

Spain

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I. Introduction

This report aims at giving an overview of Spanish Private Tenancy Law, including the latest reforms regarding substantive and procedural aspects of private tenancy contracts. It focuses on the rental of housing accommodation from private owners, and describes the current regulation laid down in the *1994 Urban Tenancy Act (Ley de Arrendamientos Urbanos de 1994)*, which is the most recent legislation in this field.

A. Origins and Basic Lines of Development of National Tenancy Law

Until the XIX century, and despite some contrasts from one region to another, most of the rural Spanish families -by then the larger part of the population- used to live in houses belonging to landlords and which were lent or rented to them with the land they were working, under different forms of tenancy.² In the second half of the XIX century, in relation with the urbanisation process, the wealthiest urban families invested in house construction, building houses for themselves and their relatives, while extra apartments were rented to other people, generally persons related to them by work or social acquaintance.³ In popular districts, dwellings were built by private investors as well as factory owners as part of their labor strategy. This scheme appeared even more clearly in isolated industrial or mining areas, where workers and their families lived in uniform dwellings whose tenancy was linked to their employment, and which were usually let to them as part of their wage. During this period, low-class families experienced very precarious housing conditions since eviction was common.⁴ As a matter of fact, the first set of rules concerning rental contracts were forged with the *1889 Spanish Civil Code*, regarding farm and housing accommodation (Title VI, Book IV, Chapters I and II).⁵ The urban and economic development of this period called for new legislative instruments in order to regulate the new relationships of a liberal society. Indeed, principles relating to the freedom of parties, the protection of private property and its transmission were codified in the 1889 Spanish Civil Code. Title VI, Book IV, Chapter I and II were devoted to farm and housing accommodation tenancy contracts, while Chapter III included rules on works and services tenancy contracts or *location conduction operarum (arrendamiento de servicios)*⁶ in a period of history when workers were agitating for better working conditions. Afterwards, specific regulation (*Leyes especiales*) was

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² Cabré Pla, A., and Módenes Cabrerizo, J.A., "Home ownership and social inequalities in Spain" (Chapter 9), Centre d'Estudis Demogràfics, Barcelona, Spain, 325, *available at* www.ced.uab.es/PDFs/PapersPDF/Text218.pdf.

³ *Id.*, at 326.

⁴ *Id.*, at 326.

⁵ The codification movement began in Spain in 1812 with the Cádiz Constitution (article 258).

⁶ Articles 1583 to 1603 C.C.

enacted and the idea of a Tenancy Act appeared as a response to those problems arising from urban development.

After the Spanish Civil War (1936-1939), under Francisco Franco's dictatorship, housing protection became a key political issue for ideological and economic reasons. Measures were taken in favour of tenants' interests. In particular, the *1939 Housing Protection Act*⁷ (*Ley de protección de vivienda, 1939*) and the *1946 Urban Tenancy Act* instituted the blocking of rents and made eviction process difficult.⁸ While inflation rose, these rents progressively turned out to be insufficient to ensure the maintenance of the houses, and contracts established under this regulation became unprofitable for landlords. As a consequence, construction-related investments sharply decreased and the existing buildings deteriorated. In 1954, the *Low Cost Housing Act* (*Ley de Vivienda de Renta Limitada*)⁹ was a first attempt to incentivise private investments in housing construction. However, it failed in preventing housing shortage, which resulted from intense migration flows from rural to urban areas. In order to prevent the buildings from further deterioration and to stimulate the rental market, legal measures were taken in the 50's, which allowed permanent tenants to purchase at somewhat interesting prices the dwellings they were renting.¹⁰ After a period of sales under those conditions, the *1960 Horizontal Property Act*¹¹ (*Ley de Propiedad Horizontal*) set the legal scene for investments in new buildings to be sold by separate flats and apartments. In conjunction with a set of other reasons (such as rural exodus, laxity in urban regulations, bursting inflation that made mortgages easier to pay), this period marked the beginning of a home ownership trend in Spanish society that would only intensify afterwards.

The *Urban Tenancy Act*¹² of 1964 introduced limited changes to the legal system as regards renting and it mostly maintained the protection of tenants' interests. Limited increases in rent were authorized, but the latter remained somehow very low. Many disputes were caused by indefinite lease renewals¹³ and by the tenancy transfer possibility (both *inter vivos* and *mortis causa*). Rental agreements had no renewal limits and tenant's heirs could succeed tenant's rights. In those conditions, rental offer remained low, and there were few new opportunities for tenants to rent an appropriate dwelling. It should be noted that with the Spanish Constitution of 1978, the Spanish society witnessed the beginning of a democratic period, hence article 47 states that "*All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the conditions necessary and establish the pertinent norms to make this right effective, regulating the use of land in accordance with the general*

⁷ *Housing Protection Act 1939*, of April 19 and the *2960/1976 Royal Decree*, of November 12. See BOE (Official State Gazette) No. 311, of December 28 (RCL 1976, 2437).

⁸ See Cabré Pla A. and Módenes Cabrerizo J.A., *Op. cit.*, 326.

⁹ See *1954 Low Cost Housing Act*, of July 15 (*Ley de Viviendas de Renta Limitada*). See BOE June 17, No. 168, 1954, 4094.

¹⁰ See Cabré Pla A. and Módenes Cabrerizo J.A., *Op. Cit.*, 326-327.

¹¹ See BOE No. 176, of July 23 (RCL 1960, 1042).

¹² Decree 4104/1964, of December 24, 1964. Rewritten Text of the Urban Tenancy Act. BOE No. 312, of 29 December, 1964; Corrections BOE No. 13, of 15 January, 1965 (RCL 1964, 2885 and RCL 1965, 86).

¹³ The origins of the indefinite lease renewal can be found in the *Bugallal Royal Decree, of June 21, 1880*. See Lacruz, "Los conceptos clásicos de propiedad y contrato, ante la legislación de arrendamientos urbanos", *Estudios de Derecho privado común y foral*, II, (1992), 163; López, J., "Arrendamientos urbanos. La crisis de los alquileres", *Estudios de Derecho hipotecario y Derecho civil*, II (1948), 360.

interest to prevent speculation. The community shall share in the increased values generated by urban activities of public bodies."¹⁴

In 1985, in order to remedy the increasing scarcity of dwellings to rent, the socialist government drew up a new regulation, the Boyer Decree¹⁵ (*Decreto Boyer*),¹⁶ which introduced deep changes and set off the liberalization of tenancy law through three specific measures: the freedom for the landlord to convert housing accommodation contracts into business leasing contracts, the right to agree on the rent level and, last but not least, the freedom to determine the term of the contract, which suppressed the indefinite lease renewal.¹⁷ In other words, the new framework allowed short-term agreements subject to rent increase control and revision. On the one hand, the Boyer Decree managed to slow down the downward trend that characterised the rental market from the beginning of the 80's, even if it could not reverse completely the tendency. On the other hand, an advantageous situation had been created for landlords, since real property speculation was greatly facilitated. The short terms contracts triggered a considerable instability in the housing rental market, while rents increased sharply. Therefore, home ownership rapidly became a far more interesting alternative than renting, so much so that in 1991 only 15% of the overall main residence market was regulated by tenancy contracts.¹⁸

Under the socialist government, the *1994 Urban Tenancy Act*¹⁹ (*Ley de Arrendamientos Urbanos*, hereinafter, the LAU) aimed at restoring a certain balance between tenants' and landlords' interests. Its main purpose consisted in promoting the tenancy market as a key element of housing policy, which mostly evolved from article 47 of the constitutional order, recognizing, as mentioned above, the right for any Spaniard to decent and adequate housing accommodation. One of the major outcomes of the *1994 Urban Tenancy Act* relates to the duration of contracts. A minimum term of five years was established, considering that tenancy would then be a valid option compared to ownership, and judging, at the same time, that it would not curb landlords' initiatives. The freedom of parties prevails as far as the rent is concerned, and rent increase is operated on the basis of the consumer price index (*Indice de Precios al Consumo*). Furthermore, the new regulation has abandoned the previous distinction between housing and business leasing contracts and introduced a new dichotomy in tenancy contracts between (i) residential purposes and (ii) other purposes, which include tenancy of second homes, seasonal housing or business offices. The 1994 Act also sets out to solve the problematic situation of the indefinite lease renewal that concerned the contracts established under the 1964 Act until the 1985 Boyer Decree. Evaluating its negative backlash on the rental market offer, the new regulation introduced some limits to this specific provision. However, the reform

¹⁴ See BOE No. 311, of December 29, 1978.

¹⁵ Royal Decree-Law 2/1985, of April 30, 1985 on Economic Policy Measures (*Real Decreto-Ley 2/1985, de 30 de abril sobre Medidas de Política Económica*), BOE No. 111, of May 9; Rect. BOE No. 116, of May 15 (RCL 1985, 1064).

¹⁶ Miguel Boyer was the Head of the Department who promoted this regulation under the socialist government.

¹⁷ Explanatory Statement, 1994 Urban Tenancy Act (No. 1).

¹⁸ Decennial census statistics, National Statistical Institute (*Instituto Nacional de Estadística*, INE), in Economic Indicators of Spanish Housing Market, Central Bank of Spain (*Banco de España*). See <http://www.bde.es/infoest/sindi15.pdf>.

¹⁹ See BOE No. 282, of November 25; Rect. BOE No. 85, of April 1995 (RCL 1994, 3272 and RCL 1995, 1141).

underlines that special attention shall be paid to the tenant's personal situation and economic resources when implementing this modification. One of the goals of the reform was achieved: to give rise to an increased placement of dwellings on the housing market.²⁰ However, the *1994 Urban Tenancy Act* has not achieved all of its objectives and even shows some deficiencies²¹ that the Tribunals had to fill progressively in a coherent way.²² Their decisions turn out to be an essential complement for the effective implementation of the legislation and are also important to understand the current overall Spanish tenancy legal framework.

As a conclusion, it can be highlighted that nowadays, in Spain, three different situations co-exist as far as private tenancy contracts are concerned.²³ The first situation corresponds to contracts established before the 1985 Boyer Decree. They are characterized by low rents – and even “anti-economic” rents for contracts concluded before 1964, because rents were blocked. These contracts mainly concern retired elderly people with relatively low incomes, although in some cases heirs have benefited from the contract via delegation of rights, and have maintained them on the basis of the indefinite lease renewal allowed by the 1964 Act. It should be noted that blocked rents and indefinite lease renewal issues are taken into account by the 1994 Act, which contemplates their progressive adaptation to the current legislative framework, always ensuring an appropriate and differentiated treatment to the concerned tenants.²⁴ The second category of tenancy contracts corresponds to the ones concluded after the 1985 Boyer Decree, and is characterized by relatively high rents. Finally, the third category includes all tenancy contracts established under the 1994 Act. The central rules are detailed in part B of the introduction.

This report mostly concentrates on the rules contained in the *1994 Urban Tenancy Act*. However, it should be noted that other specific tenancy regulations exist (*arrendamientos especialísimos*)²⁵ concerning house protection,²⁶ social integration of the disabled²⁷ and consumer protection with regard to sale and rent contracts on housing accommodation.²⁸

²⁰ Gómez Laplaza, M.C., *Legislación sobre Arrendamientos Urbanos y Propiedad Horizontal*, (Thomson-Aranzadi, 2003), 15.

²¹ *Infra*, Most problematic issues (Introduction, Part B.1). See also Gómez Laplaza, M.C., *Op. Cit.*, 15.

²² *Id.*, at 15.

²³ *Infra*, Transitory Provisions (Introduction, Part B.1).

²⁴ Explanatory Statement, 1994 Urban Tenancy Act, (No. 6). See also Second Transitory Provision.

²⁵ See Albadalejo, M., *Derecho Civil (Derecho de Obligaciones)*, II/Vol. 2, (Bosch, 1997), 204-206.

²⁶ See First Additional Provision, LAU regulates Private housing partly financed by government grants and subject to price control (the so-called *Viviendas de Protección Oficial*, VPO). See also for housing public promotions, *Royal Decree-law 31/1978, of October 31, on Subsidised Housing Policy*, BOE No. 267, of November 8 (RCL 1978, 2419); *Royal Decree 3148/1978, of November 10*, BOE No. 14, of January 16 (RCL 1979, 126); *Royal Decree 2960/1976, of November 12*, BOE No. 311, of December 28 (RCL 1976, 2437); *Decree 2114/1968, of July 24*, BOE No. 216, of September 7 (RCL 1968, 1584, 1630 and 2063); *Royal Decree 727/1993, of May 14*, BOE No. 130, of June 1 (RCL 1993, 1696) and *Royal Decree 1/2002, of January 11*, BOE No. 11, of January 12 (RCL 2002, 103, 254 and 277).

²⁷ See *13/1982 Act, of April 7, on Social Integration of the Disabled*, BOE No. 103, of April 30 (RCL 1982, 1051). See also, *15/1995 Act, of May 30*, BOE No. 129, of May 31 (RCL 1995, 1614); *Royal Decree 355/1980, of January 25*, BOE No. 51, of February 28 (RCL 1980, 457) *Royal Decree 248/1981, of February 5*, BOE No. 49, of February 26 (RCL 1981, 459); *Order of Mars 3, 1980*, BOE No. 67, of March 18 (RCL 1980, 633) and *Royal Decree 556/1989, of May 19*, BOE No. 122, of May 23 (RCL 1989, 1154).

²⁸ See *Royal Decree 515/1989, of April 21*, BOE No. 117, of May 17 (RCL 1989, 109).

B. Basic structure and content of current national law

1. Private Tenancy Law

Overall structure of the LAU

The LAU comprises five Titles laying down successively (i) the scope of the law (Title I; articles 1 to 5), (ii) the provisions concerning residential tenancy contracts (Title II; articles 6 to 28), (iii) the provisions regarding tenancy for other purposes than residency (Title III; articles 29 to 35), (iv) common provisions (Title IV; articles 36 and 37) and (v) provisions on procedural aspects (Title V; articles 38 to 40).²⁹ Further dispositions complement the Act, namely the Additional, Transitory, Derogatory and Final provisions.

General scope of the LAU

As can be deduced from its overall structure, the LAU sets a distinction between urban tenancy for residential purposes (*arrendamiento de fincas urbanas que se destinen a vivienda*), and urban tenancy for other purposes (*arrendamiento de fincas urbanas que se destinen a uso distinto del de vivienda*) (see articles 1 to 3). Within this distinction, “urban land” (*finca urbana*)³⁰ is used by the LAU³¹ to express its object of regulation: tenancy contracts either for an habitable building or an uninhabitable one (see articles 2 and 3). Although article 2.1 LAU does not provide any definition of tenancy for residential purposes, it sets down the necessary requirements to apply the LAU provisions that specifically refer to this type of tenancy (Title II; articles 6 to 28). Those requirements are the suitability of the building for residential purposes,³² its essential use as residence,³³ and the tenant’s need of permanent accommodation.³⁴ Conversely, urban tenancy for other purposes (article 3) is defined (mostly through the combination of articles 1, 2, 3 and 7) as a tenancy contract for a building basically assigned for other purposes than the tenant’s necessity of permanent housing (article 3.1). These other purposes refer in particular to industrial, commercial, professional, leisure, cultural or teaching activities (see article 3).³⁵ The substantive regulation of the tenancy contract in the LAU starts from a clear differentiation of treatment between both types of tenancy and such delineation stems from the economic divergences related to each type of tenancy. This new

²⁹ These articles have been abolished by the Civil Procedural Act 2000.

³⁰ In general terms, “urban land” is defined under Spanish law as a land that is administratively described as urban. For the definition of urban land see Cossío y Rubio, *Tratado de arrendamientos urbanos*, T. I, Rialp. Madrid, 1949, 203; Valladares Rascón, E., “Ámbito de aplicación”, *Comentarios...*, *Op. Cit.*, 27-29; Contreras, L.M., *Op. Cit.*, 38-40. See also STS (*Sentencia del Tribunal Supremo*), of December 13, 1993 (RJ 1993, 9614).

³¹ Urban land (*finca urbana*) is used in the LAU as synonym of “building or construction” (*edificación*).

³² See SAP (*Sentencia de la Audiencia Provincial*) Córdoba, of April 5, 2000 (AC 2000, 1087); STS, of January 21, 1966 (RJ 1966, 87).

³³ The residential use of the building is agreed by both parties to the tenancy contract (*uso pactado*).

³⁴ See Valladares Rascón, E., “Arrendamiento de vivienda”, *Comentarios...*, *Op. Cit.*, 31-54.

³⁵ About both concepts See, SAP Granada, Secc. 3ª, September 9, 2000 (AC 2000, 2133); STS, of December 31, 2002 (RJ 2003, 1358); SAP Santa Cruz de Tenerife, Secc. 4ª, November 11, 2002 (AC 2002, 1955); SAP Cáceres, January 24, 200 (AC 2000, 400); SAP Alicante, Secc. 5ª, April 12, 2002 (AC 2000, 1743); SAP Ciudad Real, January 17, 1997 (AC 1997, 112). About the exclusion of industry lease See SAP Teruel, November 4, 1997 (AC 1997, 2176; SAP Badajoz, Secc. 2ª, December 10, 2002 (AC 2002, 2264).

dichotomy evolved from the will to enhance the protection of tenant's rights only when the purpose of the tenancy is to satisfy a housing necessity and not in other cases when the purpose is to satisfy economic, leisure or administrative needs.³⁶ The order of priority of sources that regulate tenancy contracts is given by article 4: on the one hand, residential tenancy is regulated by the LAU Title II, in its absence by the freedom of parties and, supplementary, by the Spanish Civil Code (hereinafter, C.C.);³⁷ on the other hand, tenancy for other purposes is regulated by the freedom of parties, in its absence by the LAU Title III, and supplementary by the Civil Code. Both tenancy regimes will be under the mandatory nature (*carácter imperativo*) of the LAU Titles I, IV and V.

It should be noted that the exclusion of application of the LAU, when legally possible, should be stated expressly³⁸ in the contract for each relevant provision (see article 4). On the other hand, article 6 establishes the mandatory nature of all the LAU's provisions. This implies that private parties to a tenancy contract are not competent to modify them, except when the LAU specifies the opposite.

Some tenancy contracts are excluded from the LAU (article 5) and, thus, are subject to the Civil Code provisions or other specific regulations. These contracts relate to the accommodations assigned with a determined employment (doormen, security guards, wage earners, and civil servants)³⁹ as well as to military, farmers',⁴⁰ and student accommodation.

Requirement for conclusion of a tenancy contract

In accordance with the rules of Title II (*De los contratos*) of the Spanish Civil Code,⁴¹ a mere exchange of agreements is enough to form a contract (see articles 1254 C.C.). Under Spanish law, consent is defined as the concurrence of two reciprocal declarations of will (offer and acceptance) on the object and the cause of a contract (articles 1262 and 1254 C.C.).⁴²

Despite the absence of any special requirement concerning the conclusion of tenancy contracts (article 1278 C.C.), LAU article 37 lays down the possibility for both parties (tenant and landlord) to establish a written agreement (see article 1280.2 C.C.).⁴³ In this case, the existence of a prior enforcing contractual relation is required (see article

³⁶ Explanatory statement, 1994 *Urban Tenancy Law* (No. 3).

³⁷ Contracts covering housing accommodation sizing over 300m² or rents higher than 5,5 times the minimum annualised wage are an exception, and are regulated in first place by the freedom of parties, in its absence by LAU Title II and, supplementary, by the C.C. (article 3.2 LAU).

³⁸ About the different meanings of the word expressly (*de forma expresa*), see Albadalejo, M., *Derecho Civil*, I/Vol. 2, *Op. Cit.*, §81, no. 2, quotation 3.

³⁹ Article 5 (a) LAU states: "*Quedan excluidos del ámbito de aplicación de esta ley: (a) El uso de las viviendas que los porteros, guardas, asalariados, empleados y funcionarios, tengan asignadas por razón del cargo que desempeñen o del servicio que presten*".

⁴⁰ See article 1(2) of the *Farm Tenancy Act 2003* (*Ley 49/2003, de 26 de noviembre, de Arrendamientos Rústicos*, BOE No. 284, de November 27, 2003, 42239-42246). See articles 2 and 3 of the *Urban Tenancy Act 1964* partially in force as amended by the *Tenancy Act 1994*, Second, Third and Fourth Transitory Provisions.

⁴¹ For an introduction to the formation of contracts and Title II of the Spanish Civil Code, see Díez-Picazo, L., and Gullón, A., *Sistema de Derecho Civil*, Vol. II, (Madrid, 1989).

⁴² See also article 1254 C.C.

⁴³ This means that a tenancy contract does not have to be written to be valid. Articles 1258 and 1278 C.C. provide that a contract does not need any specific form to be valid and obligatory.

1261 C.C.). The written agreement can be completed by a public instrument or a private statement.⁴⁴ However, tenants and landlords remain free to choose between a written and oral agreement.⁴⁵ In parallel, all contracts, regardless of duration, can be registered at the Land Register (*Registro de la Propiedad*). This option re-enforces the reciprocal guarantees of both parties' rights, while providing information to the State so as to improve the normative design and the practice of tenancy law.

Contract duration

Rules concerning the duration of residential tenancy contracts are covered by Chapter II, Title II (articles 9 to 16). Parties are free to agree on the duration of the contract (article 9), but the possibility of a minimum term of five years is instituted to the benefit of the tenant. Three different situations can be distinguished.

(i) *Contract duration below five years.* Once completed the agreed duration agreed upon, the lease is automatically carried over (*prórroga obligatoria*) for successive annual terms until the expiration of a five year period. However, the tenant is entitled to put an end to the contract before the five years period, by giving notice of her intention with at least thirty days prior to the termination of the contract or any of its renewals (article 9.1).⁴⁶ This five years obligatory lease 'carryover' will not be valid if the landlord expressly states in the contract her will to recover the dwelling for her personal residence at a given date (article 9.3). Once the established duration of the contract – and at least a five years period – has been completed, if none of the parties serves notice of her will to terminate the contract one month before its term, the latter is renewed by yearly terms, up to a maximum of three years. However, the tenant may also put an end to the contract, giving notice one month before the end of any of these annual periods (article 10.1).⁴⁷

(ii) *Contract duration of five years.* If the parties opt for a contract duration of five years, then the lease 'carryover' is possible for up to three annual renewals under the above mentioned conditions of article 10.

(iii) *Contract duration over five years.* If the parties opt for a contract duration over five years (article 11), and once a minimum period of five years has been completed, the tenant has the right to discontinue the agreement giving notice of her intention at least two months in advance (*desistimiento*).⁴⁸ Moreover, article 11.2 LAU gives the possibility for the parties to agree on an indemnity for the landlord equivalent to one

⁴⁴ Some contractual effects can only be derived from its certification in a written document either by public instrument or private statement. According to article 1216 C.C. a public instrument (*documento público*) is a legal document certified by public notary or competent public officer; article 1217 C.C. states that such instruments are valid *vis-à-vis* third parties. On the other hand, article 1225 C.C. provides that a private statement (*documento privado*) legally recognised is a written document only valid between the parties. See Albadalejo, M., II/Vol. 1., *Op. Cit.*, 397-398 and also II/Vol 2, *Op. Cit.*, 208-209.

⁴⁵ Explanatory statement 1994 Urban Tenancy Act (No. 2).

⁴⁶ Contreras, L.M., *Ley de arrendamientos urbanos. Con las reformas de la Ley 22/2002, 23/2003 y de la LO 19/2003* (Bosch, 2004), 112; Cf., Marín López, J.J., "Plazo mínimo", *Comentarios a la Ley de Arrendamientos Urbano*, Coordinated by Rodrigo Bercovitz Rodríguez-Cano (Aranzadi, 2002), 169-224.

⁴⁷ See Marín López, J.J., "Plazo mínimo", *Loc. Cit.*, *Comentarios...*, *Op. Cit.*, 169-224.

⁴⁸ See SAP Vizcaya, Secc. 5ª, of January 18, 2000 (AC 2000, 126); SAP Castellón, Secc. 2ª, of March 14, 2001 (AC 2001, 1658); SAP Palencia, of January 28, 1997 (AC 1997, 122).

monthly rent for every year that the contract has not been renewed as stated by both parties at the time of its conclusion. One can notice that, a one month notice before the termination of the contract or any of its renewals (*derecho de no renovación de la prórroga*)⁴⁹ is required if parties agree on duration below five years, whereas a two months notice is required to discontinue if parties opt for a contract duration over five years (*desistimiento del contrato*)⁵⁰.

Further, LAU article 13 regulates the tenant's right to continue the contract if, during the first five years of its duration, the right of the landlord is avoided by the exercise of: the conventional redemption (*retracto convencional*),⁵¹ the open of a *fidei-commisum* substitution (*apertura de una sustitución fideicomisaria*),⁵² the compulsory sale derived from a foreclosure or a judicial decision (*enajenación forzosa derivada de una ejecución hipotecaria o de sentencia judicial*),⁵³ or the right of an option to purchase (*derecho de opción de compra*)⁵⁴. In all the aforementioned cases, the tenant has the right to continue the contract for up to five years (article 13.1§1).⁵⁵ Conversely, if the parties have agreed upon a contract duration over five and –once again– if a minimum period of five years has been completed, the tenant has the right to continue the contract only if it has been registered previously to the exercise of the above mentioned rights (article 13.1§2). Finally, regarding the tenancy contracts for other purposes, the freedom of the parties prevails and there is no minimum duration for the contract (article 4.3).

Conditions for the determination update and increase of the rental fee

Rules about rental fees, form of payment,⁵⁶ rent update and its increase⁵⁷ are stated in Chapter III, Title II (articles 17 to 20). Parties are free to determine the rental fee (article 17.1)⁵⁸. Unless otherwise specified by the parties, the payment of the rent will

⁴⁹ See Marín López, J.J., “Prórroga del contrato”, *Comentarios...*, *Op. Cit.*, 225-237.

⁵⁰ See Carrasco Perera, A., “Desistimiento del contrato”, *Comentarios...*, *Op. Cit.*, 239-254. On the differences between the right to renew or not the contract (articles 9 and 10) and the right to discontinue the contract (article 11) *see* p. 246.

⁵¹ In general terms, the right of redemption or “*retracto convencional*” is defined under Spanish law (articles 1507-1520 C.C.) as the seller's reservation of right to recover the sold thing. This recovery requires the seller's fulfilment of the conditions regulated in article 1518 C.C. (the refund of the price and other expenses made by the buyer). *See* Marín López, J.J., “Resolución del derecho del arrendador”, *Comentarios...*, *Op. Cit.*, 281-329, p. 289.

⁵² A *fidei-commisum* substitution or “*sustitución fideicomisaria*” is defined under Spanish law (articles 781-787 C.C.) as the heir's duty to carry out the conservation and transmission of all or part of the heritage to a third party. In particular, for the *fidei-commisum* under article 13 LAU *see* Marín López, J.J., “Resolución...”, *Loc. Cit.*, *Comentarios...*, *Op. Cit.*, 289-292. *See also* STS, of November 18, 1995, (RJ 1995, 8895); STS, of February 28, 1996 (RJ 1996, 1269).

⁵³ The question on whether or not a tenancy contract concluded after the creation of a mortgage is still enforceable has been deeply debated among the Spanish academic opinion. *See* Marín López, J.J., “Resolución...”, *Loc. Cit.*, *Comentarios...*, *Op. Cit.*, 292. *See also* STC 6/1992, of January 13; STC 21/1995, of January 28, BOE No. 50, of February 28, 1995. In general *see* article 1456 C.C.

⁵⁴ In this particular case, the right to option is the choice to purchase the house by a third person that can be invoked against the tenant only if it is registered in the Land Register (*Registro de la Propiedad*). *See also* article 14 RH (*Reglamento Hipotecario* or Land Regulation).

⁵⁵ Marín López, J.J., “Resolución...”, *Comentarios a la Ley de Arrendamientos Urbanos*, Coordinated by Rodrigo Bercovitz Rodríguez-Cano (Aranzadi, 2002), 281-329.

⁵⁶ On the anticipated monthly payments *see* SAP León, Secc. 2ª, October 7, 1997 (AC 1997, 1966).

⁵⁷ About notification of the rent update *see* SAP Santa Cruz de Tenerife, of February 25, 1997 (AC 1997, 217).

⁵⁸ *See* González Pacanowska, I., “Determinación de la renta”, *Comentarios...*, *Op. Cit.*, 389-406.

take place every month, within its first seven days (article 17.2). The place and form of payment is also determined by the parties, and in their absence, payment shall be made in cash in the rented dwelling (article 17.3). Whether the tenancy is for residential or other purposes, during the first five years of the contract, rent can only be updated on a yearly basis, as a function of the annual variation the general consumers price index (*Indice General Nacional del Sistema de Indices de Precios de Consumo*⁵⁹) (article 18.1). Beyond the five years term, rent will be updated according the scheme agreed the parties upon, and in its absence, according the process previously described (article 18.2).

As far as residential tenancy is concerned, once the five years period elapsed, if the landlord makes improvement work in the dwelling, she is entitled to increase the annual rental fee on the basis of the legal interest rate, incremented by three points, applied to the total investment, less the public subsidies. In any case, the rent increase can not exceed 20% of the rental fee in force at this moment (article 19.1). The same regulation applies to the contracts regarding tenancy for other purposes, but the rent can be increased as soon as from the conclusion of the contract (article 30).

The deposit (*fianza*) conserves its compulsory nature and amounts to a one month rent for residential tenancy and two-months rent for tenancy for other purposes (article 36). Further, LAU Third Additional Provision⁶⁰ states that the Autonomous Communities can establish (only for urban tenancies) the landlord's obligation to lodge at the Autonomous Administration or other local entity –chosen for this purpose– the amount of the deposit referred to by article 36.1 –without any interest– until the termination of the tenancy contract. Conversely, if the administration does not return the deposit within one month after the termination of the contract, the amount of the deposit will yield the correspondent legal interest. The Autonomous Communities having housing policy competences are entitled to manage the deposits, which have turned out to be a considerable financing source for the regional housing policies (e.g. public housing building or restoration).⁶¹ In some cases, the Autonomous Laws (*Leyes Autonómicas*) have justified it on the basis of a more solid tenant's guarantee to have the deposit back once the contract has been terminated.⁶² However, some academic opinions underline that it is vain to justify such an obligation as a benefit for the parties. Furthermore, they highlight the tax character of this deposit describing it as a parafiscal charge (*exacción parafiscal*).⁶³

⁵⁹ For the general consumers price index See the National Statistical Institute at <http://www.ine.es>.

⁶⁰ Similar provisions were inserted in the 1939 Act, of April 19 (article 8), the Decree 266/1984, of October 10, of the Autonomous Community of Andalusia (article 5) and the 10/1992 Act, of November 4, of the Autonomous Community of Aragon (Preamble). See also Appeal to the Constitutional Court (*recurso de inconstitucionalidad*) 472/93, BOE No. 64, of March 15, 2000, p. 10571.

⁶¹ Cf., 2/1999 Act (article 9.2), of the Autonomous Community of Castilla y León, BOE No. 66, of March 3, 1999 and the 13/1996 Act, of the Autonomous Community of Cataluña, BOE No. 204, of August 28, 1996. See Explanatory Statement, 1994 Urban Tenancy Law (No. 4): “(...) *Al mismo tiempo se permite a las Comunidades Autónomas con competencias en materia de vivienda que regulen su depósito obligatorio en favor de la propia Comunidad, ya que los rendimientos generados por estos fondos se han revelado como una importante fuente de financiación de las políticas autonómicas de vivienda, que se considera debe mantenerse*”. See also 12/1997, of June 4, BOE No. 80, March 3, 1998.

⁶² See Explanatory Statement, 2/1999, of February 19, *Boletín Oficial de Castilla y León*, No. 40, of March 7, 1999.

⁶³ See Ataz López, J., “Depósito de fianzas”, *Comentarios...*, *Op. Cit.*, 847-856. On the concept of parafiscal charge see p. 850. See also TSJ Valencia, of September 7, 1994 (*La Ley*, of October 26, 1994,

Reciprocal rights and obligations of landlords and tenants

Chapter IV, Title II of the LAU (articles 21 to 25) lays down the reciprocal rights and obligations of landlords and tenants as far as residential tenancy is concerned. Basically, the LAU maintained the previous regulations without introducing outstanding novelties.⁶⁴ Article 30 states that those provisions also apply to tenancy for other purposes. First, the landlord has the obligation to make all the necessary repairs for the maintenance of the house in the required conditions for an adequate use (article 21). However, the tenant will take care of the repairs regarding damages brought about by the ordinary use of the property (article 21.4). The most important rights of landlords correspond to the recovery of the rental fee and its legal update and increase. Accordingly, the tenant has the obligation to pay the rent (article 23). Tenants have the right to use the property without any disturbance from third parties (See also article 1560 C.C.). One novelty regards a provision concerning tenants with disability, or tenants taking care of a person with a disability. Indeed, the LAU contemplates the possibility for a tenant in such a situation to operate modification works aiming at making the dwelling more suited to the occupants' everyday life (article 24.1). The tenant can be obliged by the landlord to return the dwelling to its original state when the contract terminates (article 24.2).

The tenant's pre-emption right (*derecho de adquisición preferente*) is maintained, under market conditions, if the landlord decides to sell the rented house during the duration of the contract (article 25). This right mostly contributes to increase the possibilities for a tenant to stay in the dwelling.⁶⁵ Moreover, in order to promote the continuity of tenants in the case of tenancy for other purposes, the LAU has introduced a new provision (*derecho de arrendamiento preferente*) that gives the tenant the priority to continue with the dwelling over any other third party in market conditions (Part E.11, Third Transitory provision).⁶⁶ Besides, another novelty is introduced in the following case: if a tenancy contract (for commercial purposes) terminates and if the new occupant (the landlord or a new tenant) can benefit from the previous tenant's clientele linked to the previous tenants' activities, the LAU entitles the leaving tenant to an indemnity (article 34.1).

Conditions for contract termination

If one of the parties does not observe its primary and reciprocal obligations, the other one – provided she observed her respective obligations – is entitled to demand for the obligation to be respected, or otherwise to demand the resolution of the contract (*resolución del contrato*) as stated in article 1124 of the Code Civil (article 27.1).

Furthermore, the landlord can put an end to the contract under six specific conditions (article 27.2): (i) the absence of the payment of the rent or any other amount for which the tenant is responsible, (ii) the absence of payment of the deposit or its update, (iii) the unlawful sub-renting or cession, (iv) the existence of damages caused intentionally

No. 3637, p. 14). Some academic opinions highlighted the unconstitutionality of these deposits. See Fernández-Aramburu León, A., "La posible inconstitucionalidad de la normativa reguladora de la fianza en los arrendamientos urbanos", *La Ley*, No. 3576, of August 2, 1994.

⁶⁴ *Id.*, at (No. 2).

⁶⁵ *Id.*, at (No. 2).

⁶⁶ *Id.*, at (No. 6).

in the property or non-agreed or unauthorized works in the house, (v) the existence of unhealthy, disturbing, dangerous or unlawful activities, and finally (vi) the use of the house for a purpose other than residence as stated in article 7.

For her part, the tenant has the right to terminate the contract (i) if the landlord does not make the necessary repair and maintenance work in the dwelling as stated in article 21, or (ii) if the landlord perturbs tenant's right of use (article 27.3). Lastly, the termination of the contract *ex lege* (*extinción del arrendamiento*) can take place, in case (i) of property loss without landlord's responsibility, or (ii) by an official statement of a competent authority declaring its state ruined (article 28). Besides these two cases, the discharge of a contract can also be due to its ordinary termination, discontinuance or withdrawal (*desistimiento del contrato*) (see articles 11 and 12), as well as the death of the tenant without subrogation of any other persons in her rights (articles 7 and 16).

Procedural aspects

The LAU incorporated in its regulation new procedural models⁶⁷ which were afterwards adopted and unified by the *2000 Civil Procedural Act*.⁶⁸ Initially, these three new proceedings, regulated under articles 38 to 40, were related (i) to the accumulation of action⁶⁹ regarding the avoidance of contracts (*resolución del contrato*) and contractual claims (*reclamación de rentas*),⁷⁰ (ii) to the eviction proceeding of a tenant⁷¹ (*juicio de desahucio*)⁷² and third, the declaratory proceeding (*juicio de cognición*).⁷³

The abolition of articles 38 to 40 of the LAU, as a consequence of the implementation of the *2000 Civil Procedural Act*, simplified and organised these three proceedings into two single actions: firstly, the ordinary proceedings (*juicio ordinario*) concerning all the actions related with tenancy contracts on real property,⁷⁴ and secondly, the verbal proceedings (*juicio verbal*) with all the particularities of eviction proceedings and based either on default in payment of the rent or other sum due by the tenant, or on the expiry of the normal procedural time limit of the contract.⁷⁵ Also, the important

⁶⁷ Abolished by the Civil Procedural Act 2000. *Disposición Derogatoria Única, punto 2, apartado 6º*.

⁶⁸ See 1/2000 Act, of January 7, 2000. BOE No. 7, of January 8, 2000; Corrections BOE No. 90, of April 2000 and BOE No. 180, of July 28, 2001 (RCL 2000, 34 and 962, RCL 2001, 1892).

⁶⁹ See articles 70 to 73 on accumulation of actions. Particularities on such accumulation are regulated in articles 438.3.3º § 2 and 438.4 in the case of verbal procedures (*juicio verbal*), and in articles 401, 402, 419 in the case of ordinary procedures.

⁷⁰ See articles 433.3.3º, 219 and 220 *2000 Civil Procedural Act*.

⁷¹ SAP Zaragoza, Secc. 5ª, July 30, 2002 (AC 2002, 1277); SAP Las Palmas, Secc. 5ª, September 19, 2002 (JUR 2002, 265996); SAP Girona, Secc. 2ª, February 11, 2002 (AC 2002, 827); ATC 64/2001, of March 26, 2001 (RTC 2001, 64 AUTO); STC 135/1986, of October 31 (RTC 1986, 135); STC 102/1993, of 22 March, 1993 (RTC 1993, 102); STC 113/1986, of October 1, 1986 (RTC 1986, 113); SAP Girona, Secc. 2ª, of December 15, 1995 (AC 1996, 15); SAP Las Palmas, Secc. 1ª, of June 15, 1996 (AC 1996, 1159); SAP Avila, of Mars 25, 1996 (AC 1996, 1163); SAP Córdoba, Secc. 1ª, of September 2002 (AC 2002, 2141). About the enervation of the eviction proceedings see Gómez Laplaza, M.C., *Op. Cit.*, 101-113.

⁷² See article 250 of the *2000 Civil Procedural Act*. See article 70 of the *New Act 22/2003 on Insolvency* (which will become in force in September 1, 2004) on the enervation of the eviction action by the opening of an insolvency proceeding. On the new Insolvency Act (22/2003 Act, of July 9) See BOE No. 164, of July 10, 26905-26965.

⁷³ See articles 248 and 249, *2000 Civil Procedural Act*.

⁷⁴ See article 249.1.6º, *2000 Civil Procedural Act*.

⁷⁵ See articles 249.6º, 249.7 and 250.1º, *2000 Civil Procedural Act*.

role played by arbitration as a mechanism of tenancy disputes settlement has been introduced by the LAU and regulated in its former article 39.5.⁷⁶

Transitory provisions

The adaptation to the current legal framework of tenancy contracts established before the LAU represents another important issue. Contracts established after the 9th May 1985 (date of entry into force of the Boyer Decree) do not raise particular problems, given that their duration and rental fee were established freely by both parties. According to the First Transitory Provision, these contracts, whether they were concluded for residential or business purposes, will still be regulated according to the former relevant provisions⁷⁷ until their renewal; from that moment, they will be regulated by the LAU, respectively by the provisions concerning tenancy for (i) residential as for (ii) other purposes.

With respect to the contracts concluded before the 9th May 1985, the LAU opted for a solution trying to ensure a balanced treatment of the different tenant's situations. Tenancy contracts are singled out according their purpose (residential or another one), and the residential tenancy contracts have a greater flexibility as far as their modification is concerned.⁷⁸ Considering in particular the negative effects of the transfer of rights (*subrogación intervivos*) instituted by the 1964 Act, the legislator of the LAU wanted to suppress it in order to give back to tenancy contracts their original temporary nature. In that sense, for residential tenancy contracts, the delegation of rights *intervivos* is definitively suppressed (except in cases of transfer derived from judicial decisions of marital proceedings) while the delegation of rights *mortis causa* is progressively removed (part B of the Second Transitory provision).⁷⁹

More precisely, the LAU establishes that the transfer of rights *mortis causa* instituted by article 58 of the 1964 Tenancy Act will only be applicable (i) either for the surviving spouse (if they are not divorced or separated *de facto*), or the tenant unmarried partner (independently of his/her sexual orientation). Moreover, if no child was living with the surviving spouse/partner who has acquired tenant's rights, then the tenancy contract will terminate at the moment of the spouse or partner death. (ii) In her absence, the transfer of rights will be applicable to the children who had lived in the dwelling during the two last years before the tenant death. Afterwards, the contract will terminate either (i) within a two years period or (ii) when the subrogated child is 25 years if this was to occur later.⁸⁰ (iii) Finally, only in absence of the

⁷⁶ Abolished by the implementation of the 2000 Civil Procedural Act. *Infra*, Alternative dispute resolution (Introduction, Part B.2).

⁷⁷ Article 9 of the Royal Decree-Law 2/1985, of April 30, 1995, on Economic Policy Measures (*Real Decreto-Ley 2/1985, de 30 de abril sobre Medidas de Política Económica*) and Rewritten text of the 1964 Urban Tenancy Act (*contrato de inquilinato en el Texto Refundido de la Ley de Arrendamientos Urbanos, aprobada por Decreto 4104/1964, de 24 de diciembre*).

⁷⁸ Explanatory statement, 1994 Urban Tenancy Act (No. 6).

⁷⁹ *Id.*, at (No. 6).

⁸⁰ The contract would only terminate with the death of the person who acquired the tenant's rights, except if a tenant's child affected by a disability equal or over 65% was living with the subrogated spouse/partner and she died. In this case, the disable tenant's child shall also acquire rights by subrogation (this is an exceptional second subrogation). Further, if the subrogated person were the spouse and that she died having children living with her in the dwelling, there could be an additional transfer of rights in benefit of those children, following the same scheme as if they were tenant's children (part B.4 of the Second Transitory provision). The rights recognised to the tenant spouse/partner in parts B.4 and B.5 of the Second Transitory provision will also be recognised to any

relatives listed above ((i) and (ii)), the descendants who lived in the dwelling at least three years prior to the death of the tenant can benefit from the transfer of rights (part B.4 of the Second Transitory provision). Importantly, if two transfers of rights already occurred during the duration of a contract, the LAU states that after the death of the current occupant, no other delegation of rights will be accepted (part B.6 of the Second Transitory provision). It is also interesting to consider that, whereas the 1964 *Act* laid down the indefinite lease ‘carryover’, the 1994 *Act* sets up new provisions to recover the time limits that might be applicable to tenancy contracts.⁸¹ This new balance was accomplished by the legislator of 1994 through the Transitory Provisions 2 and 3, which regulate tenancy contracts on housing accommodation as well as business leasing contracts signed before the 9th May 1985.

The LAU also tackled the blocked rents issue. To that effect, a system of rent revision was set up to be applied to all *contracts concluded before the 9th May 1985*. This system foresaw the recovery of inflation variations that were not taken into account from the conclusion of the contract, or from its latest legal revision. Rent revision is not implemented immediately, but progressively so as to give the tenants with the lowest resources the opportunity to adapt their situation to the new reality (part D of the Second Transitory Provision).⁸² As far as low-income⁸³ tenants are concerned, the LAU excluded the principle of rent revision (*actualización de la renta*), but instructed the government to design a fiscal compensatory mechanism for the landlords (Fourth Final Provision). Finally, after several attempts of the socialist political group in 1996, 1997, 1998 and 2000,⁸⁴ the Third Transitory Provision of the *Royal Decree-Legislative 3/2004, of March 5*⁸⁵ has succeeded in designing such a fiscal compensatory mechanism. Therefore, when determining the real state yield resulting from a tenancy contract concluded before the 9th May 1985, the depreciation of property assets can be deducted as a charge from its annual tax payments (*Impuesto sobre la Renta de las Personas Físicas-IRPF*).

In the case of business leasing contracts concluded before the 9th May 1985, a system of temporary contract termination was scheduled. A distinction was made according to whether the tenant was a natural or a legal person, assuming that the more complex the structure, the higher the solvency would be. Therefore, the delegation of rights *mortis causa* is maintained to a certain extent in the case of natural persons, a 20 years term being guaranteed to the family organisation linked to the economic activity. In addition, this term can be extended as long as the tenant and her spouse live and develop their business activities in the accommodation.⁸⁶ Regarding the tenancy contracts where tenants are legal persons, the termination terms are shorter, comprised between 5 and 20 years according to the nature and importance of the economic

person having shared the dwelling permanently at least two years after tenant death (part B.7 of the Second Transitory provision).

⁸¹ Contreras, L.M., *Op. Cit.*, 33.

⁸² Explanatory statement, 1994 *Urban Tenancy Act*.

⁸³ Income 2.5, 3 or 3.5 times lower than the minimum wage, according respectively to the number of occupants in the dwelling: one to two, three to four or more than four. See part D. 7^a of the Second Transitory Provision, 1994 *Urban Tenancy Law*.

⁸⁴ See Draft Law of the Socialist Political Group, Official Cortes Gazette (*Boletín Oficial de las Cortes Generales*), No. 24-1, of April 25, 2000.

⁸⁵ See BOE of March 10, 2004. Rect. BOE Num. 60, of March 11, 2004.

⁸⁶ Explanatory statement, 1994 *Urban Tenancy Act* (No. 6).

activities developed in the accommodation.⁸⁷ The rental fees for these contracts are subject to a system of revision as described for residential tenancy contracts, and the revision pace is a function of the nature and importance of the tenants' activities.

As a conclusion, it can be highlighted that the harmonization process instituted by the *1994 Urban Tenancy Act* managed to balance tenants' and landlords' interests, despite the antagonist philosophies that had founded the two previous reforms of 1964 and 1985. Indeed, the *1964 Act* had been designed as a protective instrument of tenants' rights, whereas the *1985 Act* had conversely protected landlords' interests.⁸⁸ Before this harmonization process, contrasting situations co-exist. Three aspects should be underlined concerning this issue: (i) as mentioned above, the *1994 Act* designed a system of rent revision so as to give the tenants with the lowest resources the possibility to adjust their situation to the new conditions; (ii) the Second Transitory Provision provides tenants with the possibility to enter the opposition to the rent revision set up by Part D. 1^a of this Provision and instead benefit from the rent revision mechanism provided by Part D. 6^a.⁸⁹ (iii) The contracts concerning tenants who entered the opposition to the rent revision in 1994, when the LAU was enacted, will terminate eight years after the landlord required such a revision (Part D. 6^a § 2^o). This period should have come to an end in 2002; as a result the initial situation in which unequal rents were existing side by side has almost disappeared.⁹⁰

The LAU in the national legal framework

The LAU appears having recourse to article 149.1.8^a of the *1978 Spanish Constitution*. In other words, the current tenancy law was designed as one of the exclusive competences belonging to the state. Therefore, the Autonomous Communities (*Comunidades Autónomas*) have no legislative competence on tenancy law. As a result, the territorial application of the *1994 Urban Tenancy Act* covers the entire national territory without any limitation, even in the Autonomous Communities that have their own civil law rules (*Derechos Forales*).⁹¹

Most problematic issues

Some of the most problematic issues raised by the 1994 Act are due to its technical imperfections. Among the latter, it should be mentioned: first, the landlord allegations against the lease renewal (article 9.3 LAU); second, the continuation of the use of the dwelling by the tenant's spouse in case of nullity, legal separation or divorce (article 15 LAU); third, the legal vacuum caused by the abolition of article 149.3 of the 1964 Act in relation with the problems of costs taxation in the eviction trials. Besides, two other problematic questions regard, on the one hand, the modification of article 1563 of the Civil Procedural Act by the Fifth Additional Provision and its consequences and, on the other hand, the long and complex Transitional Provisions, which have been the object of many judicial decisions.⁹²

⁸⁷ Explanatory statement, *1994 Urban Tenancy Act* (No. 6).

⁸⁸ Gómez Laplaza, M.C., *Op. Cit.*, 15.

⁸⁹ The Second Transitory Provision stated an annual raise equal to the increase of the Consumer Price Index (*Indice de Precios al Consumo*, IPC) either during the previous month (Part D 1^a) or the previous twelve months (Part D 6^a) before the date of the rent revision.

⁹⁰ See *La Voz de Galicia*, May 15, 2004 available at <http://www.lavozdeg Galicia.es/reportajes/noticia.jsp?TEXTO=100000027938>.

⁹¹ Contreras, L.M., *Op. Cit.*, 35.

⁹² See Gómez Laplaza, M.C., *Op. Cit.*, 15-16.

2. Social regulation affecting private tenancy contracts

During Franco's dictatorship, from the end of the Spanish Civil War (1936-1939) until 1978, public aid was orientated towards private housing mainly for political reasons and also due to the economic importance of the construction sector, besides social objectives. Specifically, under this regime, special attention was paid to housing policy due to the ideological conception of, and support given to the family. In 1939, the National Housing Institute⁹³ (*Instituto Nacional de la Vivienda, INV*) was created with the overall mission to promote housing construction and occupation, mostly throughout multiannual Housing Plans. In parallel, the 1939 Act regulated, for the first time, private housing partly financed by government grants and subject to price control (*Viviendas de Protección Oficial*). This legislation was followed by other measures, such as the 1944 Support Facility Housing Act (*Viviendas bonificables*) and its reform by the 1948 Decree-law, of November 19,⁹⁴ the 1954 Reduced Rent Accommodation Act⁹⁵ (*Viviendas de renta limitada*), the 1957 Decree on Assisted Housing, the 1963 Decree, of July 24 on Subsidised Housing⁹⁶ and the Royal Decree 2960/1976, of November 12⁹⁷. However, during the entire period, from the 1939 Housing Protection Act to the 1976 Royal Decree, the housing protection government policy did not regulate the eligibility conditions for private tenants to these types of residential accommodation.⁹⁸ The only requirements stated at this time were that (i) the potential tenant did not own a house and that (ii) the sheltered dwelling had to be used only as a residence. Therefore, no economic requirements were established to have access to the social housing and these aids did not benefit the poorest families; housing supports were rather characterised by a strong nepotism and fraud.⁹⁹

With the 1978 Spanish Constitution, democratic changes transformed the housing social policy. New eligibility criteria were defined on the basis of economic resources to regulate access to subsidised dwellings; controls were also established over loans

⁹³ The National Housing Institute was created in 1939. Now, the institution in charge of the housing accommodation policy is the *Dirección General de la Vivienda, la Arquitectura y el Urbanismo*, which is a part of the *Ministerio de Fomento* (*Real Decreto 1886/1996, del 2 de agosto, de estructura orgánica básica del Ministerio de Fomento*).

⁹⁴ See Texto Refundido regulador para la clase media, BOE No. 348, of December 13, 1948, 5570 (*RCL* 1944, 1625).

⁹⁵ See BOE No. 168, of June 17, 1954, 4094. Ley de Viviendas Protegidas de «tipo social».

⁹⁶ See also the Regulation (*Reglamento*) approved by Decree 2114/1968, of July 24, BOE No. 216, of September 7; Rect. BOE No. 227, of September 20 and Rect. BOE No. 288, of November 30 (*RCL* 1968, 1584, 1630 and 2063).

⁹⁷ See BOE No. 311, of December 28 (*RCL* 1976, 2437).

⁹⁸ The different Housing National Plans 1956-60 and 1961-76 (*Planes Nacionales de la Vivienda*) also contributed to the use of subsidised housing without social objectives (the ceiling surface area of the houses was established on 200m²). See, Parreño Castellano, J.M., "El destino social de la vivienda protegida de promoción privada: el caso de las Palmas de Gran Canaria (1940-1978)", *Scripta Nova. Revista electrónica de geografía y ciencias sociales*, Vol. VII, No. 146 (093), Universidad de Barcelona (Barcelona, 2003). See also, Blasco Torrejón, B., *Política de vivienda en España. Un análisis global*. Universidad Complutense de Madrid (Madrid, 2000); Cotorruelo, A., *La política económica de la vivienda en España*, C.S.I.C. Instituto Sancho Moncada (Madrid, 1961).

⁹⁹ See Sánchez García, A.B. and Plandiura Riba, R., "La provisionalidad del régimen de protección de la vivienda pública en España", *Scripta Nova, Loc. Cit.*, Vol. VII, No. 146 (090) (Barcelona, 2003).

and subsidies proposed to promoters and buyers.¹⁰⁰ In this context, the current legislation on public housing protection, the *31/1978 Royal Decree-law, of October 31*¹⁰¹ was enacted. Both the socialist government (*Partido Socialista Obrero Español*, until 1996) and the conservative one (*Partido Popular*, from 1996 to 2004) have conducted similar housing policies, which essentially consisted in adapting the housing protection policy to the free housing market organisation. In other words, during the periods of satisfactory market organization, public intervention regarding housing protection came down. More recently, the government promoted a land liberalization policy aiming at favouring urbanization.¹⁰² However, over the last years, increasing immigration has been provoking pressure for additional social measures within the framework of the housing protection policy. As a consequence, new instruments have been designed¹⁰³ to solve this specific problem such as the ‘social tenancy’ (*Régimen de las Viviendas de Protección Oficial –VPO- en arrendamiento*). The ‘social tenancy’ covers both a private and a public housing protection regime. The legal aspects concerning this socially protected tenancy are regulated by the First Additional Provision of the LAU (numbers 1 to 5). The legal statutory protection of the dwelling is maintained during the period of amortisation of the mortgage obtained for its promotion, or, in its absence, during 25 years from the qualification date. This protection consists in an initial ceiling rental fee that will correspond to a percentage of the maximum sale price defined by either the national or the regional legislation applicable. Annual rent controls are possible based on the percentage variation of the consumer price index (*Indice de Precios al Consumo*) and no rent can exceed the established limit.

Tenancy of public socially protected houses (*Viviendas de Protección Oficial de Promoción Pública*) is regulated by its specific legislation¹⁰⁴ (See also First Additional Provision, No.8), and supplementary by the LAU.¹⁰⁵ Correspondingly, the difference between private and public social protected houses is that for the latter, the rent control is biannual –and not annual– and a specific price index replaces the consumer price index for its calculation.¹⁰⁶ Finally, it should be noted that national legislation (First Additional Provision, No. 1 to 5 LAU) is applied to the private socially protected houses in absence of competence of the legislation of the Autonomous Communities, whereas, in the case of public sheltered accommodation, the national regulation contained in the LAU covers the entire field (See First Additional Provision, No. 7).¹⁰⁷ This division of competences is regulated under articles 148 and 149 of the Spanish Constitution.¹⁰⁸

¹⁰⁰ This new governmental policy began with the *2960/1976 Royal Decree on Social Housing*.

¹⁰¹ This Decree created the current subsidised housing regime (*Viviendas de Protección Oficial*) and was developed by the *Royal Decree 31/1978, of November 10 on Public Housing Protection*. BOE No, 267, of November 8 (*RCL* 1978, 2419). See also, *Regulation 1968, of July 24*. The ceiling surface area was stated in 90m² and maximum prices were defined.

¹⁰² See Sánchez García, A.B. and Plandiura Riba, R., *Loc. Cit.*, p. 12.

¹⁰³ See First Additional Provision and Fifth Transitional Provision LAU. Cf., SAP Pontevedra, of November 15, 1995 (AC 1995, 2038) and SAP Las Palmas, of November, 2000 (JUR 2001, 93162; SAP Sevilla, of October 8, 1997 (AC 1997, 2378).

¹⁰⁴ The *31/1978 Royal Decree-law, of October 31*. See BOE No. 267, of November (*RCL* 1978, 2419).

¹⁰⁵ Except for competence and procedural issues that will be regulated by the 2000 Civil Procedural Act.

¹⁰⁶ See Contreras, L.M., *Op. Cit.*, 385.

¹⁰⁷ See *Royal Decree 727/1993, of May 14 and Royal Decree 1/2002, of January 11*. See also Spanish Association of Public Promoters of Housing and Land (www.a-v-s.org), “La vivienda de protección oficial y su tratamiento jurisprudencial II”, Informative Bulletin No. 73, November 2002, p. 3-4. Also

Regarding direct subsidies and tax incentives for landlords for private tenancy contracts, as a matter of fact, the generalisation of direct income taxation to the whole population in Spain¹⁰⁹ in 1991 introduced the logic of tax-deduction through mortgage payments in the financial strategies of larger numbers of families. In general terms, 10.05% can be deducted from the amount paid for the usual home purchase with a maximum tax basis of 9.015.18 € per year.¹¹⁰ The new *40/1998 Act* suppressed the deduction for the usual home rental. Only tenants still under a contract signed before April 24th 1998 (who have a tax deduction under the 18/1991 Act) can benefit from a compensatory measure under the Finance Act (*Ley General de Presupuestos del Estado*).¹¹¹ Therefore, national policy favours housing property but not rented housing. However, at least the Municipality of Madrid (*Ayuntamiento de Madrid*) has just presented a public law measure as a part of its municipal budget 2004 to prevent dwellings from staying empty. This measure consists in a fine (*recargo*) of 50% on the real property tax (IBI -*Impuesto de Bienes Inmuebles*) against owners unwilling to rent their houses.¹¹²

In the field of housing protection, new policies will be implemented within the next months. Through this new plan, the Socialist Government (i) will reform the 40/1998 Act on the annual tax payments to put the purchase tax deduction on a level with the tenancy tax deduction; (ii) will promote the rental market through the construction of new social housing; (iii) will create a new public system of financing support aiming at facilitating temporary rent leases; (iv) will promote new insurance policies to increase the landlords securities in case of tenant's non-payment or damages to the rented house; and will create a Public Tenancy Agency (*Agencia Pública de Alquiler*,

Bulletin 72, p. 36. See also SAP Valladolid, Secc. 1^a, of June 21, 1996 (AC 1996, 1049) on the twenty five years period.

¹⁰⁸ Article 148.1.3^a CE provides that: "1. The Self-governing Communities may assume competences over the following matters: 3.- Town and country planning and housing. Cf. Article 149.1.8^a provides that: 1. The State shall have exclusive competence over the following matters: 8.- Civil legislation, without prejudice to the preservation, modification and development by the Self-governing Communities of their civil law, foral or special, whenever these exist, and traditional charts. In any event rules for the application and effectiveness of legal provisions, civil relations arising from the forms of marriage, keeping of records and drawing up to public instruments, bases of contractual liability, rules for resolving conflicts of law and determination of the sources of law in conformity, in this last case, with the rules of traditional charts or with those of foral or special laws". The text is available in English, available at <http://www.constitucion.es/constitucion/lenguas/ingles.html#8>

¹⁰⁹ See 18/1991 Act, of 6 June 6, 1991, *Impuesto sobre la renta de las Personas Físicas*. (BOE, June 7, 1991, Rect. BOE of October 2, 1991). Abolished by the 40/1998 Act, of December 9, 1998.

¹¹⁰ Housing savings scheme (*cantidades que se depositen en cuentas ahorro-vivienda*) can also be deducted on the same basis described above. See Article 55 and Fourth Transitory Provision 1. a), 40/1998 Act, of December 9, regulates the annual tax payments (*Impuesto sobre la Renta de las Personas Físicas-IRPF y otras Normas Tributarias*). See BOE No. 295, of December 10 (RCL 1998, 2866). For other tax incentives to the landlords, see also *supra*, Introduction Part B.2.

¹¹¹ In this case, a 10% can be deducted from the amount paid for the usual home tenancy with a maximum tax basis of 601,01 € per year. Fourth Transitory Provision 1. b), 54/1999 Finance Act, of December 29, (*Ley de Presupuestos Generales del Estado para el año 2000*). See BOE, No. 312, of December 30, 1999, p. 46027, Rect. BOE, of March 22, 2000. For the Autonomous Community of Valencia, see article 4.1.g) of the 13/1997 Act, of December 23, BOE No. 83, of April 7, 1998, p. 11643, modified by the 9/2001 Act, BOE No. 33, of February 7, 2002, p. 4820.

¹¹² See *El mundo*, October 28, 2003 available at <http://elmundodinero.elmundo.es/mundodinero/2003/10/27Noti20031027171125.html>.

APA) and a social housing register to provide anyone with updated and accessible information.¹¹³

3. Summary Account on “Tenancy Law in Action”

Short overview of the national housing situation

In 1970, 63.4% of Spanish housing units were owner-occupied, while about 30.1% were rented under a tenancy contract. In the 1970’s, there was a marked increase in the number of home-owners and figures published in 1981 revealed that 73.2% of housing units were owner-occupied, while 20.8% were under rental agreements. The following decade, the number of owner-occupied houses continued to rise sharply, reaching 78.3% of home ownership and 15.2% of houses under rental agreements.¹¹⁴ The trend continued and in 2001 home ownership was by far the more common type of tenure in Spain since more than 82% of the main residences were owned while, correspondingly, only 11.4% of the main homes were under a tenancy contract. The table below provides a view of the evolution described.

Table 1. Evolution of (i) the number of residences and of (ii) the type of tenure concerning the main residences in Spain.

	1970	1981	1991	2001
Number of residences	10 658 882	14 726 134	17 206 363	20 946 554
<i>On total residences, percentage of:</i>				
- Main residences	79.8%	70.8%	68.2%	67.7%
- Secondary homes	7.5%	12.9%	17.0%	16.0%
- Unoccupied and other residences	12.7%	16.0%	14.8%	16.2%
<i>On main residences, percentage of:</i>				
- Home ownership	63.4%	73.2%	78.3%	82.2%
- Tenancy	30.1%	20.8%	15.2%	11.4%
- Other regimes	6.5%	6.1%	6.5%	6.5%

Source: Decennial census statistics, National Statistical Institute (*Instituto Nacional de Estadística*, INE), in Economic Indicators of Spanish Housing Market, Central Bank of Spain (*Banco de España*). See <http://www.bde.es/infoest/sindi15.pdf>.

More recent – but also less representative – statistics from the yearly Household budget survey carried out in Spain (*Encuesta Continua de Presupuestos Familiares*) indicate a continuation of the trend, since in 2002 the percentage of rented houses would have dropped to 10%, and home ownership reached 84.3%.¹¹⁵

A recent assessment report on the European housing market¹¹⁶ shows that, in the period 1998-2000, Spain was the European country with the smallest housing rental

¹¹³ See *El Mundo*, May 27, 2004 available at <http://elmundodinero.elmundo.es/mundodinero/2004/05/27Noti20040527133818.html>.

¹¹⁴ Decennial census, INE, National Statistical Institute (*Instituto Nacional de Estadística*). Economic Indicators of Spanish Housing Market, Central Bank of Spain. See <http://www.bde.es/infoest/sindi15.pdf>.

¹¹⁵ Annual census, ECPF, *Encuesta Continua de Presupuestos Familiares 2002* (Household budget survey carried out in Spain). Spain has a legal framework for conducting the survey either in terms of a general statistical law governing the collection of statistics.

¹¹⁶ Online document available at the French Ministry of Housing website, http://www.logement.equipement.gouv.fr/actu/logeeurope/parc_logt.pdf

market. In another study from the Demographic Studies Centre of Barcelona, which analysed homeownership and social inequality in Spain, the authors highlight that high home ownership rates in Spain are not the result of tradition but a new and expanding phenomenon, starting in the sixties and increasing ever since.¹¹⁷ According to both commentators, homeownership in Spain may be viewed as the product of the rapid social and economic changes that occurred in the second half of the 20th century, that has given rise to an exceptional predominance of homeownership.¹¹⁸ It should be noted that, although Spain is a very diverse country in terms of geography and culture, there is a strong homogeneity regarding the nature of tenure (ownership vs. tenancy) across the whole country.¹¹⁹

Housing prices

Undoubtedly, the most outstanding fact about the Spanish housing market regards price increase. A recent working document of the Central Bank of Spain affirms that, since 1976, the average housing prices were multiplied 16 times in nominal terms, and have doubled in real terms. In the last five years, housing prices would have risen by 55%.¹²⁰ To illustrate better the importance of this phenomenon, the authors underline that, in the long term, Spain would be one of the three or four OECD countries having registered the highest increase of housing prices in real terms.¹²¹ This increase is rationalised mainly, on the one hand, as the result of the rise of the overall income in Spain, and on the other hand, as the consequence of the drop of nominal interest rates.¹²²

Current housing policy

In this context, the latest National Housing Plan for 2002-2005 pursues the following objectives¹²³:

- As a priority, to facilitate home ownership for those on low-income and, in a general way, more vulnerable groups;
- To promote tenancy contracts within social housing so as to improve employment-related mobility;
- To facilitate the access to the first house in property to young people, and to improve support for families with children so that they can access larger houses;
- To improve housing accessibility to families who care for elderly people or persons with disabilities.

Access to protected accommodation is reserved to families earning less than 5.5 times the minimum wage (*Salario Mínimo Inter-professional*, SMI). Support will be mainly directed to facilitate the purchase of the first house, and, as regards large families, aid will be given to help them move into larger dwellings when the number of children in the family increases. As reported in table 2, the general support scheme includes (i) a public aid (*AEDE*), consisting in a grant on the purchase price reserved to the families

¹¹⁷ See Cabré Pla, A. and Módenes Cabrerizo, J.A., *Op. Cit.*, 325.

¹¹⁸ *Id.*, at 325.

¹¹⁹ *Id.*, at 330.

¹²⁰ Martínez Pagés, J. and Ángel Maza, L. Central Bank of Spain. "Análisis del precio de la vivienda en España". (2003) *Working document No. 307*, 7.

¹²¹ *Id.*, at 7.

¹²² *Id.*, at 7.

¹²³ Press Release from the Ministry of Development (*Ministerio de Fomento*) on the approval of the National Housing Plan 2002-2005 at www.mfom.es/home/portada/plandevivienda/notadeprensa.pdf.

earning less than 3.5 times the minimum wage, and (ii) subsidies of the mortgage reimbursement (up to 20% for 20 years) for the families earning up to 4.5 times the minimum wage.

Table 2. Public Aid for Home Ownership (AEDE) and Mortgage Subsidies

Income situation of the families	AEDE Public Aid (% price of the house)	Subsidies of the mortgage reimbursement (% monthly mortgage quota)
≤ 1.5	11%	20% (10 years)
$1.5 < \text{wage} \leq 2.5$	8%	15% (10 years)
$2.5 < \text{wage} \leq 3.5$	5%	10% (5 years)
$3.5 < \text{wage} \leq 4.5$	-	5% (5 years)

Source: Ministry of Development, (*Ministerio de Fomento*), National Housing Plan 2002-2005 at www.mfom.es/home/portada/plandevivienda

An alternative to that system consists in increasing the part of subsidies of the mortgage, while renouncing public aid, as indicated below.

Table 3. Mortgage Subsidies without Public Aid for Home Ownership (AEDE)

Income situation of the families	AEDE Public Aid (% price of the house)	Subsidies of the mortgage reimbursement (% monthly mortgage quota)
≤ 1.5	-	40% (10 years)
$1.5 < \text{wage} \leq 2.5$	-	30% (10 years)
$2.5 < \text{wage} \leq 3.5$	-	15% (10 years)
$3.5 < \text{wage} \leq 4.5$	-	5% (5 years)

Furthermore, special financing supports will be given (i) to large families, (ii) to people up to 35 years-old when they purchase a protected house, and (iii) to families with elderly or handicapped members.

Table 4. Additional Financing Supports

Large families	People up to 35 years-old	Others specific situations (elder people, persons with disability, etc.)
3 children: 3,000 € 4 children: 3,600 € 5 children or more: 4,200 € Mortgage subsidy: 5% during 5 years	3,000 €	900 €

At a national level, the basic price of social housing was fixed, in 2002, to 623.77 € per square meter of habitable area; this price is supposed to be revised every year by the Ministers Council (*Consejo de Ministros*) in accordance with changes in economic indicators. It should be noted that Autonomous Communities are entitled to increase this basic price (up to a 1.56 factor) according to their local housing situations.

Regarding the promotion of social housing under tenancy contracts, the National Housing Plan included an increased support to the construction sector (grants up to 20% of the costs, and subsidies up to 50% during the first 5 years and up to 40%

during the following fifteen years). In addition, the rent shall not exceed 0.4% of the house price. It should also be noted that, after 10 years under a tenancy contract in a protected house, the tenants are entitled to buy the house to its protected price, provided that they have occupied it the last 5 years.

Role of tenants' association

To take but some examples, the CECU (*Confederación de Consumidores y Usuarios*, Consumers and users confederation) evolved in 1983 from the various consumers association in the Autonomous Communities, and comprises more than 400,000 members. Its main function is to provide advice to consumers in order to protect them better, especially in the legal field. This confederation also promotes awareness and education programmes and diffuses information about consumers' rights.¹²⁴ The ADEPROVI (*Asociación de Defensa del Propietario de Vivienda*) is a non-profit association that aims at protecting owners' rights (including also the owners of garages and premises). In particular, this association provides advice to the owners through its professional staff including lawyers, architects and auditors specialised in different problems related with the ownership of a dwelling, for instance, building defects, tenancy, etc.¹²⁵ Specifically, in tenancy law the ARBIN (*Asociación de Arbitraje Inmobiliario*) plays a role of mediator in tenancy alternative dispute resolution. Their assistance consists in drafting tenancy contracts, providing free legal advice to tenants and landlords, and acting as an arbitration authority if the parties so decide.¹²⁶

Alternative dispute resolution

In the introduction (Part B) we noted the important role played by arbitration as a mechanism of tenancy dispute settlement, as recognized by the LAU. However, it should be noted that, in the past, arbitration had rarely been developed in the ambit of tenancy disputes in Spanish law, mainly for two reasons: first, because the Supreme Court (*Tribunal Supremo*) had been restrictive regarding arbitration in tenancy conflicts¹²⁷ and secondly, because this regulation had rarely been applied to solve conflicts between landlords and tenants.¹²⁸ Two examples illustrating this situation regard (i) the arbitration service¹²⁹ offered to their members by the former so-called *Cámaras de la Propiedad Urbana*¹³⁰ as well as (ii) the *Junta de Estimación* regulated by article 152 LAU 1964.

Afterwards, the situation changed as the LAU implemented arbitration procedures which acted as mechanisms of tenancy disputes. In particular, former article 39.5

¹²⁴ See at <http://www.cecua.es>.

¹²⁵ See at <http://adeprovi.com>.

¹²⁶ See at <http://www.arbin.org>.

¹²⁷ See STS, of February 28, 1962 (RJ 1962, 1169) (holding a position against arbitration). *But see* STS, of April 1, 1987 (RJ 1987, 2480), STS, of July 14, 1989 (RJ 1989, 5611) and STS, of November 20, 1989 (RJ 1989, 7894) (holding a position in favour of arbitration).

¹²⁸ See Marín López, J.J., "Modificación de la Ley 36/1988, de 5 de diciembre, de Arbitraje", *Comentarios...*, *Op. Cit.*, 869-876, p. 870.

¹²⁹ Only a service to attempt conciliation between the confronted parties was provided by such corporations.

¹³⁰ These *Cámaras de la Propiedad Urbana* were public law corporations. See also article 11 f) and 12, *Royal-Decree 1649/1977, of June 2*, BOE, No. 163, of July 9, 1977, p. 15437. Cf., *Decree-law 8/1994, of August 5 that suppressed the Cámaras de la Propiedad Urbana*, BOE No. 189, of August 9, 1994, p. 25501.

introduced that parties may agree on the submission of their dispute to an arbitration tribunal as regulated in the *36/1988 Act*, of December 5.¹³¹ Further, the Seventh Additional Provision of the LAU modified article 30 of the *36/1988 Act* adding a third paragraph providing that, in the absence of an arbitration agreement, a three month period is given to the arbitrator to pass the arbitral award. Nevertheless, both the *2000 Civil Procedural Act* and the new *60/2003 Act* have respectively modified and abolished the cited arbitration law. Currently, even if article 39.5 LAU was abolished, it is still possible for the parties bound by a tenancy contract, to agree on the submission of their disputes to a court of arbitration under 60/2003 Act (see article 2.1).¹³²

¹³¹ See BOE No. 293, of December 7, 1988. This Act has been abolished by the new *60/2003 Act*, of December 23, of Arbitration. BOE No. 309, of December 26, 2003, 46097-46109.

¹³² See also the *Royal-Decree 636/1993* that regulates the “*Sistema Arbitral de Consumo*” (BOE No. 121, of May 21, 1993).

II. Questionnaire

Set 1: Conclusion of the Contract

Freedom of contract is one of the principles governing Spanish contract law. Parties can establish the agreements, clauses and conditions that they consider suitable, provided that the latter do not oppose law, morals and public order (article 1255 C.C.). In accordance with the rules of Title II, Book IV (*De los contratos*) of the *Spanish Civil Code* (hereinafter, C.C.) three conditions are required to conclude a contract: first, the consent (*consentimiento*) of both parties; second, a definite object (*objeto*) as matter of contract; and finally, the cause (*causa*) of the obligation established by both parties through the agreement (article 1261 C.C.). In addition, two declarations of intention are necessary (offer and acceptance) in accordance with the general contract rules (article 1262 C.C.). These declarations of intention take place during a previous period before parties enter into the contract (*periodo previo*). During this period an invitation to offer or to contract (*invitatio ad offerendum*) occurs through the announcement of the plan to conclude a contract, and the other party is asked about the conditions under which she would finally accept the contract.¹³³ Then, a negotiation begins between the parties (*tratos previos*) evaluating the possibilities and further conditions to enter into a contract (*contraofertas*).¹³⁴ Under Spanish civil law the freedom of form (*libertad de forma*) relating to the offer applies to these negotiations. Moreover, such negotiations do not oblige the parties to conclude a contract and, as a result, their breaking off negotiations is not normally considered contrary to good faith (article 1258 C.C.), without prejudice of the eventual application of article 1902 C.C. on tort law.¹³⁵ Once, a definitive and secure offer is made and accepted by both parties, a contract is concluded even if it is verbal. Hence, a tenancy contract does not have to be written in order to be valid. However, despite the absence of any special requirement concerning the conclusion of tenancy contracts (article 1278 C.C.), article 37 LAU lays down the right for both parties (tenant and landlord) to a written agreement (See article 1280 C.C.). In order to do this the existence of an enforceable contractual relationship is required, which could be the verbal tenancy contract (see article 1261 C.C.). It should be noted as well that the written agreement may be supplemented by a public instrument or private statement as already explained in the introduction (Part B.1).¹³⁶

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. Does T have a claim against L?

¹³³ About the formation of contracts under Spanish civil law, see Díez Picazo, L. “La formación del contrato”, A.D.C., I, (1995), p. 5.

¹³⁴ See Albadalejo, M., II/Vol. 1., *Op. Cit.*, 380-383. About the concept of offer under Spanish law see 384-393.

¹³⁵ See *Id.*, at 383.

¹³⁶ The notion of public instrument and private statement has been defined in *supra*, quotation 44.

As mentioned above, Spanish tenancy law follows the principle of freedom of contract within the limits established by (i) the general law of obligations and contracts (Book IV, Title II C.C.) and (ii) specific regulation governing the tenancy contracts (1994 Act - LAU). Given that contracting parties in the previous negotiations (*tratos previos*)¹³⁷ are not compelled to conclude any agreement, L may decide according to her discretion whether or not to accept a given person as a tenant. Therefore, T does not have any claim against L, except if article 1902 C.C. in tort law applies; in other words, if the break down of the previous negotiations to the conclusion of a contract (*tratos previos*) has caused damage to T.¹³⁸ It should also be noted that article 14 of the Spanish Constitution on the principle of equality may act as a constitutional limitation to the landlords discretion to select someone as tenant.

b) is a Muslim, and L is afraid of terrorism. Does T have a claim against L?

Equality is one of the most important values of the legal system established by the Spanish Constitution of 1978 (*Constitución Española*, hereinafter, CE). In particular, article 10.2 CE states that “*provisions relating to fundamental rights and freedoms recognised by the Constitution shall be interpreted pursuant to the Universal Declaration on Human Rights and the relevant international treaties and agreements ratified by Spain*”.¹³⁹ Furthermore, Spanish law has developed the equality principle in the fields of immigration, religious freedom, employment, education and civil and criminal legislation, with quite a solid regulatory framework for combating discrimination on racial and ethnic grounds.¹⁴⁰ Article 14 CE establishes that “*Spaniards are equal before the law, and may not in any way be discriminated against on account of birth, race, sex, religion, opinion, or any other condition or personal or social circumstance*”.¹⁴¹ It should be noted that article 13.1 CE states that

¹³⁷ *Supra*, Set 1. Conclusion of the Contract.

¹³⁸ *Supra*, Set 1. Conclusion of the Contract.

¹³⁹ The most notable international instruments combating discrimination have been ratified during Spain’s democratic period, and these instruments have informed the Constitution and the laws passed since then. Such is the case of the conventions of the United Nations, the International Labour Organisation and the Council of Europe (but Spain has not yet ratified Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe). See Cachón Rodríguez, L., “Executive summary on race equality directive. State of play in Spain”, at http://europa.eu.int/comm/employment_social/fundamental_rights (November 27, 2003). (Short report on the current state of play in each Member State on the implementation of the race equality Directive into Spanish law. The report was prepared in October 2003 by the independent experts group in race and religious discrimination which is funded under the Community Action Programme to combat discrimination. The contents of the published reports do not necessarily reflect the opinion or position of national authorities or of the European Commission).

¹⁴⁰ *Id.*, at 2. See also *Organic Law 2/2000* which has two articles devoted to antidiscrimination measures, but it refers only to workers. Under this Law discrimination is defined as “*any act which, directly or indirectly, entails a distinction, exclusion, restriction or preference in relation to a foreigner on the grounds of race, colour, ascendance or national or ethnic origin, or religious beliefs and practices, and whose purpose or effect is to negate or limit the recognition or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social or cultural spheres*”. In addition, it defines indirect discrimination as “*any treatment stemming from criteria having an adverse effect on workers on account of their being foreigners or members of a particular race, religion, ethnic group or nationality*”. *Id.*, at 2.

¹⁴¹ The Spanish Constitutional Court (*Tribunal Constitucional*) has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups “*even when they are given more favourable treatment, for the aim is to give different treatment to effectively different situations*”, S.T.C., 128/87 (Sala 2ª), of July 16 (*RTC*

*“Aliens in Spain shall enjoy the public freedoms guaranteed by the present Title under the terms established by treaties and the law”*¹⁴². The Spanish Constitution Title to which article 13.1 CE refers to is Title I, which includes article 14 on equality. In other words, this equality guaranteed for all the Spaniards is extended to the foreigners by the way of article 13.1 C.E. In reality, these articles operate as an unilateral conflict rule that extends the scope of application of Title I in order to include the foreigners’ rights under its protection. Furthermore, article 13.1 CE ascertains that the extension of public freedoms contained in article 14 CE will be guaranteed under the terms that treaties or laws may establish.¹⁴³ However, as mentioned above, L can decide according to her discretion whether or not to accept a given person as a tenant. Hence, T does not have any claim against L, except if either (i) article 1902 C.C. in tort law or, (ii) article 14 of the Spanish Constitution on the principle of no discrimination applies. Moreover, once the contract is concluded, if L wants to terminate because T is a Muslim, then T can have a claim against L based on article 13 and 14 C.E. Furthermore, L claim based on the worry of terrorism is not recognised as a justification for discrimination.

c) has a small dog. Does T have a claim against L?

Considering that freedom of contract prevails under Spanish civil law, L is entitled to refuse to conclude a tenancy contract with T only if the keeping of pets is expressly prohibited by the statutes of the co-owners association (*Comunidad de propietarios*). As already mentioned, during this period there is no obligation to conclude a contract by any of the parties involved in negotiations. As a conclusion, T does not have a claim against L.

d) is a hobby piano player and wants to play about 1 hour every evening from 8-9 pm. Does T have a claim against L?

Article 27.2 (e) LAU states that L can terminate the contract when activities that disturb other neighbours (as over noise nuisance) occur in the house. Therefore, T does not have a claim against L if before concluding a contract L rejects T for being a

1987/128), *Recurso de Amparo* (actions for infringement of fundamental rights and freedoms) No. 1133/1985.

¹⁴² See also article 9 C.E. “Correspond to the public authorities to promote conditions that ensure that freedom and equality of individuals and of the groups that they form are real and effective; to remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life”.

¹⁴³ Article 13 C.E. fulfils three important functions: first, it includes all foreigners on the constitutional freedom space (*espacio de libertad constitucional*) designed for Spaniards; furthermore, it guarantees that transformation of public freedoms in rights might respect the essential legal content which designed such rights under Title I of the Spanish Constitution, even if the persons to whom those rights are directed are foreigners; finally, article 13.1 C.E. lays down the use of the treaties and the laws as the adequate sources for the regulation of the right’s exercise. See S.T.C., (Sala 2ª, 107/1984, of November 23, *Recurso de Amparo* No. 576 (actions for infringement of fundamental rights and freedoms), *RTC* 1984/107. See Espinar Vicente, J.M., *Ensayos sobre teoría general del Derecho internacional privado*, (Madrid, 1997), 146-148. Conversely, article 13.2 states “Only Spaniards shall have the rights recognized in Article 23 except that which in keeping with the criteria of reciprocity may be established by treaty or law for the right to active and passive suffrage in municipal elections”. Article 23 states that “(1) Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage. (2) They also have the right to accede, under conditions of equality, to public functions and positions, in accordance with the requirements established by law”.

hobby piano player. It should be noted that, in Spain, local legislation (*Ordenanzas Municipales*) restrict any noisy activities from 12.00 pm to 8.00 am.¹⁴⁴ Once a contract is concluded, L does not have any claim against T in this particular case, except if T persistently disturbs her neighbours and the latter can be proved by L.

e) does not have full capacity and is under custody. Does T have a claim against L?

Under Spanish civil law, it is legally necessary to have capacity to act (*capacidad de obrar*) to conclude a contract, which means capacity for a person to enter into a legal relationship with another person (natural or legal). Under each particular contract, this capacity is relevant once the general rules are applied.¹⁴⁵ According to these general rules, a distinction is made between three types of natural persons: first, persons who have a total capacity to act can enter into any contract; second, persons who have a partial capacity to act have a limited capacity to contract. In such a case, particular rules apply to contracts entered into by minors.¹⁴⁶ The general rule in Spanish civil law is that minors not emancipated and still living with their parents do not have capacity to enter into a contract (articles 1263.1 and 319 C.C.). However, this general rule is subject to some exceptions. One of these exceptions is the case of emancipated or married minors¹⁴⁷ (article 316 C.C.): they have capacity to contract with the consent of their parents or tutors (article 287 C.C.).¹⁴⁸ Other persons with a limited capacity to act are those who have been incapacitated by a legal decision (articles 210 and 1263 C.C.) as, for example, disabled people with mental impairment or a person after insolvency proceedings (articles 1914 C.C.). To sum up, if T does not have her full capacity to act in general or is limited to enter into tenancy contracts, then she cannot legally enter into a contract with L without the assistance of her legal representative. If a contract is concluded without this assistance, then L has a claim against T and, therefore, the contract could be avoided under article 1301 C.C.

In general, regarding the discrimination of a handicapped person, it should be noted that article 49 of the Spanish Constitution states that “*the public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally handicapped by giving them the specialised care they require, and affording them special protection for the enjoyment of the rights granted by this Part to all citizens*”. Besides, article 47 C.E. provides that “*all Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town-planning policies of public bodies*”. Consequently, two different regulations concern the enjoyment of the rights granted by the Constitution: first, the 13/1982 Act, *on the Social Integration of Handicapped Person*,

¹⁴⁴ The current legal framework on disturbing, unhealthy and noisy activities is articulated on the Regulation enacted by the Decree 2414/1961, of November 30 (*Reglamento de Actividades Molestas, Insalubres, Nocivas y Peligrosas*), but are mainly directed to industrial contamination. See RCL 1961, 1736. See also 38/1972 Act and Decree 833/1975, Decree 78/1999.

¹⁴⁵ See Albaladejo, M., *Op. Cit.*, 377-379.

¹⁴⁶ A person attains majority having full legal capacity at the age of 18 (article 315 C.C.).

¹⁴⁷ About emancipation See article 314 C.C.

¹⁴⁸ See articles 215 to 324 C.C.

of April 7¹⁴⁹ deals with the mobility and the elimination of the architectural barriers (articles 54-61), second, the LAU grants handicapped tenants with the right to reform rented dwelling to improve its habitability (article 24). In addition, the *Royal Decree 355/1980, of January 25*, obliges building companies to build a minimum number of houses for handicapped persons on the total number of social protected houses.¹⁵⁰ As a result, T can have a claim against L if a discrimination based on T's disabilities can be proved.¹⁵¹ However, the applicable housing regulation does not contain explicit anti-discrimination clauses; but they are subject to the general principle stated in the Constitution.

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?

L can claim the avoidance of tenancy contract under articles 1300 and 1301 C.C. Any contract that does not satisfy the conditions required in article 1261 C.C. (*consentimiento, objeto, causa*) can be avoided, even if no damage has been caused to the parties. Indeed, if the consent was given by mistake or fraudulently (article 1265 C.C.), L can avoid the contract, but no damages could be claimed if the tenant has paid the rent regularly and the house was not deteriorated.¹⁵²

Directive 2000/43/EC on the principle of equality between persons irrespective of racial or ethnic origin [2000] O.J, L 180/22 (the race directive).

Although immigration is a vital issue in public and political debate, and despite the position of many NGOs, the transposition of Directive 2000/43/EC is not high on the political agenda, which centres in this area on the amendment of the Immigration Law so as to ensure more effective control of immigration.¹⁵³ Directive 2000/43 (and 2000/78) has been transposed into internal Spanish law by the end of last year. On December 31, 2003, was published on the BOE (No. 313) the so-called Accompanying Law (*Ley de Acompañamiento, LA*) a law that accompanied the Finance Bill (*Ley de Medidas Fiscales, Administrativas y del Orden Social*). This Accompanying Law aimed to amend laws that need to be adapted for the purposes of the mentioned Finance Bill (hence the informal parliamentary name "Accompanying Law").¹⁵⁴ The implementation of the directive is mentioned in its Title II on Social Matters (*De lo social*), Chapter III, Section 2, on the measures for the application of the principle of treating (*Medidas para la aplicación del principio de igualdad de trato*). Regarding to how legislators have implemented the directive into internal national law, it should be noted that a criterion of "minimal

¹⁴⁹ See BOE No. 103, of April 30, 1982, 11106 (RCL 1982/1051), (article 37 has been modified by article 38 of the Accompanying Law 2003, BOE No. 313, of December 31). Cf., 15/1995 Act, of May 30, on the Property Limitations for the Elimination of Architectonical Barriers to the Handicapped Persons. See also the 49/1960 Act, of July 21, on Joint Property (*Propiedad Horizontal*), BOE No. 176, of July 23 (RCL 1960, 1042), modified by the 8/1999 Act, of April 6, BOE No. 84, of April 8 (RCL 1999, 879).

¹⁵⁰ See BOE No. 51, of February 28 (RCL 1980, 457). See also *Royal Decree 248/1981, of February 5*, BOE No. 49, of February 26 (RCL 1981, 459), *Order of March 3, 1980*, BOE No. 67, of March 18 (RCL 1980, 633) and *Royal Decree 556/1989, of March 19*, BOE No. 122, of May 23 (RCL 1989, 1154).

¹⁵¹ *Infra*, quotation 165.

¹⁵² See Albadalejo, M., *Op. Cit.*, 373-374.

¹⁵³ Cochón Rodríguez, L., *Loc. Cit.*, 1.

¹⁵⁴ *Id.*, at 3.

implementation/transposition” has been used to draw up this new legislation under the Spanish legal framework.

Moreover, as mentioned above, articles 9, 13 and 14 CE show that the principle of equal treatment has been one of the fundamental values informing the whole Spanish system since the adoption of the Constitution in 1978.¹⁵⁵ These principles have been developed in the Spanish legal system. Discrimination on various grounds is generally combated by the same regulations, and the grounds of unlawful discrimination normally specified are the origin of persons, including racial or ethnic origin, sex, age, marital status, religion or beliefs, political opinion, sexual orientation, trade union membership, social condition or disability.¹⁵⁶ Nevertheless, it has been necessary to introduce in the transposed legislation certain principles and definitions contained in the Directive that either do not exist in Spanish law or that are defined differently in the Directive. Those definitions and principles relate to direct and indirect discrimination (article 28.1 b LA) and c)), harassment (*acoso*) related to racial or ethnic origin (article 28.1 d)), the concept that any instruction to discriminate constitutes discrimination (28.2 LA) and the introduction of protective measures against victimisation (article 29 and 30).¹⁵⁷ In some points, one may question how literal was that transposition implemented: (i) the definition of direct discrimination is somewhat more restrictive, being “*when a person is treated less favourably*”, instead of referring to the forms “has been” or “would be”, used in the Directive; (ii) the definition of indirect discrimination does not include the words “criterion” or “practice”. Conversely, the exceptions to the principle of equal treatment provided by Spanish legislation go along the lines of those in article 4 Directive 2000/43.¹⁵⁸ In the fields of social protection and social advantages, education, access to and supply of goods and services available to the public, including *housing*, the applicable regulations do not usually contain explicit anti-discrimination clauses, but they are subject to the general principle stated in the Constitution. The new regulation implementing the Directive expressly provides for the establishment of anti-discrimination measures in these fields, but only for discrimination on the ground of racial or ethnic origin (article 29.1 LA).¹⁵⁹ In Spain there is no official body responsible for providing information about and monitoring compliance with anti-discrimination legislation, and the promotion of equal treatment. The new legislation provides with such a body with the name of “Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin” (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*). It is attached to the Ministry of Labour and Social Affairs (*Ministerio de Trabajo y Asuntos Sociales*). Its functions include the three functions described in article 13.2 of the Directive (article 33.1 LA) but the word “independent” does not appear, and the new law only refers to the terms “*providing assistance*”, and not legal assistance (article 33.2 a) LA).¹⁶⁰ Its make-up is of a fundamentally governmental nature, as the new law establishes that the Council will be formed by all the ministries with responsibilities in the areas referred to by article 3.1 of the Directive (regulated by *Royal Decree* (article 33.4 LA)), with the participation of Autonomous Regions, the local authorities, the employers’

¹⁵⁵ *Id.*, at 3.

¹⁵⁶ *Id.*, at 3.

¹⁵⁷ *Id.*, at 3-4.

¹⁵⁸ *Id.*, at 4.

¹⁵⁹ *Id.*, at 4.

¹⁶⁰ *Id.*, at 5.

organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons (article 33.3 LA). Finally, the Ombudsman (*Defensor del Pueblo*) may set up cooperation and collaboration mechanisms with the Council (article 33.6 LA). The difficulty with this new legal body is that it may be hard to guarantee its independence and effectiveness. Its independence is uncertain for at least two reasons: first, because the definition of its functions omits the word “independent”, which appears three times in Art. 13.2 of the Directive – once in each description of the body’s three functions; and second, because its make-up is of an essentially governmental nature, so it appears to be a typical internal consultative body within the Spanish government, albeit with a (minority) presence of the social partners and NGOs.¹⁶¹ Its effectiveness is questionable because the body will not have a budget on its own; instead it will receive “*the necessary support for the performance of its functions*” (article 33.5 LA) from a social services body (IMSERSO – *Instituto de Migraciones y Servicios Sociales*) attached to the Ministry of Labour.¹⁶²

It should also be noted that the implementation of the Directive in Spain introduced two important precisions regarding the discrimination definition to be considered here: first, as mentioned above, the introduction of the definition of direct and indirect discrimination includes, in both cases, discrimination against persons on account of their origin (racial or ethnic), sex, age, marital status, religion or beliefs, political opinion, sexual orientation, trade union membership, social condition or disability (article 28.1.a.b.c. LA). Second, article 32 establishes that, in particular, regarding the procedures on discrimination against persons on account of their racial or ethnic origin, it does not correspond to the plaintiff to prove the discrimination against her, but to the defendant to prove its absence.

As regards the enforcing law, the Constitution provides in art. 53 that all fundamental rights are protected by the ordinary courts of law. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court (TC) once ordinary proceedings have been exhausted. Further, the Organic Law on the protection of fundamental rights also contains a short procedure for civil and criminal jurisdiction and also for administrative proceedings. The Law on the rights and freedoms of aliens stipulates that foreigners are entitled to legal aid under the same conditions as

¹⁶¹ *Id.*, at 5.

¹⁶² *Id.*, at 5. On the role of NGOs and trade unions: “*Claims in respect of discrimination are normally supported by various organisations, such as NGOs working with gypsies or immigrants, NGOs active in combating racism or the trade unions. These organisations are entitled to be party to legal proceedings. The Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms. The Organic Law on the rights and freedoms of aliens provides that organisations defending the interests of immigrants may take part in legal proceedings affecting them. The Spanish Criminal Code includes racist motives as an aggravating circumstance in any offence, and penalises, among other acts, incitement to discriminate, dissemination of abusive material, discrimination in public services and professional or corporate discrimination, along with associations promoting discrimination. Racial discrimination is also penalised in the context of offences against employees. The corresponding sanctions may be prison sentences in the most serious cases. But it is highly unusual for such sanctions to be applied as punishment for discrimination, and so they cannot be said to be effective. There are generally few rulings on racial discrimination in the courts, which usually treat cases as violations of other types of legal right (aggression, damage to property, etc.) without taking account of racist motivation. A further complication is that those concerned do not bring many actions owing to bureaucratic difficulties and to the small number of convictions. However, there have been court actions brought on account of discrimination (against gypsies, immigrants or black Spaniards) which have attracted a degree of public interest*”.

Spaniards. There are also conciliation procedures for civil and social matters. As well as having recourse to the ordinary courts and to the TC, victims of discrimination may appeal to the Ombudsmen (at both national and regional level) when the issue concerns acts by the public administration, as well as to the Employment Inspectorate (in matters of employment and social security) and to the Education Inspectorate.¹⁶³

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?

Chapter V, Title II states all the conditions required to the suspension, termination and rescission of the tenant contract. Thus, article 27.1 LAU states that the non-compliance of the parties with their obligations may lead to terminate the contract (*resolución del contrato*) according with article 35 LAU (See also article 1124 C.C.). However, among the reasons given under article 27.2 LAU, defining the conditions of contract termination by the landlord, nothing is detailed concerning the number of persons living in the house rented by a tenant. Indeed, article 7 LAU states that tenancy of a dwelling is valid even if the latter is not the tenant's permanent residence but provided her spouse or non emancipated children occupy permanently the dwelling. Therefore, the spouse and other family members are *ipso iure* party to the contract.

Generally speaking, T is free to invite other persons to come and live in the apartment and, as mentioned above, the status of such persons *vis-à-vis* T is irrelevant. Furthermore, the tenant who has a specific personal and familiar situation at the moment of the conclusion of the contract, has the right to develop its own personality (as a right recognised under article 10.1 C.E.), changing her initial situation. Consequently, T can share its apartment with third persons (partner, children, friends) if the use of the rented apartment is not partially paid by them, in other words, if it is a gratuitous occupation exclusively directed to the third parties already mentioned. In such a case, T does not need the permission of L to take relatives or friends into the apartment (always following the required diligence by civil law general rules), and L can neither refuse nor increase the rent.¹⁶⁴ Finally, there are no legal minimum requirements as regards the space for each person living on the apartment, even if it should be underlined that the apartment should still fulfil in conditions of habitability.¹⁶⁵

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.

¹⁶³ *Id.*, at 5.

¹⁶⁴ Ragel Sánchez, L.F., "Incumplimiento de obligaciones", *Comentarios...*, *Op. Cit.*, 650.

¹⁶⁵ For the concept of habitability (*habitabilidad*) see SAP Cáceres, of January 24, 2000 (AC 2000, 4000).

Article 16 LAU states that if T dies, her relatives (as listed under a) – c)) can demand for the transfer or continuation of the contract. Such a right is given by article 16 to the persons listed as follows: (i) the surviving spouse¹⁶⁶ (16 a) and (ii) the unmarried partner of the tenant (*conviviente more uxorio*)¹⁶⁷ independently of his/her sexual orientation, with whom the tenant has shared the apartment during the last two years. If they had descendants, the “two years condition” will not apply. In addition, the list of article 16 includes (iii) the descendants not emancipated, as well as (iv) the ascendants and other relatives having lived with the tenant during the last two years. This article establishes also that (v) other relatives, different than the above mentioned, and affected by a disability have also the right to the continuation of the tenancy contract if they fulfil with the two years requirement.¹⁶⁸

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?

Since T has exclusively concluded the contract with L, the latter cannot impose against T will to share the apartment with another person. The contract might be interpreted as to contain an implied clause according to which L– who knows that the students can only pay the rent if their number remains the same – must accept a successor student chosen by the other students unless he has an important objective reason against a certain candidate.

Question 3: 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)?

A sublease agreement with T is regulated by article 8.2 LAU, which indicates that a previous written agreement by L is required in any case.¹⁶⁹ Under these conditions, T possesses the right to sub-rent a room in L's apartment to S. In particular, article 8.2 LAU states that a partial sub-rent of the apartment is possible by T. In addition, to be regulated by Title II of the LAU on residential tenancy, the room cannot be used for another purpose than residence (article 2.1 LAU) and the rent paid by S cannot be higher than the rent paid by T. It should be noted that, conversely, if the room is rented for another purpose, then the sub-rent contract will be governed by the freedom

¹⁶⁶ See SAP Toledo, Secc. 1^a, of July 17, 1997 (AC 1997, 1447); SAP Málaga, Secc. 6, of March 20, 1997 (AC 1997, 854); SAP Asturias, Secc 1, of September 22, 1999 (AC 1999, 6336).

¹⁶⁷ *Persona que hubiera venido conviviendo con el arrendatario de forma permanente en análoga relación de afectividad a la de cónyuge, con independencia de su orientación sexual.* (article 12 b)).

¹⁶⁸ Compare Carrasco Perera, A., “Muerte del arrendatario”, *Comentarios...*, *Op. Cit.*, 363-384 with Contreras, L.M., *Op. Cit.*, 177-194. It should be noted that Court decisions have underlined the necessity of landlord's notification: SAP Burgos, Secc 2, of May 3, 2000 (AC 2000, 1491).

¹⁶⁹ Reglero Campos, F.L., “Cesión del contrato y subarriendo”, *Comentarios...*, *Op. Cit.*, 139-165. On the previous written agreement see STS, of November 14, 1996 (RJ 1996, 8369), STS, of October 14, 1991 (RJ 1991, 6917), STS, of September 29, 1994 (RJ 1994, 7312), STS, of July 16, 1991 (RJ 1991, 5391).

of parties (article 4.3 LAU). Furthermore, if T sub-rents a room without permission, L has the right to terminate the contract (*resolución del contrato de pleno derecho*) under article 27.2 c) LAU (*subarriendo inconsentido*).¹⁷⁰ Finally, in any case, the rental fee control is regulated by article 18 LAU.

It should be noted that in case of a legal sublet, the LAU does not regulate the possibility for L to receive the rent from S when T does not regularly pay her rent. In this case, as article 4.2 LAU states, in absence of any specific regulation the rules of the Civil Code will apply. Therefore, S is also responsible towards L for the payment of her rent as provided in articles 1551 and 1552 C.C. Another different case is when the sublet is illegal: the LAU only recognises to L the right to terminate the contract (article 27.2 c) but nothing else. As regards other possible remedies, article 1556 C.C. (see articles 1542-1582 C.C. on tenancy), on the breach of contractual obligations, provides that the parties have the right to terminate the contract and/or sue for damages.

Question 4: Formal Requirements and Registration

- a) *Does the tenancy contract require a specific form (e.g. in writing) – if yes, what is the rationale of this requirement? What is the consequence if this form is not observed?*
- b) *If an oral contract is valid, are there any additional requirements to be satisfied to render it enforceable before a court?*
- c) *Does the contract need to be registered in a public register? What are the consequences in private law, especially in court actions, if the registration does not take place?*

Tenancy contracts do not require any specific form: they can be written or oral. As mentioned before, despite the absence of any special requirement concerning its conclusion (article 1278 Civil Code), article 37 LAU lays down the possibility for both parties to a written agreement (article 1280 C.C.).¹⁷¹ The existence of a previous enforcing contractual relation (article 1261 C.C.) is required in this case. It should be noted as well that written agreements may be completed by public or private instruments. If the contract is concluded by a public instrument (*Escritura Pública*), then it can be registered (article 13 LAU) in the Land Register (*Registro de la Propiedad*).¹⁷² This registration serves in opinion of some authors, to build the theory of the real nature of tenancies. In other words, some academic opinions understand this registration as responsible of the mix character (real and obligatory right) of tenancy contracts.¹⁷³

¹⁷⁰ See Guilarte Zapatero, *Comentarios a la Ley de Arrendamientos*, (AAVV). Directed by X. O'Callaghan, Madrid, 1995, 99.

¹⁷¹ See also articles 1255, 1258, 1278 to 1280 and 1549 C.C.

¹⁷² See article 2.5 and 3 *Decree 1946, of February 8, on Mortgage (Ley Hipotecaria, LH)*. See also article 13 of *Decree 1946, of February 14, (Reglamento Hipotecario, RH)*.

¹⁷³ Reglero Campos, F.L., "Formalización del arrendamiento", *Comentarios...*, *Op. Cit.*, 784; Cf., Marín López, J.J., "Resolución del derecho del arrendador", *Comentarios...*, *Op. Cit.*, 281-329.

Question 5: Extra Payments and Commission of Estate Agents

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

There is no article within the Spanish tenancy legislation regarding the question of a sum required for the drafting of contractual documents. However, article 20 LAU deals with the general expenses regarding the apartment maintenance and its services, taxes, charges and responsibilities that cannot be individualised or measured through meters and that correspond to the rented dwelling (e.g.: Community expenses in general). This article begins lays down that parties to the contract are free to agree on who is going to pay this type of non-individualised expenses. Certainly, the expenses listed on this article are not *numerus clausus*, in other words, the analogy allows to say that the agreement between L and T on the expenses for the drafting of the contractual documents may be reasonable and licit. In any case, it should be noted that this agreement does not strictly fall on the scope of the application of article 20.1 LAU. Nevertheless, considering such analogy, article 20.1 LAU may apply and consequently, a written agreement will be required.

As already mentioned, oral tenancy contracts are legal under Spanish legislation, but the specific agreements on the general expenses listed in article 20.1 LAU must be written (*forma ad solemnitatem*) to be enforceable.¹⁷⁴ Regarding the expenses for the drafting of contractual documents, article 1255 C.C. provides that the parties can establish the agreements, clauses and conditions they consider to be convenient, if the latter are not contrary to the principles informing contractual freedom under Spanish contract law: law, moral and public order.

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

- a) because F promises to make L accept T as her successor;*
- b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move in earlier.*

As mentioned above, freedom of contracts is the core principle of Spanish contract law (article 1255 C.C.). This implies that in the case presented under variant 1, the contract could be avoidable if it is considered by a court as contrary to the mentioned principles informing contractual freedom: law, moral and public order.

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?

Commercial agency agreements are regulated under Spanish commercial law as article 1 of the *12/1992 Act, of May 27 on Agency Contract*¹⁷⁵ lays down. If an agent has acted as an intermediary in the conclusion of the contract, the commission for

¹⁷⁴ Ataz López, J., "Gastos generales y de servicios individuales", *Comentarios...*, Op. Cit., 455-476.

¹⁷⁵ BOE of May 29, 1992. Modified by the 22/2003 Act on Insolvency Proceedings.

agency services must observe the requirements stated under article 12 of the *1992 Act*. If the commission has been accepted by both parties, then A's claim for its services will be lawful. In that case, article 11 states that the payment of the agent will be made through a fixed amount of money, a commission or a mixed of both methods. If the parties had not establish any amount regarding the commission, the latter should be fixed according to the customary business practice of the place where the agent is acting, or regarding the specific circumstances of the case.

Set 2: Duration and Termination of the Contract

Chapter II, Title II provides the rules on tenancy contracts duration. Articles 9 to 16 LAU have succeeded in conjugating a minimum time-limit rigidity (five years) with parties' freedom to agree on the contract extend. Thus, if the parties agree on a tenancy contract for less than five years (article 9 LAU), then the tenant possesses the right to renew it up until five years. There is an exception to this rule when the tenant states her refusal to renew, giving notice of its intention with at least thirty days before the termination of the contract. On the contrary, if the parties agree to conclude a contract for more than five years (article 10 LAU), and once the minimum mentioned period has been completed, freedom of parties prevails without obligatory contract renewal. In addition, the tenant has the right to discontinue the agreement giving notice of its intention with at least two months in advance. Further, article 13 LAU regulates the discharge, avoidance or rescission of the contract in all the legal situations already listed in the introduction (Part B.1 - Contract Duration), in which the tenant is entitled to continue with the contract up to five years.¹⁷⁶

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?

Article 9.1 LAU states that parties are free to agree on the duration of the contract. Nevertheless, as explained above, if L and T have concluded a tenancy contract that does not contain any limitation in time, article 9.2 LAU states that the contract will be considered to have a one year duration that the tenant can extend up to five years as maximum.¹⁷⁷ In other words, L is not allowed to terminate the contract if T wants to extend it (see also article 13 LAU). The same applies for the contracts that have been agreed on for less than five years.¹⁷⁸

Article 19 LAU states that if L decides to renovate the house, she is not entitled to increase the rent before the end of the minimum five years contract duration.

¹⁷⁶ *Infra*, Question 9. *Contra* SAP Córdoba, Secc 3, April 7, 1999 (AC 1999, 764). *See* also article 13.2 LAU and 513 C.C.

¹⁷⁷ *See* SAP Salamanca, of October 8, 1998 (AC 1998, 2114). *See* also SAP Asturias, Secc 5, of January 13, 2000 (AC 2000, 210); SAP Palencia, of January 28, 1997 (AC 1997, 122); SAP Badajoz, Secc 2, of January 25, 2001 (AC 2001, 73).

¹⁷⁸ *See* Gomez Laplaza, M.C., *Op. Cit.*, 40-44.

Afterwards, the rent can be increased but not higher than 20% of its amount.¹⁷⁹ There is an exception to the above mentioned rule under article 22 LAU, which considers the case of apartment's renovations that cannot be postponed beyond the end of the five years period established by article 19.¹⁸⁰ In such conditions, L is allowed to give written notice within at least three months before the beginning of the works. Then, provided that such works will affect her in a relevant way, T has a one month period to terminate the contract if she wants so. On the contrary, if T accepts the works, she will have the right to a rent reduction proportionally to the part of the house that cannot be used during the renovation. In addition, T has the right to claim for damages if the works impose her extraordinary expenses. Regarding L's will to use the apartment for herself or for her family members, article 9.3 LAU states that the automatic and obligatory renewal of the contract up to five years will not apply provided both parties expressly agreed at the time of the conclusion of the contract on L's need to use the house for herself. If three months after the contract termination, L does not occupy personally the dwelling, T could recover the use of the latter for another five years period, being moreover reimbursed from her previous vacation expenses. T can alternatively chose to be indemnified with amounts equal to the rental fee corresponding to the missing years for a five years term to be completed (article 9.3 LAU).

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?

In July 2003 a legislative reform was enacted concerning some procedural aspects of the Eviction Trial under Spanish law. The *23/2003 Act, of July 10th on Consumer Sale of Goods Guarantees*,¹⁸¹ which implemented the Directive 199/44/CE, included some changes in order to accelerate judicial proceedings related to evictions for non payment. Among other measures, the most interesting are the following: (i) possibility of announcing by the lawsuit the will to cancel totally or partially the debt and costs, as long as the tenant leaves the property voluntarily in one month at most; (ii) the defendant will be cautioned and, in case of not appearing before the judge, the eviction will be declared; (iii) the decision of the Court accepting the lawsuit will fix the date to hold the hearing as well as the date to carry out the eviction (maximum one month from the hearing). If the decision is not appealed at the defendant's request, the eviction will be produced on the agreed date.¹⁸²

Question 7: Contract Limited in Time

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

¹⁷⁹ See Ataz López, J., "Elevación de la renta por sus deudas", *Comentarios...*, *Op. Cit.*, 429-454.

¹⁸⁰ See Rodríguez Morata, F.A., "Obras de mejora", *Comentarios...*, *Op. Cit.*, 515-534.

¹⁸¹ See BOE No. 165, of July 11, 2003.

¹⁸² About the eviction proceedings See SAP Zaragoza, Secc 5, of July 30 2002 (AC 2002, 1277); SAP Las Palmas, Secc. 5^a, September 19, 2002 (JUR 2002, 265996); SAP Girona, Secc. 2^a, February 11, 2002 (AC 2002, 827); STC 102/1993, of March 22 (RTC 1993, 102); SAP Las Palmas, Secc. 1^a, of June 15, 1996 (AC 1996, 1159); SAP Sevilla, Secc. 5^a, of July 23, 2002 (JUR 2002, 262066).

It is legally possible to restrict the contract below five years, if for instance T has a transitory working contract of two years. However, at the end of these two years period, T has the right to extend the contract duration every year up to a total five years term, if she considers it convenient, e.g. her transitory working contract has been renewed for another two or three years period. As mentioned in question 6, in this case, L is not allowed to terminate the contract against T will (see article 9 LAU).

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?

Article 10 LAU regulates the automatic renewal of tenancy contracts.¹⁸³ This article mentions that the contract is automatically renewed under two conditions: if, on the one hand, (i) the obligatory five years period has come to an end; and on the other hand, (ii) the deadline to terminate the contract has been reached, none of the parties having given notice at least one month before the deadline. Such a renewal applies then for yearly periods up to a maximum of three years, except if T (and only T) gives notice of her intention to terminate the contract one month before any of the annual deadlines.¹⁸⁴

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

T can terminate the contract provided she gives notice (i) one month before the deadline in the case of a contract concluded for less than five years (article 9 LAU), and (ii) two months before the deadline in the case of a contract concluded for more than five years (article 11 LAU).¹⁸⁵

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?

L's heirs cannot give immediate notice to T because, as explained above, article 9.1 LAU obliges to observe the minimum period of five years for the contract duration.

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

¹⁸³ See SAP Zaragoza, Secc 5ª, of January 3, 2000 (AC 2000, 5); SAP Santa Cruz de Tenerife, Secc. 1ª, of October 28, 2001 (AC 2002, 361).

¹⁸⁴ Marín López, J.J., "Prórroga del contrato", *Comentarios...*, Op. Cit., 225-237.

¹⁸⁵ See Introduction (Part B, Contract Duration). See also Carrasco Perera, A., "Desistimiento del contrato", *Comentarios...*, Op. Cit., 239-254. See also SAP Asturias, Secc. 5ª, of January 13, 2000 (AC 2000, 210).

α) Sale during the initial five years period. Article 14 LAU states that in case the rented house is sold, the buyer will continue on the landlord's rights and obligations under the tenancy contract during the first five years, even if the house has been bought from the registered landlord, in good faith and for consideration (article 34 LH, Mortgage Act - *Ley Hipotecaria*). Thus, independently from the requirements of article 34 LH, the duration initially established in the contract (five years or less) as well as its obligatory and automatic renewal (article 9.1 LAU) are maintained. Actually, L's rights and obligations regarding the tenancy contract are transferred to the buyer (*cesión del contrato*). Even if the LAU does not mention anything about T's notification, it could be argued that the buyer should notify T as soon as possible. It should also be noted that article 25 LAU regulates the tenant's pre-emption right (*derecho de adquisición preferente*) as already explained in Part B of the Introduction.¹⁸⁶

β) Sale after the five years period. A distinction can be made between two different situations: (i) *Article 34 LH is not applicable.* If the duration of the tenancy contract exceeds over five years, the landlord/seller will transfer to the buyer the rights and obligations he had under the contract upon duration (e.g. seven years). (ii) *Article 34 LH is applicable* In this case, the buyer just has to continue the contract until the end of the five years term and not further. In other words, the buyer has the right to terminate the contract (*rescisión del contrato*) once the five years period has been completed, even if the contract was signed for more than five years (e.g. seven years), but she must pay the tenant a one month rent for every year, beyond the five years period, that is not respected (see also article 1554.3 C.C.).¹⁸⁷ Besides, if the parties (L and T) had initially agreed that the sale of the rented apartment would terminate the tenancy contract, this clause is valid (B can terminate the contract) except if the obligatory minimum period of five years has not elapsed and that T wants to stay in the house.¹⁸⁸

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?

Taking into account by analogy article 14 LAU, the buyer cannot give anticipated notice since she subrogates to the landlord's rights and obligations within at least the first five years of the contract, or within the time on which parties had agreed for a contract duration over five years.¹⁸⁹ In addition, and most important, article 13 LAU regulates a series of situations in which the priority is tenant protection (as it has been already pointed out in the introduction).¹⁹⁰ Academic opinions consider that the list of rights under article 13.1 LAU is not a close list (*numerus clausus*) but an open list (*numerus apertus*) which can be extended to other similar legal situations as for instance the termination of the contract due to a bankruptcy procedure. Subsequently, it can be argued that in such a case the tenant possesses the right to continue the contract for at least a minimum of five years without prejudice of the renewal possibility as stated under article 9.1 LAU. If the contract was concluded for less than five years, T can renew it up yearly, until completing a five year period. If the

¹⁸⁶ *Supra*, Part B.1, Reciprocal rights and obligations of landlords and tenants.

¹⁸⁷ Articles 1106 and 1107 C.C. does not apply in this case. *See* Contreras, L.M., *Op. Cit.*, 169.

¹⁸⁸ *Id.*, 167-171.

¹⁸⁹ *See* 22/2003 Act on Insolvency.

¹⁹⁰ *Supra*, Part B.1. Contract Duration.

contract was concluded for more than five years, the contract might be terminated at the end of the agreed duration, except if it had been registered in the Land Register before one of the above listed legal situations occurred. Consequently, L cannot give anticipated notice to T if the contract is still in force.

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?

As already mentioned, except with respect to the five years minimum period of the tenancy contract, the contractual freedom stated in article 9 LAU, allows the parties to agree on the duration without a maximum limit. In such a case, the tenancy must be registered on the Register Land (article 13.2 LAU) and the agreement on the duration should be expressly made (article 1543 C.C.); otherwise a five years period would be applied. As regards L’s possibility to give notice before T’s death, article 27.2 includes seven conditions in which L can terminated the contract that are listed under Question 11.¹⁹¹

Question 11: Immediate Termination under Unusual Circumstances

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

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

Article 27.2 LAU includes seven conditions under which L can terminate the contract: (i) the absence of payment of the rent or any other amount for which the tenant could held be responsible;¹⁹² (ii) the absence of payment of the deposit or its update; (iii) the unlawful sub-renting or cession; (iv) the existence of intentionally caused damages on the property and (v) non-agreed or unauthorized works in the house;¹⁹³ (vi) the existence of unhealthy, disturbing, dangerous or unlawful activities,¹⁹⁴ (vii) and the use of the house for another non residential purposes (see also article 7 LAU). Points (i) and (vi) respectively answer to questions a) and b), entitling L to give immediate notice to terminate the contract.

Regarding the non-payment of the rent (*falta de pago*), nothing is expressly regulated under the LAU on how long would T’s delay be to allow L to terminate the contract (*resolución del contrato*). Although a one month delay in the payment may give rise

¹⁹¹ Contreras, L.M., *Op. Cit.*, 118. See also Transitory Provisions under LAU 1994.

¹⁹² See SAP Asturias, of November 21, 1996 (AC 1996, 2030); SAP Barcelona, Secc. 13^a, April 28, 1997 (AC 1997, 913); SAP Las Palmas, Secc. 1^a, of October, 1998 (AC 1998, 7346).

¹⁹³ See SAP La Rioja, of February 4, 1998 (AC 1998, 286).

¹⁹⁴ See SAP Navarra, Secc. 1^a, of October 17, 2001 (AC 2002, 340).

to such a termination, the decision of the STSJ Navarra, of March 27, 1992 stated that a one month delay is only a “delay” (*retraso*) and can not be considered as a non-payment (*impago*).¹⁹⁵ Then, another question is when T is usually late in her payments. In this case, L does not have to stand T’s conduct; therefore, if L can prove the usual T’s delay, L could make an application against T to terminate the contract. Finally, a contractual clause or *clause résolutoire* according to which the contract is automatically terminated if T does not pay a certain number of monthly rents or commits any other breaches of her duties (e.g. as listed in article 27.2 LAU) may also be valid.

Set 3: Rent and Rent Increase

Chapter III, Title II provides the rules about rental fees, form of payment, rent update and its increases. The contractual freedom of parties to fix the rent and the due date is stated by article 17.1 LAU. However, monthly rent payments are the general rule, except if the parties agree on other type of payment (article 17.2 LAU).

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

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

The contractual rent is due in accordance with the terms of the contract and there is no restriction on the modes of acceptable payment. However, if the contract does not provide this information,¹⁹⁶ the due rent must be paid in cash to be handed over in the rented house. In addition, the rent will be due within the first seven days of each month (article 17.2 LAU),¹⁹⁷ and the landlord cannot ask for more than one month payment in advance. The landlord is required to give to the tenant a receipt of the payment, except if other modes of payment (e.g. bank transfer, cheque, etc.) upon which both parties have agreed provide automatically a proof of the transaction. Such a receipt must contain all the incurred amounts comprised in the total monthly rent.¹⁹⁸ If L does not provide such a receipt, she will be held responsible for all the expenses incurred in by T to prove that the rent was effectively paid (articles 17.1 and 4 LAU).

Question 13: Requirements for Rent Increase

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

¹⁹⁵ See RJ 1992, 6194. Cf., SAP Barcelona, of March 24, 1999 (AC 1999, 5914), SAP Málaga, of January 26, 2001 (AC 2001, 331).

¹⁹⁶ See articles 1574 and 1544.1 C.C.

¹⁹⁷ See SAP León, Secc. 2^a, October 7, 1997 (AC 1997, 1966).

¹⁹⁸ SAP Burgos, Secc. 3^a, of June 22, 1999 (AC 1999, 1533). Accord SAP Huesca, of March 26, 1996 (AC 1996, 533); SAP Navarra, Secc. 1^a, of June 20, (AC 1995, 1671).

As mentioned in question 6, L's intention to increase the rent after the restoration of the house is regulated under article 19 LAU. The latter states that L does not have the right to increase the rent before the end of the five years minimum contract duration. Once this period of time elapsed, the rent increase is calculated according the following formula (article 19.1):

$$\text{Rent increase} = (\text{Tot. Inv.} - \text{Pub. Sub.}) * (\text{legal interest rate of the money} + 3 \text{ points}),$$

where Tot. Inv. are the total investments engaged, and Pub. Sub. the public subsidies received by L for the work. In any case, the rent increase must not be higher than 20% of the current rent.

Question 14: “Index-clause” and Progressive Rent

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

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

Under the tenancy regulation in 1946, practically no system of rent revision was introduced, conversely in 1964, the new legislation established that, in some cases, rent adjustments were possible creating the so-called stabilization clause (*cláusula de estabilización*).¹⁹⁹ However, even if rent revision was introduced at that time under the Spanish tenancy system, nothing was made regarding the automatic and obligatory lease renewal (*prórroga forzosa*). Later on, the 1985 legislation, without pretending to regulate the rent increase issue, laid down the abolition of indefinite lease renewal, liberalizing tenancy contracts. Consequently, all revision clauses disappeared in favour of short duration contracts, rents being regularly increased on the occasion of contracts renewal. In this legal context, the LAU (1994 Urban Tenancy Act) introduced a new system characterised by an equilibrium between the parties through the automatic renewal of the contract with a five years minimum limit (article 9.1 LAU), and with an additional renewal possibility for the next three years (article 10 LAU). At the same time, this legislation regulated the free choice of the parties on the rent payment (article 17 LAU), but article 18 LAU introduced an important limitation to the contractual freedom. Indeed, unlike to the system of stabilization clause introduced by the 1964 Act, article 18.1 LAU establishes an automatic and obligatory new clause of stabilization which cannot be changed by the parties' contractual agreements: the Consumer Price Index (*Indice de Precios al Consumo*, IPC),²⁰⁰ and during the first five years of the contract, the parties can update the rent only according to the variations of the IPC, without any other agreement possibility (see also article 1256 C.C.). From the sixth year of contract, parties are free to agree on new rent increase conditions (article 18.2 LAU). If nothing was agreed at the conclusion of the contract, then the IPC will again be the reference index to be used for the rent increase determination. In addition, article 18.3 LAU establishes that L

¹⁹⁹ The stabilization clause was fixed by the free choice on the parties and tied the rent to the price of a specific product (e.g.: sugar). See, Contreras, L.M., *Op. Cit.*, 203.

²⁰⁰ *Id.*, at 203.

should notify T on her intention to increase the rent with a written notification;²⁰¹ the increase percentage to be applied should be joined with an official certification of the National Statistical Institute or its reference in the State Official Bulletin (BOE) if T demands for it.²⁰² Finally, article 18 states that the notification will be valid through the payment receipt if L includes all the above mentioned information.²⁰³ It should be noted as for the IPC System, that the National Statistical Institute has created the LAU Index to facilitate the calculation that have to be done to determine the rent increase.²⁰⁴

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?

As explained in Part B of the introduction, during the first five years of the contract, the rent can only be updated on a yearly basis, as a function of the annual variation the general consumers price index (*Indice General Nacional de Precios de Consumo*²⁰⁵) (article 18.1 LAU). Beyond the five years term, the rent will be updated according the scheme defined by the parties, and in its absence, according to the process previously described (article 18.2). Therefore, if the 10% increase corresponds to one of these cases, it will be valid under Spanish law. Otherwise, the concept of unlawful collection (*cobro de lo indebido*) is regulated under article 1895 C.C. (Section II, Title XVI, Book IV). In other words, it is possible for T to claim for handing over (*acciones restitutorias*) under article 1901 C.C.²⁰⁶ Three conditions are required for the success of such an action (*condictio indebiti*): (i) effective payment, (ii) deficiency on payment cause and (iii) party concerned paying error. These articles should be linked with those articles of *the Spanish Criminal Code* (109 to 122) on the “Civil Liability derived from a Criminal Offence” (*Responsabilidad Civil derivada de delito*). Regarding the offsetting of the sum (articles 1195 to 1202 C.C.), T can off-set the amount to be repaid against future rent instalments on her own motion without judicial intervention, if conditions under article 1196 C.C. are fulfilled (both parties should be principal debtors, the debt should consist in a payment of money, current maturity, cash and payable and free of any legal charges).

²⁰¹ See SAP Santa Cruz de Tenerife, of February 25, 1997 (AC 1997, 217). See also Third Transitory Provision LAU, Cf., SAP Alicante, Secc 5, of December 22, 1996 (AC 1996, 2239); SAP Vizcaya, Secc. 5^a, of February 10, 1997 (AC 1997, 224); SAP Asturias, Secc. 5^a, of December 13, 1996 (AC 1996, 2244).

²⁰² See also Third Transitory Provision LAU. Cf., SAP Santa Cruz de Tenerife. The notification made by registered mail with acknowledgement of receipt is considered valid, SAP Asturias, Secc. 6, of January 23, 1997 (AC 1997, 10). Cf., SAP Pontevedra, Secc. 1^a, of January 3, 1997 (AC 1997, 15) in application of the Second Transitory Provision.

²⁰³ Contreras, L.M., *Op. Cit.*, 202-210.

²⁰⁴ For the new method and LAU Index see *Id.*, at 669-670.

²⁰⁵ For the general consumers price index See the National Statistical Institute at <http://www.ine.es>.

²⁰⁶ See STS, of January 25, 1984 (RJ 1984/381).

Question 16: Deposits

What are the basic rules on deposits?

Concerning the landlord's guarantee deposit (the so-called *fianza*)²⁰⁷, article 36 LAU states one month rent for residential tenancy and two months for other types of tenancies as guarantee against damages on the property (article 36.1 LAU).²⁰⁸ During the five years minimum duration of tenancy contracts, landlords are not allowed to update the deposit, but at the time of the extension of tenancies, this amount can be increased or diminished (article 36.2 LAU) and its actualization will be made following the IPC (article 18 and 36.3 LAU). If the landlord does not give back the deposit in due time to the tenant, then the legal interest rate will be applied (article 36.4 LAU). The Sixth Additional Provision of the *52/2002 Act, of December 30 on Proposed National Budget 2003* has established the legal interest rate in 4.25% until December 31, 2003.²⁰⁹ Finally, it should be noted that the obligatory character of this deposit should be analysed in connection with the Third Additional Provision that lays down the possibility for the Autonomous Communities to demand landlords to place the deposit in the housing local administration created with this aim, without any interest-bearing neither to the landlord nor to the tenant.²¹⁰

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 general expenses regarding the apartment maintenance and its services, taxes, charges and responsibilities that cannot be individualised or (measured through a meter) and that lawfully correspond to the tenant (e.g. Community expenses in general)²¹¹ are stated in article 20 LAU. The parties to the contract are free to agree that the tenant will pay for the utilities (e.g. water supply and garbage removal) and, a monthly lump sum to cover certain or all utilities may be established in the contract. Besides, article 20.1 LAU requires a written agreement, even if oral tenancy contracts are legal under the Spanish legislation. This implies that the tenancy contract can be verbal, but the specific agreement on utilities should be written (*forma ad*

²⁰⁷ On the irregular pledge (*prenda irregular*), see M., Derecho Civil, III/Vol. 2, Barcelona, 1994, §115, no. 3. See also the general rules: article 1195 C.C. and 1561 C.C.

²⁰⁸ On the offsetting of the deposit to be repaid against the last rent instalment, see SAP Pontevedra, of September 2, 1996 (AC 1996, 1713) and SAP Badajoz, Secc. 2^a, of January 25, 2001 (AC 2001, 73).

²⁰⁹ See Ley 52/2002, de 30 de Diciembre, de Presupuestos Generales del Estado para el Año 2003, BOE No. 313, of December 31; Rect. BOE No. 81, of April 4 2003 (RCL 2002, 3080 and RCL 2003, 932).

²¹⁰ For a list of the local legislation that regulates the deposit in every Autonomous Community See Gómez Laplaza, M.C., *Op. Cit.*, 140-143. For instance, the deposit is placed in the *Conserjería de la Vivienda* of the Autonomous Community of Andalusia.

²¹¹ Community expenses in general (*Gastos de Comunidad*) correspond to the landlord, although the written agreement stating that the tenant will pay such an expenses is valid, see SAP Valladolid, Secc. 1^a, of January 14, 1997 (AC 1997, 223) and SAP Asturias, Secc. 4^a, of November 24, 1999 (AC 1999, 2429).

solemnitatem) to be enforceable (see also article 17.4 LAU).²¹² In absence of such an agreement, the landlord will be responsible for the utilities.²¹³

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

Article 51 of the Spanish Constitution corresponded to the first rule on Consumer and Users Protection within the Spanish legal framework after 1978. It states that (1) “*The public authorities shall guarantee the defence of the consumers and users, protecting their safety, health, and legitimate economic interests through effective procedures.*” (2) “*The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them in those questions which could affect them under the terms which the law shall establish.*” (3) “*Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic commerce and the system of licensing commercial products.*” As a result, in fulfilment of the objectives of the above cited constitutional mandate, the 26/1984 Act on Consumer Protection (*Ley General para la Defensa de los Consumidores y Usuarios*) was enacted on July 19, 1984 to provide consumers and users with a legal instrument to protect and defend themselves. This instrument however does not exclude nor replace other actions or regulatory developments from other close or related competencies such as mercantile, penal or procedural legislation and regulations applying to industrial safety and public health, production organisation and domestic trade.²¹⁴ Further, the objectives of this Act can be summarised as follows: (i) to establish efficient, direct and firmly established procedures for the defence of consumers; (ii) to develop the proper legal framework needed to foster the optimal development of the associative movement in this field; (iii) to declare the principles, criteria, obligations and rights that comprise consumer and user defence and which, within the scope of their competences, should be kept in mind by the public authorities in their future actions and regulatory development within the framework of the doctrine established by the Constitutional Court.

In 1998, the *Directive 93/13/EC on Unfair Terms in Consumer Contracts* was implemented in the Spanish law through the 7/1998 Act on General Contract Terms (*Ley sobre Condiciones Generales de Contratación*).²¹⁵ This new regulation stated in its article 2.1 that, unlike the Directive (which is limited to business to consumer transactions), the 1998 Act applies to the contracts containing general terms and

²¹² Ataz López, Joaquín, “Gastos generales y de servicios individuales”, *Loc. Cit. in Comentarios...*, *Op. Cit.*, p. 455-476.

²¹³ See SAP Zaragoza, Secc. 4^a, of March 25, 1996 (Act. Civ. 1996-2, 1152).

²¹⁴ BOE of July 24, 1984 No 176, 21686. The National Consumer Institute (*Instituto Nacional del Consumo* - INC) is an independent body (created in 1975 in implementation of article 51 C.E.) of the Spanish Ministry of Health and Consumer Affairs; together with the Directorate General Consumer Affairs of the Autonomous Communities, the INC is in charge of the functions of promotion and development of consumers and users right. See at <http://www.consumo-inc.es>.

²¹⁵ 7/1998 Act on General Contract Terms, of April 13, 1998. BOE No. 89, of April 14, 1998. Modified by the 24/2001 Act, of December 27, *de Medidas Fiscales, Administrativas y del Orden Social*, BOE No. 313, of December 31, 2001, 50598 (The modification introduces article 5.2.) and by the 39/2002 Act, October 28, *de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios*, BOE No. 259, of October 29, 2002, 37922-37933). (This modification concerns articles 16 y 19).

celebrated between a professional (*predisponente*) and any legal or natural person (*adherente*). Article 2.2 states what is understood by “professional” under this law: any natural or legal person acting within the framework of its professional and business activity. Further, article 2.3 states that an “*adherente*” may be also a professional, even if she is not acting within the framework of its business activity.

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).

In case a landlord acts in a non-commercial capacity, the general civil rules on contracts will be applied. Moreover, the LAU establishes under its article 4 the mandatory character of its rules and provides in article 6 the mandatory nature of all the current provisions. This implies that private parties to a tenancy contract are not competent to modify it, except when the expressly LAU specifies the opposite.

Question 19: Frequent Standard Terms

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

- a) The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorised by a judge.*
- b) The cost of small reparations, up to 100E per annum, has to be met by the tenant.*
- c) At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.*
- d) If the tenant becomes a member of a tenants' association, the landlord has the right to give notice.*

a) Tenant's fundamental obligation is to pay the rent; for this reason, the absence of the payment of the rent or any other amount for which the tenant could be responsible, as well as the absence of payment of the deposit or its update (article 27.2 LAU), constitute one of the conditions under which L can terminate the contract. The off-setting of expenses by the parties is lawful under Spanish Civil law without judicial intervention if conditions under article 1196 C.C. are fulfilled (see question 15), and in that case such a contractual stipulation is void.

b) Such a term can be lawfully included in a tenancy contract by a non-commercial landlord; however, it should be noted that the mandatory terms of the LAU will act as the lawful limit of this type of contractual terms. Therefore, small repairs and general expenses of the apartment maintenance and its services, taxes, charges and responsibilities, which cannot be individualised and that lawfully correspond to the tenant, are regulated under article 20 LAU.

c) The landlord has the obligation to make all the necessary repairs for the maintenance of the house in conditions of habitability (article 21 and 30 LAU)²¹⁶

²¹⁶ See also article 1554 C.C.

except for damages caused by the ordinary use of the property, in which case tenant is responsible for it as stated in articles 21.4 and 30 LAU. Repainting by a professional does not enter under the scope of articles 21.4 and 30 LAU, and thus, cannot be done at the expense of T.

d) As already mentioned, Spanish civil law states that parties can establish the agreements, clauses and conditions that they consider suitable if they are not opposed to law, moral and public order (article 1255 Civil Code). Therefore, a contractual term that prohibits T to become a member of a tenants' association will be unlawful and unheard of in practice.

Directive 98/27/CE²¹⁷ was enacted on May 19, 1998 on injunctions for the protection of consumers' interests. This Directive provides that certain qualified institutions promoting consumer rights (article 3)²¹⁸ shall be given the right to file collective actions *inter alia* against abusive terms in consumer contracts as defined in Directive 93/13/EC. In order to comply with this Directive, the *39/2002 Act Promoting Consumer Rights* has been enacted in 2002 under Spanish law. This *Act* amends first, the *Civil Procedural Act 2002* to make possible the exercise and effectiveness related to actions for an injunction (*acción de cesación*) (Chapter I); second, the substantive legislation relating to this type of legal actions (Chapter II), except the legislation related to illegal publicity and to consumer credit which is regulated in Chapter III and IV respectively. The amendment of the *Civil Procedural Act 2002* allows conferring to other national Member States' qualified institutions the competence to bring an action for an injunction in the Spanish Courts.²¹⁹ Furthermore, the *39/2002 Act* regulates (i) the Spanish qualified institutions competent in other Member States of the European Union for the exercise of injunctions and (ii) the territorial competence of the Spanish Courts establishing a system *ad hoc* of periodic penalty payments to reinforce the effectiveness of the action. However, the person who applied for (and obtained) a preventive measure in exercise of a cessation action, may be exempted of the provision of a security (*caución*) under the Act. Such an injunction pursues a double effect: (i) the judicial conviction of requiring the cessation of infringement harmful to the collective interests of consumers, and (ii) the judicial prohibition to make further infringements. Finally, the Act lists the Spanish qualified entities to bring such actions: (i) bodies or public entities competent in consumer protection; (ii) the consumers and users associations according to the Spanish General Act of Consumers and Users Protection and (iii) other Member States entities of the EU aimed at the protection of the collective interests of consumers and users.

²¹⁷ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *O.J.*, L 166, of June 11, 1998, 0051-0055.

²¹⁸ Article 3 states that "For the purposes of this Directive, a "qualified entity" means anybody or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1, in Member States in which such bodies exist and/or (b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law", L 166/52.

to in Article 1 are complied with, in particular:

²¹⁹ To ensure rapidity in the judicial proceedings in which those actions will be exercised, an oral trial shall be held.

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.

Article 23.1 LAU states that the tenant cannot make any work in the apartment without the written consent of the landlord if such work modifies the configuration of the house or its accessories (e.g.: lumber room, garage, furniture, etc.), or diminishes the stability or security of the building.²²⁰ If the tenant has made some works without the required consent (*obras in consentidas*), then the landlord can either terminate the contract or demand the tenant to remove the work made in the apartment.²²¹ The cases regarding the installation of a parabolic TV antenna on the balconies, are regulated by the Decree 1957, *on the Installation of TV External Receiver Antennas* (articles 1 and 2)²²² and the 19/1983 *Act on Radio Electric Amateur Stations* (articles 1 and 2). These provisions allow the tenant to install a parabolic TV antenna outside the building without prejudice of the tenant's civil responsibilities under the provisions of the Spanish Civil Code (articles 1561, 1573, 487, 488, 454) and the LAU 1994 (article 23). So T has the right to install a parabolic TV antenna but after the termination of the contract, L may ask T to remove it.

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

This variant would not alter the answer.

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?

Article 23 LAU only covers tenants' work that modify the configuration of the dwelling or that diminish its stability or security. Moreover, T possesses the constitutional right to the free development of her personality, recognised under article 10.1 CE on human dignity and human rights as follows: "*The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace*". Therefore, L cannot force T to remove the poster from the balcony unless it modifies the configuration of the dwelling which does not seem to be the case.

²²⁰ See article 2.2 LAU where a list of such accessories is provided.

²²¹ See SAP Santa Cruz de Tenerife, Secc 1^a, of February 4, 1997 (AC 1997, 218) on termination of the tenancy contract due to works on the house without the landlord's consent.

²²² See BOE of April 18, 1957, No. 289/1957, 1115.

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 LAU does not contain any provision prohibiting the landlord from keeping a set of keys of the apartment. However, as a general rule, the landlord may only enter with T's consent, otherwise L would commit a criminal offence (*allanamiento de morada*) under article 202.1 of the Criminal Code.²²³ In addition, T has the right to terminate the contract if she is disturbed, in fact or in law, by L in her right to use the house (article 27.3 LAU).

Question 22: The Landlord's Liability for Personal Injury

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

If the tenancy contract contains an express clause imposing on L a duty to keep the apartment in a reasonable state of repair, as article 21 LAU establishes, then T has the right to terminate the contract as states article 27.3 a) LAU if L does not respect this duty. If such a term is not included under the tenancy contract, articles 27.3 a) and 21 LAU will be applicable in any case.

With respect to the civil liability, if T's child falls and breaks her leg, T may claim damages under the general rules on liability in tort of Spanish civil law. The general rule is laid down in article 1902 C.C. Spanish civil law makes a distinction between, on the one hand, the liability due to someone's fault (*responsabilidad por culpa*), which is the general rule and, on the other hand, the objective liability (*responsabilidad objetiva*), which is the exception to the general rule.²²⁴ In addition, article 1093 C.C. states that the duties derived from acts and omissions, if someone's fault intervene (if not regulated by the *Spanish Criminal Code*), will be in any case regulated under Chapter II, Title XVI, Book IV C.C. on the duties originated by fault or negligence (*De las obligaciones que nacen de culpa o negligencia*). It should be noted that the 8/1999 Act on Joint Property (*Propiedad horizontal*)²²⁵ and article 396 C.C. regulate the Collective Community (*Comunidad de Propietarios*).²²⁶ Those regulations contain all the rules regarding the constitution and functioning of such collective community, which must subscribe to an insurance contract for civil liability to face the claims for damages of any accident occurring within the common spaces of the building. As a result, L's liability depends on the place where C fell; if she fell inside the house due to L's negligence, then L can be liable under articles 1092 and 1093 C.C. On the contrary, if she fell within the common spaces of the building, then

²²³ See Organic Law 10/1995, of November 23, modified by the Organic Law 15/2003, of November 25, BOE No. 283, of November 26, 2003, Rect. BOE No. 65, of March 16 and No.80, April 2, 2004.

²²⁴ See Albadalejo, M., II/Vol 2, *Op. Cit.*, 484-486.

²²⁵ *Supra*, quotation 149.

²²⁶ See SAP Badajoz, Secc. 2ª, of September 1999 (AC 1999, 1844). *Contra* SAP Zaragoza, Secc. 5ª, of June 17, 2002 (AC 2002, 1275), see Gómez Laplaza, M.C., *Op. Cit.*, 67.

the Collective Community statutes, as well as the civil liability insurance (contracted by the Community of co-owners) should be examined.

Set 5: Breach of Contract

The *legal relationship (relación jurídica)* that a contract establishes between the parties may terminate (*extinguirse*) due either to certain circumstances present at the moment of its conclusion or to unexpected other situations which could occur afterwards (*circunstancias sobrevenidas*). Therefore, a contract can be terminated either by its fulfilment (*cumplimiento*) or without it (*sin cumplimiento*).

In other cases, a contract terminates by legal invalidity (*invalidéz*), non enforceability (*pérdida de eficacia*), withdrawal (*rescission*), bilateral agreement (*mutuo disenso*) or cancellation (*resolución*).²²⁷ In all these legal situations, one can refer to the expression termination of a contract (*extinción de un contrato*), even if naturally there are differences between them (See articles 1254 to 1314 C.C., Title II, Book IV).²²⁸

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.*

Spanish civil law has established a number of grounds on which the legal relationship can be terminated (*causas de extinción de la obligación*) as mentioned above. If the transfer of the apartment's possession was not possible due to the fire, then the contract is void *ab initio*. Moreover, tenancy contracts are defined under Spanish law as contracts where the landlord is obliged to provide the tenant with the right of use or enjoy (*uso o goce de la cosa*) of a property during certain time and against a sum of money (article 1543 C.C.). Therefore, if the apartment/thing (*la cosa*) is destroyed, or lost, without responsibility of the debtor/tenant, before T takes possession of it (*use o goce de la cosa*), L has not fulfilled her obligation, and article 1182 C.C. establishes that the contract is terminated (*extinción de la obligación*).

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

Bearing in mind that the contract has been already concluded and the possession transferred, article 28 LAU will apply and the tenancy contract will be terminated (*extinción del arrendamiento*) due to the destruction of the property without responsibility of neither parties. In this case, the contract terminates without its fulfilment due to the destruction of the apartment.

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?*

²²⁷ Albadalejo, M., II/Vol. 1, *Op. Cit.*, 466-473.

²²⁸ *Id.*, at 466.

As pointed out above, under the rules of Title II, Book IV (*De los contratos*) of the *Spanish Civil Code* three conditions are required to conclude a contract. First, parties' consent (*consentimiento*), second, a definite object (*objeto*) as matter of contract, and finally, the obligation's cause (*causa*) established by both parties through the contract (article 1261 Civil Code). Therefore, if the apartment has already been destroyed at the time of the conclusion of the contract without the parties' knowledge, then the Spanish civil law provides the general rules on the circumstances rendering a contract voidable or void. These circumstances are misrepresentation, lack of capacity, illegality, undue influence, non-disclosure or mistake (*vicios de los elementos esenciales del contrato*). The last circumstance, or mistake (*el error*), is considered under civil law as a false mental representation of the reality that invalidates the conclusion of a contract process (the so-called *error-vicio*). Under question 23 c), there is a mistake on the object of the contract, consequently, one of the essential conditions of the contract is missing, thus the contract is void ab initio.²²⁹

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?

Property law governs the answers to the present question. Even if a tenancy is not more than a contract, it creates a property right for T, namely the right to use the apartment. Such a possession is regulated under article 430 and 432 C.C. (*posesión en concepto de dueño y en concepto distinto de dueño*). If L (*propietario-poseedor mediato*) transfers (*traditio*) the possession of the apartment (article 609 C.C.) to T1 (*inquilino-poseedor inmediato*), then the possession has been effectively transferred to T1 and not to T2. With respect to movables and immovable sales' plurality, the Spanish Civil Code states that the first one who registers her rights, or who takes *bona fide* possession, has the better right (article 1473 C.C.). Consequently, T1 has succeeded to conclude the contract with L, whereas T2 has only the right to claim damages. It should be noted that if T2 registers the tenancy in the Register Land before T1, even if T1 was first in the possession, T2 will have then, a better right than T1 (article 1473 C.C.).

Question 25: Delayed Completion

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

²²⁹ Díez Picazo, L., and Gullón, A., Vol II, *Op. Cit.*, 58. See also articles 1094, 1096, 1097 C.C.

General rules on tenancy contracts states that L's must transfer the possession of the thing/apartment to T (article 1554.1 C.C.). If L fails in fulfilling her obligation, then T has the possibility to terminate the contract (*resolución del contrato*) or to ask for the contractual fulfilment (*cumplimiento del contrato*). T can also claim for damages under articles 1556, 1558, 1563, 1564 and 1559.3 C.C. With reference to the article 27.3 b) LAU, T can terminate (*resolución*) the contract if L disturbs, in fact or in law, the use of the apartment by T. Conversely, L does not have a claim against N, unless the behaviour in bad faith was proved and therefore a claim in tort under article 1902 C.C. could be possible.

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.

The landlord has the obligation to make all the necessary repairs for the maintenance of the house in convenient conditions of habitability (article 21 and 30 LAU) except for damages caused by the ordinary use of the property, damages for which the tenant is held responsible as stated in articles 21.4 and 30 LAU. Therefore, T may terminate the contract if L does not make the necessary repairs on the house to keep it in the required conditions of habitability, but this is not a valid ground for seeking a rent reduction.

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?

Under article 21.3 LAU, T has the obligation to inform L as soon as possible of the reparations required in the apartment. In order to facilitate such a repair, T might consent L to enter to the house to directly verify by herself or by a specialist the state of the house. At any moment, T after informing L may proceed to the urgent repairs that prevent any imminent injury or inconvenience from occurring. Moreover, under Spanish law, it is possible for T to repair and to ask for the immediate reimbursement to the landlord (article 21.3 LAU). Regarding the offsetting of the costs from the monthly rent rates (see articles 1195-1202), T can off-setting the sum to be repaid against future rent instalments on her own motion without judicial intervention if conditions under article 1196 C.C. are fulfilled. Such conditions have already been listed under question 15.

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?

L is responsible whether the mildew stains were possible to discover or not. Whether T had seen the stains or not, she can ask L to repair (remove the mildew stains, paint, etc.) under article 21.3 LAU. The rules for the off-setting of the expenses incurred by T are also applicable here.

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

L does not have any responsibility in this case. If the noise exceeds the level permitted by local rules, then T or the neighbours' community may denounce the situation to the administration and eventually ask compensation for damages from it. Therefore, L is not obliged to accept a rent reduction.

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.

Again this is not a valid ground for claiming for a rent reduction. T is obliged under the LAU to pay the rent as and when it falls due. It should be noted that in Spain, local legislation (*Ordenanzas Municipales*) restrict any noisy activity from 12.00 pm to 8.00 am.²³⁰

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?

Currently, articles 4 and 6 LAU lay down the mandatory nature (*carácter imperativo*) of Title IV and V of the LAU (*the latter on procedural aspects*) and the priority order of sources regulating tenancy. Article 4 establishes that the exclusion of the application of the LAU's provisions (when legally possible), should be made expressly for each provision. In addition, article 6 defines the mandatory nature of all the current provisions, which implies that private parties to a tenancy contract are not competent to modify it, except when the LAU specifies the opposite. Generally speaking, L's liability cannot be lawfully excluded by a disclaimer clause contained in the contract. Anyway, in the present case, L cannot be held liable under a)- c); a disclaimer clause in this sense could be lawful.

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?

As already mentioned, articles 1 to 3 of the 1994 Tenancy Act make a distinction between residential tenancy (*arrendamiento de vivienda*)²³¹ and tenancy for other type of use (*arrendamiento para uso distinto del de vivienda*) as for example business leasing contracts (See articles 29 to 35 LAU). Regarding the residential tenancy, article 2 LAU states that occupied buildings must be essentially assigned to satisfy a permanent housing necessity. It should be noted that this article uses the word "essentially"²³² (*primordialmente*) which means that the apartment must be used mainly with residential purposes and not the contrary. In other words, if T uses the

²³⁰ *Supra*, quotation 144.

²³¹ See articles 6 to 28 LAU.

²³² Article 2 states: "*Se considera arrendamiento de vivienda aquel arrendamiento que recaiga sobre una edificación habitable cuyo destino primordial sea satisfacer la necesidad permanente de vivienda del arrendatario*".

apartment *essentially or mainly* as a surgery clinic, even if there is one room assigned as residence, the tenancy contract will not be considered as a residential tenancy. In that case, only articles 29 to 35 LAU will be applied to the contract being considered as a business leasing contract (*arrendamiento para uso distinto del de vivienda*).²³³ Conversely, if the apartment is used by T essentially as her residence, although one or two rooms were used as a surgery, then the contract will be considered as a residential tenancy.²³⁴ As regard T's claims, it has been pointed out in Part B of the introduction that the consent of both parties on the object and the cause is necessary to form a contract. So it is possible for T to terminate the contract based on the consent vice by error (articles 1265 and 1266 C.C.) if T really trusted the local authorities permission to open the surgery in the studio. Therefore, it can be argued that the absence of such a permission can be the ground of the contract frustration between L and T (see articles 1258, 1266.1, 1281 C.C.)²³⁵ and in case of fraud, guilt or negligence on the part of L, T can claim to her for damages under article 1101 C.C.

Set 6: The Relationship among the Tenant and Third Persons

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?

Article 27.2 (e) LAU states that the landlord can terminate the contract when activities disturbing other neighbours (as over noise nuisance) take place in the house. As already mentioned, local legislation (*Ordenanzas Municipales*) restricts noisy activities from 12.00 pm to 8.00 am. In addition, the same article states that the landlord can terminate the contract (*resolver de pleno derecho el contrato*) when inside the house annoying, unsanitary, unhealthy, noxious, hazardous, dangerous and illicit activities are having place. Therefore, T can tell L about N's behaviour and L can terminate the contract with N under article 27.2 LAU. If T is the owner of the apartment she has directly the possibility to terminate the contract concluded with N. In any case, there is the possibility of calling the police if the excessively loud music is played between 12.00 pm and 8.00 am.

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged negligently by a lorry during construction work undertaken at a neighbour's house, which causes repair costs of 10000 € and entails T being unable to use two rooms for 2 weeks. The lorry has been driven by E, an employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?

²³³ See the Explanatory Statement (*Exposición de Motivos*) LAU 1994.

²³⁴ Contreras, L.M., 42-50.

²³⁵ For the concept of vice-error (*error vicio*) see Lacruz, *Elementos del Derecho Civil*, Vol III-2, Madrid 2000, 154. For its conditions See STS, of January 4, 1982 (Ar. 9177).

Under Tort law, a distinction is made between three different types of liability (*responsabilidad extracontractual*):

- (i) Subjective liability (*responsabilidad subjetiva*) which is exclusively fault-based (*fundada en la culpa*), and objective liability (*responsabilidad objetiva*) which is completely fault-independent (*independiente de toda culpa*);

- (ii) Direct or indirect liability (*responsabilidad directa e indirecta*). While the first one is the liability of the person who directly caused the damage, the second one is the liability of the person legally responsible on behalf of another person (e.g. the liability of the parents for the damages caused by their children (article 1903 C.C))

- (iii) Principal and subsidiary liability (*responsabilidad principal o subsidiaria*) relating to its priority for the same damage or injury committed by several persons.²³⁶

In addition, four conditions are required to consider someone's liability: 1) a behaviour which may be an action or an omission (*acción u omisión*) as article 1902 C.C. states; 2) an action or omission having produced a damage or injury; 3) a causal link between the behaviour and the injury must exist; 4) a criterion of liability of the action or omission that could be the fault (*culpabilidad*).²³⁷ As for the injury or damage (*daño*), Spanish civil law establish two different types: a) property damage (*daño patrimonial*) which is the injury relating to property rights classified into two other categories: first, the general damage (*daño emergente*) and second, the loss of revenue (*lucro cesante*) as stated in article 1106 C.C.; b) moral damage which is referred to by the injuries caused in violation of someone's property and rights.²³⁸

Under Spanish civil law, damages can be claimed in case of certain and present or future property or moral injuries. As already mentioned, the right to claim for damages in Tort law is based, among others things, on the guilt as criterion of liability, but negligence is also a valid criterion. Article 1104 C.C. defines as synonyms both concepts, stating that the guilt/negligence is the omission of the diligence required by the obligatory nature corresponding to the circumstances of persons, time and place. The diligence obliges every person to take all the necessary measures to avoid harmful results,²³⁹ excluding the case of unpredictability in which nobody will respond for damages (article 1105 C.C.).²⁴⁰ Within this legal framework, since the lorry was driven by E negligently and if the structure of the house has been damaged, T and L can sue N, except in case of unpredictability of the accident. Then N should give evidence of her diligence contracting with B to be exempt of such liability (1903 *in fine*). In addition, damages can also be claimed from B by T and L, given that article 1903.4 C.C. (*culpa in vigilando/in eligendo*) lays down the liability for somebody else's actions or omissions (*responsabilidad por actos ajenos*).²⁴¹ Therefore, employers are responsible for the acts of their employees with exception of unpredictable accidents, which means that T or L could claim damages directly from B. To summarise, either T or L, or both of them respectively for their own damages (if they can be individualised), can claim damages from E, B or N. If B pays for the damage caused to T or/and L, then B can claim towards E (article 1904.1 C.C.) It is also possible that B was able to give evidence of her diligence contracting E, in which

²³⁶ Díez Picazo, L., and Gullón, A., Vol. II, *Op. Cit.*, 597-598. For the civil liability on behalf of another person *see* p. 624.

²³⁷ *Id.*, at 598.

²³⁸ *See* the 1/1982 Act, of May 5, *de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*, BOE No. 115, of May 14, 1982, p. 12546.

²³⁹ Under Spanish civil law is used analogically the concept of a "good father" (*concepto del buen padre de familia*).

²⁴⁰ Díez-Picazo, L., and Gullón, A., Vol II, *Op. Cit.*, 608.

²⁴¹ Albadaledo, M., II/Vol. 2, *Op. Cit.*, 509-518.

case the claims must be directed directly to E. It is also possible from the very beginning to sue B and E together (*liability in solidum*). It is clear enough that T may request compensation for the fact that his full possession and use of the apartment was disturbed by the accident on the basis of articles 1195 to 1202 C.C. In that case, T can off-set the repair costs to be repaid against future rent instalments on her own motion without judicial intervention if conditions under article 1196 C.C. are fulfilled.

New Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

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

If N cannot show due diligence and that the gas smells were effectively coming from a gas installation or similar (article 1903 *in fine* C.C.),²⁴² then L has a tort claim against N for damages caused to the apartment door (article 1902 C.C.).

²⁴² See SAP Balears, Secc. 3^a, of January 15, 1998 (AC 1998, 2705).