionality. The deposit, when it includes compensation, means that the tenant recognises that he was in delay, unless it is conditional (1042, 2 CC).

[70] On one hand, if the landlord does not receive, without justification, the rent he is in delay and the tenant does not have to deposit it, while the landlord does not cease the *mora accipiendi*. On the other hand, the deposit is irrelevant if its cause is not lawful or if the tenant is already in delay for a prior rent. Only a correct deposit will cease the delay. Cf. Jorge Aragão Seia, *Op. cit.,* p. 251.

The deposit should be made in the Caixa Geral de Depósitos (the public bank) and is available to the Court where the building is situated, or the current court, if it is suiting an action of eviction.

The tenant can deposit the posterior rents, with no obligation to try to pay again or to communicate the following deposits (25 RAU).

The landlord can contest deposit for 14 days from notification (26 RAU); or he can receive the deposit if he declares, in writing, that he has not impugned and will not do so (27 RAU).

The deposit contested by the landlord and the conditional deposit can be received only after a judicial decision and according to it.

L does not have a right of distraint (pledge) on T's furniture and other belongings to cover the rent or possible other claims against him.

Question 13: Requirements for Rent Increase

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

The increase of the rent is allowed only in the cases and in the form foreseen by law.

The first increase only can be demanded one year after the entry into force of the contract and the subsequent, one year after the former (Article 34 RAU).

If the landlord does not increase the rent, he cannot recover that money. However, over the two years, he can add the coefficient/factors not applied to the coefficient due (34 RAU). For example, the factor for 2001 was 1,022 and for 2002, 1,043. If the landlord did not increase the rent in 2001, in 2002 he can increase by 1,065.

The rent can be increased in the following cases:

a) Every year, the landlord can apply the coefficient determined by Article 32 RAU.

Article 32 RAU states that the coefficient for the increase of rents is average rate of consumer index prices, without housing over the previous 12 months. This rate should be available on 31st August, and should be defined by the National Institute of Statistics. This Institute publishes the coefficient in the Official Journal by 30th October. The landlord should inform the tenant, in writing, of the new amount one month prior to the increase.

b) Every year, by agreement of the parties, if allowed by law [See introduction to set 3].

c) On other occasions, the rent can be increased as a result of building works of conservation and improvement, according to 38 RAU. This increase is cumulated with the annual increase.

d) When tenant has other residence (81-A RAU)

If the contract is not time-limited, the landlord can increase the rent when the tenant lives in Lisboa or Porto and has another residence or his the owner of property in the surrounding areas (Law 44/91, 2.08 establishes the surrounding areas of Lisboa and Porto); if the tenant lives in another part of the country, when he has another residence or is the owner of immovables in the same judicial district, if these can satisfy his housing needs.

The increase of rents is limited to its value in a conditioned rent regime.

Article 14, DL 321-B/90, 15.10, states that landlords, who receive a rent that is higher than that fixed by law, are committing a crime of speculation (prison 3 to 6 mouths and fine not lower than 100 days).

Question 14: "Index-clause" and Progressive Rent

a) Is it possible to contractually link the annual increase of the rent with the annual average increase of the cost of living (or a similar index) as established by official statistics?

The annual increase of rents is mandatory linked with annual average increase of the cost of living. Article 32 RAU states that the coefficient for the increase of rents is average rate of consumer index prices, without housing over the previous 12 months (see question 12).

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

The rent stepped clauses, successive or variable, are allowed only in tenancy contracts where the free rent regime is accepted (78, 2 RAU).[71] However, progressive rent arrangements are possible in time-limited tenancy contracts for residence only when they last for more than 8 years (99, 2 RUA); and in tenancy contracts for commercial, industrial, professional and other activities only if the are be unlimited in time or, if time-limited, with duration longer than five years (119, 121, 123 RAU). In these cases, it is possible to stipulate by contract or by amendment the sum that the tenant should pay in the following years.

Question 15: Rent Increase by Contractual Amendment

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

[71] See Decision of the Court of Appeal of Porto, of 11.05.1993.

In tenancy contracts for residence lasting for more than 8 years (99, 2 RUA), parties can stipulate the free rent regime. In this case, it is possible to stipulate by contract or by amendment the sum that the tenant should pay in the following years. Only in this situation is a rent increase by contractual amendment according to general contract law possible.

In my opinion the present situation can be interpreted as a valid contractual amendment. In this case, the announcement of a unilateral rent increase constitutes a valid offer for the amendment contract and the fact that T pays the increased rent for 3 months without any reservation constitutes a valid tacit acceptance. Therefore, the rent increase is lawful and no set-off would be possible.

If one considered that T has the right to get back the amount paid but not due, and he could off-set the sum to be repaid against future rent instalments, on his own motion, according to the general regime of compensation (Articles 848 CC).

Question 16: Deposits

What are the basic rules on deposits?

There is no legal obligation to provide the landlord a deposit under Portuguese law. It is a frequent practice to ask for an anticipation of the rent. However, the amount of the anticipation cannot exceed the equivalent of one month rent (Article 21 RAU).

The deposit only serves as a protection of the landlord's claims against the non-payment of the rents by the tenant. Usually, this anticipation is set-off with the rent corresponding to the last month of the contract.

Question 17: Utilities

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

All expenses and public charges for the building (in assurances, taxes, etc.) are to be paid by the landlord, even if parties can agree differently (1030 CC). It is assumed that the landlord takes these expenses into account when he calculates the rent.

The parties can agree only that the current charges are for the tenant for the utilisation of common parties of stocks of buildings and for the use of common services (40 RAU). The agreement shall be in the written contract or in an amendment, and signed by the tenant; shall specify the charges for tenant; and shall be reported to a lawful assemble of the condominium. To simplify, parties can agree on a certain amount, to be paid monthly.

The landlord shall communicate to the tenant, with necessary forewarning, all the information that determines and shows the charges for these services, including decisions form the assembly of condominium, lectures of counters (water, electricity), and others.

According to legal repartition of the utilities, one can say that utilities concerning property right (tax, repairs) are to be met by the landlord whereas the utilities

concerning the use of the premise are to be paid by the tenant (*e.g.* consumption of water, gas, electricity, heating). In Portugal, the water, electricity, gas and telephone companies conclude individual contracts directly with tenants, if they exhibit the tenancy contract.

About the regime for repairs, see question 19, b).

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

Short General Introduction

Under Portuguese law, the main obligations of the landlord are to deliver the dwelling to the tenant and to assure that it can be used according the purpose of the contract (Article 1031 CC). The landlord has a continuous obligation of tolerating the use of the building for the purpose of the contract and cannot act in ways that would obstacle or diminish the use of the building. Further it has to maintain the property in due state during the entire period of the contract.[72]

In urban tenancy, we have three kinds of repairs (11 RAU):[73]

- Works for ordinary/common conservation – this includes the reparation and the cleansing of the build; works imposed by the Public Administration;[74] works in order to keep the building in the state required by the purpose of the contract and already existent at the moment of its conclusion. They are the responsibility of the landlord and lead to an increase of the rent (12 RAU).
- Works for extraordinary conservation – this includes the works to repair construction defects of the building (including hidden effects) or as a result of a casualty and, in general, works that exceeds 2/3 of the net revenue of the building, if they were not caused by the landlord.
- Works for improvement – all the other works.

Works for extraordinary conservation and for improvement are the responsibility of landlord when: its execution is ordered by the public authority or when parties agree, in a written document that specifies which work must be done. This works also lead to an increase in rent (13 RAU)

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[72] Jorge Pinto Furtado, *Op. cit.,* p. 31 and 406.

[73] Jorge Aragão Seia, *Op. cit.,* p. 202 ff.

[74] When the landlord, after being notified by public authority, does not do the works for ordinary conservation, the tenant can deposit the part of the rent corresponding to the increase foreseen in Article 13 RAU. The municipality can order an administrative eviction and then occupy the buildings, total or partially, in order to do the necessary works (15 RAU). If the municipality does not begin the works in the 120 days after tenant's requirement, the latter can carry out the works on his own account (16 RAU). In this situation, the tenant shall pay only 30 % of the rent at the date of the administrative notification of the landlord for the execution of the works until he is reimbursed for the expense and interest, increased by 10 % for administrative expenses.

The tenant's obligations are enumerated in Article 1438 CC. They are the following:

a) to pay the agreed rent;

b) to permit the landlord to exam the dwelling;

c) do not use the dwelling for a different purpose of the ones agreed with the landlord;

d) to use the dwelling with due diligence;

e) to allow repairs in the dwelling, either when they are urgent or are imposed by public authorities;[75]

f) do not provide to anyone else the total or partial use of the building, by cession of his position, for free or by payment; by subletting; by loaning for use;

g) if the cession is authorized, and so lawful, communicate it to the landlord, in fifteen days;

h) to warn the landlord of important facts related to the building, like that the dwelling has problems (*e.g.* in the plumbing or in the walls) or that someone else is pretending to have rights over it;

i) to deliver the property back after the termination of the contract.

The duty to deliver the dwelling and the duty to pay the rent are synallagmatic. If the landlord does not deliver it, the tenant can invoke *exceptio non adimpleti contractus* and refuse to pay the rent. In case the landlord does not provide conditions for the use of the dwelling according the purpose of the contract (e.g., he does not repair damages caused by humidity) the tenant might have the right to abatement of the rent (Article 1040 CC), to termination of the contract (Article 63 RAU) and/ or to damages (Article 798 CC). Specifically, if the tenant is deprived partially of the dwelling (he cannot use the humid room, for instance) or is deprived of it for a certain period, and he had warned the landlord in time (according to Article 1038, g), he can ask for an abatement of the rent. If the tenant is totally deprived of the use of the dwelling (e.g. the humidity destroyed the electric system), the adequate remedy is termination of the contract. According to Article 798 CC, the party who does not comply with her duties is responsible by damages if acting with fault. Consequently, if the landlord negligently postponed the reparation of the walls, he has to compensate the tenant.

Depending on the kind of breach of contract by the tenant, the main remedies for the landlord are damages (Article 798 CC) and/or termination of the contract. Articles 64 RAU enumerates some other situations, rather than the ones foreseen in Article 1038 CC, where the landlord can terminate the contract [see introduction to set 2].

[75] Without the tenant's consent, the landlord needs a judicial authorization to do repairs in the building. Works are unlawful if made without consent or judicial authorization and give the tenant the right to damages (decision of the Supreme Court of 24.02. 1999).

Question 18: Control of Standard Terms

What kind of control exists for clauses contained in standard contracts used by a landlord acting in a non-commercial capacity?

Law 446/85, of 25.10 amended by the Decree-Law 220/95, of 31.08 and the Decree-Law 249/99, of 07.07 (both transposing the Council's Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) states a mandatory control of standard business terms.[76]

Standard business terms are unilaterally formulated for a multitude of contracts by one party and are subscribed or accepted by the other for the conclusion of the contract. Under the expression "standardised terms" it is also included the contractual content written by a party, generally prior to any negotiation, and that the other party does not have the power to shape.[77]

Differing from Directive 93/13/EC (OJ 1993, L 95/29) on Unfair Terms in Consumer Contracts that prescribes a mandatory control of standard terms restricted to contracts among consumers and commercial parties, Portugal extended this control to contracts among two non-commercial parties either

Therefore, it would make no difference if the landlord was acting in commercial or non-commercial capacity. The point would be to settle if the contract was negotiated by both parties (general control under Civil Code)[78] or if the content of the tenancy contract was imposed by the landlord to the tenant and accepted by him (specific control under Law 446/85).

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[76] António Pinto Monteiro, *Contratos de adesão: o regime jurídico das cláusulas contratuais gerais instituído pelo DL n.º 446/85, de 25 de Novembro*, Separata da ROA, Coimbra, 1986; "Les Clauses Limitatives et Exonérations de Responsabilité et la Protection du Consommateur", *Boletim da Faculdade de Direito*, 1993, p. 161 ff; "Harmoniesierung des Portugiesischen Verbraucherschutzrechts, *Boletim da Faculdade de Direito*, 1993, p. 351 ff; "La directive "Clauses abusives", 5 ans après – A transposição para a ordem jurídica interna da directiva 93/13/CEE", *Boletim da Faculdade de Direito*, 1999, p.523 ff; "Contratos de adesão e cláusulas contratuais gerais: problemas e soluções", Studia Iuridica, 61, Estudos em Homenagem ao Prof. Doutor Rogério Soares, *Ad Honorem 1*, Coimbra Editora, 2001, p.1103 ff; "Contratos de adesão/Cláusulas contratuais gerais", *Estudos de Direito do Consumidor*, CDC-FDUC, n.º 3, 2001, p. 131 ff; "Die Allgemeinen Geschäftsbedingungen im Portugiesichen Recht", *Boletin da Faculdade de Direito*, 2001, p. 4 ff; Joaquim de Sousa Ribeiro, *O Problema do Contrato – As cláusulas contratuais gerais e o princípio da liberdade contratual,* Almedina, Coimbra, 1999; "Responsabilidade e garantia em cláusulas contratuais gerais", Estudos em homenagem ao Prof. Doutor A. Ferrer-Correia, IV, Coimbra, 1997, p. 241 ff; Mário Júlio Almeida Costa, *Nótula sobre o regime das cláusulas contratuais gerais, após a revisão do diploma que instituiu o seu regime*, Lisboa, 1997; João de Matos Antunes Varela, *Das Obrigações em Geral,* I, 7th ed., Almedina, Coimbra, 1991, p. 266.

[77] Article 1, Decree-Law 446/85, 25.10.

[78] The Court of Appeal of Porto (Decision 16.09.2002) decided that in a situation where the rent, the place f payment and the duration of the contract where stipulated between parties, the contact should not be considered as imposed to the tenant.

Chapter V of Law 446/85, on prohibited general unfair terms, distinguishes between Section I (Articles 15 and 16) on common provisions, Section II (Articles 17 to 19) on relations between parties acting in commercial capacity and Section III (Articles 20 to 23) on relations with final consumers.

Article 15 states a general prohibition of terms contrary to good faith.[79] Articles 18 (parties acting in commercial capacity) and 21 (when one party is a consumer) contain a list of terms that are invalid *ipso iure*. Articles 19 and 22 contain a list of standard business terms that are normally invalid, but for whose assessment the judge has some discretion.

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 100E per annum, has to be met by the tenant.

c) At the end of the tenancy, the apartment has to 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?

I will answer the above questions one by one.

a) The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorised by a judge.

The duty of the landlord to deliver the dwelling and the duty of the tenant to pay the rent are synallagmatic, as mentioned in Introduction.

Article 428 CC states the *exceptio non adimpleti contractus* principle. In bilateral contracts one party can refuse to comply with her duties while the other party does not fulfil her part of the contract, if there are no different dates to compliance. This rule is mandatory and cannot be excluded by parties (see, for instance Article 18, f), *ex vi* Article 20 of Law 446/85). Hence, as long as the landlord does not deliver the building, the tenant can refuse the payment of the rent, invoking *exceptio non adimpleti contractus* under Article 428.

[79] The principle of good faith in contractual relationships was already stated in Article 762 CC.

The synallagmatism does not exist between the duties of the tenant to pay the rent or to live in the building and the duty of the landlord to make repairs in the dwelling.[80] Hence, even if landlord refuses to comply with his obligation of making the repairs the tenant cannot invoke *exceptio non adimpleti*, and has to ask for different remedies.

The Portuguese Supreme Court has already decided that *exceptio non adimpleti contractus* has a very limited action in the field of tenancy contracts. If the landlord delivers the building to the tenant, a refusal of the payment of the rent can occur only when there is a serious fault of the landlord, and the refusal has to be proportional and adequate to that fault, according to good faith principle.[81]

The right to off-set obligations with liquid credits stands on Article 847 CC and parties cannot agree differently. So, if the tenant has lawfully paid for some repairs in the dwelling (see question) he can off-set the rent instalments with this credit.

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

Under Portuguese Law, the dwelling must be delivered to the tenant in good condition, unless the contrary was stipulated by the parties. If there is no document attached to the contract describing the state of the building when it was handed over, Article 1043, 2, CC, establishes a presumption in favour of the landlord that the building was in a good state.

The landlord must grant the good conservation of the building during the contract. Article 1030 CC states that the charges with the rented building shall be met by the landlord, even if parties agree differently (see question 17) and Articles 12 and 13 RAU provide that the works of reparation, ordinary and extraordinary are the charge of the landlord.

The tenant is allowed to cause some deteriorations, if they are a result of a careful use of the building, according the purpose stipulated in the tenancy contract; the criterion is the figure of the *bonus pater familias* (1043 CC). The tenant does not have the duty to repair them before restitution of the building. As a result of these legal provisions, we shall consider that the clause establishing that the costs of small reparations, up to 100E per annum, have to be met by the tenant is void.

In tenancy contracts for commercial, industrial, professional and others activities, parties can agree, in writing, that works of ordinary or extraordinary repair ordinary and extraordinary and improvement are the total or partial charge of tenant (Articles 120, 1, 3; 121; 123 RAU).

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

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[80] See Decision of the Supreme Court of 31.01.2002.

[81] Jorge Aragão Seia, *Op. cit.*, p. 412.

The tenant has the duty to give the building back, when the contract is finished (1038, I CC), in the same condition that it was when he received it. There is only one exception: deteriorations caused by a careful use of the building, according to the purpose stipulated in contract (under the criteria of a *bonus pater familias*) are allowed and the tenant is not obliged to carry out repairs before the restitution of the building (1043 CC). For example, he could lawfully fix pictures install electric socket or telephone lines in the walls; in the end of the contract, he would not have to repaint the apartment.

The tenant is also allowed to do some deteriorations in the building for his own comfort or commodity (Article 4 RAU); these deteriorations shall be repaired by the tenant before the restitution of the building, unless he had agreed differently with the landlord. For example, the tenant can do a closet in the wall, blind a window or remove a door, but he is obliged to take it off and restore the original state before the restitution of the apartment.

In consequence, the stipulation of the duty to repaint the apartment by a professional painter at the expense of the tenant would be unlawful, if the damage causing on the painting of the building was the result of a careful use of it. However, if the tenant damaged the painting (he changed the colours of the dwelling or if he has used a different kind of taint from the previous one) for his own comfort and commodity, he has to repaint the apartment in the end of the contract. In this case, the condition that the work should be done by a professional does not seem disproportionate if the apartment was painted by a professional before the celebration of the contract.

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

The claim of T, to give notice by reason of membership is unlawful, because it goes against the freedom of association foreseen by Article 46 of the Portuguese Constitution.[82] As mentioned above, the constitutional provisions relating to rights, freedoms and guarantees are directly applicable to, and bind on, both public and private bodies, according to Article 18.

So, the landlord has no right to give notice because the tenant became a member of a tenant's association; and even if he did it, it would have no legal efficacy.

Tenant's associations created according to Law 24/96, of 31.07, when expressly authorized by the interested parties, have legitimacy to assure the judicial defense of their members in housing matters (Article 13. b)), and have the right to file collective

[82] Article 46 states that: *1. Citizens have the right to form associations freely and without prior authorisation, provided that the associations are not intended to promote violence and that their objectives are not contrary to the criminal law. 2. Associations may pursue their objectives freely and without interference form any public authority, and they may not be dissolved by the State, nor their activities suspended, unless by judicial decision in the circumstances prescribed by law. 3. No one shall be put under a duty to join an association or compelled to remain in it. 4. Armed, quasi-military, militarised or paramilitary associations, other than those of the State or the Armed Forces, and racist organisations or those that adopt fascist ideology are not permitted.*

actions *inter alia* against abusive terms in consumer contracts, according to Article 46 of Decree-Law 446/85.

However, in the situations referred to, these clauses do not have to be challenged. In procedural terms, the adequate devise is a defense by *exceptio*; so the tenant could lawfully refuse to pay (a and b), to repaint the apartment (c), or to leave it (d).

Question 20: Changes to the Building by the Tenant

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

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

As it was mentioned above, the tenant can make some deteriorations in the building caused by a careful use of it, according to the purpose stipulated in contract and he is not obliged to repair them before the restitution of the building. He can also make some changes in the building for his own comfort or commodity (Article 4); these changes shall be repaired by the tenant before the restitution of the building (unless parties stipulate to the contrary).

The doctrine has unanimously considered that the installation of an antenna, parabolic or not, on the balcony or the roof shall be considered as damage inherent to a careful use of the building.[83] Further, Article 64, d), of RAU, states that only a substantial change of the form or structure of the premise constitutes a breach of the contract.[84]

However, even of the solution was not clear, constitutional law would provide an interpretative criterion. The freedom of speech and information stands in Article 37 of

[83] Aragão Seia, *Op. cit.,* p.161.

[84] In each case, the Court has to consider if the modification affects the structure of the building, if there is a functional and irremovable or a permanent aesthetical harm (Decision of the Supreme Court of 23.03.1994). The Court of Appeal of Porto considered, in concrete the following criteria: reasonability, good faith of the tenant; the purpose of the tenant; the influence on the value of the dwelling (Decision of 25.03.2003). Therefore, it is lawfully to replace breakable windows glass with bullet proof glass (Decision of the Supreme Court of 28.10.2003); enlarge a bathroom with a masonry wall, easily removable (Decision of the Supreme Court, of 12.11.96); take out a wall connecting two distinct buildings (Decision of Court of Appeal Porto, of 29.04.2002); the replacement of a demarcation in plastic with one in wood (Court of Appeal of Porto, 20.06.1994); installation of bars (Decision of the Court of Appeal of Porto, 17.04.1997); the building of a bathroom, to give the minimum of habitability to the dwelling (Decision of the Appeal of Porto, 14.12.1998).

the Portuguese Constitution:[85] *"Everyone has (…) the right to impart, obtain and receive information without hindrance or discrimination."*

The fact that the Turkish immigrant does not speak the national language will lead to an increasing interest of T to install the antenna. And Article 15 states that aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.[86]

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

A general prohibition to install or exhibits posters or flags or other devises in the balconies or walls of the building can be stated by public rules (according to public publicise in environmental and urban law) or by private rules (internal rules of the building according to aesthetical considerations). For example, in Portugal, if a commercial tenant wants to advertise his office,[87] he might have to ask authorization to other proprietors of the building and has to pay a tax to public authorities.

If there is no such general and objective prohibition, the tenant cannot be forbidden by the tenant to place such a poster on the balcony, insofar as he has the right to freely enjoy the rented premises. Again, Article 64, d), of RAU, states that only a substantial change of the form or structure of the premise constitutes a breach of the contract. To exhibit a poster would not be considered a substantial changing of the building, inasmuch as it can be removed.

The political or religious content of the poster would not be relevant *de per se*; as mentioned, the freedom of speech and information stands in Article 37 of the Portuguese Constitution, and Article 15 states that aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.

Of course, public authorities could intervene, *a posteriori*, if the poster caused public order attempting, like manifestations in front of the building.

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[85] ***1.*** *Everyone has the right to express and publicise his or her thoughts freely, by words, images or other means, and the right to impart, obtain and receive information without hindrance or discrimination.* ***2.*** *The exercise of these rights shall not be prevented or restricted by any kind or form of censorship.* ***3.*** *Offences committed in the exercise of these rights are punishable under the general principles of criminal law or of the law relating to regulatory offences; jurisdiction to try them lies, respectively, with the courts of law or an independent administrative body, in accordance with the law.* ***4.*** *The rights to reply and to make corrections, and the right to compensation for loss suffered, shall be equally and effectively guaranteed to all individuals and corporate persons.*

[86] Paragraph 1 does not apply to political rights, to the performance of public functions that are not predominantly technical or to rights and duties that, under this Constitution or the law, are restricted to Portuguese citizens (Article 15, 2).

[87] The tenant of a commercial premise has the right to install a removable sign-board with the name of the enterprise or with advertising of the products sold there. Therefore, the tenant can, lawfully, make the works in the wall necessary to fixing it (cf. Decision of the Supreme Court, of 18.03.1997).

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

Does L have the right to keep one set of the keys of the apartment rented to T? Under which conditions is L allowed to enter the apartment without T's previous permission? If these conditions are not fulfilled, does L commit a criminal offence when entering the apartment without T's previous permission?

There is no statutory provision prohibiting the landlord from keeping a spare set of keys of the apartment, a situation that is common.

However, the landlord may only enter into the flat with the tenant's consent. Article 34 of the Portuguese Constitution[88] deals with inviolability of home and correspondence; no one shall enter the home of any person at night without that person's consent. And according to Article 190 of the Portuguese Penal Code, L would commit a criminal offence (one year prison or 240 days of fine) if entered the apartment without T's previous permission.

Question 22: The Landlord's Liability for Personal Injury

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

The landlord has a continuous obligation of tolerating the use of the building for the purpose of the contract and cannot act in ways that would obstacle or diminish the use of the building. Further it has to maintain the property in due state during the entire period of the contract (Article 1051 CC).

Because the landlord did not repair the stairs, he breaches the contract and he is liable for damages. Tenancy contracts have protective effects towards third parties, and the child falls within the protective circle of the contract; accordingly, the tenant can claim damages under the law of contracts, although T's daughter is not party of the lease contract.

If the tenant claims for contractual liability of the landlord, an inversion of the charge of proof occurs, and it is up to the landlord to prove that he complied with his contractual duty to maintain the building in due state (Article 799 CC).

Set 5: Breach of Contract

Short General Introduction

If a party deviates from the content of an obligation, this constitutes a breach of the contract.

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[88] ***1.*** *An individual's home and the privacy of his or her correspondence and other means of private communication are inviolable.* ***2.*** *A citizen's home shall not be entered against his or her will, except under the order of the competent judicial authority and in the cases and in the manner prescribed by law.* ***3.*** *No one shall enter the home of any person at night without that person's consent.* (…)

Under Portuguese Law of Obligations a party will be deemed in breach of contract whenever it fails to perform any of its obligations pursuant to the contract, or when the performance is defective or if the obligations are not performed at the time they are due.[89]

The legal consequences and remedies would vary contingent upon the reasons for the breach. The most important guiding principles of allocating negative consequences, arising out of the breach, are: (i) the one who gets the benefits will be obliged to pay the damages; (ii) the one who creates risks of injury, has to bear the damages resulting from the injury.

The creditor may claim specific performance, provided that the performance is still possible; where the non-performed obligation is an act which can be performed by another person, the non defaulting party is entitled to claim permission to perform that act at the debtor's expense (Article 828 CC); where the obligation is for non-performance of an act, the non- defaulting party may request permission to remove at the debtor's expense what has been done in violation of the obligation (Article 829 CC).

The tenant can resolve the contract in every situation where the breach of a contractual duty by the landlord shatters the relationship between them, in the sense that is not just and reasonable for the tenant to hold on to the contract (Article 63, 1). On the contrary, the landlord has relatively few possibilities to terminate the contract (see introduction to set 2). The termination of the contract in the cases described as taxative in Article 64 RAU must be decreed by the Court, and the action of eviction shall be proposed during the year after the knowledge.

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 a 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) We are before a case of initial impossibility of the object.

Where only part of the building is destroyed, partial performance of the Landlord's obligation is still possible.[90] In that situation, the tenant may choose between two

[89] Pires de Lima/Antunes Varela, Código Civil Anotado, II, Coimbra Editora, Coimbra; Mário Júlio de Almeida Costa, *Direito das Obrigações*, 7th ed., Almedina, Coimbra, 1998, p. 955 ff; Inocêncio Galvão Telles, *Direito das Obrigações,* 7th ed., Coimbra Editora, Coimbra, 1997, p. 299 ff; José Dias Marques, *Noções Elementares de Direito Civil*, 7th ed., Lisboa, 1992, p. 222 ff.

[90] Pires de Lima/Antunes Varela, Código Civil Anotado, II, Coimbra Editora, p. 46. The loss of the thing can be total (the dwelling is no more adequate for the purpose of the tenancy contract) or partial. Further, if the tenancy contract has multiple purposes, and only one of

alternatives – (i) to ask for proportionate reduction of the rent and to continue to use the apartment or (ii) to terminate the contract (Article 802 CC). If the destruction is total, Article 1051, f), states that the tenancy contract expires with the loss of the thing.[91] This termination operates *opere legis*; the landlord is not obliged to restore the object and the tenant is no more obliged to pay the rent (Article 795 CC).[92]

The Landlord will not be liable for non- performance, because the non –performance is due to circumstances beyond his control. If the loss was the landlord's fault, he had the duty to compensate the tenant (790, 1 CC).

Often, the landlord has insured the house against fire. If the fire was not caused by L or T the insurance will pay compensation to L.

b) It is not important if the apartment is destroyed after transfer of possession. The tenancy contract is a consensual contract. Therefore, it would be deemed concluded irrespective of whether possession of the property has been delivered or not. The answer to case b is the same as given in the answer to case a.

c) If the apartment has already been destroyed at the time of the conclusion of the contract, it would be void, according to Article 280 and 408 CC.[93] It is a case of initial objective impossibility. He is not entitled to claim damages, since the landlord did not know about the impossibility of the performance and was not responsible for not having known about it.

Question 24: "Double Contracts"

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

Both contracts are valid; individuals are entitled to oblige themselves to render the same performance as many times he wishes to do so. However, under the Portuguese regime the contract with T1 would prevail; T2 would have the right to sue L, and get compensation.

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them became impossible to pursue, the contract does not expiries. Decision of the Supreme Court, 24.10.1996

[91] The contract expires when the loss of the thing is due to a natural fact (fire, earthquake) or to a licit human fact. The landlord' obligation to ensure the use of the dwelling only leads to the expiration of the contract when the loss of the dwellings is not his fault (Decision of the Supreme Court of 7/7/99 and Decision of the Court of Appeal of Porto, 26.01.1999).

[92] Pires de Lima/Antunes Varela, Código Civil Anotado, II, Coimbra Editora, 49.

[93] Pires de Lima/Antunes Varela, Código Civil Anotado, I, Coimbra Editora, p. 258.

Article 407 CC states that, when someone agrees non-compatible personal rights to different people, by multiples contracts, the contract that was signed first prevails(*prior in tempore, potior in iure*), without prejudice of registration provisions.

Hence, we shall distinguish tenancy contracts lasting for less than six years and contracts for more than six years (requiring registration); in the latter situation, the first contract to be registered prevails (Article 6 of Code of Real Property Registration).

If tenancy contracts last less six years or last more but have not been registered, it would prevail the first one conclude. This solution has been debated in Doctrine since it goes against the general principles of contracts, according to it is possible to celebrate incompatible contracts and then choose the one to comply with. For the others, the debtor is responsible, according to freedom of contracts principle.[94] The date of the creation of the right is the decisive criterion and it prevails against the rule *melior est conditio possidentis*.[95]

Question 25: Delayed Completion

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

The situation above described is one of temporary impossibility (792 CC); in this case the debtor is not liable. The temporary impossibility does not imply the extinction of the obligation nor delay. The compliance is postponed to a posterior date, when possible, without consequences to the debtor.[96]

However, if the tenant looses the interest in the contract, the impossibility should be considered definitive. As it would be deemed as a situation of objective impossibility, the landlord would not be held responsible (See question 23).

L has not any claim against N. Under the Portuguese Law regime, N is not liable, because he was exercing a legitimate right, the right to access to Court, by challenging the building permit granted by public authority. The Landlord cannot sue N, just because N has exercised his right. This will be true, even if the court later rejects N's claim as being unfounded.

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[94] Pires de Lima/Antunes Varela, *Código Civil Anotado, I*, 4th ed., Coimbra Editora, 407.º, note 1; Orlando de Carvalho, *Direito das Coisas,* Centelha, 1979, p. 22;

[95] Jorge Pinto Furtado, *Op. cit.,* p. 323.

[96] Decision of the Supreme Court, of 21.01.88.

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

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

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

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

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

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

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

To the extent the landlord is held liable under a)- c): Could his liability have been lawfully excluded by a disclaimer clause contained in the contract?

I will answer one by one:

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

Only when the tenant is deprived, total or partially, of the use of the thing, an abatement of the rent takes place. The reduction is proportionate to the duration of the deprivation.[97] However, if the deprivation is not due to landlord or relatives fault, the reduction of the rent only takes place if it exceeds 1/6 of the duration of the contract (1040 CC). In none of the presented cases this situation has occurred. We are dealing with situations that disturb the tenant (not depriving him form the use of the thing), which can not grounded a diminution of the rent.

According to Article 11 RAU[98], the works for ordinary conservation – which include the reparation and the cleansing of the build;[99] works imposed by the Public Administration; works in order to keep the building in the state required by the purpose of the contract and already existent at the moment of its conclusion - are the responsibility of the landlord and leads to an increase of the rent (12 RAU).

If the landlord is in delay, and does not carry out the repairs, and on account of urgency, it is not compatible with a judicial procedure, the tenant can do it, and has the right to reimbursement. When the urgency does not admit any postponement, the tenant can do the work, also with the right to reimbursement, without delay of the landlord, but must advise him (1036 CC). Only in this situation the tenant could be

[97] A permission of utilisation is necessary to celebrate the contract (see general introduction to set 1).

[98] Jorge Aragão Seia, *Op. cit.,* p. 202 ff.

[99] For example, the renovation of water-pipes or bathroom floor-tiles (Decision of the Supreme Court 11.11.99); the reparation of the roof, and the painting of doors and windows (Decision of the Court of Appeal of Porto, 22.02.1999).

reimbursed of the expenses with the reparations and would have the right to off-set the costs from the monthly rent rates.

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

As the position of the tenant is strongly protected and he can use possessor means, the landlord does not have the duty to assure the use of the building against third parties acts (1037, 1 CC).

One of the legal obligations of the landlord is to deliver housing exempt from defects (Article 1032). The landlord owes the tenant a guarantee for the juridical troubles (juridical disturb) caused by third persons, pretending to have juridical rights on the rented thing. The factual trouble (*de facto* disturb) is a trouble caused by a big road (public administration) or loud parties. So the landlord won't be held responsible for the troubles caused by administrative authorities, even when these are illegal. In this case the public authority will engage its extra-contractual responsibility towards the tenant and can be prevent from continuing works.[100]

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

There is a general and abstract prohibition, according to public policies on noise and environment. But, besides there is a civil prohibition of affecting someone else' personality rights. Here the assessment is made in each concrete situation and can lead to prohibition of activities that harm personal rights to quietness, to sleep, and so on.

In Portugal, noise is allowed till midnight, except if there are special reasons to forbid it from a sooner hour (for example, a baby, an old or a sick person living in the building). In this situation, the ground for the prohibition is the respect for a personality right. Hence, noise can be forbidden since 7 p.m, for example, or can be forbidden completely.[101]

The neighbours are third persons towards the contract; so, according to the Portuguese regime, the landlord cannot be held responsible by the loud nightly parties organised by the tenants of the neighbouring apartment. T can act by himself, and claim cessation from the disturber, ask for a police order, seek an injunction, or ask for damages. In the concrete situation, it is normal practice to call the police.

The solution would be the same if the neighbouring tenants are tenants of the same landlord.

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[100] It already occurred while the construction of the Metro of Lisboa. Nightly works disturbed neighbors and were stopped by the Court. If all the requirements were fulfilled, the offended people could have claimed for extra-contractual liability.

[101] The Supreme Court ordered to close a discotheque that was allowed by public authority (Decision of 8.5.1998); the Court of Appeal of Porto order to take off an air-conditioned (Decision of 27.04.95); and the Court of Appeal of Lisbon order an orchestra to stop rehearsal (decision of 19.02.1987). In all the cases referred to, personal rights of the neighbors were being affected.

A similar situation was decided by the Court of Appeal of Lisbon (Decision 6/4/1991). *In casu*, neighbours were affected by the smells coming from a rented house. The Court considered that it was the result the usage of the building for unlawful, indecent and dishonest practices and decreed the resolution of the contract, according to article 64, 1, c RAU.

Question 27: House to be used for Specific Purpose

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

I. I will assume that it is possible to install fire protections.

We shall distinguish:

a) It is a mixed contract: to reside and to exercise a medical activity.

It is a duty of the landlord to ensure that tenants use the building according to the purpose of the contract (1031, b CC). However, in tenancy contracts to a commercial, industrial, professional and other activities, parties can stipulate, in writing, that repairs are the responsibility, total or partial, of the tenant. Article 120 RAU states a default rule: in this case, the tenant has the right to compensation. If the work is imposed by the public authorities, according to the purpose of the contract, when are responsibility of the tenant, the landlord's authorisation is not necessary where the tenant carries it out – 120, 2; 121; 123 RAU.

b) It is a residential contract where the landlord will tolerate the exercise of a medical activity.

In this case, the work is responsibility of the tenant. Article 4 allows the tenant to make some changes in the building for his own comfort or commodity. These deteriorations shall be repaired by the tenant before the restitution of the building (unless the parties stipulate to the contrary).

II. It is not possible to install fire protection:

a) Its a mixed contract: to reside and to exercise a medical activity

When the building has a defect that prevents the use for the purpose of the contract or does not has the qualities necessary for that purpose or ensured by the landlord, the contract is considered as not accomplished:

a. if the defect already existed at the date of the delivery of the building and the landlord does not prove that he did not know without fault;
b. if the defect is posterior, when it is due to landlord.

However, the landlord is not responsible if the tenant already knew about the defect when he concluded the contract or received the building.

b) It is a residential contract and the landlord will tolerate the exercise of medical activity

In this case, there was compliance of the contract by L.

Respecting Zoning Law, in principle, the tenant bears the risk that he can use the leased premises for his purposes. He should have been careful and celebrate a tenancy contract under the suspensive condition that the public authority authorised the exercise of medical activity. So, the tenant is bound by the contract even if the business prospects he envisaged in the rented premises are not allowed by zoning rules. Of course, he can always give notice.

Set 6: The Relationship among the Tenant and Third Persons

Short General Introduction

The relationship between the tenant and third people is not, in general, governed by the law of contract, but by the law of torts.

According to Article 1031 CC, the landlord owes the tenant a guarantee for the juridical troubles (juridical troubles) caused by third persons, *e.g.,* when someone pretends to have juridical rights on the rented thing.

The factual troubles (*de facto trouble*) is a trouble caused by a person who is not pretending to have rights on the rented thing (*e.g.* prevents the tenant to have access to the premise). In this situation, the tenant is legitimate to act by his own (Article 1038). Further, he cannot ask the landlord to act instead of him.

The neighbours are always third persons towards the contract. So the landlord only has to guarantee the juridical troubles caused by them, not the factual troubles. The loud nightly parties organised by the tenants of the neighbouring apartment, the excessively loud piano or the smell caused by a dog constitute a factual trouble, so the landlord cannot be held responsible for it. Even if the neighbouring tenants are tenants of the same landlord this one cannot be held responsible.

Question 28: Neighbour Relations

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

Loud music and smells can disturb T's possession and are unlawful.

T can claim cessation from the disturber, may ask for a police order, may seek an injunction, or may ask for damages. The ground for these claims is always a concrete offence of a personally right: the right to sleep, the right to rest, the right of a good quality of life, the right of health, among other. At this point, it makes no difference if T is not the tenant but the owner of the apartment or if T and N are tenants of the same landlord.

T can ask for compensation on basis of civil responsibility for pain and suffering if the music or the bad smell caused a psychic injury, e.g. sleep disorders, or obliged T to leave the apartment and find another place to sleep.

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 causes repair costs of 10000 € and entails T being unable to use two rooms for 2 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?

Tenant's claim for damages can only remedy his losses sustained through the accident. He is not the owner of the house, so he cannot claim damages for the destruction caused by the lorry. He can only claim damages he suffered for not being able to enjoy the use of the premises.[102] T may request compensation for the fact that his full possession and use of the house were disturbed by the accident.[103] The building company is liable for damages on the house, but only L, as the owner of the thing, can claim damages.

L may have a claim for damages under Article 483 of CC. The elements of an action based on Article 483 are satisfied: (i) there must be a violation of one of right or interest, which was (ii) unlawful, (iii) culpable (intentional or negligent), and (iv) there must be a causal link between the defendant's conduct and the plaintiff's harm. The claim for damages against the building company does not pose major obstacles, since the lorry driver acted negligently.

Since the lorry driver is an employee of the building company, T can demand directly the company,[104] and ground his action on Article 500 CC[105] which set out the rule for employer's liability for auxiliaries. An employer is liable for any damage which the auxiliary unlawfully causes to a third party in the performance of his work; then, the company has a regressive claim against the E.

Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

When T has left his rented apartment for holidays, neighbour N notices a strong gas-like smell coming out of T's door. Assuming that the gas pipe in T's apartment has a leak and that a danger of explosion may be imminent, N breaks open the apartment door, thereby destroying his chisel worth 10 € and causing a damage of 200 € at the apartment door. After entering the apartment, N discovers, however, that the gas-like

[102] According to the basic principle of tort law, everyone is obliged to redress the damages he has caused with fault to another person.

[103] Manuel Henrique Mesquita, *Obrigações Reais e Ónus Reais*, Coimbra, 1990, p. 153.

[104] See Decision of the Supreme Court, of 20.05.1999.

[105] João de Matos Antunes Varela, *Das Obrigações em Geral,* I, 7th ed., Almedina, Coimbra, 1991, p. 632.

smell stems from the garbage bin which T had forgotten to empty before leaving. Has N a claim against T or vice-versa?

Under the definition embedded in Article 464 CC there is *negotiorum gestio* someone pursues a matter for another person without having received a mandate from him or being otherwise entitled to do so in respect of him. The *gestor* is not liable for damages if he acts in accordance with the interest and the actual or presumptive will of the principal (Article 466). In the case at hand, N pursued a matter of T, and he was not expressly authorised; however, a gas-like smell can be very dangerous, especially in the summer. The risk is very strong and the absent tenant would also have a very strong interest to check whether there was a gas leak or not, so N is not liable for damages.

Assuming N acted in T's interest and presumed will, he could even claim the reimbursement of expenditures (Article 468). So, the costs for the repair of the broken door have to be borne by T; N can claim € 10 from T for the broken chisel.

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Annex I

State Intervention affecting private tenancy contracts	
State intervention is detailed in basic aspects of this regime	▪ Conclusion of tenancy contracts: form, content and duration; ▪ the fixing and increasing of rents; ▪ modes of termination
access to tenancy	The tenancy relation can be created by: ▪ judicial decision: The beneficiary of the right to a new tenancy contract under Article 90 RAU can ask for specific performance – Article 95, 2 RAU Under Article 1793 CC, in the case of divorce, if the family house is owned by one of the spouses or if it is owned by both, in joint ownership, the Court can rent the house, under request, to the other spouse, taking into consideration the necessities of each spouse and the interest of their children. This contract is ruled by the general legislation of tenancy contracts with residential purpose, but the Court can define special conditions of the contract and terminate it, at the request of the landlord, when this is justified by supervening circumstances. ▪ or by public authority: If coercive repairs are carried out on an empty building by public authority, according to public law (Articles 91 and 107 of Decree-Law 55/99, of 16.12), and the owner refuses to pay them, the public authority can rent the premises (Article 15 RAU) in order to be compensated by receiving the rents. The contract lasts for between three and eight years and shall be stipulated the conditioned rent regime.
Rents	There are three specific forms of rent stipulation: freely agreed, conditioned and supported rent. Conditioned rent is mandatory in many situations (81 RAU) [See introduction to set 3]. The rents are not freely increased (30 RAU) [See question 13]. In practice, the non payment of the rents rarely leads to eviction [See question 11].

	State intervention affecting private tenancy contracts
Modes of transmission of the tenancy contract	Tenancy contracts are transmitted: ▪ By death of the tenant (see question 2) ▪ By divorce. The Article 84 RAU states that in case of divorce or judicial separation, the spouses can agree about the transmission of the position of tenant. If the parties do not reach an agreement, the Court should decide taking into account the patrimonial situation of the spouses; who is in fact occupying the house; the interest of their children; if the tenant was guilty for the separation or the divorce; if the tenancy contract has been concluded before or after the marriage; and other relevant grounds.
How market works	▪ The tenant has a pre-emption right in the case of the sale of the premise (47 RAU); ▪ Rules regarding termination are mandatory (51 RAU); ▪ The contract is mandatory transferred under special circumstances (84, 85 RAU) [see questions 2 and 10]; ▪ The landlord can give notice to extend the building when it is degraded - Legislator supposes that the landlord will repair it and then conclude a larger number of tenancy contracts -, according Article 69 RAU and Law 2088, 03.06.57 (modified by Articles 42 and 43 of Law 46/85, 20.09).
Remedies	▪ The action of eviction has a special regime and is regulated by Articles 55- 61 RAU, not by general procedural legislation; ▪ Suspension of eviction is possible in various situations [See question 6b]; ▪ The tenant has possessor's protection (1037 CC).

	State Intervention affecting private tenancy contracts
Incentives from State	▪ Rent subsidy – 12 DL 321-A/90, 61 RAU; Law 46/85, 20.10; Decree Law 68/86, 27.03 (modified by Law 21/86, 31/07 and Decree Law 329-B/2000, 22.12) ▪ Supported Rent – 82 RAU, Law 166/93, of 7.05. ▪ Decree-Law 7/99, of 8.01, that deals with financial support for the repairs in dwelling of families in need. ▪ The IAJ [Incentivo ao Arrendamento por Jovens] created by Decree-Law 162/92, of 05.08. is a program to support the celebration of lease contracts by youths under thirty years (Article 2, number 1).
Tax benefits	▪ Some of the amount of rent paid is deductible in IRS (Singular Income Impost) ▪ Renovation costs are deducted of the incomes provided by rents. ▪ Exemption of payment of the municipal tax of the municipal contribution to someone that rents a house and stipulates conditioned rent.
Housing Programs	▪ Special program of lodging in Lisboa e Porto (Decree-Law 1/2001, of. 4.01) ▪ Law 91/95, of 2.09 amended by Law 64/2003, of 23.08.2003, deals with urban areas constructed illegally. ▪ RECRIA – [Regime Especial de Comparticipação na Recuperação de Imóveis Arrendados], created by Decree-Law 197/92, of 22.09, and amended by Decree-Law 104/96, of 31.07 and Decree-Law 320-C/2000. This program deals only with leased premises and with the recuperation of degradated ones. ▪ REHABITA – created by Decree-Law 105/96, of 31.07, deals with the support of housing rehabilitation in old urban areas (especially, historic centres)

Annex II

Termination
Agreement of the parties
Expiration
Resolution
Specific Notice

Agreement of the parties
Parties can, at any time, revoke the contract (62 RAU).

	Expiration (Caducidade)
Contracts without time-limit	The tenancy contract terminates in the following situations (1051CC): when the duration agreed on by parties or fixed by law expires (but, in this case landlord cannot avoid the automatic renewal of the contract); if the contract has a suspensive condition, when it is certain that the fact will not occur; if the condition is resolutory, when occurs the fact, to which parties subordinate the end of the contract (in this latter case, only if the contract is not renewed automatically); when the right (e.g. usufruct) or the administration powers of the landlord, based on which he concluded the contract, expires (in this situation, the tenant has a right to a new contract according to Article 66, 2 RAU); when the landlord dies, or if is a corporate body, when is extinguished; with the loss of the building; if the building is the object of a taking by public utility, unless the subsistence of the tenancy contract is compatible with the taking.
Time-limited contracts	Contracts limited in time do not expire without notice at the end of the time limit. Notice might be given by the landlord, with a singular judicial declaration, one year before the deadline; the tenant can give notice, all the time, in writing. This declaration will become effective after 90 days. If parties do not give notice, the contract will be renewed for more three years (Article 100 RAU).

	Resolution (Resolução)
By the landlord	Resolution supposes the breach of an important contractual duty by the tenant, that shatters the relationship between them, in the sense that is not just and reasonable for the landlord to hold on to the contract. Landlords can rescind the contract only in situations foreseen by Article 64 RAU: if the rent is not paid in time; if the tenant uses or allows someone to use the premise for a purpose different to the one agreed with the landlord; if the building is used for indecent and dishonest practices; if the tenant substantially changes the structure of the premise or the

	internal disposition of its divisions; if the tenant receives more than three guess in the building; if the tenant sub-lets or loans, totally or partially the building, without landlord's authorisation; if the tenant receives from the sub-tenant an unlawful rent (the rent cannot be more than the rent paid by him plus 20%); if the premise is not used; if the tenant fails to perform a service to the landlord. The termination of the contract in the cases described as taxative in Article 64 RAU must be decreed by the Court. The action of eviction shall be proposed during the year after the knowledge of the ground that caused eviction, or the cause will expire.
By the tenant	The tenant can rescind the contract if the breach of a contractual duty by the landlord shatters the relationship between them, in the sense that is not just and reasonable for the tenant to hold on to the contract (Article 63 RAU).

	Specific Notice [Denúncia]
By the landlord	Specific notice supposes that the landlord has a legitimate interest in the termination of the lease contract: the landlord needs the premises for himself or his family or has the intention to reconstruct it. Article 69 RAU states that the landlord can give notice (for the term of the duration or of renewal): when he or his descendents in first degree need to live in the premise; when he needs the premise to construct a residence for him or for his first degree descendents; when he wants to enlarge the building or to construct in it, to increase the number of leased premises. In this case, he must already have an architectural plan approved by the competent public authority; when the building is degraded and, technically or economically, is not recommended to be improved. Also in this case, the landlord must have an architectural plan approved by the competent public authority.
By the tenant	The tenant can stop the automatic renewal of the tenancy contract by giving notice (Article 68, 1 RAU). He does not need a justification for giving specific notice; he just has to comply with a certain anticipation (Article 1055 CC): six mouths, if the contract lasts form more than six years; sixty days, if the contacts has a duration between one and six years; thirty days, if the contract lasts for three months to a year; a 1/3 of the duration, if the contracts lasts less the three months. For time-limited contracts, the tenant can give notice, all the time, in writing. This declaration will become effective after 90 days (Article 100 RAU).

Annex III

RENTS	
Free rent	In the free rent regime, the initial rent and its posteriors increase are freely stipulate by the parties. In tenancy contracts for residence with a duration longer than 8 years (in time-limited contracts, with duration till eight years, parties cannot agree on the annual increase of rents) (99, 2 RAU); tenancy contracts for commercial, industrial, professional and other activities not limited in time or of a limitation for more than five years (119, 121, 123 RAU).
Conditioned rent	In the conditioned regime, the original rent/the first rent can not exceed, by the month, 1/12 of the result of tax (actually, 8%) x actual valour of the place. The choice between a free rent regime and a conditioned rent regime, in a first or in a new tenancy contract, is agreed upon by the parties. However, the conditioned rent is the mandatory regime for the following contracts: When the right (e.g. usufruct) or the administration powers of the landlord, based on which he concluded the contract ceases, the tenancy contract forfeits. In this case, the tenant has a right to a new contract (1051, CC, 66, 2 RAU) and the conditioned rent regime is applied; When the tenancy contract is forfeited because the tenant dies, there is a right to a new contract (90 RAU)[106] and a conditioned rent is applied; When the contract is not written, Article 7 RAU imposes the conditioned rent regime; When the tenant dies and the contract is transferred to descendents and relatives by affinity in direct line, the conditioned rent can be applied; the criteria is age or physical limitations (87, 1, 2, 4 RAU); When the first contract is concluded because someone has a right to a new tenancy contract (92 RAU); When the State, its autonomous organisms, public institutes, municipalities, mercies, and institutions of providence, build residential dwellings and then sell these places to the tenants. The next tenancy contract is concluded under the conditioned rent regime (81 RAU); Dwellings built by cooperatives, when these are subsidised or financed by the State; In other cases prescribed by special legislation.
Supported rent	In supported rent regimes, the rents are subsidised and there are also specific rules for calculation and increase (Article 82 RAU and Law 166/93, 7.05.) This regime is applied to places built or bought by the State and by his autonomous organisms, public institutes, municipalities and private institutions of social solidarity with the financial support of the State.

Increase of rents
Every year, by the application of the coefficient determined by Article 32 RAU (average rate of consumer index prices, without housing over the previous 12 months)
Every year, by agreement of the parties, if allowed by law
As a result of building works of conservation and improvement, according to 38 RAU (this increase is cumulated with the annual increase)

When tenant has other residence (81-A RAU)

Annex IV

	Works
Work for ordinary/common conservation	Includes the reparation and the cleansing of the build; work imposed by the Public Administration; work in order to keep the building in the state required by the purpose of the contract and already existent at the moment of its conclusion. The works for ordinary conservation are the responsibility of the landlord and leads to an increase of the rent (12 RAU). When the landlord, after being notified by public authority, does not do the works for ordinary conservation, the tenant can deposit the part of the rent corresponding to the increase foreseen in Article 13 RAU. The municipality can order an administrative eviction and then occupy the buildings, total or partially, in order to do the necessary works (15 RAU). If the municipality does not begin the work in the 120 days after tenant's requirement, the latter can carry out the works on his own account (16 RAU). In this situation, the tenant shall pay only 30 % of the rent at the date of the administrative notification of the landlord for the execution of the work until he is reimbursed for the expense and interest, increased by 10 % for administrative expenses. If the landlord is in delay, and does not carry out the repairs, and on account of urgency, it is not compatible with a judicial procedure, the tenant can do it, and has the right to reimbursement. When the urgency does not admit any postponement, the tenant can do the work, also with the right to reimbursement, without delay of the landlord, but must advise him (1036 CC).
Works for extraordinary conservation	Includes the works to repair construction defects of the building (including hidden effects) or as a result of a casualty and, in general, work that exceeds 2/3 of the net revenue of the building, if they were not caused by the landlord. The works for extraordinary conservation are the responsibility of landlord when: its execution is ordered by the public authority or when parties agree, in a written document that specifies which work must be done. They lead to an increase in rent (13 RAU).
Works for improvement	All other works. They are the responsibility of landlord when: its execution is ordered by the public authority or when parties agree, in a written document that specifies which work must be done. They lead to an increase in rent (13 RAU).

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