

# Romania

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## 1. Introduction

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

The housing situation in Romania is one of the domains still affected by the country's communist past, when housing policy was considered to be one of the main ways to achieve urban expansion and rapid industrialisation. Especially during the 1970s and beginning of the 1980s, massive State-led housing programs produced the now emblematic blocks of flats, dwellings representative for the "new man": the worker – tenant. The legislation on housing adopted at that time (Law No.5/1973 on the management of the housing stock and the regulation of the relationship between landlords and tenants and the Government Resolution No.860/1973 establishing measures for the enforcement of Law No.5/1973) reflected to a certain extent the communist ideology and the idea of the landlord embodied in the State<sup>2</sup>. Nevertheless, the "socialist" law applied only to urban dwellings, whereas any rental of housing in the countryside remained regulated by the provisions of the Civil Code (which contains a title dedicated to the lease contract, including special provisions on the renting of housing). The Civil Code also retained its position as *ius commune*, whenever there was no explicit reference in the special tenancy law.

The fall of the communist regime in 1989 brought important changes in the housing sector and the development of a new legal framework for housing was one of the reforms intended to facilitate the transition to a market economy. One of the first measures undertaken by the post-communist government was the mass-privatisation of the State-owned housing stock<sup>3</sup>. Law no.61/1990 concerning the sale to the population of dwellings constructed with state funds and law no.85/1992 on the sale of dwellings and building space for other purposes paid for by State funds and other public organisations allowed sitting tenants to buy their dwellings under extremely advantageous conditions.

To get the overall view of the specific problems related to tenancy in post-communist Romania, one should mention also the effects of the privatisation process. Formerly state owned companies, had acquired as assets, in the course of the privatisation process, several tenements previously used for housing premises for employees of the

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<sup>2</sup> Especially provisions like those limiting the number of rooms according to the number of family members and constraining the owner to rent the exceeding space (article 60 of Law no.5/1973), those obliging an owner to rent a dwelling which is not used by himself or his family (article 61 of Law no.5/1973) and those providing for the renewal of the tenancy contract at the end of the term foreseen in the contract, without the consent of the owner and even against his own will (point 3 annex 2 of the Government resolution no.860/1973), the owner could evict the tenant only for personal use of the dwelling and under the condition of assuring to the tenant the use of another adequate dwelling (article 64 of Law no.5/1973).

<sup>3</sup> It should be mentioned that during the more liberal 60s and early 70s, Romanian legislation already had allowed for the sale of state-owned dwellings to private citizens.

state enterprise. These buildings became private property of the privatised entities, whilst many tenants became unemployed. Mass-privatisation of housing did not apply to the sitting tenants, tenancy contracts were extended by law, but tenants did not have the right to buy the dwellings (although courts rendered it sometimes possible).

Last but not least the restitution process of housing nationalised before 1989 was considered to be one of the hallmarks of the transition process. The legislation on restitution (Law no.112/1995 for the regulation of the legal situation of some dwellings passed into state-ownership and Law no.10/2001 concerning the legal status of buildings abusively taken over by the State during the period 6 March 1945 - 22 December 1989 established several modes of restitution and created new intricate types of landlord-tenant relationships, requiring special regulation.

A new constitution came into force on the 8<sup>th</sup> of December 1991 consecrating the commitment to democratic values<sup>4</sup>. In the light of the new socio-economic conditions and of the provisions of the new basic law, the validity of the old tenancy legislation was challenged. It was argued that such legislation could be upheld with regard to the housing stock owned by the State, it could however not apply to rental of private housing to the extent that it submits the landlord to constraints specific for laws of “socialist” inspiration<sup>5</sup>. In the early 90s, when the promotion and reinforcement of the respect for private ownership was one of the key tools for passing from a centralised to a market economy, the limits imposed to private property have been assessed in the light of the new constitutional provisions. The relevant constitutional provisions are:

- private property shall be, in accordance with the law, inviolable (article 135(6));
- the right of property is guaranteed, the content and limitations shall be established by law (article 41(1));
- private property shall be equally protected by law, irrespective of its owner (article 41(2));
- the domicile and the residence are inviolable; no one may enter or remain in the domicile or residence of a person without consent; derogation may be permitted for the execution of an arrest warrant or a court sentence, to assure a person’s life, physical integrity or assets, national security or public order and to prevent the spread of an epidemic (article 27)
- the State is bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens (article 43).

After the referendum organised on 18-19 October 2003 the Constitution has been amended so as to reinforce the provisions on property. Thus, according to the new article 135 (5) limits to the inviolability of private property may be brought only through organic law. Article 41(2) has been amended so as to ensure that private property is equally protected and guaranteed by law. It is also relevant to note that article 27 enumerates now the execution of judicial resolutions among the derogations from the fundamental principle of inviolability of domicile.

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<sup>4</sup> The first article paragraph 3 of the Constitution sets the general principle: “Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed”.

<sup>5</sup> Francisk Deak, *Tratat de drept civil. Contracte speciale*, Editura Actami, Bucuresti, 1996, p.169

In application of these constitutional principles, corroborated with the provisions on property of the Civil Code, the Constitutional Court has settled that the legislature may adopt rules aimed at harmonising the fundamental rights of citizens (property right and right to housing). Thus, the legislature “is entitled, when setting the content and limits of property, to take account not just of the interests of the landlords, but also of those of the tenants, to which it has to secure the right to housing, establishing thus an equilibrium between the constitutional commandments”<sup>6</sup>. Thus, it was considered that tenancy law adopted under the communist regime was still valid and compatible with the new constitution.

Subsequently it was nonetheless acknowledged that Law no.5/1973 was not corresponding to the prevailing socio-economic situation and the article 7 of law no.17/1994 (concerning the prolongation or renewal of certain rental contracts) revealed that within a mere 30 days of its publication in the Official Journal, the Government was required to elaborate and submit to Parliament the draft of a new tenancy law. The deadline was not complied with, and tenancy relationships were finally regulated by law no.114/1996 (that will be referred to as the Housing Act), which establishes general framework principles not just for tenancy relations but for general housing policy. The Housing Act was inspired by the French law of the 06.07.1989.

In the statement of reasons accompanying the draft law submitted to the Senate, the Government stated its purposes: alignment to European practices in the field of minimum housing standards, the involvement of public local authorities in social protection measures for disadvantaged categories of the population, the stimulation of the building of dwellings through various economic levers, the application of a system for the calculation of rents that allows for the coverage of the expenses required for the maintenance and reparation of the buildings and the alignment of standards for public housing to European norms<sup>7</sup>. The preamble of the Housing Act lays down two principles for the national housing policy:

- Every citizen has the right to free and unrestricted access to housing.
- Housing (construction, use and management) is in the national interest and represents a major long-term goal for the public and for both central and local government.

Although these principles remained unchanged, the Housing Act itself was affected by the legislative instability characteristic for the post-1989 legal environment<sup>8</sup>. Moreover, tenancy law was supplemented by another piece of legislation, reflecting the peculiarities of the current rental market: emergency ordinance no. 40/1999, subsequently amended and approved by law no.241/2001. Emergency ordinance no.40/1999 has as its object the protection of tenants and the fixing of the rent for tenements and is partly a response to the numerous litigation arising from recovered nationalised housing. The courts, although not uniformly, had preponderantly upheld

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<sup>6</sup> Decision no.30/1994 of the Constitutional Court

<sup>7</sup> See Alina-Iuliana Tuca, Florentin Tuca, *Constructia, inchirierea si administrarea locuintelor*, ALL Beck, 2000, p.12

<sup>8</sup> The law was amended or extended by the following legal acts: the emergency ordinance no.40/1997 for the amendment of the Housing Act, law no.146/1997 on judicial taxes, law no.196/1997 approving and modifying ordinance no.40/1997, the emergency ordinance no.44/1998, law no.145/1999, emergency ordinance no.127/1999 for the establishment of certain fiscal measures, emergency ordinance no.22/2000 and emergency ordinance no.98/2000.

the rights of sitting tenants against those of the former owners. The new ordinance intended to put some order into the fragmented and ambiguous legislation, especially after the decision by the European Court on Human Rights (case Brumarescu vs. Romania no.28342/1995), which emphasised the importance of the restitution of nationalised property and highlighted the rights of landlords and the respect for property, without actually considering the protection of tenants.

To conclude this introductory part, we may say that the current legal framework for renting housing in Romania has been substantially affected by the political and socio-economic situation in the country. Case law and legislation reflect the tensions accompanying the transition to a new regime. Conflicts arise from old mentalities based on overwhelmingly state-guaranteed housing rights, on one side, and the hallmark of the transition to a market economy – inviolable private ownership rights, on the other side. Courts and legislature oscillated sometimes between these two extremes, and it is only through the Housing Act and the recent legislation on restitution that a still fragile equilibrium between the rights of landlords and those of tenants is under way. Scrutiny of tenancy law in the light of the new constitutional principles has become a constant after 1989. Also, the influence of the European Convention on Human Rights is increasing and Romania's ambition to accede to the European Community speeds up its rapprochement to European standards in the field of housing.

#### b) Basic structure and content of current national law:

##### aa) Private tenancy law

Romania is a unitary and indivisible state and legislative competencies exist only at national level. Thus, current tenancy law is entirely state law. Although the powers, duties and responsibilities of local authorities with regard to housing-related issues have increased over time, there is no rule-making power at local or regional level with regard to relationships between landlords and tenants.

Tenancy law has been traditionally analysed as contract law. Under current, but also under "socialist" legislation the contract for rental of housing was considered a variety of the lease contract (*contractul de locatiune*). It is primary subject to special statutes (the Housing Act and Emergency Ordinance no.40/1999 for the protection of tenants) and subsequently to general private law, according to the principle *lex specialis generalibus derogant*. Recourse to general private law is made constantly in courts, so that we might appreciate that there is legal certainty. A certain degree of instability appears because of the frequent amendments of the special statutes, which sometimes alter also general civil law. The provisions of the special statutes are mandatory; most of the general rules in the Civil Code have a dispositive character, so that they apply to the extent that the parties to the tenancy contract have not agreed otherwise.

Special tenancy law consists, as already mentioned, of the Housing Act (Law no.114/1996) and the ordinance on the protection of tenants (emergency ordinance no.40/1999). The Housing Act regulates social, economic, technical and juridical aspects related to the construction and the use of housing and provides for all types of rented dwellings. Chapter three is dedicated to tenancy contracts. It introduces the requirement of a written contract that has to be registered with the local fiscal body.

The contract must contain several elements enumerated by the law<sup>9</sup>. The role of such an enumeration is not to fix rigidly the elements of the contract, but rather a recommendation to the contractual parties to take into consideration important aspects, so as to ensure contractual equilibrium.

The statute declares as void *ipso iure* any contractual provisions that

- 1) oblige the tenant to pay in advance an amount of money for repairs which constitute an obligation of the landlord;
- 2) foresee the collective responsibility of the tenants for the degradation of the elements of the building or the installations and objects pertaining to it;
- 3) oblige the tenant to conclude an insurance for damages;
- 4) exempt the landlord from his duties as resulting from the law (the prohibition refers especially to the obligations of the landlord flowing from article 28 of the Housing Act, but also from other mandatory tenancy law provisions);
- 5) allow the landlord to obtain benefits in case of infringement of the contract.

The cancellation of the contract before the agreed term may be requested by the tenant with a notice of minimum 60 days or by the landlord in the following cases:

- the tenant did not pay the rent for three consecutive months
- the tenant caused damage to the tenement or alienated parts of the installations or pertaining objects
- the tenant behaves in a way that makes cohabitation (living together) impossible or precludes the normal use of the building
- the tenant did not comply with the contractual provisions (this provision repeats the general rule in articles 1020 and 1021 of the Civil Code consecrating the possibility of judicial cancellation of the contract in case of non-fulfilment of the contractual obligations<sup>10</sup>).

The cancellation may be also requested by the association of landlords, in the case when the tenant did not pay for three months his contribution to the common expenses (if this contribution has been foreseen as one of his duties in the tenancy contract).

Law no.114/1996 allows for the tenant to sublet the dwelling, but only with the previous written permission and under the conditions set by the landlord. The sub-

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<sup>9</sup> The address of the tenement, the dimensions of the dwelling and common spaces, the surface of the court/garden area, the value of the monthly rent, the rules for its modification and the payment modalities, the amount paid in advance for the rent, place and conditions for the receipt and restitution of the keys, the duties of the parties as to the use and maintenance of the spaces that form the object of the contract, an inventory of the installations and objects pertaining to the house, the date of the coming into force of the contract and its duration, the conditions regarding the exclusive and joint use of the spaces owned in common, the persons who will live together with the nominated tenant as well as other clauses commonly agreed by the parties.

<sup>10</sup> There are three conditions necessary to cancel a contract: 1) total or partial non-compliance by one party to a contract (in the latter case, the partial non-executed part of the contract should have been considered essential at the time of the conclusion of the contract – the judge is free to appreciate to what extent non compliance is important and serious, also taking account of the reasons behind it, and thus capable of justifying the cancellation of the contract); 2) non-compliance should be in principle imputable to the party; 3) the debtor of the obligation should have been notified prior to the institution of court proceedings.

tenancy contract must also have a written form and be registered with the tax authorities.

The housing statute regulates also the situation when the tenant - the concluding party to the contract leaves definitively the dwelling or dies. The tenancy contract may continue for the benefit of the wife/husband if she/he had lived with the initial beneficiary of the contract, the descendants and ascendants if they had lived together with the initial beneficiary, or it may continue in the benefit of other persons that had the same domicile (dwelling) at least for one year and who were mentioned in the tenancy contract.

As regards the rent, the statute stipulates that it must cover the expenses relative to management, maintenance and repairs, land and building taxes, the redeeming of the investment according to the standardised duration of the building established through regulation, as well as a certain profit (benefit) subject to negotiation by the parties. A maximum ceiling is foreseen only for state-owned tenements and is stipulated through a special statute.

The basic legislative instrument for ensuring the protection of tenants is the Emergency Ordinance no.40/1999 regarding the protection of tenants and the fixing of rents for dwellings. It was approved and amended by Parliament through the Law no.241/2001 and subsequently amended. The provisions of this normative act have to be read together and supplemented with the measures contained in the Statutes regulating restitution of nationalised buildings (law no.112/1995, law no.10/2001 and subsequent amending acts). It was adopted as a consequence to the increasing number of problems associated with the restitution of dwellings.

The ordinance provides for the mandatory extension or mandatory conclusion (for a period of 3 or 5 years) of tenancy contracts in certain situations: state-owned tenements and tenements that made the object of restitution of nationalised properties or became the property of private companies as a result of the privatisation process. It does not affect private tenancy relationships that do not fall within the limitative enumerated categories - such parties may agree without any constraint on the duration of their contract, the level of the rent. Also, the extension of the contract does not apply in other circumstances characterised by a certain behaviour of the tenant (e.g. he has become owner himself, he refuses to take over another dwelling offered to him by the former owners, their heirs or the local authority, he has sublet or modified, partially or totally, the use or internal structure of the dwelling without the landlord's prior approval). The extension/conclusion of the contract occurs either *ipso iure* – in the case of state-owned dwellings, or at the request of the tenant.

Ordinance 40/1999 foresees the right to renewal of the contract at the end of the extended period. This may be declined by the landlord only under certain circumstances (the dwelling is needed to accommodate family members, the dwelling has to be sold as a result of legal action, the tenant did not pay the rent for at least three months). The local authorities have the obligation to offer suitable accommodation to the tenants losing their dwellings in this way.

As regards the level of the rent, the ordinance establishes an upper ceiling, of 15% or 25% of the family's monthly net income dependent on whether the family's monthly net income is below or beyond the national average. Tenants are required to inform the landlord of income changes, however no conditions are set on how and where the landlord can request additional information on the tenant's family income. The

landlords are exempted in these cases from the payment of taxes on land and buildings for the whole duration of the contract.

During the execution of the contract, the rent may be increased only for the contracts having a duration over 1 year and if this wasn't prohibited in the contract. A mandatory procedure is established for increasing the rent.

It is important to note that there is frequent amendment of special tenancy legislation in Romania, which sometimes affects very important aspects of the tenancy contract (for instance the prolongation period provided for certain categories of dwellings by emergency ordinance no.40/1999 has been amended from 3 to 5 years). The intervention of Government in the legislative acts through the wide spread practice of emergency ordinances has an important bearing on legal certainty<sup>11</sup>. The recently adopted legislation on the restitution of property and the relationships between tenants and landlords of recovered houses may ensure, at least theoretically, some legal certainty as regards these situations. However instability will be for long time perpetuated by litigation (already thousands of cases were referred to the courts). Nevertheless this uncertainty is affecting only the situations related to restitution of dwellings. As for the general private tenancy law, we may consider that, in principle, there is legal certainty and uniform case law.

General private law stems from Romania's Civil Code, which was elaborated in 1864 on the basis of Code Napoleon (with its subsequent amendments), the project for the Italian Civil Code, Belgian mortgage legislation (from 1851) and old Romanian Civil Laws (Codul Calimach, Codul Caragea).

The third title of the third book of the Romanian Civil Code (articles 942-1204) constitutes the *ius commune* for contract law<sup>12</sup>. The general rules on the lease contract contained in the seventh title of the third book of the Civil Code may also be qualified as *ius commune*. The aforementioned title dedicates its second chapter to special rules common for the lease of buildings and rural land. The third chapter provides for specific rules for renting housing and has to be regarded as *lex generalis* with respect to the Housing Act.

The civil code does not require the written form for the tenancy contract, but explicitly rejects evidence by witnesses in case of an orally concluded contract that has not been carried out (executed). Sub-tenancy is allowed, if it is not expressly forbidden in the contract. Rights and duties of both landlord and tenant are prescribed by dispositive norms. As regards the period of the contract, it may be limited and the contract will be considered terminated at the end of the time limit, without the need for further notice. In case of a contract unlimited in time, the Civil Code gives the right to cancellation to

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<sup>11</sup> Ordinances are issued by the Government on matters pertaining to statutory laws (such delegation of legislative power to the Government is permitted only with regard to subjects pertaining to ordinary laws, not those that constitute the realm of organic laws – which have to be adopted by qualified majority and concern the area enumerated in article 72 (3) of the Romanian Constitution), on the basis of a special enabling law by the Parliament (which sometimes in very general). They come into effect on issue, but are subject to subsequent approval by Parliament. Under special circumstances, the government may issue emergency ordinances, which enter into force only when submitted for approval to the Parliament. The recent amendments to the Constitution try to address the abusive use of this instrument by providing more strict conditions and procedures (see amended article 114).

<sup>12</sup> It contains partly mandatory, partly dispositive provisions on the definition of contracts, the essential requirements for the validity of contracts, the effects of a contract on the parties and on third parties, interpretation of contracts, the liability regime, the modalities, conditions of a contract, rules governing offer and acceptance, general contractual obligations, termination of contracts, proof of contracts etc.

both parties, under the condition of the observance of the time limits imposed by local customs. If, at the end of the time limit of the contract, the tenant remains and is allowed to have the possession of the dwelling, the tenancy will be considered renewed (*tacita reconductio*). The civil code further stipulates that the contract does not end with the death of the landlord, nor that of the tenant and has to continue even in the case of subsequent purchase of the tenement by a third person, if the parties to the tenancy contract had not agreed to the contrary. Chapter 3 of this title enumerates in a more detailed way the rights and duties of the parties to a tenancy contract.

The Civil Code, in the second book, third title, second chapter, regulates also another form of “lawful possession” of dwellings: the habitation right – a real property right, having a similar legal regime as the usufruct right. The civil code regulates also the *commodat* contract (article 1561), which may consist of the free loan of a dwelling, nonetheless such alternative is rarely used in practice.

Consumer protection legislation does not interfere with private tenancy law. The Romanian legislation in this field (Ordinance No.21/1992 concerning consumer protection, amended and extended by Ordinance No.58/2000) applies to the “commercialisation” of products and services, thus eventually it may be used in cases of commercial housing renting.

Tenancy is a special contract analysed essentially under contract law, the position of the tenant has to be interpreted as an obligatory right.

#### bb) Social regulation affecting private tenancy contracts

The Housing Act establishes the legal framework not just for the private housing–rental sector, but also for all types of rented dwellings. These are:

- Social housing – dwellings with subsidised rent, allocated to individuals or families whose financial position would not otherwise allow them access to tenements rented on the market; it is public property of the local authorities;
- Official residence – dwelling for public servants or employees of certain institutions or businesses, allocated under the employment contract, which may be financed by the State, local authorities or by businesses;
- Intervention dwelling – for employees of businesses who, by their employment contract, perform activities or jobs requiring their presence permanently or in case of emergency, inside or in close proximity to the business premises, built under the same conditions as those stipulated for official residences;
- Protocol residence – tenement for persons elected or appointed to certain posts or public positions, exclusively for their term of office, it is state property;
- Emergency dwelling – intended as temporary accommodation following natural disasters or accidents, or where homes have been demolished to permit the construction of public utilities, or rehabilitation work which cannot be undertaken while homes are occupied; it is financed and built under the same conditions as social housing;
- Holiday residence – a dwelling temporary occupied as a secondary residence, for rest and leisure.

The Housing Act contains special provisions for each of these categories. These provisions are *lex specialis* and thus, may derogate from the general rules on tenancy prescribed by the same piece of legislation.

As already mentioned, State intervention in housing was the norm until the 90s when the State somehow started to withdraw from its overwhelming position in favour of the emerging market mechanisms. Nevertheless the tendency remained to look to the Government for leadership with regard to both, ensuring a well-functioning free market and providing direct support for those who have no effective access to the market. Although the Guiding Principles for the National Strategy for Housing, adopted by the Romanian Government in 1992, promoted among other major objectives the development of a private rental sector, in practice no efficient incentives have been given to encourage consistent private investment in housing.

Housing provision is the general responsibility of the local authorities and is financed from the local budgets as well as from central budget programs. However, judged by the size of public expenditure, housing seems neither a local nor a national priority. The destination of budget allocations on housing reflect the prevailing view in official circles that “the only major housing problem requiring government intervention is the need to ‘kick-start’ the market in house purchases: all else can be left to market forces”<sup>13</sup>.

Public spending is nevertheless not restricted to direct budget allocation to housing, but takes a variety of forms, which sometimes involve sums larger than State investment in housing itself. The notorious case consists of heating energy subsidies that go both to the utility companies to cover their losses from price controls and arrears in payments and to households, to compensate for the increasing heating tariffs (the so-called winter-subsidies). Other forms involve opportunity costs of artificially low public rents, State land provided free for development, tax-free periods following privatisation, that would not necessarily be qualified as a market-oriented approach.

Housing policies in Romania have been qualified as poorly targeted, as they do neither actually stimulate investment among those elements of the population that having resources need incentives for investing in housing, nor provide housing to those who are not in a position to afford suitable dwellings in the market. Instead recent reforms in the housing sector concentrate around the activities of the National Housing Agency whose activity mainly pursues the building of new good-quality dwellings (undoubtedly a necessity, but not an urgent priority). Current policies on the building and sale of dwellings at low prices (without providing any procedure to check whether the buyer can afford also to buy at market prices) occurs at the expense of social housing, for which an increasing demand was predicted for the next years.

The situation with regard to public spending related to the rental market also reflects outdated mentalities, difficulties of political actors in recognising the complexities of the housing market and setting adequate priorities. The country profile by the United Nations Economic Commission for Europe summarises the situation as follows: “ Poor targeting is also evident in the allocation of subsidies to the public rental stock and utilities, when the subsidy (of either rents or utility bills) is applied across the board irrespective of the household income. Basically, the rental stock is subsidised through rent controls, which is commonly recognised as an obsolete method. Even though the public rental stock in Romania is very small by any European standards – which means

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<sup>13</sup> United Nations Report p.95, [www.un.org](http://www.un.org)

that rent controls do not greatly interfere with the owner-occupied sector – it can still hinder the growth of the private rental sector, limit the housing mobility of tenants, and – most importantly – adversely affect the physical condition of the rental stock to which it is applied”<sup>14</sup>.

We recall that the basic interference of private tenancy law with public measures aimed at the protection of tenants results from emergency ordinance no.40/1999 as approved and amended by law no.241 from 16.05.2001. The tenants protected by this piece of law are those that inhabit dwellings owned by the state, the tenants in apartments that were the object of restitution to former owners and those sitting in apartments that after 1990 became the property of commercial companies as a consequence of the privatisation process. The ordinance provides for the extension of tenancy contracts for these categories, it also stipulates a right of the tenant for the renewal of the contract for the same period, after the expiry of the extended period. The ordinance sets maximum thresholds for the rents (thresholds that are derisory with respect to rents in the market) and, as compensation, exempts landlords from paying land or building taxes for the whole duration of the contract.

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

According to the 2002 census, the total number of dwellings exceeds that of households (there are 91,1 households corresponding to 100 dwellings). It may not be inferred from such a statistic that there is no housing shortage, rather it reflects overcrowding and the fact that the size of the dwellings does not respect current standards. Also, it does not say anything about the poor quality of the dwellings<sup>15</sup>, the fact that they often constitute just a shelter without offering decent living standard.

With regard to the owners of the housing, quite surprisingly, despite of nationalisation and expansive urbanisation, the share of the State in the housing stock amounted by 1990 only to 32,7%, while the rest still was in private hands. After 1990, as a consequence of restitution of former properties and of the privatisation process (the sale to sitting tenants of state-owned dwellings, normally in blocks of flats, and the acquiring of dwellings as an asset by privatised companies), the private share in the housing stock increased to 94.6% in 1999, and this trend seems to continue.

The rental market is emerging slowly, but it is difficult to gauge its size, probably much of it is hidden). A survey done by the Institute for Quality of Life in 1999 appreciates that in Bucharest, about 3% of households rent units from private landlords, and that an additional 1.8% are “rent-free tenants”. The size of the rental market depends very much on the geographical position, on which is dependent also the level of the rent. The market may be divided in two segments. On one side there is a luxury market operating in hard currencies and at rent instalments comparable to those in the EU. On the other side, there is a larger market offering a range of options, that, although not exclusively, still prefers to operate in foreign currencies; the rent level still is high with respect to average salaries (e.g. the rent for a two rooms apartment in big cities is around 130-150 euros, which is more or less the value of the national average income).

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<sup>14</sup> United Nations Report, p.96

<sup>15</sup> It is held that in 20 years about 80% of all dwellings will probably come to the end of their life unless serious measures are taken. See United Nations Report p.21 and following

The current role of owners' and tenants' associations is still limited, sometimes restricted to that of representational bodies when negotiating – especially with utility companies. Although the Housing Act provides for the mandatory constitution of condominium types of associations by the owners in multi-family units, this has not yet been translated into reality for all condominiums. The main activity of such owners associations is that of managing the blocks. In practice, the manager is usually a retiree – a volunteer willing to collect payments from the residents – situation that would indicate that mentalities had not changed and homeowners in blocks of flats still organise themselves like tenants in state-owned dwellings. The Housing Act also actually provides the possibility for the constitution of tenants' associations, whose function is to represent tenants' interests in relation with the owners as well as with any other natural or legal person (article 37). The tenants' associations do not seem to be very efficient either. That is also the reason why we cannot really talk about standard contracts prepared by such associations.

There are no alternative mechanisms for resolving disputes between landlords and tenants, if they were not provided in the contract. Thus tenancy law is normally enforced in courts. This has to be read keeping in mind Romanians' general mistrust with respect to the judiciary. The last resort appeal to judicial settlements is reflected also in the nature of the claims brought before courts, which concern especially the main obligations resulting from the tenancy contract (the possession, damage caused to the parties, the payment of the rent, repair works) or the allocation of the tenement in case of divorce or the death of the tenant. Most of the litigation on tenancy issues during the last years had as an object the relationship between tenants and former landlords that attempted to recover their nationalised properties

There is no special jurisdiction for tenancy law, the ordinary courts – i.e. civil courts are competent. There is a framework in place that ensures effective access to courts for tenants and legal fees are not prohibitive. Procedures last around 1.5 –2 years till the parties may rely on a title counting as *res judicata*. Legal assistance is not compulsory, but advisable due to the intricacies of rapidly changing laws. Often it is however quite expensive. Statutes are sometimes contradicting and frequently modified, whereby no consolidated versions are available. Further, case law is not systematised and hardly ever referred to by the courts or the doctrine.

## 2. Questionnaire

### Set 1: Conclusion of the Contract

#### 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?

The dominant principle in Romanian contract law is that of “consensualism”, that means that the natural and legal persons have the right to freely conclude contracts. That impinges on both, the choice of the other contracting party and on the content of the contract. The freedom of contract is limited by public order and good morals, of which the infringement is sanctioned with the absolute nullity of the contract. Public order is understood largely as all mandatory provisions contained in public and private law aimed at protecting the institutions and basic values of society, ensuring the development of a market economy and social protection of all persons<sup>16</sup>. The content of the concept “good morals” has been varying in time and space, and constitutes the realm of case law. Courts have considered as being contrary to good morals, contracts disregarding the respect due to human being, those whereby both contracting parties pursued immoral benefits, those contrary to sexual morality<sup>17</sup>.

These principles apply to tenancy law, which does not contain any special provision with regard to the choice of the tenant. Article 21 of the Housing Act stipulates that rental of housing is brought about on the basis of the agreement between the landlord and the tenant. The conclusion of the contract is thus subject to the general rules of contract law, including those on offer and acceptance. The landlord may make a rental offer to the general public (offers made in newspapers are termed offers made to absent persons, as opposed to offers made to present persons, to which slightly different rules on acceptance and conclusion of the contract apply). As a principle, the landlord is free to choose the tenant according to his own criteria and a broad interpretation of the freedom of contract, of course while observing public order and good morals.

Romanian legal doctrine has developed several theories on the legal force of a contracting offer and the liability of the offeror in case of its unexpected revocation.

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<sup>16</sup> See Liviu Pop, *Drept civil. Teoria generala a obligatiilor. Tratat*. Editura Fundatiei Chemarea, Iasi, 1994, p.35

<sup>17</sup> See I. Albu, *Drept civil. Introducerea in studiul obligatiilor*, Edit. Dacia, Cluj-Napoca, 1984, p.160

Besides the theories on the offer as a unilateral legal act or as a pre-contract, which had hardly ever an application, the most successful theory was based on tort law<sup>18</sup>. According to this theory, the unexpected recalling of an offer constitutes an illicit fact causing damage and entailing liability for damage due to misfeasance or nonfeasance (*responsabilitate delictuala*). A variant of this theory explains the liability of the offeror on the grounds of misuse of law (*abuz de drept*). But, irrespective of whether the unexpected revocation of an offer is linked to the exercise of a right or the misuse of law, if it produces damage it may be qualified as an illicit act and triggers the liability of the offeror on the basis of article 998 Civil Code<sup>19</sup>. The principle is that legal redress should be in kind, so that the person suffering damage is put in the position she would have been in if the tort had not been committed. According to legal doctrine<sup>20</sup>, the most suitable remedy would be to consider the unexpected revocation of the offer as inoperative and leave it without legal effects. Consequently courts may decide that the contract has been concluded.

Although we could not find any evidence in case law, we consider that this theory may apply also whenever a landlord unexpectedly recalls its offer to rent an apartment. The tenant will have a claim based on tort law, not on contractual law. If proof is made of the existence of damage, of an illicit act of the landlord, the causal link between the illicit act and the damage, as well as of the culpability of the landlord, courts may decide that the contract has been concluded despite the refusal of the landlord or, in case that this is not anymore possible award compensation to the tenant.

As regards, the relationship between the constitutional rights and civil law, we observe that several constitutionally consecrated fundamental rights constitute also subjective civil rights. Such rights rank at the highest in the hierarchy of norms and should be given prevalence, by observance of the concrete circumstances. Further, the understanding and interpretations given by the Constitutional Court to these fundamental rights have to be duly observed not only by the courts but also by the other participants in the civil circuit. The Constitutional Court is competent to deal only with violations of constitutional principles through legislative acts. It is for the ordinary courts to assess such violations stemming from relationships between private parties.

The issue of discrimination is subject to law 48 of 16 January 2002, approving and amending Government Ordinance no.137/2000 (the law has been adopted in order to implement Directive 2000/3/EC). Article 1 paragraph 2 letter e) indent (iii) explicitly stipulates that the principle of equality between citizens, of exclusion of privileges and discrimination is guaranteed also with regard to the exercise of the right to a dwelling. Paragraph 4 of the same article further stipulates that every natural and juridical person has the duty to observe this principle, which applies to persons who are in comparable situations.

- a) In principle, the landlord has the discretion to reject a prospective tenant on the ground that he has a numerous family. This will be considered legitimate as long as justifications like overcrowding or potential disturbance of neighbours can be

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<sup>18</sup> Liviu Pop, op.cit., p.50

<sup>19</sup> Article 998 of the civil code provides that any act of an individual causing damage to another, obliges to its remedy (legal redress) by the person responsible for the damage.

<sup>20</sup> T.R. Popescu, P.Anca, *Teoria generala a obligatiilor*, Ed. Stiintifica, Bucuresti 1968, p.73; C. Statescu, C.Barsan, *Tratat de drept civil. Teoria generala a obligatiilor*, Universitatea Babes Bolyai, p.62-63.

reasonably invoked. Otherwise, theoretically the tenant would have an action for damages against the landlord based on tort.

- b) Such ground of discrimination would be contrary to the public order. Non – discrimination and equality of rights are constitutional principles enshrined in articles 4 and 16 of the basic law. Thus, “Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin” and “citizens are equal before the law and public authorities without any privilege or discrimination”. Moreover, the prospective tenant would have a claim based on Law no.48/2002 (published in the Official Journal no.69/31.01.2002) approving Emergency Ordinance no.137/2000 on the prevention and sanction of all forms of discrimination. This law implements to a large extent two components of the *acquis communautaire*: directive 2000/43/EC and directive 2000/78/EC. Governmental resolution no.1194/2001 provides for the organisation and functioning of the National Council for Fighting Discrimination (*Consiliul National pentru Combaterea Discriminarii*) that was supposed to take up its activities during the second half of 2002.
- c) – d) These grounds might be legitimately invoked by the landlord when choosing his tenant.
- e) A person not having full capacity may not be part to a tenancy contract. This mandatory provision results from articles 949-950 Civil Code and Decree no.31/1954 on the legal capacity of natural and legal persons; their infringement is sanctioned with the nullity of the contract. A person without full capacity is normally under custody and the contract may be concluded by the custodian on his behalf. The refusal to conclude the contract on the ground that the prospective tenant is a disabled person may amount to discrimination and remedies may be claimed on the basis of law no.48/2002. However, the landlord may invoke the fact that the tenement would not be suitable for such a person.

*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?*

In this situation, the contract has been concluded. The landlord may avoid the contract before the expiration of the term agreed on, only under the circumstances allowed for in the Housing Act. That is that he has to demonstrate that because of the situations exemplified under a)-e) damage has been caused to the tenement or cohabitation has been made impossible or the normal use of the building has been precluded. Further, L has at hand the more general ground for invoking non-compliance with the contractual provisions. Nevertheless, in order to engage contractual liability, L has to demonstrate that the prevention of the situations under a)-e) has been considered an essential clause at the time of the conclusion of the contract (this has to result from the contract and may not be proven by testimony). For claiming damages, L has to demonstrate that he suffered a loss and there is causal link between T’s illicit fact of hiding the true situation and the caused damage.

L could also have recourse to general tort law in order to obtain redress. There is no such tort as deceit or *artlistige Täuschung* in Romanian civil law and the form or

degree of T's guilt do not present any practical interest in civil law, as in principle damages must be fully compensated (*restitutio in integrum*) for any unlawful act.

With regard to the situation described at d), if the contract has been concluded directly by the person without full capacity, it has to be mentioned that the absence of the power of discernment (typical for persons without full capacity) does not necessarily entail the absence of consent (we are in the presence of an error to consent – *viciu de consimtantant*). As a consequence, the contract is subject only to relative nullity; the annulment of the contract has to be judged from the perspective of the protection of the person without full capacity<sup>21</sup>.

### 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?*

The Housing Act stipulates that the tenancy contract should contain, among other provisions, the enumeration of the persons that will live together with the holder of the contract. We argue however that such a norm should not be interpreted rigidly, so as to exclude any right for other persons to be taken into the dwelling (except for sub-rental, where special rules apply). On the contrary, as long, as it was not prohibited through the contract or expressly stipulated that the tenant should ask the landlord for permission, he may take whomever he wants into the apartment, without prior consultation of the landlord.

Such a solution would result from the case law concerning the previous law on tenancy (law no.5/1973), which made any tenancy rights dependent on the nomination in the contract of the persons taken into the dwelling. This rule has been nuanced and interpreted by the courts so as to confer tenancy rights also to the husband that came into the dwelling of the other one, to the children born after the conclusion of the tenancy contract, the minor adopted after the conclusion of the contract and even to the full aged children. Moreover, the Housing Act allows for the continuation of the tenancy contract in favour of the husband, children and parents who lived together with the holder of the contract, without any further requirement. Such a right exists also for the benefit of third persons (like boyfriend, homosexual partner), nevertheless only if he lived at least one year with the original tenant and was nominated in the contract (the registration in the contract does not have to date back one year). It may be induced that the presence of third persons in the dwelling is allowed and the general private law principle that everything is allowed that is not expressly prohibited is incident. Furthermore, also the spouse and/or other family members do not, as a general rule,

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<sup>21</sup> T.S., sc., dec.nr.1998/1989, Dr. nr.7/1990, p.66

become *ipso iure* parties to the contract, it is only in certain situations that the law substitutes them to the tenant.

Of course, this does not entail any special rights based on the tenancy for the persons who were not included in the contract, except this was provided by law. Such persons are called “tolerated” and may effectively live in the apartment, but without acquiring in this way a title<sup>22</sup>. So, the landlord or administrator of the dwelling has no obligation with regard to them.

If the persons mentioned above have caused damage to the tenement or alienated parts of the installations or pertaining objects, or if they behave in such a way that makes cohabitation impossible, the landlord is entitled to ask for the cancellation of the contract. According to the principle *qui potest maius potest et minus*, L can ask T only to eject the non-nominated tenants without cancelling the contract, nevertheless this does not give T any explicit claim he might oppose in an action of eviction.

The Housing Act understands the rent to cover expenses related to the administration, maintenance and reparation, taxes, redeem of investments made as well as a profit negotiated by the parties. In case that the landlord incurs higher costs due to the increased number of tenants (utilities are normally subject to direct contracts concluded by the tenants) he is entitled to ask for a higher rent on grounds of unjust enrichment. If no such additional costs appear, the landlord cannot simply ask for an increase of his profit.

The Annex I to the Housing Act contains the minimum requirements for dwellings, including the minimum requirements as regards available space for each inhabitant of an apartment.

*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.*

Article 27 of the Housing Act stipulates expressly that in case of the death of the tenant, the tenancy contract will continue in the benefit of the spouse or the husband, the descendants or the ascendants who were living together with the tenant. This right of the family members to continue the contract under the same conditions is irrespective of their nomination in the initial contract. It should be noted that the legislature uses the more general terms of ascendant and descendant so as to comprise more family members than the children and parents (e.g. grandparents, grandchildren).

As for the boyfriend, the homosexual partner and any other third person, the continuation of the contract is possible if two requirements are fulfilled: the person had lived together with the tenant for at least 1 year and he has been nominated in the contract. In case that these cumulative conditions are not fulfilled, the tenancy contract is considered terminated after 30 days from the registration of the death of the tenant.

Similar provisions exist in Emergency ordinance no.40/1999 concerning the protection of tenants (article12), legislative act that applies as already mentioned only certain categories of tenants. Whilst the provision regarding third parties is identical, there is however an additional requirement as concerns the spouse or husband and the

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<sup>22</sup> Supreme Court of Justice, CSJ, sc, dec.civ. nr.489/1993, Dr.7/1994, p.90

descendants and ascendants. They too need to be mentioned in the contract in order to benefit from the continuation of the tenancy under the same conditions as T.

*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?*

As a principle, the same rules apply as described above. The other students would be considered tolerated and T might bring in A without L's consent. As long as the other students are not mentioned in the contract and no criteria for exclusion of prospective co-tenants are contained therein, it will be hard to demonstrate L's opposition with regard to A. Also, this does not seem a valid reason for annulling the tenancy contract. In the absence of the nomination of A in the contract he will not have any automatically assigned contractual rights. As for the rent, L will be liable for the whole amount and has a claim against the other students for their parts.

Nevertheless, there would be also a different solution, in case that the situation is regarded as a sub-tenancy. Thus there is a tenancy contract between L and T, which expressly allows T to sub-rent rooms to other students. As a rule, sub-rental requires the prior written consent of the landlord and has to observe the conditions set by the landlord. Apparently if this were the case, L would have the final say about A's presence in the dwelling. There is no case law on similar situations, but in the light of the jurisprudence on article 1418 of the Civil Code<sup>23</sup>, that settled that the rental contract is not a contract *intuitu personae*, the requirement as to the prior written consent, might be interpreted as regarding just the possibility of sub-renting and not the person of the sub-tenant.

### 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)?*

The provisions on sub-tenancy contained in the Housing Act are more favourable to the landlord than those in article 1418 of the Civil Code. Article 26 of the Housing Act allows the tenant to sub-rent, but only with the previous written consent of the landlord and under the conditions established by the latter. The sub-tenancy contract may not contain clauses contrary to those provided by the tenancy contract. It may have as an object part or the whole of the tenement. The sub-tenancy contract produces its effects with regard to its contracting parties: the tenant and the sub-tenant, without affecting the landlord (*res inter alios acta, aliis neque nocere, neque prodesse potest*).

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<sup>23</sup> allowing for sub-tenancy, in case it was not prohibited by contract

The landlord and the sub-tenant have no direct action against each other, but only an indirect one (*actiune oblica*), based on article 974 of the Civil Code, as a creditor availing himself of the rights of his passively remaining debtor (the tenant). Further, the landlord may use also the revocatory action (*actiune pauliana*), based on article 975 of the Civil Code, whereby he may ask for the judicial revocation and annulment of the sub-tenancy contract, if it was done against his interest. On the other side, according to the second paragraph of article 26 of the Housing Act, the sub-tenant cannot avail himself of any right against the landlord, nor of any occupancy title.

The doctrine maintains that the sub-tenant does not acquire any tenancy right of his own, thus once the contract of the tenant is terminated, he will also lose the right to occupy the dwelling. Also, even if the sub-tenant effectively uses the dwelling, the obligations of the tenant with regard to maintenance and repairs of the tenement subsist, as expressly provided for by the final paragraph of article 29 of the Housing Act.

In practice, even where it was prohibited by the contract, the landlord may subsequently recognise the sub-tenancy and thus renounce his advantage resulting from the interdiction. Such recognition would implicitly modify the prohibitive clause.

A special situation regards the tenants occupying a dwelling that has been restituted to the former owner. In such a situation the conclusion by the tenant of a sub-tenancy contract without the written consent of the landlord, will be sanctioned with the non-application of the legal prolongation of the contract for the tenant.

Normally a tenancy contract allowing for sub-renting will detail also the conditions, including any limits concerning the rent and the obligations of T. Any claim for damage on the part of L will have in this case a contractual basis. In case the contract does not contain any specification and in the absence of a tort, the landlord might use the *actio de in rem verso* whereby he may claim the unjust enrichment of the tenant. Nevertheless, against such an action two arguments may be brought: on one side, the impoverishment of the landlord is not straightforward and, on the other side, the Housing Act will apply also to the sub-renting and it allows for the free negotiation of a profit as part of the rent.

#### 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?*

Article 21 of the Housing Act requires that the agreement between the landlord and the tenant take the form of a written contract. Such a provision existed also under previous tenancy law. The written form has been constantly interpreted as a condition *ad probationem*, not *ad validitatem*<sup>24</sup>. Thus, it does not confer to the contract a solemn character. The tenancy contract remains consensual, but its proof may be done only through a written document and, only in exceptional situations through witnesses and presumptions.

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<sup>24</sup> E. Safta-Romano, *Contracte civile*, Ed. Graphix, Iasi 1995, vol.I, p.116; Curtea Suprema, dec.civ. nr.1366/1971 in *Culegere de Decizii*, p.96

The rationale for the requirement of the written form and the enumeration of several elements that the tenancy contract should normally include (see introduction) lies in the intention of the legislature to ensure legal security and to indicate the most important aspects of tenancy that should be taken into consideration during the negotiation and conclusion of the contract.

Some commentators<sup>25</sup> consider the written requirement as superfluous as long as article 1191 Civil Code establishes that written proof is needed for every act whose value is superior to 250 lei (which will always be the case with regard to tenancy contracts). Thus, the provisions of the Housing Act are interpreted as a confirmation of the rule consecrated in article 1191, rather than derogation from general private law.

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

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As mentioned, the tenancy contract preserves its consensual character and thus, as a principle an oral contract is valid. The existence of the tenancy contract may be established in court through testimony or presumptions only when there is the beginning of a written proof<sup>26</sup> (article 1197 of the Civil Code) or when the pre-constitution or conservation of the written proof was impossible (article 1198 of the Civil Code). Any writing of the person against whom court procedures have been brought and from which the alleged fact may be induced is considered the beginning of a written proof.

An additional requirement results from article 1416 of the Civil Code. For testimonial evidence to be admitted for proofing an orally concluded tenancy contract, in the absence of any written proof, there is need that the execution of such a contract has begun.

*b) 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?*

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According to article 21 of the Housing Act, the tenancy contract has to be registered with the local fiscal authorities. This is not a requirement for the validity of the contract, but is meant to ensure the evidence of all revenues resulting from renting housing and to preclude tax dodging<sup>27</sup>. The requirement of registration may be found also in article 30 of Ordinance no.73/1999 on income tax, which adds also a time constraint to registration: the tenancy contract has to be registered within 15 days from its conclusion.

Registration with the local fiscal authorities is mandatory also in the case of the sub-tenancy contract, according to the last paragraph of article 26 of the Housing Act. The Housing Act does not explicitly foresee any requirement for the written form of the sub-tenancy contract, but only the written consent of the landlord.

Further, if the tenancy contract has been concluded for a period of more than 3 years, it should be registered also with the real estate register, the Cadastre. Such a registration

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<sup>25</sup> Alina-Iuliana Tuca, Florentin Tuca, op.cit., p.77

<sup>26</sup> According to the second paragraph of article 1197 the beginning of proof is any writing by the person against whom an action was introduced and which makes the alleged fact believable.

<sup>27</sup> It is interesting to note that under law no.5/1973 the registration of tenancy contracts concluded by privates in urban areas, as well as of sub-rental contracts was foreseen as a condition *ad validitatem*.

is stipulated by article 21 letter c) of law no.7/1996 on the Cadastre and has the consequence of rendering the tenancy opposable to third parties (according to article 711 point 9 of the Civil Procedure Code). The omission of such registration does not affect the relationship between tenant and landlord, but only the effects of the tenancy contract with regard to third parties.

Question 5: Extra payments and Commission of Estate Agents

*During the negotiations for a tenancy contract, L requests the sum of 100 Euro (the monthly rent being 1000 Euro) for the drafting of the contractual documents. Is this legal?*

The parties to a tenancy contract may agree that the costs for drafting the contract be only in the charge of the tenant and may settle a certain amount for such contractual expenses. Nevertheless, in our opinion, to the extent that such extra payments do not cover any service or expenditures incurred by L, T has a claim against L.

According to article 1092 of the Civil Code, any payment assumes the existence of an obligation. The sums paid without corresponding to a debt may be recovered. Thus, T may make use of the action for the recovery of payment made by mistake (*actiune in repetitiune* or *condictio indebiti*), provided by articles 992-997 of the Civil Code. The conditions required for such an action are: the existence of a payment, the absence of a legal obligation that might be extinguished through that payment and the subjective error of the *solvens* (T). The good faith of the *accipiens* (L) matters only with regard to the additional payment of interest to the recovered sum.

We appreciate, that T may also have a claim based in tort law, if the request of the extra payments can be interpreted as a misuse of law. L is liable under tort law if he has exercised his rights by embezzlement from the purpose for which they were recognised by law, by exceeding their legal limits or without good faith.

Last but not least, it is worth looking at article 22 of the Housing Act that sanctions with absolute nullity some clauses of the tenancy contract. Thus, it declares void any provision in the contract that obliges the tenant to pay in advance an amount of money for repairs, which constitute a duty of the landlord. Such a clause would be easy to elude if the parties would qualify such a sum not as expenses for repairs, but as key money or administrative expenditure or extra payments. If that were the case, and the extra payments would be destined to cover repairs due by the landlord, then an action for the declaration of simulation will have to precede the declaration of the nullity of such a contractual clause.

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

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

Such a situation is a clear misuse of law and triggers the liability of F under tort law. To check whether it may be qualified also as a criminal offence.

The principles of undue payment or unjust enrichment, which both require good faith, do not apply as long as there is an illicit action triggering consequences in tort law.

b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move earlier.

Such an arrangement may be looked at as an unjust enrichment, as long as T will be obliged to pay also the rent for the whole month. Nevertheless, to the extent it covers costs incurred by F for moving out earlier, which is in T's interest, such a clause can be valid.

*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?*

An industry of real estate agencies is slowly emerging in the rental market. When they intermediate a tenancy contract, estate agents usually charge a commission that amounts to a month's rent and is paid 50/50 by tenant and landlord<sup>28</sup>.

The Romanian Association of Real Estate Agencies (ARAI) has the power to issue professional and ethical standards applicable to real estate agents. Real estate agents are established and exercise their activities in accordance with the provisions of Ordinance no.3/2000. Articles 13-32 of this ordinance dealing with the transformation of ARAI into the National Union of Real Estate Agencies, an organisation representing certain Government interests, have been recently declared unconstitutional (decision no.333 from 3.12.2002 of the Constitutional Court). Article 8 provides that real estate agents have the right to receive remuneration as agreed with their clients. The decision making body of the National Union of real Estate Agents was explicitly prohibited from verifying the relationship of real estate agents with their clients, including those concerning the remuneration.

The Housing Act, or the Civil Code do not provide any rules with regard to real estate agents acting as intermediaries in the conclusion of tenancy contracts.

### **Set 2: Duration and Termination of the Contract**

The Housing Act contains specific provisions on the duration of the contract only with regard to social housing<sup>29</sup>. For tenancies having as an object other types of dwellings it does not establish minimal or maximal contractual time limits, but only states the principle that the contractual relationship ceases at the end of the agreed term, if the parties have not agreed to the renewal of the contract (article 23). At the entering into force of the Housing Act it was argued that article 23 introduces a derogation to article 1437 of the Civil Code (which provides for the tacit renewal of the tenancy contract). Nevertheless subsequent case law has confirmed that the special norm has to be supplemented with the norms of the Civil Code. Thus, *tacita reconductio* is, according

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<sup>28</sup> United Nations, Economic Commission for Europe, Country Profiles on the Housing Sector. Romania, 2001

<sup>29</sup> Tenancy contracts for social housing are concluded for 5 years, duration that is stipulated for the benefit of the tenant.

to general private law, one of the modes of renewal of the contract<sup>30</sup>. According to article 23, in case that the contract has not been renewed the tenant is obliged to liberate the dwelling at the end of the contractual term. In case of tacit renewal of the contract, the renewed contract is considered concluded for an indeterminate term (unlimited in time) and the landlord has at anytime the possibility to ask for the termination of the tenancy, under the only condition of giving notice according to the local customs (article 1436 of the Civil Code).

Aspects related to the duration and the termination of the contract are heavily regulated by Romanian law as a consequence of the restitution process of previously nationalised housing, and of the privatisation process. The legal extension of tenancy contracts has been successively imposed through law no.17/1994, law no.112/1995 and emergency ordinance no.40/1999, approved and amended by law no.241/2001. The main piece of law intended to protect tenants is ordinance no.40/1999 as modified, which was adopted in a climate of great tension between tenants and former owners having recovered their properties and under the pressure of the expiration of the extension initially foreseen by law no.17/1994. In general lines, the ordinance provides for the extension of the duration of tenancy contracts, the obligation of certain landlords to conclude tenancy contracts with the sitting tenants and the right for renewal of the contract at the end of the prolonged period, the corresponding conditions, exceptions, procedures, etc. *Grosso modo* it may be said that the scope of the ordinance regards tenancy contracts where the landlord is either the State or local authorities, or a private person who recovered tenement nationalised before 1990 or a trading company that acquired tenements through the privatisation process. It does not apply to tenancy relationships established between private parties that do not fall within the described categories (especially those resulting from contracts concluded after 01.01.1999).

#### 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 tenancy contract concluded without a time limit is subject to the general provisions of the Civil Code (article 1436 second paragraph). Thus, L is entitled to give notice not only in the situations where he is allowed to claim the cancellation of the contract prior to the end of the determined duration of the contract, but whenever he wants, without needing a particular reason. His unilateral denunciation triggers the end of the contract unlimited in time, under the only condition that the notice term respects local customs. The parties may agree in the contract on the term of giving notice (covering the time period between the denunciation of the contract and the date when the contract will be terminated). Otherwise, it is established on the ground of local practice, so as to allow T to find another suitable dwelling. In practice it was considered that the action for eviction constitutes beyond any doubt a notice for the termination of the tenancy contract, while the term for giving notice is covered by the time necessary to solve the

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<sup>30</sup> CSJ, s.com., dec. nr.268/1998, Dr. nr.10/1999, p.146

litigation<sup>31</sup>. The denunciation by L produces legal effects without the need for any acceptance on the part of T. No special form is required for giving notice, but in practice it uses to be written and, in case that T refuses to give evidence of its receipt it may be done through an executor. According to article 1438, once L gave notice, T will not be able to invoke the tacit renewal of the contract, even if L allows him to remain in the dwelling<sup>32</sup>. He will be obliged to pay the rent as long as he uses the apartment.

The provisions of the Civil Code on the possibility of unilateral denunciation of the contract by L are inapplicable in the situations regulated by emergency ordinance no.40/1999. By virtue of this piece of legislation, tenancy contracts are either automatically renewed (for dwellings owned by the state or local authorities) or at the request of the tenant (for dwellings recovered by former owners and dwellings received by companies as a result of the privatisation process). L is obliged to observe the extension period and may refuse it only in the situations expressly enumerated in article 13 letters a)-l) of the ordinance<sup>33</sup>. During this period L cannot make use of the right to give notice, the contract unlimited in time is transformed by law into a contract limited in time (5 years). Moreover, even at the end of the extension period, T will have a right for renewal of the contract for the same time period. L will be allowed to oppose such a renewal only on the limitative grounds foreseen by article 14 of the ordinance: a) L needs the dwelling for his own use, that of his husband/spouse, the parents or children of each one of these, if they are Romanian citizens domiciling in Romania; b) the dwelling will be sold under the conditions provided by the ordinance; c) T did not pay the rent for three consecutive months during the execution of the contract; d) T has sub-let, changed the destination or modified the internal structure of the dwelling without the written consent of L, or the necessary authorisations; T has produced substantial damage to the tenement or the building or makes cohabitation impossible. L has to give notice to T on the refusal to renew the contract at least one year before the expiration of the extension period for the first two grounds and at least 60 days before the end of the contract in the case of the situations covered by letter d).

As mentioned above, as long as the Civil Code applies, L does not have to invoke any particular reason in order to terminate the contract. Both, the need to renovate the house and that of using it for himself are equally legitimate. Under the special provisions of the legislation adopted for the protection of certain categories of tenants, the powers of the landlord are restricted and L is held to respect the legal extension. Only the renewal of the contract may be refused for the satisfaction of L's own living needs or those of his family. Renovation of the tenement would not constitute a legitimate reason for the termination of the contract within the scope of these special provisions.

We have to correlate these provisions also with article 1425 of the Civil Code, that allows L to undertake urgent repairs to the tenement, that cannot be postponed to the end of the contractual period (that might be also the extended period). L himself is not

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<sup>31</sup> T.S., s.civ., de.nr.2628/1987, in CD, 1987, p.85

<sup>32</sup> In the absence of the notice, T could oppose the tacit renewal of the contract if he continues to stay in the dwelling.

<sup>33</sup> According to article 13, the legal extension of the contract does not apply for tenancy contracts concluded between a tenant and landlord, other then those enumerated in the ordinance, in case that the tenants or family members mentioned in the contract are the owners of a dwelling or sold an adequate dwelling after 01.01.1990, when the tenant refuses to use another dwelling offered to him by the landlord or local authorities, when the tenant has sub-let without the written consent of the owner, or has modified the destination or internal structure without prior consent, when the tenant has produced substantial damage to the tenement, when the tenant behaves in a way that makes cohabitation impossible, etc.

allowed to give notice of the termination of the contract, but if the repairs are of such a nature that T and his family cannot use the dwelling, T may ask for the cancellation of the tenancy. In practice often landlords try to make use of this provision in order to evict the tenant, but the case law has been constant in refusing to admit such a ground for the termination of the contract unilaterally by L. Courts have constantly held that evacuation of T to allow for urgent repairs of the building may be just temporary and conditioned by the offer of another adequate tenement<sup>34</sup>.

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?*

According to article 25 of the Housing Act, T may be evicted only on the basis of an irrevocable court order (that is a title having *res iudicata* effect). This is to be seen as a reinforced protection for the tenant, as the previous provisions allowed for the eviction of tenants through an administrative procedure or on the basis of just a definitive, not irrevocable court order<sup>35</sup>.

The only legal defence available to T whenever there is already an irrevocable title for eviction is based on the right of retention (*drept de retentie*). This right may be exercised with regard to tenancy on the basis of article 1444 Civil Code that stipulates, “tenants cannot be evicted before being reimbursed by the landlord”. Case law has settled that the tenant may retain the possession of the tenement and refuse its restitution until his claims with regard to the tenement have been satisfied<sup>36</sup>. The right of retention is normally invoked during the court procedures for eviction but may be claimed also separately and by way of presidential ordinance (a special emergency procedure provided by article 581 of the Civil Procedure Code).

In the light of the special provisions of emergency ordinance no.40/1999, T is obliged to quit the tenement within 60 days from the end of the extended period. The tenants that had been given notice of L’s refusal to renew the contract have a priority right to claim a dwelling from the local authorities. For this purpose T has to make a request at the local council, within 30 days from the notice, which itself has to be given at least one year before the expiration of the contract. The local authorities are obliged to procure a dwelling for T within 1 year from the date of the request. In case, that this does not happen within that time limit, the tenancy contract will be extended for a period of maximum 6 months by law. In case that no suitable dwelling has been found, and the landlord still refuses to extend the contract he is obliged to put at the disposal of the tenant another dwelling respecting the minimum standards.

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<sup>34</sup> Cas I, dec.12.04.1921, in P.R. 1923.1.151, T.S., col.civ., dec.1386/1958, dec.145/1960, dec.251/1961

<sup>35</sup> A court order becomes irrevocable after it has been examined by all jurisdictions (normally three – the court of first instance, the instance for appeal and the instance for review), it is considered definitive after the second degree (appeal).

<sup>36</sup> CSJ, sc., dec.civ., nr.2018/1992, Dr. nr.8/1993, p.80

Question 7: Contract Limited in Time and Termination

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

As a rule, parties to the tenancy contract may freely decide upon the duration of the contract. Legislation does not preclude them to agree on a contract limited to one year, but just stipulates that the termination of the contract occurs at the end of the agreed period. If at the end of that period, T remains in the dwelling and L does not hinder that in anyway, the tacit renewal operates under the same conditions and for a time limit determined by local custom.

There is a special provision in the Civil Code, with dispositive character, that was hardly ever used in practice. It concerns tenancies having as their object furnished dwellings and foresees that the rental of a furnished apartment will be considered to be made for one year if the rent was stipulated for one year, for one month when the rent was stipulated for one month, for one day if the rent was stipulated for one day. In case there is no evidence that the tenancy has been agreed for one year, month or day, its duration will be considered by reference to local custom.

The situation is different for the tenancies that fall within the scope of emergency ordinance no.40/1999. The extensions by virtue of the ordinance occur for 5 years, thus contracts concluded for just one year would be contrary to this mandatory norm. Nevertheless, we have to differentiate between the situations when the extension operates automatically, *ipso jure*, and those in which it operates on the request of the tenant. We consider that in the first case the conclusion of the contract for a period of one year would be illegal, while in the second it may be admitted and interpreted as T's renunciation of his right to require the conclusion of the contract for 5 years. Further, the renewal of the contract after the end of the extension may also occur for 5 years, but the ordinance allows explicitly for a different duration (shorter or longer) of the renewed tenancy contract, if the parties have expressly agreed to that.

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?*

The parties to the tenancy contract enjoy contractual freedom; they may decide that the renewal of the contract will operate under the same conditions as it was initially adopted. L has given notice with observance of the contractual clauses so that there is no breach of the contract. The termination of the contract operates at the end of its agreed duration and there is no need for invoking any special reasons therefore. T does not acquire any special rights on the tenement, he remains a precarious holder. The successive renewal of the contract up to 6 years does by no way modify this status. Thus, such a situation would be lawful.

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

Such a restriction of notice would not apply to T. According to article 24 of the Housing Act, T may ask for the cancellation of the tenancy contract prior to the end of its duration, under the sole condition that he gives notice to L at least 60 days before such a cancellation. Thus T may give notice anytime between the start of the execution of the contract and the 60th day before its agreed time limit.

#### Question 9: Termination in Special Cases

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

a) *L dies. Can her heirs give immediate notice to T?*

Article 1440 of the Civil Code stipulates that the tenancy contract does not end with the death of L or that of T. L's heirs will have no right to give immediate notice to T, because not only L's ownership rights but also his duties are transferred *mortis causa* to her heirs, according to the general rules. They are held to observe all the contractual clauses and may give notice only under the same conditions as L.

This is a dispositive rule and T and L may agree that the tenancy ends with the death of L. If such were the case, the heirs would still have to observe the local customs for giving notice, as for the contracts concluded without time limit.

b) *The house is sold. Has the buyer a right to give anticipated notice?*

According to article 1441 Civil Code, if L sells the tenement, the buyer is obliged to observe the tenancy contract concluded before the sale, under the condition that such a tenancy has been established through an authentic act or a private act having a certified date and, except for the case when it was agreed through the tenancy contract that it will end in case of the sale of the tenement.

Consequently, in the absence of any stipulation to the contrary, the tenancy contract is opposable to the buyer under the conditions agreed at its conclusion and without the amendments that have not been registered in written form and having a certified date.

These norms have to be correlated also with the provisions on the registration of the tenancy contract in the real estate register. As mentioned above, the tenancy contract concluded for more than 3 years is opposable to third parties only upon registration in the Cadastre. The registration of the tenancy contract in the Cadastre (not mandatory) should be done prior to the registration of the sales contract (mandatory). If such registration was omitted, but the tenancy contract has a certified date, the tenancy contract will still be opposable to the buyer of the house, but the term of the tenancy will be reduced to three years from the day when the sales contract was registered in the Cadastre. This results from the fact that within these three years the new landlord may expect that tenancy contracts with certified date, concluded for less than 3 years (of which the registration is not mandatory) be opposed to his property rights.

Even if the termination of the contract in case of sale was agreed between L and T, the tenancy does not end automatically, but only after the buyer has given notice in accordance with local custom, as in the case of contracts unlimited in time. Also, when the buyer is entitled to give anticipated notice (when the tenancy contract has no

certified date or when a contract over 3 years was not registered in the Cadastre) he has to respect local custom when giving notice.

In all cases when the tenancy ends because of the sale of the tenement, T has a claim for damages against L (article 1442 of the Civil Code), provided the contract has not stipulated to the contrary. T has a possessory lien until L or the buyer pays him. T's duties under the contract are not affected by the substitution of L with the buyer of the tenement.

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 same rules apply as under b). The buyer of the auctioned house will be obliged to respect the tenancy concluded before.

#### 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?*

The rule "*pacta sunt servanda*" applies, so that such a provision will have legal force with respect to both contracting parties, as well as with respect to the courts. In the presence of such a clause the tenancy is a contract affected by an extinctive, uncertain, conventional term consisting of T's death. It will have as a consequence the termination of the contract for the future, while the rights and duties that were not executed prior to the termination will continue to exist.

L may not give notice as in the case of contracts unlimited in time. Nevertheless, L may give notice before T's death according to the rules provided by the Housing Act and applicable for any situation of cancellation of tenancy contracts before the agreed term: T did not pay the rent for three consecutive months, T caused damage to the tenement or alienated parts of the installations, T behaves in a way that makes cohabitation impossible or precludes the normal use of the building, T did not comply with other contractual provisions (article 24 b)<sup>37</sup>.

#### 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?*

As a rule, T may claim the termination of the contract under the condition of giving notice at least 60 days in advance (article 24 a) of the Housing Act), irrespective of any circumstances.

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<sup>37</sup> This provision repeats the general rule in articles 1020 and 1021 of the Civil Code consecrating the possibility of judicial cancellation of the contract in case of non-fulfilment of the contractual obligations.

There are several provisions of the Civil Code that might be interpreted as giving T the right to claim immediate termination of the tenancy because of unusual circumstances. Hence, article 1423 allows T to claim termination of the contract when the tenement has been partly destroyed by fortuitous case (as an alternative he may request the diminution of the rent). As T is not entitled to claim damages, we consider that he does not have to observe any terms for giving notice, but may ask for the immediate termination of the contract (including through the presidential ordinance procedure), so as to avoid further loss. Similarly, T will be allowed to claim cancellation of the contract in case that L has to do urgent repairs to the tenement that would render the habitation impossible (article 1425 of the Civil Code).

As for L, the unusual circumstances when he may claim termination of the contract are enumerated limitatively in article 24 b) of the Housing Act (see above).

*In particular:*

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

L does not have a claim in such a case; the Housing Act requires that the rent instalments have not been paid for at least 3 consecutive months.

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

Giving notice in such a situation would be lawful, as it corresponds to the provisions in article 24 b) third indent of the Housing Act (the tenant behaves in a way that makes cohabitation impossible or precludes the normal use of the building).

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?*

As the tenancy contract is subject to the principle of contractual consensualism, we appreciate that such a clause is valid and the provision in article 24 b) of the Housing Act has a dispositive character. This can be also inferred from article 22 d) of the Housing Act that sanctions with absolute nullity only those contractual clauses that exonerate the landlord from his obligations as imposed by legal norms. The doctrine<sup>38</sup> has interpreted that only total exoneration is invalidated by the aforementioned article, not limitation or mitigation of the obligations incumbent to the landlord by agreement of the contracting parties.

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<sup>38</sup> Alina Iuliana Tuca, Florentin Tuca, *Constructia, inchirierea si administrarea locuintelor*, ALL Beck, 2000, p.81

### **Set 3: Rent and Rent Increase**

Rules on rents are also affected by the different regimes introduced through the special legislation for the protection of certain categories of tenants. Thus, we can identify various legal regimes for rents: a) a general regime, b) a regime for the tenancy of dwellings owned by the State and local authorities (which on its turn foresees differentiated rules for different types of housing) and c) a third legal regime concerning tenancy contracts concluded by owners that have recovered nationalised properties and those of companies owning dwellings acquired as assets through the privatisation process. In the following we will give a short presentation of each one.

#### a) The general regime for rents

The legal framework of this regime is set by the Housing Act and the Civil Code. Although the Housing Act does not enumerate the payment of the rent among the obligations of the tenant, by reference to article 1429, second point of the Civil Code this has to be regarded as his main obligation and demonstrates one of the essential features of the tenancy contract – its onerous character<sup>39</sup>.

The Housing Act establishes in article 31 the elements that can be taken into consideration for fixing the rent. Thus, the rent will cover expenses relative to management, maintenance and repairs, land and building taxes, the redeeming of the investment according to the standardised duration of the building established through regulation, as well as a profit subject to negotiation by the parties. Further, it provides that the maximum rent level for the dwellings owned by the state is subject to a special statute. Rent levels will be dependent on the place and zone where the dwelling is situated, in accordance with the criteria for local land taxes.

#### b) The rent regime for dwellings owned by the State and local authorities

This regime is regulated by emergency ordinance no.40/1999 and is based on the constitutional norm that ascribes to the State the function of guarantying measures of social protection and ensuring a decent living standard. Rent levels are determined on the basis of a basic monthly tariff to which different coefficients are applied depending on the category and calculated in accordance with the criteria for local taxes and fees. The basic monthly tariff is updated through a Government Resolution on the 31 January of each year, depending on the annual inflation rate.

According to article 31 of the ordinance, as amended, the maximum rent level cannot exceed 15% of the family's monthly gross income when the monthly gross income per family member does not exceed the national average. The limit will be 25% when the monthly gross income per family member is situated in-between the national average and its double. The tenant is obliged to inform the landlord of any change in the family's gross income, within 30 days, under the sanction of the cancellation of the contract.

#### c) The rent regime for dwellings owned by certain categories of private persons

As already explained these special categories are those of the landlords – natural persons having recovered nationalised properties and companies having acquired dwellings in the course of the privatisation process. Their situation is subject to the rules of emergency ordinance no.40/1999.

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<sup>39</sup> Tuca, op. cit., p.112

The rent in these situations will be subject to negotiation between landlord and tenant on the occasion of the mandatory conclusion of the tenancy contract. The negotiating capacity of the landlord is nevertheless limited, as he is constrained by the thresholds provided in article 31 of the ordinance, that apply to him correspondingly.

Question 12: Settlement Date and Modes of Payment

*When is the rent due? Is there any restriction on modes of payment? Does and if yes, under 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?*

There are no provisions in the Housing Act or in Ordinance no.40/1999 with regard to the date and modes for the payment of the rent. This should be determined by the tenancy contract (article 1429 of the Civil Code provides that the tenant should pay the rent at the stipulated dates). In the absence of specific stipulations, the general rules of the Civil Code will apply.

According to article 1104 Civil Code, the payment has to be made at the domicile of the debtor, that is the tenant. The receipts for the payment of the rent are opposable to third parties even if they don't have a certified date and, if made without any reserve, they are presumed to cover the payment for earlier terms.

It should be also mentioned that according to article 1446 of the Civil Code, the tenancy contract can be terminated in case that the tenant does not furnish enough the dwelling, except when he has given sufficient guarantee for the payment of the rent. Although there is no evidence that this provision has been applied lately, it may be interpreted as implicitly referring to L's right of distraint. Moreover, the right of distraint is generally admitted every time when there is a material connection between an object and a debt (*debitum cum re iunctum*). This is a real right of guarantee, which confers L the precarious holding, and no possession of T's furniture.

Question 13: Requirements for Rent Increase

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

The rents subject to emergency ordinance no.40/1999 may be increased in accordance with the provisions of article 35 paragraph 1 of the emergency ordinance, which applies to contracts concluded for more than one year and entitles the landlord to request the increase of the rent, provided that the parties had not agreed in the contract not to modify the rent. The procedure for the request of a rent increase is detailed in paragraphs 2-6 of the same article and requires:

- the written request has to be addressed to the tenant and justified by the undertaking of works of repairs or consolidation of the tenement or building or by the increase of the family's monthly gross income beyond the national average<sup>40</sup>;
- the notification of the request has to follow the special procedure foreseen for the mandatory conclusion of tenancy contracts by virtue of the ordinance;
- the written consent of the tenant signed by both parties has to be registered with the local tax authorities and constitutes an integral part of the tenancy contract;
- if the tenant does not give his consent for the rent increase within 60 days, the landlord may start procedures in court; the tenancy contract cannot be terminated and the tenant evicted on the ground that he opposed the rent increase;
- if there is a definitive court order obliging the tenant to pay the increased rent, the landlord may claim the cancellation of the tenancy contract and eviction of the tenant if the latter dishonestly did not pay the rent for at least 3 consecutive months following the court order.

We note that the above-described rules apply only to the special situations that fall within the field of application of the emergency ordinance. For other tenancy situations, courts have recently applied general private law principles and found solutions in article 970 of the Civil Code. Before 1990 the courts were reluctant to allow rent increases, relying on the principle of monetary nominalism<sup>41</sup>. This approach has changed due to a wider acceptance of the theory of the unforeseen (*teoria imprevizibilitatii*) supported by the ever more dynamic reality. The admissibility of rent increase is crucial in the actual economic context when large depreciations of the national currency risk rendering rents derisory even during short periods. The Supreme Court has constantly admitted that, when rents have been stipulated in lei, the landlord had the right to ask for rent increase<sup>42</sup>. The principle *pacta sunt servanda*, had to be interpreted in the light of article 970, according to which "Conventions have to be executed in good faith. They oblige not only to what is expressly stipulated, but also to all consequences that may be attached according to the nature of the obligation by equity, custom or law".

There are no rules on maximum increase either in private and/or criminal law.

#### Question 14: "Index-clause"

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

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<sup>40</sup> This provision inserted in paragraph 2 apparently limits the general permission for rent increase allowed for in the first paragraph. As such a limitation would not be equitable in the present inflationary context it is held that the enumeration of the grounds for rent increase should not be interpreted restrictively, but should count as illustrative.

<sup>41</sup> According to this principle, whenever there is a pecuniary obligation the payment value of money remains unchanged despite the fact that its purchase power may change before the term of the debt. The principle can be found in article 1578 of the Civil Code.

<sup>42</sup> CSJ, s.com., dec. nr.87/16.01.1997, dec. nr.21/25.01.1994

Such index-clauses are quite frequent in all types of contracts and their presence is justified by the galloping inflation and the need to preserve the equilibrium between the parties to the contract. Alternatively, it is commonplace to denominate the rent in a hard currency. Such rents are paid in the national currency, at the exchange rate of the day of the payment (although in practice many landlords require that the payment be made in hard currency as well).

Emergency ordinance no.40/1999 provides that the basic monthly rent tariff for dwellings owned by the State or local authorities is realigned every year according to the inflation rate. Such decision will be taken through a Government Resolution, at the latest on the 31 January of every year. If that is mandatory for the State, there is no reason why, between privates, the contractual reference to the inflation rate or other official variables documenting the increase in the cost of living should be prohibited.

It is interesting to note that the initial version of Ordinance no.40/1999, as adopted by the Government contained article 36 which expressly allowed that the parties stipulate in the tenancy contract a clause for the revision of the rent in accordance with the variations of the annual inflation rate as determined by the National Statistics Commission. Law no.241/2001 for the approval of the ordinance and amending its content has abrogated this provision.

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

Such an arrangement would be lawful as long as it is aimed at preserving the balance between the parties to the contract and does not result in a misuse (abuse) of law.

*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?*

Under the provisions of ordinance no.40/1999 such a rent increase would be innocuous, as it would infringe the mandatory procedure stipulated by article 31. The payments done by T do not constitute debt and are susceptible of being recovered. T would definitely have a claim against L to repair the damage, as the prescription does not intervene before the passing of 3 years. As between T and L exist two mutual obligations of the same kind, so that each one is creditor and debtor to the other, judicial off-set (*compensatie judiciara*)<sup>43</sup> may operate, as allowed for by articles 1143-

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<sup>43</sup> The institution of *compensatie* (off-set) in Romanian civil law is a means for extinguishing two mutual obligations of the same nature, which exist between two persons, so that each one is at the same time creditor and debtor of the other. Off-set may be stipulated by law (legal off-set) - when it is mandatory, or be agreed by the parties (conventional) or ordered as a result of court proceedings (judicial) – also mandatory.

1153 of the Civil Code. Conventional compensation may also operate if the parties reach an agreement thereto.

As for the situations of rent increase that fall under general private law, which does not require any particular procedure for rent increase, it is questionable whether T would have a claim against L. Such rent increase would be rather interpreted as a valid contractual amendment. The courts will be rather prone to interpret the payment of the increased rent for 3 months as an acceptance by T of the unilateral rent increase offer made by ordinary letter. 10% reflect more or less the change in the cost of living in the current economic situation and would hardly be qualified as a misuse of law. Only an obvious discrepancy between the rent increase and the changing cost of living might justify a claim for damage on T's side.

#### Question 16: Deposits

*What are the basic rules on deposits?*

The Housing Act does not contain any provisions on deposits. The Civil Code only stipulates that the landlord may request the cancellation of the contract if the tenant does not sufficiently furnish the tenement, except when he gives sufficient guarantees for the payment of the rent.

Emergency ordinance no.40/1999 for the first time prescribes detailed rules on deposits, in articles 37-41. The parties to the tenancy contract have the possibility, not the obligation, to agree on the constitution of a deposit for guarantee (article 37). Such a deposit will be held in the bank account of the landlord<sup>44</sup>, at the bank indicated in the tenancy contract. Once constituted, the deposit triggers the mandatory application of the other norms of the ordinance relative to deposits. Hence, the sum stipulated in the tenancy contract as a deposit for guaranteeing the performance of the obligations incumbent to the tenant cannot exceed the rent due for three months, at the level of the year when the deposit was constituted. If the rent is paid in advance for a period superior to three months the deposit cannot be charged (article 38).

The deposit has to be restituted within maximum 3 months from the date of the handing over of the keys by the tenant. At the end of the contract the landlord may retain directly from the deposit the sums due by the tenant, under the condition that justification is provided. If the deposit is not restituted within the above-mentioned time limit, the interest rates corresponding to the deposit will be in the benefit of the tenant<sup>45</sup>.

The sums that may be retained by the landlord from the deposit can be destined to cover expenses resulting from repairs or substitution of sanitary objects or other works incumbent on the tenant; regular maintenance and monthly repair of the elements used in common that fall within the duties of the tenant; other services, which benefited to the tenant during the contract and were not paid (article 40). For each sum, the landlord is required to issue a receipt. Every deduction and the repartition of common expenses among tenants need justification.

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<sup>44</sup> The law does not mention whether this has to be a special separate bank account.

<sup>45</sup> According to law the tenant's right to interests is limited to the mentioned situation.

### Question 17: Utilities

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

The legislation does not foresee any rule with regard to utilities<sup>46</sup>. Only the Housing Act stipulates that among the elements of the tenancy contract should appear also the obligations of the parties with regard to the use and the maintenance of the dwelling, as well as the conditions for the exclusive or common use of parts that constitute shared property. Consequently, the landlord and tenant may agree freely on the distribution of the financial burdens related to utilities.

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

As a general rule, the obligations of the landlord are based on the principle that he has to ensure the peaceful use of the dwelling by the tenant. Consequently, he has to hand over the dwelling in good condition, to keep it in good order and to guarantee the tenant the normal use. These general obligations are detailed by the norms of the Housing Act and Civil Code and have to be correlated with provisions resulting from other special statutes (e.g. article 25 of law no.10/1995 concerning the quality in building, article 32 of ordinance no.73/1999 on tax income). These provisions are mandatory, that is why any contractual clause that would exonerate the landlord from the duties imposed by law is void (article 22 d) of the Housing Act).

The duties of the tenant are subsumed to the principle that he has to behave like a good owner of a house. His obligations are detailed in article 29 of the Housing Act and in the Civil Code. His duties extend not just to the dwelling but also to the common spaces.

### Question 18: Control of Standard Terms

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

It is hard to talk about standard contracts in Romanian tenancy law. Such contracts exist in a solid established rental market, and hardly ever in an emerging, instable one, whose size cannot really be gauged. In these conditions, the control over the clauses contained in tenancy contracts is mainly ensured by the courts.

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<sup>46</sup> Traditionally utilities constituted the object of direct contracts between the service providers (for heating, water, electricity, rubbish collection, gas, telephone, cable TV etc.) and homeowners. More recently utilities companies use standard contracts for apartment blocks where there are registered owners' associations.

Law no.193/2000 concerning unfair terms in contracts concluded between commercial parties and consumers, implementing Directive 93/13/EC, applies only to contracts concluded between commercial landlords and consumers. So far no definition of commercial landlords has been established by special norms or case law, but it is likely that courts will treat a landlord renting out more than 3 apartments and thereby making profits, as a commercial landlord. The Office for the Protection of Consumers, as well as authorised specialists of other organs belonging to public administration ensure the control of the contractual clauses. Also, the State, using frequently standard contracts, might also be considered a commercial landlord and subject to the law on unfair terms in contracts.

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.*

Such a clause is lawful as long as no statute stipulates legal off-set between the rent and the eventual claims of the tenement. Moreover, the payment of the rent is indivisible, as a principle (article 1101 first paragraph of the Civil Code), so that the landlord cannot be constrained to receive only part of the rent against his own will and without an order resulting from law or the courts).

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

Article 22 d) of the Housing Act declares void any clause exonerating the landlord from his obligations stipulated by law. As this provision refers *in terminis* to “exoneration”, *a contrario* the limitation or mitigation of some of the obligations incumbent on the landlord is acceptable. In accordance with such an interpretation, a clause obliging the tenant to bear the costs of small reparations up to 100 E would amount to mitigation and is lawful. Moreover, the expression “small reparations” is used in article 1447 of the Civil Code in order to designate those repairs that fall within the duty of 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.*

Such a clause is legal. It details one of the obligations of the tenant with regard to his duty of handing over the apartment in good order at the end of the contract.

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

This clause would be illegal and void as it infringes the constitutional right of association of the tenant (article 37 of the Constitution).

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

According to law no.193/2000 the concept of consumer covers not only natural persons involved in a contractual relationship, but also groups of natural persons represented by associations. These associations are also allowed to request the control by the competent authorities of unfair contractual clauses.

Question 20: Changes to the Building by the Tenant

*T is a tenant in a building with 4 floors and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses 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.*

According to article 26 of the Housing Act, the tenant cannot alter or improve the dwelling without the prior written consent of the landlord and without respecting the conditions imposed by the latter. The provision was intended to preclude alterations in the form and structure of the dwelling. It is arguable whether the installation of a parabolic TV antenna on the balcony amounts to an alteration or improvement of the dwelling. It is also doubtful whether L's arguments based on esthetical considerations may prevail over T's constitutional right to information (article 31 of the Constitution).

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?*

T's case for installing the parabolic antenna would be even stronger in this situation as it involves not just the fundamental right to information but also the general constitutional principle recognising and guaranteeing the right to identity. By virtue of this principle, persons belonging to national minorities have the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity.

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?*

L would not have any means to force T to remove the poster. T could oppose him any time his freedom of expression (article 30 of the Constitution). The constitutional rule stipulates that “freedom of expression of thoughts, opinions, of beliefs and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable”. Such constitutional right of the tenant will be balanced against the constitutional property right of the landlord (article 41), both having the status of fundamental rights.

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?*

The Housing Act doesn't contain any provision on the landlord's right of possession of the keys. Instead, article 1420 third indent of the Civil Code stipulating that the landlord should act in such a way as to allow the tenant the unhampered use of the dwelling during the tenancy relationship, has been constantly interpreted as entailing a negative duty on L's side in the sense of refraining from anything that could disturb the use of the tenancy. The courts have constantly held that L's act to enter the rented dwelling in T's absence and without his previous permission constitutes an infringement of his obligations resulting from article 1420 Civil Code<sup>47</sup>. Moreover this hasn't been considered just as an infringement of the civil law obligation of *non facere*, but recognised also to have criminal law implications, like the offence of disturbance of possession (*tulburare de posesie*) or violation of domicile (*violare de domiciliu*).

On the other side, a right for the landlord to keep one set of keys may be inferred from his obligations with regard to the maintenance and reparation of the apartment. Moreover, the old housing act (law no.5/1973) explicitly provided that the landlord had a right to check, once a year, the way in which the tenant was using the dwelling and, to check periodically the way the common parties and installations are used. Although the new Housing Act did not take up such a provision, this does not qualify as infringement an attempt by L to verify the state of the dwelling, if it occurs within the contractual and legal limits.

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?*

According to article 28 of the Housing Act, the landlord has, amongst others, the duty to take the necessary measures for the reparation and maintenance in a state of security and functionality of the building, he has to keep in good conditions the external and internal elements belonging to the fundamental structure of the building, whereby the stairs are explicitly mentioned. L will be liable for the non-performance *lato sensu* of its contractual duties, as the neglected state of the stairs can be considered either a non-execution or a improper execution of L's duties of maintenance. Consequently L will be held liable on a contractual basis.

Nevertheless, in case that L's negligent attitude amounts to an offence under criminal law, T and C will have the choice between tort and contract law as the basis of L's liability.

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<sup>47</sup> T. Jud. Bistrita-Nasaud, dec.civ.550/1976, in RRD 5/1977 p.67

### Set 5: Breach of Contract

The situations dealing with the impossibility, delay and guarantees are basically dealt in Romanian civil law under the heading of contractual risks, which is dominated by the general principle of *res perit debitori*, i.e. the risk for the non-performance will be carried by the party whose duty could not be performed due to *force majeure*.

#### 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.*

The problem of the destruction/disappearance of the object of the tenancy contract is analysed under the general private law rules relative to the contractual risks. The basic principle is *res perit debitori*, i.e. the risk of the non-execution of the contract due to *force majeure* or other fortuitous cases is borne by the debtor of the obligation.

In tenancy law, articles 1423 and 1439 of the Civil Code stipulate that when, during the tenancy, the dwelling disappears completely because of fortuitous circumstances, the contract will be considered terminated *ipso jure*. L, as the debtor of the obligation that is not anymore susceptible of restitution will bear the risks resulting from the disappearance. Thus L won't have the right to claim any rent, as the apartment has been destroyed prior to be taken into possession by T.

L cannot be held liable for compensation to T. This is expressly stipulated by the second paragraph of article 1423 of the Civil Code and results also from the general rules contained in article 1083 Civil Code. Nevertheless, as the bearer of the risks of the contract, he may be held liable for any other damage resulting from the fortuitous impossibility of the execution of the contract (according to general rules on liability). Also, if T suffered damage because of other causes than the destruction of the apartment, he may claim damages according to *ius commune*<sup>48</sup>.

Judicial practice has settled that L cannot be obliged to reconstruct the apartment and T does not have any right over the land on which the destroyed dwelling was built. T is not held to pay rent anymore and if he paid it in advance he will be entitled to recover it<sup>49</sup>.

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

The fact that the transfer of possession occurred prior to the destruction is relevant only with regard to the rent due by T. He will have to pay the rent till the day of the disappearance of the object of the tenancy contract.

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

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<sup>48</sup> Cas.I, dec.26.11.1910, in C.civ.adnotat, nr.10 sub art.1423

<sup>49</sup> Cas.I, dec. 19.3.1908, in C.civ.adnotat, nr.8 sub art.1423

This does not make any difference as long as both parties were in good faith and L is anyway the bearer of the risk of the fortuitous destruction of the tenement.

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?*

The solution would be different depending on whether one of the tenancy contracts has been registered in the Cadastre or such non-mandatory formality has been omitted. If the contract with T1 had been written down in the real estate register it would be opposable to T2 who may be considered to have acted negligently at the time of the conclusion of the contract and bear the risk. If T2 has registered his contract, but T1 has not, this does not necessarily make T2's contract prevail over that of T1, when both contracts are concluded for less than three years. Rather, if T1 has a written contract and has already taken possession of the apartment, this demonstrates the anteriority of his contract and T1's prevailing right of possession. On the contrary if both contracts are concluded for more than 3 years, and should be registered in the Cadastre in order to be opposable to third parties, if only T2's contract is registered it will be considered the valid contract, while T1 will have a claim against L.

In case no contract was registered, T1's contract will remain valid and he will retain the possession of the apartment. If he incurred any damage because of T2's challenge, he may claim damages from L. T2's contract will not be valid and he may claim compensation for tort or breach of contract from L. T2 may pursue L and recover also any costs paid to T1. L definitely was not in good faith and infringed his obligation to ensure the peaceful use of the dwelling (article 1420 point 3 of the Civil Code). He is liable towards both T1 and T2 for the damage caused.

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 L 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?*

This situation may be considered a breach of contract, in the strict sense, as L did not execute his main obligation resulting from the tenancy contract, i.e. handing over the dwelling to T. T has the right to request the cancellation of the tenancy contract because of L's failure to execute one of his main duties (paragraph 2 of article 1439 of

the Civil Code). T may claim also damages based on contract law. When establishing compensation courts will have to take into consideration L's good faith. T cannot be obliged to pay rent prior to taking possession of the apartment.

L will have a claim against N based in tort law, if N's action amounts to a misuse of law, i.e. he abusively wanted to delay the construction works, although there was obviously no reason for that. Also it has to be mentioned that such a situation is rather theoretical, as lodging such an administrative action does not automatically lead to suspension of the work. In practice, for construction works to be delayed there is need for a special request and a special court order providing for suspension of building activities, which suppose that N's action is *prima facie* admissible.

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.*

T has to be guaranteed against any deterioration or defect of the tenement that prevent him from using the dwelling and may claim compensation if it causes him loss, even if L had no knowledge about the deterioration or defect (article 1422 Civil Code). The presence of stains of mildew is definitely a defect or deterioration, but does not prevent the use of the dwelling. T may ask for urgent reparations to be done by L.

As a principle, T has an action for rent decrease only with regard to disturbances of his peaceful use of the apartment resulting from the direct or indirect facts of L. Thus only if L would undertake repairs that last more then 40 days T would be entitled to ask for a proportional rent decrease (article 1425 second paragraph). If repairs last less then 40 days, T is forced to bear the restriction of these rights, even if he can use only part of the dwelling.

Hypothetically, if T can demonstrate that his health was affected by the presence of stains of mildew so that he had to undertake medical treatment, he may have a claim against L based on article 1422 Civil Code.

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?*

According to article 30 of the Housing Act, if L does not execute his obligations with regard to the repairs and maintenance of the dwelling, the tenants may proceed themselves to the execution of the works on behalf of L and are allowed to off-set the costs from the rent. The second paragraph stipulates two conditions for such an action by T. Thus, T may undertake repairs that fall within the duties of L if the deterioration is of such a nature that it affects the normal use of the dwelling, and only when L, although informed by letter did not act within 30 days from the notification.

Consequently, T may not impose by letter a shorter period to L (2 weeks instead of 30 days). In principle, the fact of undertaking the repair prior to the end of 30 days does not deprive T from his right to offset the costs from the rent. Nevertheless, L can prove that if he would have had the chance of undertaking the repairs within the 30 days he might have done it at a more advantageous cost (either by doing repairs himself or by using a cheaper specialist). If this were the case L may claim that the costs of the

repairs undertaken and off-set by T do not exceed those he would have incurred if he were allowed to do the repairs.

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

This situation would not change the solution. Article 1422 Civil code refers to all deteriorations and defects of the tenement, without differentiating whether they are visible or hidden, or whether L or T had knowledge about their existence at the time of the conclusion of the contract.

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

Article 1426 of the Civil Code stipulates that the landlord is not responsible for the disturbances resulting from the acts of third persons, if such persons do not claim any right over the tenement. Consequently, T will have no right to claim a decrease in the rent because of the noisy building site.

Another solution may result from the large interpretation of the notion of “administrative easement”<sup>50</sup>. The doctrine has qualified as administrative those easements related to the support of pillars, electric or phone cables. It was maintained that restraints to the tenants rights or inconveniences resulting from such easements intervened after the conclusion of the contract, may justify an action for the cancellation of the contract or for rent decrease<sup>51</sup>. In our opinion, the extended interpretation of the concept of administrative easement so as to include the building site for a road cannot be accepted, because this situation would not directly impinge on the property of the landlord (as in the enumerated situations), but only affect it in a remote way.

*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.*

Article 1426 is definitely operable, L cannot be held liable for the acts of noisy neighbours. Nevertheless, in this situation, T will have an action based on tort law against the neighbours themselves (article 998 Civil Code). T may claim damage and a prohibitory injunction.

*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?*

L can be held liable only under a), as a consequence of his obligation stemming from law to guarantee T against deteriorations and defects of the tenement corroborated with his obligation to proceed to repairs. According to article 22 d) of the Housing Act any clause exonerating L from the obligations imposed to him by law is void *ipso jure*.

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<sup>50</sup> See N. Pepelea, *Servitute administrative*, in Dreptul nr.9/1994, p.36

<sup>51</sup> Camelia Toader, *Evictiunea in contractele civile*, Ed. ALL Beck, 1998, p.234

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?*

In such a situation the tenancy contract is valid and T has no particular claims. He may ask for the termination of the contract under the general rules (respecting the 60 days term for giving notice).

If the assumption was not included in the contract, and cannot be induced from the interpretation of special clauses (e.g. L guarantees that the dwelling fulfils high standards for fire protection), no evidence through witnesses or presumption can be admitted. According to article 1191 Civil Code, if the parties have not agreed to the contrary, courts may not admit evidence through testimony or presumptions about what is alleged to have been said before, during or after the writing down of the contract.

There are no special rules applying to such mixed "private-professional" tenancies.

Set 6: The Relationship among the Tenant and Third Persons

As presented above, article 1426 Civil Code exonerates the landlord from liability if the tenant is disturbed by the acts of third persons that do not claim any right on the tenement. In these situations the tenant will have a direct claim against third parties infringing his rights.

The situation is different when a third party claims a right of every kind related to the tenement, and thus disturbs T's use of the dwelling. If the third party is not successful, T may request damages, however if court proceedings result in conferring on the third parties special rights, T basically may claim damages only from L.

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?*

As mentioned above T can start proceedings against N and claim for damages, as well as for injunction. In the case of the piano player a prohibitory injunction cannot forbid totally N's right to play music, but may restrict it to certain hours. The second situation requires a mandatory injunction, which orders him to carry out the measures necessary for impeding bad smells to penetrate into T's apartment. It would make no difference if T would not be the tenant but the owner of the apartment.

It can make a difference if N is also L's tenant. In this case, in general, it is admitted that L is responsible for its own act, as he shouldn't have conferred rights that disturb the peaceful use of the dwelling by other tenants. Thus courts have admitted L's

liability when excessive noise was made through the exercise of a certain profession by the co-tenant, because of the barking of dogs held in the neighbouring apartment, in case of damage caused by the immoral nature of the neighbour's profession etc. Nevertheless, if the disturbance is not due to the normal use of the dwelling, but to a misuse of law, without any causal link to the tenancy relationship, L cannot be held liable and T will have only a direct claim against N.

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 euros 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 or the neighbour N who commissioned the building company?*

T, being directly prejudiced, has the right to claim damages on the basis of tort law. Nevertheless he should inform L so as to allow him to participate in the proceedings and defend his own rights corresponding to the damaged property. T may claim compensation for the limitation or impossibility to use the rented house as well as other damages capable of covering fully his losses.

The building company will definitely be liable under tort law for the fault of his employee. This liability is regulated by article 1000 paragraph 3 of the Civil Code and article 393 paragraph 1 of the Commercial Code.

The neighbour will not necessarily be held liable for E's faulty conduct. Generally civil contracts (like the one for construction works) do not institute a liability of the owner with regard to faulty action on the part of the building company, even if he had retained a general right to supervise the works. Nevertheless, such a liability can exist if the building company has renounced its independence when performing contractual duties, accepting to be subordinated to the authority of the client. Also N may be liable for any other personal act that may be qualified as tort.

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 the apartment door, thereby destroying his chisel worth 10 euros and causing a damage of 200 euros at the apartment door. After entering the apartment, N discovers, however, that the gas-like smell stems from the garbage bin, which T had forgotten to empty before leaving. Has N a claim against T or vice-versa?*

*Negotiorum Gestio* is expressly regulated by the Civil Code in articles 987-991 and creates mutual obligations between the *negotiorum gestor* and the beneficiary. Whilst the first has the duty to render account of all measures undertaken, the latter is obliged to remunerate all necessary and useful expenses and repay all damage incurred by the *gestor* during the *negotiorum gestio*. Nevertheless, if the beneficiary does not ratify the *negotiorum gestio*, these duties exist only to the extent that the intervention proved to

be useful. Consequently N will not have a claim against T, whereas T's claim against N based on tort law will be limited by his contributory negligence.