

Germany

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A. Introduction

This report provides an introduction to German tenancy law and briefly analyses the effects regarding the law of the lease if the Principles of European Contract Law (PECL) were to be incorporated into the German Law of Obligations.

German Tenancy Law and the German Law of Obligations were subject to major reforms in 2001 and 2002. The legislature changed the structure and substance of the German Civil Code (*Bürgerliches Gesetzbuch* = BGB) considerably.¹ The reader should take into account that many older judgements and citations are based on Sections which have a different numbering and sometimes even a different wording today. However, the effects of these law reforms cannot be examined in detail at the present stage. Although old disputes have been buried, new ones are born. A report such as the following cannot elaborate on new doctrinal problems in depth, but will have to confine itself to an outline of the law as it stands. Many details will have to be passed over. There is a massive body of public tenancy law which can only be briefly described here. Special rules introduced after the reunification of Germany in 1990 for lease contracts for premises in the former German Democratic Republic, as well as rules for co-operative building societies and public building companies are also excluded. The report will focus on tenancy law with regard to housing accommodation built without special state subsidies (*preisfreier Wohnraum*) and rented from private owners.

1. *Origins and basic lines of development of national tenancy law*

a) Historical background

The BGB contains rules on tenancy law in its Book II (Law of Obligations). According to § 535 BGB, a contract of lease (*Mietvertrag*) can be defined as granting the use of a thing in return for money. The basic structure of the German law of lease can be traced back to the Roman law. Only a few BGB rules are influenced by Germanic Law, such as the rule “sale does not break hire” according to which the purchaser of leased land has to continue the lease contract with the tenant, § 566 BGB.² The *Bürgerliches Ge-*

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¹ An English translation of the new law of obligations can be found in the German Law Archive, <http://www.iuscomp.org>. For a translation of the German Civil Code (partly outdated), see: Gordon, The German Civil Code and the Introductory Act to the Civil Code of August 15, 1896 (Including Amendments to January 1, 1992) and the Act on Liability for Defective Products of December 15, 1989 (Littleton, Col., 1994). For an overview on the new law of obligations in English, see Zimmermann, Breach of Contract and Remedies under the New German Law of Obligations, in: Bonell (Dir.), Centro di studi e ricerche di diritto comparato e straniero, No. 48 (Rome, 2002); Zimmermann, Remedies for Non-Performance – The Revised German Law of Obligations Viewed Against the Background of the Principles of European Contract Law, EdinLR 6 (2002), p. 271 ff.; Zimmermann, Modernizing the German Law of Obligations?, in: Birks/Pretto (Eds.), Themes in Comparative Law in Honour of Bernard Rudden (Oxford, 2002), p. 265 ff.; Krajewski, The New German Law of Obligations, European Business Law Review 14 (2003), p. 201 ff.

² Under Roman law, the position of the tenant was far weaker in case the landlord sold the property to a third party. Once ownership had been transferred, such a third party could evict the tenant. After

setzbuch or German Civil Code, which entered into force in 1900, was the principal body of the law governing lease at the beginning of the 20th century, and accented the principle of private autonomy. The German BGB is the product of a society based on the liberal belief that once the individual is freed from traditional constraints and authorities of a feudal, political or religious nature, he is a reasonable, rational person capable of determining his own fate; he must be put in a position whereby he may decide for himself whether or not to make a contract, to whom he will undertake a legally recognised obligation, and what its content ought to be.³ As a consequence, nearly all BGB rules on the law of the lease were of a dispositive nature. This led influential landlord associations at the beginning of the last century, to issue standard tenancy contracts which excluded the rights of the tenant to the largest possible extent.⁴ There was no special legislation to protect tenants' rights nor state activities to bolster private or public house building.

The lack of any incentives to foster construction, allied to the effects of World War I, led to a housing shortage after the war. To administer the shortage, the German legislature shifted its approach towards the enactment of a powerful tenant protection regime and a robust housing control legislation. The administration was empowered to register and distribute available flats, to decide on the validity of a termination of the contract and to control rent increases.⁵ These regulations served merely to distribute available accommodation, they did not create any incentives to foster investments in the housing market. As a consequence, the housing market did not develop sufficiently. During the Third Reich, more regulations enabling the state to control the housing sector were enacted such as the Law on Price Freezes (*Preisstoppgesetz*) of 1936⁶ which contained a prohibition for landlords to increase the rent. After World War II, the tight control of the housing market continued due to the massive housing shortage caused by war destruction and refugees. At the beginning of the sixties when the housing market seemed to recover, a gradual liberalisation started. The legislature was aware of the close connection between economics, monetary policy and the housing market: To leave the housing market to the forces of the free market will only work when there is sufficient housing available and the landlords do not form cartels to control the relevant market. Sufficient housing from private investors would only emerge when the return on investments is profitable and high rents can be achieved. On the other hand, the legislature needs to ensure sufficient housing for its population, especially the socially disadvantaged. To achieve these various goals, the German legislature enacted a large number of statutes

the transfer of ownership the tenant could not counter the claims of the new owner to evict the tenant (*emptio tollit locatum*), see Zimmermann, *The Law of Obligations* (Oxford, 1996), p. 378 sqq.

³ Zweigert/Kötz, *An Introduction to Comparative Law*, translated by Weir (3rd Edition, Oxford, 1998), p. 324.

⁴ Emmerich, in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, Buch 2 Recht der Schuldverhältnisse, §§ 535-652d, Mietrecht 1 (Neubearbeitung, Berlin 2003), Vorbem zu §§ 535 margin no. 4.

⁵ Sonnenschein, *Der Mietvertrag über Wohnraum zwischen Vertragsfreiheit und staatlicher Regulierung*, DWW 1992, p. 193, 194 ff.

⁶ RGBl. 1936 I, p. 371.

and regulations. Critics argue that these efforts served only to impede rather than to encourage the development of the housing market.⁷

Since the sixties, the German legislature enacted legislation to foster private house building with the help of public funds⁸. Furthermore, since that time the rent control regime was loosened to a certain extent. However, exceptions applied to congested urban areas. In parallel with this process, the social elements of tenancy law aimed at protecting the tenant were constantly reinforced. For example, the enactment of the Rent Control Act (*Miethöhegesetz* = MHRG)⁹ restricted landlord's power to increase rents, which could not exceed a level considered customary to a particular area.

b) Recent law reforms

Several recent attempts to bring order into the scattered body of law have failed. In the nineties, the call for a “unification” of the various private law tenancy statutes became stronger.¹⁰ In 2001, the German government enacted the Tenancy Law Reform Act (*Mietrechtsreformgesetz*) which has been in force since September 1st, 2001.¹¹ It aims at a simplification of tenancy law through consolidation of the main Statutes dealing with private tenancy law and an introduction of a systematic structure of the rules based on lease objects. Under the old law, the BGB section on lease contracts had been structured according to legal issues (duties of the parties, defects in the leased object, termination etc.). These rules had applied to all lease objects. Special provisions for housing had been attached to each subsection. The reform shifted the systematic structure of the German tenancy law away from legal issues to lease objects. Under the new order in the BGB, one first finds the general rules applicable to all lease contracts (§§ 535-548 BGB), then the rules for the lease of housing accommodation (§§ 549-577a BGB) and in a third section, the rules applicable to the lease of other objects (§§ 578–580a BGB), such as ships.

More importantly, a modernisation of the substance was necessary to adapt tenancy law to changes in society, mainly the increased needs of mobility of tenants, new forms of cohabitation¹² and the political wish to promote the conservation of energy. Finally,

⁷ Eekhoff, Wohnungspolitik (Tübingen, 2002), p. 45 ff.

⁸ Cf. only II. Wohnungsbaugesetz (BGBl. I 1994, p. 2137, detached by the Wohnungsförderungsgesetz (BGBl. I 2001, p. 2376) which is in force since January 1st, 2002.

⁹ BGBl. 1974 I, p. 3604, now incorporated in the BGB.

¹⁰ See Expertenkommission Wohnungspolitik, Wohnungspolitik auf dem Prüfstand, Bundestagsdrucksache 13/159; Sonnenschein, Wohnraummiete. Eine Analyse des geltenden Rechts (Tübingen, 1995) and Weitemeyer, Das Mieterhöhungsverfahren nach künftigem Recht, NZM 2001, p. 563 with further references.

¹¹ BGBl. 2001 I, p. 1149; for a detailed outline cf. Böstinghaus/Eisenschmid, Arbeitskommentar Neues Mietrecht (Recklinghausen, 2001); Hau, Schuldrechtsmodernisierung 2001/2002 – reformiertes Mietrecht und modernisiertes Schuldrecht, JuS 2002, p. 130 ff.; Emmerich, Neues Mietrecht und Schuldrechtsmodernisierung, NZM 2002, p. 362 ff.

¹² Most notably the Registered Partnership Act 2001 („Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften“, BGBl. 2001 I, p. 266) created a completely new family law institute. Same-sex couples can now sign a public register and thereby enjoy to some

case law was codified.¹³ Changes in the new tenancy law were prompted by the Act to Modernise the Law of Obligations (*Schuldrechtsmodernisierungsgesetz*) which entered into force on 1 January 2002.¹⁴ It marked the most sweeping reform of the BGB since its enactment. The new Law of Obligation is inspired by the rules contained in the UN Convention on the International Sale of Goods (CISG) and its predecessor, the Convention relating to a Uniform Law on the International Sale of Goods of 1973.¹⁵ The new law consists of a system of rules structured primarily according to the types of legal remedies available, such as specific performance, damages, termination, and a uniform concept of breach of duty.¹⁶ During the last stage of the reform debate, the Principles of European Contract Law (PECL) have been taken into consideration, notably, but not exclusively, with regard to the law of prescription.¹⁷

c) Constitutional influences

The contract of lease as it exists in modern German law is no longer characterised solely by the autonomy of the private parties. It has been converted into something of a publicly regulated social owner-and-user relationship.¹⁸ This shift is partly influenced by the German Basic Law (*Grundgesetz* = GG) or Constitution.¹⁹ The political and social

extent the same rights as married couples, for details, see only Muscheler, *Das Recht der eingetragenen Lebenspartnerschaft* (Berlin, 2001); for a comparative overview, cf. Dopffel/Scherpe, in: Basedow/Hopt/Kötz/Dopffel, *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, (Tübingen, 2000), p. 7 ff. Under German law – unlike in the Netherlands – only same sex marriages can register. Heterosexual couples do not possess this right. They can marry or form a cohabitation (*nichteheliche Lebensgemeinschaft*).

¹³ See the example given in A I c.

¹⁴ Gesetz zur Modernisierung des Schuldrechts, BGBl. 2002 I, p. 3138.

¹⁵ Zimmermann, *Schuldrechtsmodernisierung?*, in: Ernst/Zimmermann (Eds.), *Zivilrechtswissenschaft und Schuldrechtsreform* (Tübingen, 2001), p. 14. In general on the CISG: Magnus, in: Staudinger: *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Wiener UN-Kaufrecht (CISG) (Neubearbeitung, Tübingen, 1999); von Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (3rd Edition, München 2000).

¹⁶ For a survey of the discussions on the new German law of obligations, see only Ernst/Zimmermann (Eds.), *Zivilrechtswissenschaft und Schuldrechtsreform: Zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz* (Tübingen, 2001); Schulze/Schulte-Nölke (Eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Tübingen, 2001). For an introduction to the new law of obligations, see Canaris, *Die Reform des Rechts der Leistungsstörungen*, JZ 2001, p. 499 ff.; Dauner-Lieb/Heidel/Lepa/Ring (Eds.), *Das neue Schuldrecht* (Bonn, 2002); P. Huber/Faust, *Schuldrechtsmodernisierung: Einführung in das neue Recht* (München, 2002); Lorenz/Riehm, *Lehrbuch zum neuen Schuldrecht* (München, 2002).

¹⁷ Cf. Regierungsentwurf vom 9.5.2001, BT-Drucksache 14/6040, 113; Zimmermann/Leenen/Mansel/Ernst, *Finis Litium? Zum Verjährungsrecht nach dem Regierungsentwurf eines Schuldrechtsmodernisierungsgesetzes*, JZ 2001, p. 684 ff.; Canaris, JZ 2001, p. 499 ff.

¹⁸ Wieacker, *Industriegesellschaft und Privatrechtsordnung* (Frankfurt a.M., 1974), p. 27; Zimmermann (note 2), p. 343; see also the critical remarks by Honsell, *Privatautonomie und Wohnungsmiete*, AcP 186 (1986), p. 115, 117 ff.

¹⁹ The title "Basic Law" was intended to stress the provisional nature of the West German "Constitution" prior to the unification of the two German States.

order of the Federal Republic of Germany is founded on the Basic Law. This is of relevance for private law, too. As early as 1962, the Federal Constitutional Court (BVerfG) ruled in its *Lüth*-judgement²⁰ that fundamental rights were “objective principles”, forming a value system that must be given effect in all areas of the legal system. Although fundamental rights do not bind private actors directly,²¹ they “radiate” through general clauses into the realm of private law and deploy an indirect (horizontal) effect.²² The influence of the constitution has been manifested in a large body of jurisprudence of the Federal Constitutional Court on tenancy law matters,²³ of which only a few examples can be named here. Most importantly, the Basic Law contains a guarantee both of private property (Art. 14 (I) GG)²⁴ and of private autonomy (Art. 2 (I) GG²⁵, as interpreted by the Federal Constitutional Court²⁶). Property rights are limited in the social interest (Art. 14 II GG). According to the Federal Constitutional Court, Art. 14 GG – despite its wording – also protects the tenant as a possessor of the premises although he is not the owner.²⁷ For example, a tenant can rely on Art. 14 (I) GG to require the approval of a modification of the leased object from the landlord in order to allow proper use for handicapped people.²⁸

Also other constitutional rights have a strong influence on tenancy law. First, the freedom of information as protected in Art. 5 (I) GG should be named. There is, for exam-

²⁰ BVerfGE 7, p. 198, 220.

²¹ BVerfGE 73, p. 261, 269; Canaris, Grundrechte und Privatrecht, AcP 184 (1984), p. 203 ff.

²² The precise relationship between fundamental rights and private law is disputed in academic opinion, see only Alexy, *Theorie der Grundrechte* (Frankfurt a.M., 1985), p. 475 ff; Canaris, *Grundrechte und Privatrecht*, AcP 184 (1984), p. 203 ssq.; Medicus, *Der Grundsatz der Verhältnismäßigkeit im Privatrecht*, AcP 192 (1992), p. 43 ssq.; E. Schmidt, *Verfassungsrechtliche Einwirkungen auf zivilistische Grundprinzipien und Institutionen*, KritV 1995, p. 424; Hager, *Grundrechte im Privatrecht*, JZ 1994, p. 373 ssq.; Diederichsen, *Das Verfassungsgericht als oberstes Zivilgericht*, AcP 198 (1998), p. 171 ssq. The limitation of private autonomy through the adjudication of the Federal Constitutional Court is criticised, see only Zöllner, *Regelungsspielräume im Schuldvertragsrecht – Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu sogenannten Ungleichgewichtslagen*, AcP 196 (1996), p. 1 ff., but see also Koch, *Bundesverfassungsgericht und Fachgerichte*, in: Erbguth/Müller/Neumann (Eds.), *Rechtstheorie und Rechtsdogmatik im Austausch*, Gedächtnisschrift für Jeand’Heur (Berlin, 1999), p. 135 ff.

²³ Cf. Sonnenschein, *Die Rechtsprechung des Bundesverfassungsgerichts zum Mietrecht*, NJW 1993, p. 161 ff.

²⁴ Art. 14 (I), (II) GG states: (I) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (II) Property entails obligations. Its use shall also serve the public weal.

²⁵ Art. 2 (I) GG states: Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

²⁶ BVerfGE 12, p. 341, 347; BVerfGE 70, p. 115, 123.

²⁷ BVerfG, NJW 1993, p. 2035.

²⁸ BVerfG, WuM 2000, p. 298, 299 with note Spranger, ZMR 2001, p. 11 ff.

ple, a large amount of jurisprudence of the Constitutional Court as well as ordinary courts on antenna dishes installed by tenants without permission of the landlord.²⁹

Second, the principle of equal treatment as embedded in Art. 3 (I) GG led to a discussion as to whether the landlord has to treat his tenants in an equal manner, e.g. when charging the rent.³⁰ Today, it is undisputed that the principle of private autonomy allows the landlord to negotiate different contracts with different tenants living in the same house. A duty for equal treatment exists only for regulations of a “collective character”, such as the rules of the house or the allocation of the shared costs.³¹

Third, the constitutional rights enshrining protection of marriage and the family (Art. 6 (I) GG) further play a crucial role in tenancy law. § 569a (I) BGB (old version) provided that in the case of lease of premises in which the tenant has maintained a joint household with his spouse, the spouse enters *ipso iure* into the lease upon death of the tenant. The Federal Constitutional Court decided *obiter* that Art. 6 (I) GG which protects marriage and the family does not prohibit extending rights given to spouses to cohabitants.³² However, under German procedural law, only the ordinary courts can interpret private law. Thus, the German Federal Court of Justice (BGH) had to decide whether § 569a (I) BGB (old version) can be applied analogously to cohabitants. The Court ruled with a side reference to Art. 6 (I) GG that § 569 a (I) BGB must be applied analogously to cohabitants, arguing that this form of partnership is very close to marriage.³³ The Reform of 2001 codified this jurisprudence in § 563 (II) (4) BGB.

In conclusion, it can be stated that the law of lease is probably the field of private law with the largest constitutional influence.

2. Basic structure and content of current tenancy law

a) Acts and Regulations

After the reform of 2001, most private law rules on the law of lease can be found in §§ 535 ff. BGB. Yet, this body of law does not contain all private law rules relating to the law of lease. Other statutes or regulations include: the Regulation on the calculation of heating costs (*Verordnung über Heizkostenabrechnung – HeizkostenVO*)³⁴, which sets forth rules on the calculation and distribution of costs for heating and warm water

²⁹ Wiesner, Anbringung von Parabolantennen – die Leitlinien der Rechtsprechung im Überblick, MDR 1999, p. 131 ff.; Maaß/Hitpaß, Die Rechtssprechung seit 1998 zur Problematik der Installation von Parabolantennen unter besonderer Berücksichtigung mietrechtlicher und wohnungseigentumsrechtlicher Aspekte, NZM 2000, p. 945 ff.; Maaß/Hitpaß, Entwicklung der Parabolantennen-Rechtsprechung seit 2000, NZM 2003, p. 181 ff. See also question 20.

³⁰ See only the references given by Voelskow, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 3 – Schuldrecht Besonderer Teil I (3rd Edition, München 1995), § 535 margin no. 6.

³¹ Paschke, Das Dauerschuldverhältnis der Wohnraummiete (Berlin, 1991), p. 431 ff.; Voelskow, in: Münchener Kommentar (note 30), §§ 535, 536 margin no. 6 ff.

³² BVerfGE 82, p. 6. The case concerned the legal question as to whether ordinary courts can apply § 569a BGB (old version) analogously.

³³ BGHZ 121, p. 116.

³⁴ BGBl. 1989 I, p. 115.

for certain premises with more than two apartments, central heating and water supply. The Regulation on the housing costs calculations, the so-called “II. Calculation Regulation” (II. *Verordnung über wohnungswirtschaftliche Berechnungen* = II. BV)³⁵ in turn contains a full set of rules on the calculation of costs, charges, encumbrances etc. with regard to the financing of housing. Furthermore, the Law on Regulation of Estate Agencies (*Gesetz zur Regelung der Wohnungsvermittlung* = WoVermittG)³⁶ contains rules on certain parts of the contractual relationship between a (prospective) tenant and the estate agent, e.g. the amount of commission the estate agent can claim or rules on the payment of key money, the *Abstand*. Other rules can be found in the Regulation on Personal Chattels (*Hausratsverordnung*) and the Law on Apartment Ownership (*Wohnungseigentumsgesetz*). Beyond the civil law rules, there is a whole set of public law norms mainly on governmental funding of housing, rent calculation or rent increase control for social housing, and last but not least tax law regulation to support the construction of housing accommodation.³⁷ Some public law provisions have an important effect on private law such as § 5 Economic Criminal Law (*Wirtschaftsstrafgesetz*). It declares profiteering to be a regulatory offence.³⁸ Local authorities can furthermore enact regulations prohibiting the alienation of premises.

b) European Community Law and national tenancy law

European consumer protection directives have a strong influence on German tenancy law. First of all, the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts³⁹, now transposed in §§ 305 sqq. BGB, is applicable to lease contracts.⁴⁰ As an example, a clause that obliges the tenant to have the premises renovated by craftsmen is void because it is contrary to the requirement of good faith since it puts an unreasonable disadvantage on the tenant causing a significant imbalance in the parties’ rights.⁴¹ Art. 3 (II) (a) Council Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, excludes the application of the directive’s regime to lease contracts. However, the German legis-

³⁵ BGBl. 1990 I, p. 2178.

³⁶ BGBl. 1971 I, p. 1747 as amended.

³⁷ See the *Wohnraumförderungsgesetz* (BGBl. 2001 I, p. 2376) as amended, the *Gesetz zur Sicherung der Zweckbestimmung von Sozialwohnungen* (BGBl. 2001 I, p. 2404) or the *Neubaumietenverordnung* (BGBl. 1990 I, p. 2203) as amended.

³⁸ For details, see Blank, in: Schmidt-Futterer, *Mietrecht – Kommentar* (8th Edition, München, 2003), § 536, margin no. 227 ff.

³⁹ OJ 1993 L 95, p. 29; German law goes beyond the scope of the Unfair terms in consumer contracts Directive, see only Basedow, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 2a – Schuldrecht Allgemeiner Teil (4th Edition, München, 2003), Vor § 305 margin no. 20.

⁴⁰ For a list of void clauses in lease contracts under the German AGBG, now incorporated in §§ 305 ff. BGB, see Basedow, in: *Münchener Kommentar* (note 39), § 307 margin no. 97; Harz, in: Schmid (Ed.), *Miete und Mietprozess* (3rd Edition, Neuwied, 2001), Chapter 2 margin no. 221 and 337 ff.

⁴¹ OLG Stuttgart, NJW-RR 1999, p. 1422, 1423. This does not mean that the tenant can accomplish his renovation duty in a sloppy way. He is allowed to renovate the premises on his own, but has to ensure that the work is carried out in a workmanlike manner.

lature has gone beyond the European level of consumer protection as permitted by Art. 8 of the Directive when transposing it by granting also tenants a right of cancellation: According to § 312 (I) BGB, in the case of a contract between a business person and a consumer concerning performance for remuneration which the consumer has been induced to conclude (i.) as a result of oral negotiations at his place of work or in a private residence, (ii.) on the occasion of a leisure event organised by the business person or by a third party which at least was also in the interest of the business person, or (iii.) subsequent to a surprise approach in a means of transport or in an open public space, the consumer is entitled to a right of cancellation pursuant to § 355 BGB. Therefore, a tenant also has such a right of cancellation, since a lease is a contract concerning performance for remuneration.⁴²

c) Legal concept of the lease contract

As stated, a lease is defined as granting the use of a thing in return for money (§ 535 BGB). The lease is an obligatory right. As long as the object is not handed over to the tenant, he has only an obligatory right to claim possession. The situation differs when the object is in possession of the tenant. His possession is protected by § 858 BGB which deals with unlawful interference, and § 823 (I) BGB which provides for compensation for damage. However, these protection rights do not change the obligatory right into a property right. Academic opinion speaks of a “reification of obligatory possession rights” by taking possession (*Verdinglichung der obligatorischen Besitzrechte durch Besitzerlangung*).⁴³ With regard to the lease of premises, one should notice, though, that the tenant’s position is very close to a property right. As mentioned above,⁴⁴ the Federal Constitutional Court ruled that the tenant’s possession right enjoys protection under the property guarantee of Art. 14 (I) GG.⁴⁵ Also many BGB rules on the lease of premises suggest that the lease gives the tenant certain property rights. § 566 BGB provides that if the leased land⁴⁶ is sold to a third party by the landlord after the delivery to the tenant, the buyer takes the place of the landlord in the rights and obligations arising from the lease during the existence of his ownership. Furthermore, as mentioned above, spouses

⁴² OLG Koblenz, NJW 1994, p. 1418, 1419; OLG Braunschweig NZM 1999, p. 916; Ulmer, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2a – Schuldrecht Allgemeiner Teil (4th Edition, München, 2003), § 312 margin no. 25; Saenger, in: Ermann, Bürgerliches Gesetzbuch, Kommentar, Band 1 (10th Edition, Köln, 2000), HaustürWG § 1 margin no. 18; O. Werner, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (Neubearbeitung 2001, Berlin), HaustürWG § 1 margin no. 64; Putzo, in: Palandt, Bürgerliches Gesetzbuch (62nd Edition, München, 2003), § 312 margin no. 8; see, however, the critical remarks of Drygala, Wohnungsmietverträge als Haustürgeschäfte?, NJW 1994, p. 3260 and Voelskow, in: Münchener Kommentar (note 30), §§ 535, 536 margin no. 2.

⁴³ Emmerich, in: Staudinger (note 4), Vorbem zu §§ 535 margin no. 18.

⁴⁴ A. 1 c.

⁴⁵ BVerfGE 89, p. 1. See the critical remarks of Emmerich, Neueste Entwicklungen im Mietrecht – Gesetzgebung und Rechtsprechung, DWW 1993, p. 313, 319.

⁴⁶ Under German law, the seller sells the land (not the house) to a purchaser, §§ 433, 311b BGB. Houses are essential components of the land, § 94 BGB. According to the principle of abstraction, the transfer of property is independent of the contractual agreement (sale, gift) underlying it, cf. §§ 873, 925 BGB. To buy an apartment in a house (Eigentumswohnung), the purchaser becomes a co-owner of a fraction of the land and essential components (“Miteigentum”, cf. § 1008 BGB), whereas the apartment will become his special property (“Sondereigentum”, cf. § 3 WEG).

or descendants enter into the lease contract in the event of the tenant's death (§ 563 BGB). And finally, the landlord has only limited rights to terminate the contract and to increase the rent.

However, there are also genuine property rights (*dingliche Rechte*), such as the right of residence (*Wohnrecht*) according to § 1093 BGB, which are economically comparable to the lease. In this case, the parties conclude a sales contract in regard to land and agree on a right of residence for the seller. Often, the parties include the same provisions in this type of contract as contained in a lease contract, including a monthly rental fee.⁴⁷ The right of residence has to be registered in the land register (*Grundbuch*).

German law provides also for other forms of "lawful possession" of a premise. Without going into details⁴⁸, one can name usufructuary lease (*Pacht*) according to § 581 BGB, and gratuitous loan for use (*Leihe*) according to § 598 BGB. A housing contract would be regarded as a gratuitous loan for use if the lender does not demand any or only very little money for the use.⁴⁹ Usufructuary lease can be characterized as the right of the tenant to enjoy the fruits of the object. With regard to premises, a typical case of usufructuary lease would be a contract for the use of a pub where the landlord provides the plant and equipment necessary to manage it.⁵⁰ Furthermore, there are leasing or time-sharing contracts which lead also to a "lawful possession".

d) Social regulation affecting private tenancy contracts

Since World War II, the German State pursued a housing policy founded upon subsidies for private investors constructing new developments. Generally, properties constructed with public funds fell under a particular rent restriction regime. The landlord could only demand rent calculated in accordance with special regulations which ensured rents remained well below the market level. Importantly, however, these houses were subject to the aforementioned rent calculation provisions for a limited period only. After some years, the owner was permitted to adapt the rent upwards to meet the market level. Due to a financial crisis in the public sector, these programs had been steadily reduced over the last number of years.

A recent reform in 2001⁵¹ shifted the very general subsidy approach towards a more focused promotion of housing premises. Today the German State aims not to create as many houses as possible, but rather to focus subsidies on those considered most in need,

⁴⁷ See only case BGH, NJW 1974, p. 2123.

⁴⁸ For a delimitation of lease and similar contracts cf. Voelskow, in: Münchener Kommentar (note 30), Vor § 535 margin no. 1 ff.; Emmerich, in: Staudinger (note 4), Vorbem zu §§ 535 margin no. 30 ff.

⁴⁹ However, since the rights of the tenant under a lease contract are much stronger than under a gratuitous loan contract, courts tend to qualify such contracts as lease contracts even when a tenant pays a relatively low rent, cf. Kollhosser, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 3 – Schuldrecht Besonderer Teil I (3rd Edition, München 1995), § 598 margin no. 13; Putzo, in: Palandt (note 42), § 598 margin no. 4.

⁵⁰ Emmerich, in: Staudinger (note 4), Vorbem zu §§ 535 margin no. 31.

⁵¹ Gesetz zur Reform des Wohnungsbaurechts, BGBl. I, p. 2376.

such as single parents or large families. It is usually cheaper to renovate existing premises than to build new homes, therefore subsidies are granted to those who prefer to purchase existing property than to construct new developments. The indirect promotion of housing construction remains nonetheless. Homeowners who invest in their premises further benefit from tax breaks.

Moreover, the German Länder ran housing programs, especially for larger urban areas. A number of the Länder constructed housing solely for the most economically disadvantaged members of society. These programs enjoyed their peak moment in the seventies and eighties and are very much reduced today.

Furthermore, there are laws to stop the alienation of housing premises. The Prohibition of Misappropriation Act (*Verbot der Zweckentfremdung von Wohnraum*⁵²) grants the power to the Länder to issue Regulations prohibiting any alienation of housing premises. House owners can be fined if, for example, they demolish or leave dwellings derelict.

Finally, one should mention the public law rules of assigning houses to people in need. According to the Laws of Police of the Länder, local authorities can order the landlord to tolerate that a tenant who is in risk of becoming homeless stays in the apartment despite a valid termination of the tenancy contract by the landlord. However, such an order is seen as very much a last resort.⁵³ Public accommodation does exist for homeless people, and local authorities have to transfer tenants on the verge of homelessness to these facilities. Only in the event that such a possibility does not exist, because e.g. there is no available place, can they decree that the landlord temporarily ceases to carry out the eviction of the tenant.

3. Summary account on "tenancy law in action"

a) Economic Background

Germany has one of the largest leasehold property markets in Europe. Approximately 60% of all households are accommodated in rented property.⁵⁴ General tenancy law applies to around 90% of rented accommodation. For the remaining 10%, certain special public law rules on social housing apply.⁵⁵ These figures show the importance of private tenancy law. The high percentage of rented property can be explained on various grounds:⁵⁶ Firstly, it seems that a large number of people prefer to rent rather than to

⁵² The Act bears the following title: Gesetz zur Verbesserung des Mietrechts und zur Begrenzung des Mietanstiegs sowie zur Regelung von Ingenieur- und Architektenleistungen, BGBl. I, 1745.

⁵³ See also question 6b.

⁵⁴ Cf. Eekhoff (note 7), p. 41. Statistics vary. Older publications estimate a 50:50 quota, cf. Biedenkopf/Miegel, Wohnungsbau am Wendepunkt (2nd Edition, Stuttgart, 1979), p. 61. According to the Deutsches Institut für Wirtschaftsforschung (DIW), Wochenbericht 41/2001 zur Wohnsituation in Ost und Westdeutschland, in 2000, the property-quota was: 43,3% % of the households in the old Länder and 32% in the new Länder.

⁵⁵ Cf. Eekhoff (note 7), p. 41.

⁵⁶ Cf. Eekhoff (note 7), p. 41.

buy accommodation. The German government has always subsidised the development of housing property for personal use. Moreover, in the last three decades the general income situation in Germany has generated relatively sound conditions for the acquisition of housing property. The low percentage of owned properties indicates that many people, at least in certain periods of their life, find the idea of renting more attractive to ownership. Secondly, despite rent control regimes and notice protection, private investments in the housing market still seems to pay off and, therefore, many investors offer housing for rent. Thirdly, as mentioned above, certain stipulations granting tax advantages to those who invested in the lease housing market of the new German Länder, led to a brief but nonetheless important period of building boom.

There are strong fluctuations on the German housing market. Every ten to twelve years there is a housing shortage. It may take between three and four years to reduce a housing shortage, due to the functioning of this particular market; a market characterised by long periods of both planning and construction of new homes. An added dimension is the requirement that town councils make land available for building purposes. Different arguments are put forward to explain this type of “market failure”. In the post-War years, the excess demand caused by the massive destruction of accommodation during World War II was believed to be the core reason for the housing shortage. In the eighties, it was believed that high east-west migration played a key role in generating the later shortage.⁵⁷

At present, there is an excess of housing accommodation, at least in certain regions of Germany, especially in the new German Länder. In this area, Government subsidies for private investment in housing for rental purposes prompted a building boom and created a large number of houses and office space. In stark contrast, affordable accommodation in attractive congested urban areas such as Hamburg or Munich is difficult to find. Real estate in these areas is very costly. Prices up to € 1000/sqm are frequent.⁵⁸ These investment costs, in conjunction with a huge demand for attractive premises, give rise to high rents. Tenants of low income or with large families have particular difficulties in finding suitable accommodation in these areas. In the countryside, rents are generally lower than in urban areas. In April 1998 the average rent in the old Länder was around DM 13 (€ 6,65) per sqm.⁵⁹ In 2000, as an overall average, 25% of net income available per household was spent on the net-rent, that is the rent without consumption charges, e.g. heating. Households in the highest income category spent on average 18,1% on net-rent, while households in the lowest income category spent 35% of their income.⁶⁰ Local authorities grant housing aid to the economically disadvantaged according to the

⁵⁷ Cf. Eekhoff (note 7), p. 2 ff.

⁵⁸ Cf. Donner, Wohnungspolitik in der Europäischen Union (Wien, 2000), p. 189.

⁵⁹ Sonnenschein, Beendigung und Fortsetzung des Mietverhältnisses über Wohnraum in der Mietrechtsreform, WuM 2000, p. 387, 406.

⁶⁰ For a detailed statistic, see Deutsches Institut für Wirtschaftsforschung, Wochenbericht 41/2001 zur Wohnsituation in Ost und Westdeutschland.

provisions of the Law on Housing Aid (*Wohngeldgesetz*).⁶¹ In 2000, 5,3% of all households in the old Länder and 9,6% of those in the new Länder received housing aid.⁶²

b) The role of associations and alternative dispute resolution

The role played by both tenant and landlord associations is multi-faceted. They assist in drafting rental tables, or statistics on local rent levels, and provide legal advice to their members. Landlord associations further regularly issue standard contracts. The role of these associations in alternative dispute settlement is, however, limited. Tenancy law is generally judged to be a suitable field for alternative dispute settlement, especially considering a) the fact that a lease, being a long-term contract involves parties who typically continue to have close contractual relations even after a trial is concluded, and b) the relatively small claims pursued in court. Nevertheless, few arbitration boards can be found. Private tenancy law is enforced in ordinary courts. Estimates speak of 300,000 cases each year.⁶³ In some cities, the landlord and tenant associations have founded so-called *Schlichtungsstellen* (mediation centers). Their powers vary.⁶⁴ Some are approved by the Ministry of Justice of the Länder as a conciliation authority, others are not. The difference is striking. Decisions of an approved conciliation authority can be executed according to § 794 (I) (no. 1) German Civil Procedure Code (*Zivilprozessordnung* = ZPO), while the decisions of a non-approved authority cannot. Furthermore, practitioners have introduced mediation concepts for disputes in tenancy law.⁶⁵ The basic idea of these concepts is to have a dispute settled by a mediator who discusses possible solutions with the parties in order to find a solution agreeable to both parties. Apart from the mediation centres and proceedings, the recently introduced § 15a Implementation Law of the Civil Procedure Code (EGZPO) allows the Länder to make conciliation mandatory before a case can be brought to an ordinary court. Pursuant to § 15a EGZPO, the Länder shall have the right to introduce mandatory conciliation for, among other things, pecuniary matters not greater than € 750 and cases concerning personality rights or disputes between neighbours. Certain Länder⁶⁶ have enacted regulations aimed at reducing the workload of the courts. Since a lot of tenancy law matters are about pecuniary claims below € 750, this pre-trial conciliation will become important for tenancy law litigation. Finally, every court that hears a matter at first instance can work towards an

⁶¹ BGBl. 1970 I, p. 1637. This Act was reformed in 2001 and 2002, see BGBl. 2002 I, p. 474. For a general overview cf. Donner (note 58), p. 182 ff. In 1996 about 2,07 Million people in Germany received housing aid, cf. Bundesministerium für Verkehr, Bau und Wohnungswesen, *Wohngeld- und Mietenbericht* (Berlin, 1997).

⁶² For a detailed statistic, see Deutsches Institut für Wirtschaftsforschung, *Wochenbericht* 41/2001 zur Wohnsituation in Ost und Westdeutschland.

⁶³ Sonnenschein, DWW 1992, p. 193 ff.

⁶⁴ See Boysen, *Die vorgerichtliche Streitschlichtung im Mietrecht*, NZM 2001, p. 1009 ff.

⁶⁵ See Glenewinkel, *Mietstreitigkeiten im System der Konfliktbearbeitung – Chancen und Grenzen der Mediation*, WuM 2002, p. 649 ff.

⁶⁶ Baden-Württemberg, Bayern, Brandenburg, Hessen, Nordrhein-Westfalen, Saarland, Sachsen-Anhalt and Schleswig-Holstein opted for specific regulations, for a synopsis of these regulations, see Prütting, *Außergerichtliche Streitschlichtung* (München, 2003), p. 292 ff.

out-of-court settlement, § 278 (I) ZPO and shall at the beginning of the hearing hold a conciliation hearing, § 278 (II) ZPO – unless the parties have undergone a mandatory conciliation procedure according to the Law of the Länder.

c) Tenancy law in German courts and effective access to justice

There is fair and effective access to courts in Germany. In the first instance, the *Amtsgericht* has jurisdiction over tenancy law disputes, § 23 (No. 2a) German Judicature Act (GVG). Legal representation is not mandatory for hearings before these courts. Every plaintiff or defendant can plead for him/herself to save the costs of a lawyer. Under the German law of civil procedure, the parties have to submit all relevant facts of the case (*Beibringungsgrundsatz*)⁶⁷ but do not need to argue on their legal assessment (*iura novit curia*). Moreover, according to § 139 ZPO the judge can discuss the case with the parties to ensure that all relevant facts are produced and the necessary motions are made. Needless to say, the judge is neutral. However, when parties appear without legal council, a judge might use this right to advise the parties carefully, in order to achieve an amicable settlement or a withdrawal of the action. An appeal before the Court of Second Instance, the *Landgericht*, is possible when the value of the matter exceeds € 600 or when the *Amtsgericht* admits an appeal based on the fundamental importance of the matter, § 511 ZPO.⁶⁸ Appeals on questions of law to the Federal Court of Justice are further possible if the *Landgericht* admits such an appeal or if the Federal Court of Justice grants an appeal. Again, appeal is allowed on grounds of the fundamental importance of the matter, or in order to secure uniform jurisprudence.⁶⁹

In general the costs of litigation – including the winning party's legal fees and court fees – are borne by the losing party under § 91 (I) ZPO.⁷⁰ Fair and effective access to justice is also ensured through legal aid. Parties who are at an economic disadvantage can apply for legal aid (*Prozesskostenhilfe*), if their claim or their defence has sufficient prospects of succeeding, see §§ 114 ff. ZPO. Moreover, many tenants have insurance which covers the costs of litigation. This form of insurance undoubtedly encourages litigation, as the fear of bearing the costs of a lost trial is reduced.

⁶⁷ See Stadler, in: Ebke/Finkin (Eds.), Introduction to German Law, (The Hague/München, 1996), p. 357 ff.

⁶⁸ For details, see Albers, in: Baumbach/Lauterbach/Albers/Hartmann, Zivilprozessordnung (61st Edition, München, 2003), § 511 margin no. 24; Gummer, in: Zöller, Zivilprozessordnung (23th Edition, Köln, 2002), § 511 margin no. 38 ff.

⁶⁹ N.B. Under German law neither the strict rule of binding precedent nor the *stare decisis* doctrine apply. Judgements of German upper courts do not have a de jure binding effect as long as no special deference rule applies. However, there is a de facto binding effect of judgements of the Federal Court of Justice, cf. Stadler (note 67), p. 373; see, however, Baade, Stare Decisis in Civil-Law Countries: The Last Bastion, in Birks/Pretto (Eds.), Themes in Comparative Law in Honour of Bernard Rudden (Oxford, 2002), p. 3 ff.

⁷⁰ N.B. There are, however, certain exceptions for eviction claims according to § 93b ZPO. In the event that a plaintiff sues for eviction and the tenant defends himself by arguing that the plaintiff had no legitimate interest to terminate the contract under §§ 574 to 574b BGB but loses the case because the reasons for the legitimate interest occurred subsequently, it is the plaintiff who is required to bear the costs.

There are special rules for the execution of tenancy law judgements. The most important is § 721 ZPO. If a landlord sues for an eviction, the judge can fix an appropriate time limit between one month and one year before the tenant can be legally removed.⁷¹ However, if evidence reveals that a tenant will become homeless, public authorities may interfere and render the judgement unenforceable.

⁷¹ The law does not provide for a minimum time limit. However, academic opinion considers a time limit below one month as useless, cf. Putzo, in: Thomas/Putzo, Zivilprozessordnung (24th Edition, München, 2002), § 721 margin no. 14.

Questionnaire

Set 1: Conclusion of the tenancy contract

In order to form a tenancy contract, two congruent declarations of intent (offer and acceptance) are needed in accordance with the rules of the General Part of the BGB.⁷² In general, a contract does not have to be in writing to be valid. An exception applies, *inter alia*, for lease contracts on housing premises. Pursuant to § 550 (1) BGB, a lease contract entered into for a period longer than a year must be in writing. It can also be concluded in electronic form using an electronic signature, § 126 BGB ff. However, in legal practice nearly all lease contracts, irrespective of their duration are in writing to avoid problems of proof.⁷³

Question 1: Choice of the Tenant

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

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

Does T have a claim against L?

A. German Law

A contract is an agreement, typically between two parties. To form a contract, two reciprocal, corresponding declarations of will (*Willenserklärungen*), namely offer and acceptance are required to subject the parties to contractual bond. Case law⁷⁴ and aca-

⁷² For an English introduction to the formation of contracts and the General Part of the BGB, see: Dannemann, *An Introduction to German Civil and Commercial Law* (Oxford, 1993), p. 11 ff. Markesinis/Lorenz/Dannemann, *The German Law of Obligations, Vol. I: The Law of Contracts and Restitution* (Oxford, 1997), p. 46 ff. In German, see only Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (Tübingen, 2001); Brox, *Allgemeiner Teil des BGB* (24th Edition, Köln, 2002); Köhler, *BGB – Allgemeiner Teil* (22nd Edition, München, 2002); Medicus, *Allgemeiner Teil des BGB* (8th Edition, Heidelberg, 2002); Pawlowski, *Allgemeiner Teil des BGB: Grundlehren des bürgerlichen Rechts* (7th Edition, Heidelberg, 2003); Rüthers, *Allgemeiner Teil des BGB*, (12th Edition, München, 2002).

⁷³ Harz, in: Schmid (note 40), Chapter 2 margin no. 474.

⁷⁴ Cf. BGH, NJW 1980, p. 1388 ff.

demic opinion⁷⁵ unanimously treat newspaper advertisements, shop window displays or prospectuses as invitations to treat (*invitatio ad offerendum*) and not as binding offers. Thus, in the cases at hand, T makes the offer by showing interest, and L rejects. As result, a contract was not concluded. The question is, whether T has a claim against L to enter into a lease contract. Contract law is based on the principle of private autonomy. More precisely, the notion of freedom of contract provides the freedom to enter into a contract (*Abschlußfreiheit*) and the freedom to determine its conditions (*Gestaltungsfreiheit*).⁷⁶ However, there are exceptional situations where case law and doctrine have developed a duty to contract. Some are codified, such as § 20 (II) read in conjunction with § 33 Act against Unfair Competition (GWB), which prohibits certain discriminatory practises for undertakings with a dominant position, others are developed in the case law. Often fundamental rights are put forward as a basis of a duty to contract. As stated above, the Federal Constitutional Court ruled in its *Lüth*-judgement⁷⁷ that fundamental rights are “objective principles” forming a value system that must be given effect in all areas of the legal system.

Questions a-d) The rule of freedom of contract allows the landlord to contract with whoever he wishes to.⁷⁸ Thus, if he does not want to rent out the apartment to families with children, Muslims, dog-owners or musicians, he is – in principle – entitled to do so. There are certain (public law) exceptions for social housing in which the landlord is obliged to contract with people of low income.⁷⁹ The rule of freedom of contract is not absolute. Restrictions may be possible when the offeror has a dominant position on the market, or is an association with an outstanding status⁸⁰ or offers informational performances, such as concerts.⁸¹ But these fact patterns arise more in business law than in the realms of classical private law, where it is disputed to what extent the principle of private autonomy can be restricted.⁸² Furthermore academic opinion disagrees on the legal basis of a duty to contract. While a majority infers a duty to contract from the law

⁷⁵ See only Bork, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (13rd Bearbeitung, Berlin 1996), § 145 margin no. 5; Hefermehl, in: Erman, BGB (10th Edition, Köln, 2002), § 145 margin no. 4; H. Eckert, in: Bamberger/Roth, Bürgerliches Gesetzbuch (München, 2003), § 145 margin no. 40.

⁷⁶ Markesinis/Lorenz/Dannemann (note 72), p. 28.

⁷⁷ BVerfGE 7, p. 198, 220.

⁷⁸ LG Trier, WuM 1997, p. 548; Paschke (note 31), p. 426.

⁷⁹ If the construction of a housing accommodation was (partly) financed through public funds, the owner can rent it only to people in possession of a so-called “§ 5 Schein”, a document issued by local authorities to people with a low income; cf. § 5 Wohnungsbindungsgesetz.

⁸⁰ BGH, NJW 1999, p. 1326; LG Karlsruhe, NJW-RR 2002, p. 111.

⁸¹ Eidenmüller, Der unliebsame Kritiker: Theaterkritik und Schmähkritik, NJW 1991, p. 1439, 1441 ff.; Neuner, Diskriminierungsschutz durch Privatrecht, JZ 2002, p. 57, 63.

⁸² Origins and scope of this limitation are controversial in detail, cf. only Busche, Privatautonomie und Kontrahierungszwang (Tübingen, 1999); Neuner, Diskriminierungsschutz durch Vertragsrecht, JZ 2003, p. 62 ff.; Hermes, Die Regulierung der Energiewirtschaft zwischen öffentlichem und privatem Recht – Zugleich ein Beitrag zum Kontrahierungszwang, ZHR 166 (2002), p. 433 ff.; see in a broader context also Canaris, Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht, in: Sitzungsberichte der Bayerische Akademie der Wissenschaften (München, 1997).

of torts (§§ 826 BGB),⁸³ others scholars base the claim on a (non-fault) action for injunction (*quasi-negatorischer Unterlassungsanspruch*)⁸⁴ or on a claim of *culpa in contrahendo* (§§ 280 (I), 311 (II), (III), 241 (II) BGB).⁸⁵ Neuner points out that none of these arguments is convincing and it would be best to codify a duty to enter into a contract in the BGB.⁸⁶ The competent ordinary Courts do not hesitate to base a duty to contract on § 826 BGB.⁸⁷ A duty to contract might arise when the landlord enjoys a monopoly and his rejection will be *contra bonos mores*, i.e. he rejects the interested tenant without a good reason (*sachlicher Grund*) although he needs the apartment and cannot find a similar offer at all or only with unreasonable effort. Academic opinion gives the example of a handicapped person who would like to rent an apartment in a new building area where the landlord enjoys a monopoly and the handicapped person needs certain utilities which can be found only in this area close to his work.⁸⁸

With regard to sub-question (b) the question arises whether L can reject tenants on “ethnic” or “religious” reasons. The law is not clear with regard to contracts where the offeror does not enjoy a monopoly situation. As an example one can quote the case that a person of colour is not allowed to enter a discotheque. Some favour a duty to contract in this case since the refusal is not based on a good reason but on a racial discrimination which is *contra bonos mores*.⁸⁹ Others in turn say that private law only provides a right to damages for the discriminated person, and emphasise that the discotheque owner can be prosecuted for criminal or administrative offences.⁹⁰ Thus, it is uncertain whether a tenant who is subject to discrimination could demand to conclude a contract. Yet, with regard to housing, it goes without saying that Directive 2000/43/EC will restrict the possibilities of the landlord, since he cannot refuse potential tenants on grounds of race and ethnic origin. In the given case (b), a landlord’s refusal on the assumption that all Muslims are terrorists can certainly be interpreted as based on ethnic grounds.

e) The freedom to enter into a contract applies also to the case if T is under custody. One should point out that a person under custody in the sense of the German *Betreuung* according to §§ 1896 ff. BGB is still capable of entering into legal transactions unless he or she is insane, § 105 (II) BGB.⁹¹ If there is a considerable danger to the person un-

⁸³ Medicus, Schuldrecht, Band I (13. Edition, München, 2002), margin no. 85; Larenz/Wolf, Allgemeiner Teil des Bürgerlichen Rechts (8. Edition, München, 1997), p. 649.

⁸⁴ Bork (note 72), margin no. 672.

⁸⁵ Schiek, Differenzierte Gerechtigkeit (Baden-Baden, 2000), p. 396 ff.

⁸⁶ Neuner, Diskriminierungsschutz durch Privatrecht, JZ 2002, p. 57, 61.

⁸⁷ See RGZ 133, p. 388, 392; OLG Celle, OLGZ 1972, p. 281. These cases did not concern the lease of housing premises.

⁸⁸ Voelskow, in: Münchener Kommentar (note 30), §§ 535, 536 margin no. 16.

⁸⁹ Bork, in: Staudinger (note 75), Vorbem zu § 145 margin no. 27 with further references.

⁹⁰ Canaris, AcP 184 (1984), p. 201, 243; Kühner, Das Recht auf Zugang zu Gaststätten und das Verbot der Rassendiskriminierung, NJW 1986, p. 1397, 1401 ff.

⁹¹ However, even insane people can enter into legal transactions, but those are restricted to daily life transactions of low value, cf. § 105a BGB.

der custody or his or her patrimony, the competent court can order that the person placed under the care of a custodian needs the consent of that custodian, §§ 1903 (I) BGB. If a contract is concluded without consent, the validity of the declaration of will depends on the consent of the custodian, §§ 1903 (I), 108 BGB. According to § 1903 (III) BGB the person under custody does not need consent if the declaration of will leads to a legal (not economic) benefit only.

B. PECL

The application of the Principles of European Contract law (PECL) would not alter the solution found under German law nor would it lead to inconsistencies. First of all, the Principles also relate to the “offer and acceptance model”, which is the usual model for the conclusion of the contract. An offer has to be made to one or more specific persons or the public (Art. 2:201 (2) PECL). Proposals to the public, such as advertisements are in general to be treated as offers if they show an intention to be legally bound. However, the Comments on Art. 2:101 PECL state clearly that proposals made to the public are generally to be presumed to be invitations to make offers only. This applies to an advertisement of a house for rent at a certain price.⁹² Thus, even under the Principles the parties did not conclude a contract.

Like German law, the Principles acknowledge the right of freedom of contract (Art. 1:102 PECL). Every person shall decide with whom he or she will enter into a contract and what its content will be. This principle is restricted by the principle of good faith and fair dealing, mandatory rules in the PECL itself and mandatory rules of national law (Art. 1:103 PECL).⁹³ The principle of good faith as enshrined in Art. 1:201 PECL may also impose duties on the parties before a contract was concluded. Particular application of this rule can be found in specific provisions, such as the rule not to take unfair advantage of the other party’s dependence, economic distress or other weakness (Art. 4:109 PECL). Art. 4:109 PECL is not applicable in any of the cases at hand, since the landlord does not exploit any weakness of the tenant. The Directive 2000/43/EC will restrict the freedom of contract according to Art. 2:102 PECL since it contains mandatory rules of national law⁹⁴ pursuant to Art. 1:103 (2) PECL. Thus, in a case such as this one it will be difficult for landlords to reject a Muslim since it may be discriminatory on grounds of ethnic origin, the argument being that the landlord considers all Muslims as terrorists.

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?

⁹² See Lando/Beale, Principles of European Contract Law, Parts I and II (The Hague, 2000), Art. 2:101, p. 160.

⁹³ See Lando/Beale (note 92), Art. 1:103, p. 99.

⁹⁴ Once a Directive is transposed, it forms part of the national law.

T and L entered into a contract. T may rescind his declaration of will for error or for fraud in accordance with §§ 119, 123 BGB. More specifically, § 119 (I) BGB provides that a person who, when making a declaration of intention, is in error as to its content may rescind the declaration if it may be assumed that he would not have made it with knowledge of the facts and with reasonable appreciation of the situation. § 119 (II) BGB extends this right also to errors as to those characteristics of a person or thing which are regarded in business as essential. According to § 123 (I) BGB, a person who has been induced to make a declaration by fraud or unlawfully by threats may rescind the declaration. Case law and academic opinion adapt these general rules to the needs of the law of lease in certain cases. There is no adaptation of the rules when L avoids the contract before T has taken possession of the apartment.⁹⁵ After the tenant has taken possession of the premises, some argue that rescission for error related to the lease object is excluded and special remedies such as §§ 536, 536a, 543 BGB (defects in the thing, duty to compensate, immediate notice) apply.⁹⁶ With regard to errors as to the person of the tenant, the majority opinion maintains that rescission after the tenant has taken possession only takes effect *ex nunc*, and not *ex tunc* according to the general rule set out in § 142 (I) BGB.⁹⁷ The latter applies also for the rescission for fraud, which gives the rescission the same effect as a termination of the lease through immediate notice.⁹⁸

In the context of the conclusion of a lease contract, the Courts have developed a system of information rights for the landlord. A landlord can request essential information from an interested party who wants to rent the premises. Although the correct legal basis is disputed, agreement exists that a landlord can avoid the contract (either by rescission or by immediate notice) if the tenant lies to lawful questions. However, it is always a prerequisite for rescission that T somehow acted “wrongfully”. This does not need explanation for “fraud” mentioned in § 123 (I) BGB but it holds also true with regard to a rescission according to § 119 (II) BGB which relates to essential characteristics of a person. Generally, a lie to questions that the landlord is not allowed to ask, will only concern non-essential characteristics of the person. Thus, if the landlord’s question was unlawful, the tenant has “a right to lie”, and in these cases the landlord cannot rescind

⁹⁵ See only Lengeler, in: Schmid (note 40), Chapter 1, margin no. 21 with further references.

⁹⁶ Brox/Elsing, Die Mängelhaftung bei Kauf, Miete und Werkvertrag, JuS 1976, p. 1, 5; Kramer, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 1 – Allgemeiner Teil (4th Edition, München, 2001), § 119 margin no. 37; Voelskow, in: Münchener Kommentar (note 30), vor § 537 margin no. 11; Paschke (note 31), p. 243 ff. with further references. However, a judgement of the Reichsgericht allowed a rescission according to 119 (II) BGB, cf. RGZ 157, p. 173, 174, see also Emmerich, Nichtigkeit und Anfechtung von Mietverträgen, NZM 1998, p. 692, 694.

⁹⁷ Brox/Elsing, JuS 1976, p. 1, 5.

⁹⁸ See AG Hamburg, NZM 1998, p. 233; Sternel, Mietrecht, (3. Edition, Köln, 1988), margin no. 242; some authors argue that neither § 119 (II) BGB nor § 123 (I) BGB is applicable. Instead special remedies such as immediate notice shall apply, see Voelskow, in: Münchener Kommentar (note 30), vor §§ 537-543 margin no. 11; others do not want to introduce any changes to the general system, see Emmerich, in: Staudinger (note 4), Vorbem zu § 535 margin no. 70; Harting in: Schmid (note 40), Chapter 8 margin no. 286.

the contract. Legitimate questions of a landlord are e.g. profession and income,⁹⁹ whether the tenant does receive social aid¹⁰⁰ or family status¹⁰¹. Questions that touch upon the tenant's personality rights or do not produce information which is objectively necessary for the decision in favour or against the tenant, are inadmissible.¹⁰² The same applies for data protected by data protection regulations. It would be of no consequence if T were to lie about questions of religion (unless the apartment is rented by a religious group for their members only)¹⁰³, whether the spouse is a foreign national,¹⁰⁴ insanity,¹⁰⁵ or affiliation to a political party. If the landlord wants to rent out the apartment only to a certain group of people (non-smokers, handicapped people, couples, non musicians, pet lovers or pet haters) he can also ask questions related to these attributes.¹⁰⁶ The landlord can in certain cases also claim damages.¹⁰⁷ The Directive 2000/43/EC will make questions on race and ethnic origin illegitimate since a landlord cannot refuse potential tenants on these grounds. However, so far, there is not even a proposal of a national implementation measure.¹⁰⁸

Thus, the answers are:

- a) In case T wanted to rent the apartment to a single person and not to a family, he can rescind the contract according to § 123 (I) BGB.
- b) Questions concerning affiliation to a religious group are illegitimate. T cannot rescind the contract.
- c) The question as to what extent a tenant can have pets in the apartment is heavily disputed. Very small pets, such as small birds or cats cannot be excluded in the lease contract.¹⁰⁹ Thus, a question with regard to small pets is illegitimate. However,

⁹⁹ LG Landau, ZMR 1985, p. 127; LG Mannheim, ZMR 1990, p. 303; AG Saarlouis, NZM 2000, p. 459.

¹⁰⁰ AG Wolfsburg, NZM 2001, p. 987.

¹⁰¹ LG Landau, WuM 1986, p. 133.

¹⁰² Lammel, Heidelberger Kommentar zum Wohnraummietrecht (Heidelberg, 1998), § 535 margin no. 28.

¹⁰³ Lammel (note 102), § 535 margin no. 31.

¹⁰⁴ AG Nürnberg, WuM 1984, p. 295.

¹⁰⁵ BVerfG, WuM 1991, p. 463.

¹⁰⁶ Lammel (note 102), § 535 margin no. 31.

¹⁰⁷ BGHZ 61, p. 118 ff.; LG Landau, WuM 1986, p. 133.

¹⁰⁸ The Government withdrew its first proposal after fierce criticism, see only Picker, Antidiskriminierung als Zivilrechtsprogramm, JZ 2003, p. 540 ff. with further references; a more positive stance from the angle of the economic analysis of law is taken by Engert, Allied by Surprise? The Economic Case for an Anti-Discrimination Statute, German Law Journal 4 (2003), No. 7 available at <http://www.germanlawjournal.com>.

¹⁰⁹ Emmerich, in: Staudinger (note 4), §§ 535, 536 margin no. 93.

small dogs and cats can be prohibited in the contract.¹¹⁰ Therefore, one may conclude that this question is legitimate and T can rescind the contract (unless T is blind and needs a guide dog).

- d) If L wants to rent out only to silent non-musicians, he is entitled to ask whether T plays piano and can rescind the contract if T lied.
- e) The Federal Constitutional Court ruled that insanity must not be disclosed.¹¹¹ This reasoning must also apply to people without full capacity. Thus, T cannot rescind the contract in the event that T lied.

B. PECL

Also the Principles foresee that a party may rescind a contract when the other person has been induced to conclude it by the other party's fraudulent misrepresentation (Art. 4:107 PECL). Rescission may be effected by the party entitled to rescind the contract (Art. 4:112 PECL). Neither the comment nor the notes provide a clear answer as to whether T's lies can be seen as a fraudulent behaviour. Pursuant to the definition given in the Comment, fraudulent behaviour is defined as follows: if one party knew that the information was incorrect and it intended to deceive the other party.¹¹² Under this definition, T's lies must be regarded as fraud. The tenant answered incorrectly in order to deceive the landlord. There is no exception for a lie with regard to a question that in its self can be regarded as unlawful.

This gap could be closed in two ways: First, by the application of Art. 1:201 PECL which lays down the principle of good faith and fair dealing. In general, the Principles allow rescission on grounds of fraud pursuant to Art. 4:107 PECL because there is no reason to protect any interest the fraudulent party may have in upholding the contract.¹¹³ In the cases at hand, this might be doubtful since good faith requires also that the tenant ask only for lawful information. If he asks unlawful questions to which the tenant lies, it can be argued that this case is distinguishable from the normal cases of fraud, and that it is worth protecting the interest of T to uphold the contract. Last but not least, one has to define which questions are lawful and which are illegitimate. As mentioned above, the Principles are based on the freedom of contract. Therefore, in the choice of his tenants a landlord ought to be afforded the maximum degree of freedom possible. However, he is bound to respect mandatory rules, which restrict his freedom of contract, such as are laid out in Directive 2000/43/EC. The same problem occurs when the landlord wants to rescind the contract for error (Art. 4:103 (1) PECL). T caused this error with his lie and L would not have concluded he contract if he knew the true facts. Therefore, according to the wording of Art. 4:103 PECL rescission would be in all these cases possible. Again, one has to ask whether the principle of good faith may restrict the right of rescission for error.

¹¹⁰ BVerfG, WuM 1981, p. 77.

¹¹¹ BVerfG, WuM 1991, p. 463.

¹¹² Lando/Beale (note 92), Art. 4:107, p. 252.

¹¹³ Lando/Beale (note 92), Art. 4:107, p. 252.

The second way would be to leave the question whether there should be a “right to lie” to national law, namely to the constitutions, which set out mandatory law to limit the right of rescission. Pursuant to Art. 1:103 (2) PECL, mandatory provisions of national law cannot be abrogated by the Principles. Thus, the Principles provide for a system whereby a landlord may rescind the contract should the tenant lie. This right to rescission can be restricted by mandatory national law, such as the German “right to lie” flowing from special mandatory rules, be it the Federal Data Protection Act or constitutional rights such as Art. 4 GG (freedom of religion) or Art. 2 (I) GG (personality rights).

Thus, according to the plain wording of the PECL, T could rescind the contract in all cases on grounds of fraud and error. If one restricts the application of Art. 4:107 and Art. 4:103 PECL to cases of misrepresentation for information which the landlord could legitimately ask, the answer is similar to the solution found under German law.

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?

According to § 540 (I) BGB, the tenant is not entitled, without the permission of the landlord, to transfer the use of the leased premises to a third party, particularly to sublet the premises. However, with regard to housing premises, the tenant can demand of the landlord to approve a sublease for a part of the premises to a third person, e.g. a room, provided that the tenant has a legitimate interest in the sublease, § 553 BGB. Financial needs of the tenant are, for example, a legitimate interest.¹¹⁴ If a third person moves in without L's consent, L can send a special warning (Abmahnung) and then give immediate notice, § 543 BGB.

Close family members of the tenant, such as a spouse, registered same-sex partner, parents or children, are not regarded as third persons. Taking them into the apartment does not constitute a case of sublease but falls within the scope of an appropriate use of the premises.¹¹⁵ Thus, permission is not necessary. Nevertheless, the tenant has to notify the landlord that he intends to take family members into the premises. Moreover, there must be sufficient space in the apartment for the accommodation of the family members. Courts have held that a married couple cannot take their three adult children into their

¹¹⁴ AG Hamburg WuM 1985, p. 87; AG Hamburg WuM 1983, p. 261.

¹¹⁵ See only Emmerich, in: Staudinger (note 4), § 549 margin no. 6. There might be a restriction for certain cases, e.g. when the landlord does live in the same apartment, see Voelskow, in: Münchener Kommentar (note 30), § 549 margin no. 9.

40 sqm sized flat¹¹⁶ and that an apartment of 54 sqm is too small for eight people.¹¹⁷ On average, one can say that each person should have 6-9 sqm,¹¹⁸ but for small children there can be exceptions. If the apartment is over-populated with family members the landlord is entitled to give immediate notice in accordance with § 543 (II) (No. 2) BGB.¹¹⁹

Beyond close family members it is still disputed who can be brought into the apartment without the landlord's permission especially with regard to cohabitants. While some lower courts¹²⁰ tend to accept them as family members, higher courts reject this view.¹²¹ Thus, the landlord has to be asked for his permission. However, the Federal Court of Justice has held that the wish of the tenant to bring his (same-sex) partner into the apartment does in general have to be considered as a legitimate interest according to § 553 (I) BGB.¹²² Therefore, the landlord cannot deny his permission if the tenant wants to bring her boyfriend or homosexual partner into the apartment.

In the light of the foregoing, the answers are:

a + d) Husband, children and parents are close family members. Provided that the apartment is spacious enough, T can take them in without L's permission. L only has to inform the landlord.

b + c) The boyfriend or homosexual partner would need the permission of the landlord. However, the landlord cannot deny his permission since L has a legitimate interest to move together with her partner. If the same-sex partner is registered, he or she is regarded as a family member and does not need the permission of the landlord.

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.

¹¹⁶ AG Neukölln, GE 1988, p. 633.

¹¹⁷ OLG Karlsruhe, WuM 1987, p. 180.

¹¹⁸ Emmerich, in: Staudinger (note 4), § 553 margin no. 12.

¹¹⁹ BGHZ 123, p. 233; BayObLGZ 1963, p. 228, 229.

¹²⁰ LG Hamburg, WuM 1980, p. 255; LG Aachen WuM 1989, p. 372.

¹²¹ BGH, NJW 1985, p. 130; OLG Hamm, NJW 1982, p. 2876; OLG Hamm, NJW 1992, p. 513. See also Emmerich, in Staudinger (note 4), § 540 margin no. 4.

¹²² BGH, NJW 1985, p. 130, 131.

After the landlord's demise, his heir becomes party to the tenancy contract *ipso iure*, § 1922 BGB (principle of universal succession). The same holds true in case the tenant dies; his heir will enter into the contract. With regard to commercial tenancy contracts, German law provides the landlord the right to give immediate notice in the event of the tenants' death, § 580 BGB. This rule does not apply to housing tenure where special rules exist to cover the case of the tenant's demise.¹²³ According to § 563 (I) BGB, the spouse who maintained a joint household with the tenant becomes party to the contract *ipso iure*. The surviving spouse can declare within a month after notice of the death that he or she does not want to continue the contract.

For the application of § 563 (I) BGB, it is essential that the couple maintained a joint household at the time of demise. If the surviving spouse had moved out prior to the demise in order to terminate the relationship, he or she does not become a party to the contract. It is disputed whether a pre-divorce separation according to § 1567 BGB (which can be even fulfilled by living separated in the same apartment) gives the surviving spouse the right to enter into the contract.¹²⁴ The surviving registered same sex partner has an analogous right, with, however, some limitations. If the surviving spouse enters into the contract, all other family members, e.g. the children, are barred from entering. Yet, if the registered same-sex partner does so, the children can also enter into the contract according to § 563 (II) (2) BGB.¹²⁵ If the spouse or registered partner abstains from executing this right, the children or other family members and even those persons with whom the deceased tenant maintained a joint household (e.g. the cohabitee or the non registered same-sex partner) may enter into the contract of lease, § 563 (II) (4) BGB.

Therefore, the answer is: in case a-c the surviving person (husband, boyfriend, homosexual partner, registered or not) will enter into the lease contract *ipso iure* under the same conditions as T.

Variant 2: Students' house

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

¹²³ See Meyer, Mietrechtsverhältnisse von Partnerschaften, NZM 2001, p. 829 ff.; Jendrek, Der Übergang von Mietwohnungen im Todesfall nach der Mietrechtsreform, ZEV 2002, p. 60; Löhning, Veränderungen im Recht der Wohnraummiete durch das Lebenspartnerschaftsgesetz, FamRZ 2001, p. 891 ff.

¹²⁴ In favour: Blank/Börstinghaus, Miete, BGB-Mietrecht und MHG, Kommentar (München, 2000), § 569a margin no. 7; against: Jendrek, in: Erman, Bürgerliches Gesetzbuch, Kommentar, Band 1 (10th Edition, Köln, 2000), § 569a margin no. 7; Voelskow, in: Münchener Kommentar (note 30), § 569a margin no. 3; Herrmann, in: Bamberger/Roth, BGB (München, 2003), § 563 margin no. 11 all with further references.

¹²⁵ Otherwise the protection of the family according to Art. 6 (I) GG would not have been guaranteed, cf. Sonnenschein, WuM 2000, p. 387, 405.

The contractual relationship between the parties can be described as follows: T contracted with L renting the whole apartment. Then, T sublets the free rooms to his fellow students with L's permission according to § 540 (I) BGB. Thus, T has a contractual relationship with L and with his fellow students. Hence, T is liable for the full rent while the subtenants have to pay their rent to T. According to § 553 (I) BGB, T can demand the permission to sublet rooms from L if he has a legitimate interest in the sublease. L can only deny the permission if there is no space for a subtenant in the premises or if there is a serious reason relating to the person of the subtenant. T is a student and one can assume that he cannot bear the rent of the flat alone. Therefore, he has a financial interest in subletting the room. This is accepted as legitimate interest.¹²⁶ There is no obvious reason for L to reject A. Such a reason could be that A could disturb the sanctity of the home or does not have sufficient funds to pay his share of the rent. Very often the reason for subletting is that the tenant cannot bear the rent alone and depends on the money charged from the subtenant. Therefore, the landlord has an interest that a financially credible subtenant moves into the premise – even though the tenant owes the full rent to him and is responsible for all damages to the apartment caused by the fault of the subtenant, § 540 (II) BGB.¹²⁷ However, mere personal “discomfort” is not sufficient for a denial of the permission. Thus, T can claim permission from L to sublet a room to A.

One could also argue that the contract between L and T allows T to replace any departing student with another student of his choice. This “implied” contractual agreement can be inferred from L's consent to allow a flat sharing community formed by students to live in his apartment.¹²⁸ T, as L knows, has insufficient funds to pay the entire rent alone and is thus dependent upon the sublease. Should an “implied clause” be interpreted into the contract, T would therefore only have to inform his landlord about the new tenant but L has no right to reject him.

Question 3: Subletting

Does, and if so 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)?

As mentioned above, T can claim permission from L to sublet a room to S provided that (i.) he has a legitimate interest after he moved into the premises, (ii.) the premises will not be overcrowded with the new tenant, and (iii.) there are no reasons in the person of the subtenant that allow L to deny his permission, § 553 (I) BGB. However, L has the

¹²⁶ OLG Hamm, WuM 1982, p. 318 ff. Other interests may be taken into consideration on humanitarian grounds, e.g. friends or family members have fled from war areas, see Derleder, Die Kündigung wegen Hilfeleistung, WuM 1994, p. 305 ff.

¹²⁷ Jendrek, in: Erman (note 124), § 549 margin no. 13; Voelskow, in: Münchener Kommentar (note 30), § 549 margin no. 21.

¹²⁸ See Horst, Praxis des Mietrechts (München, 2003), margin no. 49 ff.; Blank, in: Schmidt-Futterer (note 38), § 549, margin no. 19.

right to increase the rent in a reasonable manner and can make his permission contingent upon tenant's acceptance of such increase. The increase can only be charged for the intensified use of the premises caused by the sublet.

If T sublets the room without permission, L can send a warning demanding the eviction of the subtenant and/or fix a reasonable period of time for the eviction, § 543 (III) BGB. L can, *inter alia*, abstain from sending a special warning or fixing a time period if it is evident that T will not comply.¹²⁹ If T does not evict the subtenant, L can give immediate notice, § 543 (III) BGB. However, a termination of the contract is not possible, when T has to accept the subtenant on grounds of § 553 (II) BGB.¹³⁰

Apart from giving immediate notice, the Federal Court of Justice¹³¹ has held that L cannot claim the rent which the tenant charged the subtenant for the sublet. It is undisputed that a claim for damages according to § 280 I BGB (breach of duty) fails because there is no damage to the premises. This could only be the case when the subtenant uses the apartment excessively. But even in that case, L could only claim the repair costs as damage, not the additional rent that T gains with the sublease. According to the Federal Court of Justice, there is no claim on grounds of unjustified enrichment either. Academic opinion is, however, divided on this question. Some share the view of the Federal Court of Justice,¹³² while others claim that the result is unsatisfactory. Among these, some argue that the landlord should have a claim based on *negotiorum gestio*, §§ 687 (II), 681 (II), 667 BGB (*angemessene Eigengeschäftsführung*)¹³³ since the tenant treats the matter of another (landlord) as his own although he knows that he is not entitled to do so. Thus, the tenant should at least be liable for the profits.¹³⁴ However, the Federal Court of Justice rejects this interpretation and points out that the landlord has granted the right of use to the tenant. Therefore, it is up to the tenant alone, to conclude a sublet contract, and in doing so he does pursue a matter of its own.¹³⁵

Other scholars argue that there should be a claim based on the law of unjustified enrichment.¹³⁶ Some¹³⁷ would like to grant the *Eingriffskondiktion*, a type of enrichment

¹²⁹ Further exceptions regarding the necessity of sending a special warning before further action is taken are provided in § 543 (III) (No. 2, 3) BGB.

¹³⁰ OLG Hamburg, NJW 1982, p. 1157.

¹³¹ BGH, NJW 1964, p. 1853 ff.; BGH, WuM 1969, p. 298, 300; BGHZ 131, p. 297 ff., see also OLG Düsseldorf, WuM 1994, p. 280 ff.; OLG Celle, ZMR 1995, p. 159 ff.

¹³² Söllner, Herausgabe des Untermietzinses bei unberechtigter Untervermietung?, JuS 1967, p. 449 ff.; Mutter, Die unberechtigte Untervermietung und ihre bereicherungsrechtliche Behandlung, MDR 1993, p. 303 ff.; Blank in: Schmidt-Futterer (note 38), § 540, margin no. 14 with further references.

¹³³ Herschel, Nochmals: Herausgabe des Untermietzinses bei unberechtigter Untervermietung?, JuS 1968, p. 562.

¹³⁴ Krämer, in: Bub/Treier, Handbuch der Geschäfts und Wohnraummiete, (3rd Edition, München, 1999), Chapter III, margin no. 1035.

¹³⁵ BGHZ 131, p. 297, 306.

¹³⁶ For an overview of the German law of Unjustified Enrichment in English see, Markesinis/Lorenz/Dannemann (note 72), p. 710 ff.; Zimmerman/Du Plessis, Basic features of the German Law of Unjustified Enrichment, Rest. Law Rev. 1994, p. 14 ff.; Zweigert/Kötz, (note 3), p. 537 ff. In

claim not based on performance (*Nichtleistungskondiktion*) which is contained in § 812 (I) (1) (2nd Alt.) BGB. This claim remedies a shift of wealth to another party without valid legal ground through encroachment of the defendant in the rights of the plaintiff. Others¹³⁸ in turn prefer to apply the rules on disposition by a person without title, as laid down in § 816 (I) (1) BGB, in an analogous manner. Prerequisite for the latter solution would be that the tenant, as a person without title, makes a disposition of an object (or to be more precise of a right attached to the object, in our case the property right) which is binding upon the person having title, in the case at hand the landlord. A disposition in this sense is defined as an assignment, burden, change or abolishment (*Veräußerung, Belastung, Inhaltsänderung* or *Aufgabe*) of a right. Merely obligatory dispositions are not covered. According to the majority view, a sublease without permission does not constitute a disposition, since the property right of the landlord is neither abolished nor restricted in another way.¹³⁹ In addition, the subtenant has no right of possession with regard to the landlord, so that the sublease does not affect the legal position of the latter.¹⁴⁰ An analogous application is rejected because the rent that the tenant receives is not a comparable counter-performance which the tenant receives in the landlord's place. The landlord could not have sublet the apartment to a third person since he concluded a contract with the tenant granting him the full use of the premises.¹⁴¹ With a similar argument, a claim based on the *Eingriffskondiktion* according to § 812 (I) (1) (2nd Alt.) BGB is bound to fail: since the landlord granted the tenant the right of use of the apartment, there is no interference with the landlord's (remaining) rights over the apartment. He does not lose any right of "utilisation" (*Verwertungsrecht*) and was only deprived of his approval "right" according to § 540 (I) BGB, which merely exerts a controlling function.¹⁴²

German, see only: Koppensteiner/Kramer, *Ungerechtfertigte Bereicherung* (2nd Edition, Berlin, 1988); Larenz/Canaris, *Lehrbuch des Schuldrechts, Band II/2, Besonderer Teil* (München, 1994), p. 127 ff.; Reuter/Martinek, *Ungerechtfertigte Bereicherung* (Tübingen, 1983); Wieling, *Bereicherungsrecht* (2nd Edition, Berlin, 1999).

¹³⁷ Larenz/Canaris (note 136), § 69 II 1 d; Lieb, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 5 – Schuldrecht Besonderer Teil III* (3rd Edition, München 1997), § 812 margin no. 221; Kollhosser, *Dingliches Wohnrecht und unberechtigte Vermietung*, BB 1973, p. 820 ff.; H. P. Westermann, in: *Ermann Bürgerliches Gesetzbuch, Kommentar, Band 1* (10th Edition, Köln, 2000), § 812 margin no. 71; Theuffel, *Herausgabe des Untermietzinses bei unberechtigter Untervermietung?*, JuS 1997, p. 886 ff.

¹³⁸ Diederichsen, case note, NJW 1964, p. 2296; Emmerich, in: *Staudinger* (note 4), § 540 margin no. 31; Voelskow, in: *Münchener Kommentar* (note 30), § 549 margin no. 17.

¹³⁹ BGHZ 131, p. 297, 306; Reuter/Martinek (note 136), § 8 I 3 a, p. 309.

¹⁴⁰ BGHZ 131, p. 297, 306; Reuter/Martinek (note 136), § 8 I 3 a, p. 310.

¹⁴¹ BGHZ 131, p. 297, 306; Reuter/Martinek (note 136), § 8 I 3 a, p. 311; Mutter, MDR 1993, p. 303, 304.

¹⁴² BGHZ 131, p. 297, 306; Reuter/Martinek (note 136), § 8 I 3 a, p. 311; Mutter, MDR 1993, p. 303, 304.

Question 4: Formal Requirements of the Contract

- a) *Does the tenancy contract require a specific form (e.g. in writing) – if so, 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?*

a) German law does not require in principle that an agreement of lease has to be in writing. An exception applies to contracts of lease for housing premises. A lease contract entered into for a period longer than a year must be in writing (§ 550 (1) BGB).¹⁴³ The main rationale of the writing requirement is to enable a potential buyer of the property to be informed about tenants on the property he intends to acquire.¹⁴⁴ It is very important for a buyer to know about long-term lease contracts since the rule “sale does not break hire” applies to leased property, § 566 BGB, which makes it difficult for the buyer to evict the tenants.

If the written form is not observed, the lease contract shall be regarded as concluded for an unlimited time, § 550 (2) BGB. The law provides a fiction which abrogates the general rule set forth in § 125 (1) BGB providing that a legal transaction which is not in the form prescribed by law is void.

b) If the contract is valid, there are no additional requirements to be satisfied to render it enforceable before a court. However, in the course of litigation, the burden of proof rests on the party who bases a claim on the contract to prove its existence (i.e. by naming witnesses), should the other party contest.

c) There is no public register for lease contracts in Germany. However, a (property) right of residence according to § 1093 BGB has to be registered in the land register (*Grundbuch*).

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?

¹⁴³ It can also be concluded in electronic form using an electronic signature, § 126 BGB ff. However, in legal practice nearly all lease contracts are in writing to avoid problems of proof, cf. Harz, in: Schmid (note 40), Chapter 2 margin no. 474.

¹⁴⁴ Franke, Der „wiederentdeckte“ § 566 BGB – Schriftform für Mietverträge, ZMR 1998, p. 529, 530.

Different forms of “key money” exist in legal practise. First, it is common that landlords who are not renting their apartments with the help of an estate agent demand a “contract fee” when concluding the contract with a tenant. Second, if an estate agent is involved, the future tenant has to pay estate agent’s commission up to a maximum of two monthly payments of rent after conclusion of the contract, § 3 (II) of the Law on Regulation of Estate Agencies (*Gesetz zur Regelung der Wohnungsvermittlung* = WoVermittG). Third, in certain cases there are key money payments from the future tenant to the current tenant. Two forms of payments have to be distinguished in the latter case: In some cases the incoming tenant pays money to the current possessor as incentive that the latter terminates the lease contract and arranges that the future tenant will be accepted as a new tenant by the landlord. More often, payments are made to buy certain objects in the property of the current tenant, e.g. fitted kitchens, curtains or furniture.

Whereas the second form of key money is, in principle, legal (see Variant 2), the first and third (Variant 2) may pose problems. The law regarding the first form of key money can be outlined as follows: Whilst the landlord can ask for a contract fee (*Vertragsaufertigungsgebühr*), this fee has to be reasonable.¹⁴⁵ Excessive fees render the contractual stipulation void as a violation of the *bonae mores* principle according to § 138 (II) BGB. Courts have held that a fee above 150 Euro is unreasonable,¹⁴⁶ others accepted fees between 50-75 Euro.¹⁴⁷ Therefore, it is likely that a fee of € 100 would be held unreasonable. Since the landlord is not an estate agent in accordance with § 1 WoVermittG, he cannot claim a commission which certainly would be well above € 100 considering the monthly rent of € 1000.

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.*

According to § 4a (I) (1) WoVermittG, contracts which oblige the new tenant to pay for the removal of the current tenant are void. Therefore, in case b) F cannot demand € 500 from T. However, F could ask for key money with regard to his actual costs of moving out, § 4a (I) (2) WoVermittG, which might be higher than € 500. Furthermore, F can conclude a purchase contract for things he leaves in the apartment. In case of doubt such contracts are subject to a condition precedent to the conclusion of a tenancy contract between T and L, § 4a II (1) WoVermittG. If the purchase price is in blatant disproportion to the value of the purchased object, it is void, § 4a (II) (2) WoVermittG. Courts

¹⁴⁵ AG Hamburg, WuM 1999, p. 215; LG Hamburg, WuM 1990, p. 92.

¹⁴⁶ See AG Bremen, WuM 1999, p. 194; AG Hamburg, WuM 1999, p. 215.

¹⁴⁷ AG Wuppertal, WuM 1994, p. 194; LG Hamburg, WuM 1990, 62.

have held that a price of 50% above the real value at the time of purchase is blatantly disproportional.¹⁴⁸

The agreement in case a) is not covered by § 4a WoVermittG. However, there is severe doubt as to its validity. § 4a WoVermittG shall protect the new tenant against claims from the current tenant. It makes no difference whether the new tenant has to pay for the removal of the current tenant or whether he has to pay the current tenant to secure a contract with a landlord. Thus, it would be likely that the agreement would be held void.

Variant 2

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

An estate agent can claim from the tenant a commission up to a maximum amount of two rental payments after the landlord has concluded a lease contract with the tenant, § 3 (II) WoVermittG. Thus, A's claim is lawful.

Set 2: Duration and Termination of the Contract

A lease contract can be concluded for a limited or an unlimited period of time. The four grounds for termination are expiry, if a limited period was agreed upon, termination by mutual agreement, transfer of the contract to a new tenant accepted by the landlord, and notice. While the first three grounds are only governed by the general rules, the BGB provides an extensive body of mandatory law on termination by notice. Only a cursory overview can be given here. German law distinguishes between ordinary and immediate notice (*ordentliche/außerordentliche Kündigung*) as well as specific notice (*Sonderkündigungsrecht*). Under German law, the ordinary notice generally is only applicable in cases where the lease has been entered into for an unlimited period. It does not have to be based on a specific reason and it is always subject to a certain period of notice. The immediate notice (*außerordentliche Kündigung*) must be based on a specific reason, normally the breach of an important contractual duty by the other party and – in some cases – is not subject to a period of notice. Specific notice can be given in special cases prescribed by law and is subject to a period of notice.

a) For all lease contracts (for example, those relating to housing or commercial premises, movable objects etc.) both parties can terminate the contract with "*immediate notice based on an important reason*" (*außerordentliche Kündigung aus wichtigem Grund*), such as the non-grant of use, or default in payment of rent (§ 543 BGB). Moreover, the law allows immediate notice if the relationship between the parties is "shattered", in the sense that it is no longer just and reasonable for one side to continue under

¹⁴⁸ OLG Köln, WuM 2000, p. 555.

contract. In the case of "immediate notice based on an important reason", no notice period is applicable. Thus, the contract terminates with immediate effect. For the termination of a lease of housing premises additional rules apply: The termination of the contract with immediate notice based on an important reason may include a reason such as (i.) danger to health of the tenant or (ii.) disturbance of the sanctity of the home (*Störung des Hausfriedens*), § 569 (I), (II) BGB. However, § 569 (III) BGB restricts the application of § 543 BGB for delayed rent payments.

b) In principle, both parties can give *ordinary notice*. However, different regimes are stipulated for the parties. The *landlord* has relatively few possibilities to terminate the contract. If a lease contract for housing premises is concluded for an indefinite period of time, the landlord can only give notice if he has a *legitimate interest* in the termination of the lease contract. According to § 573 (II) BGB, a legitimate interest exists in particular, if (i.) the tenant is in manifest breach of a contractual duty, (ii.) the landlord needs the premises for himself or his family, or (iii.) the lease contract prevents the landlord from making an economically justifiable use of the premises (*angemessene wirtschaftliche Verwertung*). The tenant can object to the notice of termination and demand the continuation of the lease if the termination of the lease would give rise to hardship for the tenant or his family that would be unjustified even in the light of the legitimate interests of the landlord (§ 574 ff. BGB). However, the tenant cannot object to ordinary notice if the landlord could also have given immediate notice, e.g. for an important reason, § 574 (I) (2) BGB.

Certain lease contracts are exempted from notice protection rules. According to § 549 (II) No. 1-3 BGB, the rules on notice protection do not apply to housing premises which are leased for temporary use only (No. 1) or, which are part of the landlord's own home and which have been entirely or mainly equipped with furniture by the landlord, except if it has been let for the permanent use of a family (No. 2), or rented by public entities or private organisations which promote social welfare. Further exceptions apply to apartments in a house in which the landlord lives himself (§ 573a BGB) and to certain parts of the rented property, which are not designed for living purposes, such as outhouses (§ 573b BGB).

The *general notice period* for "ordinary notice" according to § 573 BGB is three months. According to the basic rule, notice must be given at the latest on the third day of a month to take effect at the end of the month after the next month. The notice period will be extended gradually up to nine months, the longer the tenant lives in the premises. For contracts of housing premises that fall under § 573a BGB (e.g. where the landlord lives in the same house) it can be extended up to twelve months. These rules are mandatory for the landlord only. Whilst clauses which reduce the tenant's protection are void, clauses that extend his protection are valid.¹⁴⁹

The *tenant* does not need a justification for giving notice. He can give notice within the general notice period, pursuant to § 573c BGB. As a basic rule, the notice period for the tenant is three months, regardless of the duration of the contract (§ 573c (I) (1) BGB).

¹⁴⁹

An exception applies to housing premises according to § 549 (II) (No. 2) BGB.

The rationale behind this rule is that the legislature aims to ensure the tenant's mobility.¹⁵⁰

c) In exceptional situations, the law foresees *special termination rights* (*Sonderkündigungsrechte*) either for the landlord, or the tenant, or both. For example, if the tenant dies and none of his family members or persons living in his household enters into the contract (§ 563 BGB), the contract shall be continued with the tenant's heir. Then § 564 BGB gives both landlord and heir one month to terminate the contract within the statutory notice period. Furthermore, the tenant has a special termination right in case of rent increases. If the landlord increases the rent, the tenant can give notice with effect from the end of the second month after the landlord declared the increase (§ 561 BGB).

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?*
- 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?*

A. German law

a) As mentioned in the introduction to this section, one needs to distinguish between immediate notice based on an important reason and ordinary notice.

The rules for an immediate notice can be found in §§ 543, 569 BGB. Some important reasons are mentioned in § 543 (II) (No. 1-3) BGB. Of particular importance to the landlord is § 543 (II) (No. 2, 3) BGB: After a special warning or the setting of a time period, he can give notice if the tenant sublets the premises or negligently places the rented premises at risk (§ 543 (II) (No. 2) BGB), or in certain cases when the tenant pays his rent too late (§ 543 (II) (No. 3) BGB). The severe disturbance of the sanctity of the home is another important reason for giving notice, § 569 (II) BGB.

The landlord can give ordinary notice if he has a legitimate interest in the termination of the lease. Certain legitimate interests are listed in § 573 (II) (No. 1-3) BGB. Most importantly, the landlord can give notice if he needs the premises (as housing accommodation) for himself, his family or someone that lives in his household (§ 573 (II) (No. 2) BGB). Family members, *inter alia*, include: parents,¹⁵¹ step-parents,¹⁵² children,¹⁵³ step-

¹⁵⁰ BT-Drucksache 14/4553, p. 67.

¹⁵¹ LG Berlin, MDR 1989, p. 1104.

¹⁵² OLG Braunschweig, WuM 1993, p. 731, 732.

¹⁵³ OLG Karlsruhe, NJW 1982, p. 889.

children,¹⁵⁴ brother or sister,¹⁵⁵ son/daughter-in-law,¹⁵⁶ mother/fathers-in-law¹⁵⁷ and registered partners which are regarded as family members according to § 11 LPartG unless certain provisions provide differently. Courts are more reluctant to accept a termination if the brother/sister-in-law wants to move into the apartment.¹⁵⁸ It is not a prerequisite that the family members have to live in the landlord's household.¹⁵⁹ However, should the landlord wish to terminate the contract in order to allow people other than family members – for example, his cohabitee – to occupy the flat, he can only terminate the contract if this person has lived in his household.¹⁶⁰

In the case at hand, L would like to modernise the apartment. That would enable him to subsequently demand a much higher rent on the market. The law provides that a lease contract may be terminated if it hinders the landlord to make an economically adequate use of the premises (§ 573 (II) BGB). However, a simple renovation or modernisation of one apartment that does not require T to leave is not sufficient to be so regarded,¹⁶¹ according to § 559 BGB. If, however, the reconstruction would involve major building works, e.g. if L wants to reshape some apartments, he is in a position to give notice.

b) The rules on enforcement of judgements are laid down in §§ 704 ff. ZPO. If a judgement aimed at the eviction of a tenant has acquired the effect of *res iudicata*, the landlord can enforce it through the bailiff, §§ 883, 885 ff. ZPO. The tenant has to bear the costs of the enforcement, § 788 ZPO. However, experience has shown that the tenant often is bankrupt and, thus, that the landlord is not able to recover the lawyer and court fees he had to pay in advance.

To avoid hardship in eviction cases, the court may upon the tenant's request set a time period in which an enforcement cannot be pursued, § 721 ZPO. The time span ranges from two weeks to one year.¹⁶² There are exemptions for certain rent contracts: For contracts limited in time according to § 575 BGB, or contracts without notice protection (see above)¹⁶³ no additional time period can be granted pursuant to §§ 721 (VII), 794a (V) ZPO. The competent court to issue a motion under § 721 ZPO is

¹⁵⁴ OLG Braunschweig, WuM 1993, p. 731, 732.

¹⁵⁵ BayObLG, MDR 1984, p. 316.

¹⁵⁶ LG Mainz, WuM 1991, p. 554.

¹⁵⁷ LG Köln, WuM 1994, p. 541.

¹⁵⁸ AG Oldenburg, NJW-RR 1993, p. 526 with further references.

¹⁵⁹ Weidenkaff, in: Palandt (note 42), § 573 margin no. 27; Börstinghaus/Eisenschmid (note 11), § 573, p. 494.

¹⁶⁰ Weidenkaff, in: Palandt (note 42), § 573 margin no. 27.

¹⁶¹ Things are different if L wants to reconstruct the whole house, e.g. to put together two small apartments in order to create a bigger apartment, see Voelskow, in: Münchener Kommentar (note 30), § 564b margin no. 64.

¹⁶² See *supra*, Introduction, A 3 c.

¹⁶³ I.e., contracts mentioned in § 549 (II) (No. 1-3) BGB.

the court that has rendered the judgement to be enforced, usually the *Amtsgericht*.¹⁶⁴ After the time period set out by the Court has passed, there is a last chance for the tenant to avoid eviction. According to § 765a ZPO, the competent court may suspend the enforcement upon a tenant's request if it causes hardship contrary to *contra bones mores*. A hardship *contra bones mores* is accepted, when the tenant or one of his family members is incapable of moving out due to illness which puts his life at risk. Usual "stress" or psychological strain such as depression is not sufficient to avoid the enforcement of the eviction judgement.¹⁶⁵ The latter are "normal" consequences of an eviction, which have to be borne by the tenant. He is responsible to find a new place to stay within the time period established by the judge according to § 721 ZPO. Therefore, the risk of becoming homeless does not constitute a hardship in the sense of the law.¹⁶⁶ It is up to the local authorities to protect the tenant against homelessness. This burden is not placed on the landlord.

B. PECL

Pursuant to Art. 6:109 PECL, a contract for an indefinite period may be terminated by either party by giving notice of reasonable length. Again, this is only the general rule. The Comment states that this Principle does not cover contracts for which statutory provisions of notice apply.¹⁶⁷ And in the Notes it can be read that many, if not all laws provide for special periods of notice for specific contracts.¹⁶⁸ Hence, one can argue that this general rule will not touch on specific tenant protection rules, such as the notice protection rules under German law.

Question 7: Contract of Limited Duration and Termination

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

German law allows only so-called qualified fixed term lease contracts (*qualifizierte Zeitmietverträge*), to avoid "chain contracts", i.e. contracts where landlords subsequently conclude fixed term contracts to circumvent tenant protection rules.

The law does not prescribe a maximum time period. Yet, § 575 BGB provides that a fixed term contract can only be concluded if the landlord has a reason for such a limitation. According to § 575 (I) (1) BGB a contract limited in time can be concluded if after the termination of the contract the landlord (i.) wants to use the premises for himself, his

¹⁶⁴ Cf. § 23 (I) (No. 2a) GVG.

¹⁶⁵ Scholz, in: Schmid (note 40), Chapter 25 margin no. 78 ff.

¹⁶⁶ OLG Oldenburg, NJW 1961, p. 2119; OLG Köln, ZMR 1995, p. 535; Heßler, in: Münchener Kommentar, Zivilprozessordnung, Band 2 (2nd Edition, München, 2000), § 765a margin no. 58; Münzberg, in: Stein/Jonas, ZPO (21st Edition, Tübingen, 1996), § 765 margin no. 6; Stöber, in: Zöller, ZPO (23th Edition, Köln, 2002), § 765a margin no. 5 ff.

¹⁶⁷ Lando/Beale (note 92), Art. 6:109, p. 316.

¹⁶⁸ Lando/Beale (note 92), Art. 6: 109, p. 317.

family or people living in his household, (ii.) wants to demolish or alter the premises considerably so that these building measures would be significantly aggravated when the tenant would stay in the premises, (iii.) wants to rent it to an employee. If these prerequisites are not met, the contract is deemed to be extended for an unlimited time period, § 575 (I) (2) BGB. The landlord has to inform the tenant in writing¹⁶⁹ about the reasons why he wants to limit the contract in time, § 575 (I) (1) BGB. If he fails to inform his tenant, the contract is deemed to be of unlimited time, § 575 (I) (2) BGB. Furthermore, if the reason ceases to exist during the time period, the tenant can demand a contract unlimited in time, § 575 (III) (2). Housing premises as defined under § 549 (II) (No. 2, 3) BGB do not fall under § 575 BGB.¹⁷⁰

A fixed term contract terminates through lapse of time unless immediate notice under § 575a BGB is given, or the contract is renewed, § 542 (II) BGB. The German legislature seeks to ensure that the tenant actually moves out when the contract terminates through lapsed time.¹⁷¹ Thus, there is no right for the tenant to demand an extension of the contract on grounds of hardship. The rules on notice protection according to §§ 574 ff. BGB are therefore not applicable, except for the case of immediate notice pursuant to §§ 575a (I), 573 BGB. Only in the latter case can the tenant object to the notice on grounds of hardship (the so-called *Sozialklausel*) according to § 574 – 574c BGB. However, even then, the maximum period in which he can continue to stay in the premises is until the contract would have expired through lapse of time, § 575a (II) BGB.

Question 8: Justification for Time Limit

- a) *L and T have concluded a contract limited to one year with automatic renewal for another year, provided that no party has given notice three months before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, respecting the delay of three months before the annual deadline, L gives notice of termination without alleging any reasons. Is this lawful?*
- b) *Does the restriction of notice under a) (which is possible only once per year) apply to T, too?*

a) As mentioned in the answer to question 7, a contract limited in time can only be concluded if the landlord can prove that either (i.) he wants the premises for his own needs, or (ii.) plans a reconstruction, or (iii.) wants to rent them to his employees, § 575 (I) BGB. In the present case, none of these reasons applies. Furthermore, the landlord did not inform the tenant in writing about the reasons for the time limitation. Therefore, the contract is deemed to be of unlimited time and the rules on notice protection

¹⁶⁹ Not necessarily in the lease contract itself which do not require a written form if it is concluded for a period up to a year, 550 BGB, cf. Weidenkaff, in: Palandt (note 42), § 575 margin no. 9.

¹⁷⁰ Cf. supra, Set 2 – Introduction.

¹⁷¹ BT 14/5663, p. 69.

apply. As mentioned in the introduction to this chapter,¹⁷² T can give ordinary notice provided that he can show a legitimate interest in the termination (§ 575a, 573 BGB). He could give immediate notice based on an important reason if T is in default with his monthly payment of the rent or if he disturbs the sanctity of the home (§ 543 BGB). A termination without alleging any reasons would be unlawful.

Apart from this formal argument, it is unclear under the new law whether a landlord can conclude a contract limited to one year with a renewal clause. The rationale underlying § 575 BGB is that a landlord who knows that he needs the apartment at a given time in the future can be sure that the tenant will move out when he needs it. The case at hand might constitute a circumvention of the new tenant protection rules. According to the rules, it is only possible to conclude a second fixed term contract after the termination of the first fixed term contract if a new reason as listed in § 575 BGB exists.¹⁷³ Thus, the landlord could conclude a contract limited for a year because he wants to reconstruct the premises considerably. Yet, if he cannot find the necessary financing but knows that he will need the apartment in more than two years time for his children, he is allowed to conclude another contract limited for two years.

It is not yet decided under the new law, whether the landlord can conclude a contract with a short time limitation of one year and renew it automatically every year or whether he has to assess his situation and give the tenant a contract for six years, if he is of the opinion that he needs the premises by then. The latter position seems preferable.

b) The tenant has also the right to give immediate notice based on an important reason, according to § 543 BGB. This is of particular importance since in fixed term contracts the right to give ordinary notice is usually excluded by the parties.¹⁷⁴ Therefore, T would further need an important reason to terminate the contract before the end of each year. If, however, one is of the opinion that the contract as a whole circumvents the requirements set forth in § 575 BGB, the contract has to be regarded as concluded for an unlimited time, § 575 (I) (2) BGB. In this case, T could give ordinary notice pursuant to § 573c BGB within the time limits prescribed by the law.¹⁷⁵

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?

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

c) A bankruptcy procedure is carried out against L at the end of which the house is auctioned off. Can the buyer give anticipated notice?

¹⁷² Cf. supra, Set 2 – Introduction.

¹⁷³ Weidenkaff, in: Palandt (note 42), § 575 margin no. 21.

¹⁷⁴ Rolfs, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Buch 2: Recht der Schuldverhältnisse, §§ 563-580a, Mietrecht 2 (Neubearbeitung, Berlin 2003), § 575a margin no. 5.

¹⁷⁵ See supra, Set 2 – Introduction.

a) According to the principle of universal succession laid down in § 1922 (I) BGB, upon the death of a person, *ipso iure*, the property passes in its entirety to one or several persons (heirs). Thus, upon the death of the inheritor, the heirs enter into the lease contract.¹⁷⁶ There are no special rights to terminate the contract for L's heirs. They can terminate according to the general rules, set out above.¹⁷⁷

b) As mentioned above, the rule "*emptio non tollit locatum*" set forth in § 566 BGB applies. A buyer enters into a lease contract and has the same rights and obligations as landlord as the seller used to have.¹⁷⁸ Again, the rules of notice protection are applicable. L has to show a legitimate interest in an ordinary notice or terminate the contract by giving immediate notice based on an important reason, §§ 543, 573 ff. BGB.¹⁷⁹

c) In case of bankruptcy and an auction of the house in accordance with the Act on Compulsory Auction (*Zwangsversteigerungsgesetz* = ZVG), the new owner has a privileged right to give anticipatory notice within the statutory termination time limit, § 57a ZVG. The statutory notice period (*gesetzliche Kündigungsfrist*) for unlimited contracts is calculated as follows: if notice is given on the third day of a month, the contract terminates with effect from the end of the following month, § 573d (II), § 575a (III) BGB.¹⁸⁰ The new owner has to give notice on the first date possible, otherwise he loses his right to give anticipated notice, § 57a (2) ZVG. However, he shall be given a certain period of time to consider the factual and legal situation. To give an example: the buyer auctions the house on June, 20th. He can consider his new situation for a week¹⁸¹ and must give anticipated notice on July, 3rd with effect to September, 30th. Certain exemptions apply if the tenant participated in the costs incurred in the construction or maintenance of the housing premises, § 57c ZVG.¹⁸²

¹⁷⁶ Jendrek, ZEV 2002, p. 60.

¹⁷⁷ See supra, Set 2 – Introduction. An exception applies in case of the appointment of a reversionary heir. The testator may appoint an heir in such manner that the latter becomes an heir only after another person has previously been an heir (reversionary heir), § 2100 BGB. If the provisional heir has let a piece of land forming part of the inheritance, and if the lease is still in force at the time of the reversionary succession, the reversionary heir has a right to terminate the contract according to § 2135, 1056 BGB.

¹⁷⁸ See supra, Introduction, 1 a.

¹⁷⁹ See supra, Set 2 – Introduction.

¹⁸⁰ The statutory limitation period is shorter for housing premises which falls under § 549 (II) (No. 2) BGB.

¹⁸¹ The exact time period may vary according to the circumstances of the case, cf. Böttcher, ZVG – Gesetz über die Zwangsversteigerung und Zwangsverwaltung mit Erläuterungen (3rd Edition, München, 2000), §§ 57-57d margin no. 12 ff.

¹⁸² For details, see only Böttcher (note 181), §§ 57-57d margin no. 16 ff.

Question 10: Tenancy "For Life"

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

If a lease contract is concluded for a period of more than 30 years, either party may, after such period, give notice of termination of the lease, upon observance of the statutory notice period, § 544 (1) BGB. If, however, a lease contract is concluded for life, even after 30 years, the right to give ordinary notice is excluded, pursuant to § 544 (2) BGB.¹⁸³ However, both parties, retain their right to give immediate notice based on an important reason according to §§ 543, 569 BGB, namely if the other party is in breach of an obligation.

Where the parties had agreed on a right of residence according to § 1093 BGB for the lifetime of the "tenant", and the right is registered in the Land Register, there is no possibility for the landlord to "terminate" the right of residence. The right of residence is a property right which is independent from the obligatory transaction underlying the granting of the lifelong right of residence.¹⁸⁴ Thus, it cannot be terminated according to rights resulting from the underlying obligatory transaction.

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?*

Under German law, both the tenant and the landlord can give immediate notice according to §§ 543, 569 BGB¹⁸⁵ provided that they can show an important reason. Not every breach of a contractual duty may constitute such an important reason. Due to the severe consequences for the tenant, who will lose his place to live, only manifest and grave breaches, which "shatter" the contractual relationship may allow the other side to termi-

¹⁸³ Börstinghaus/Eisenschmid (note 11), § 544, p. 11; Emmerich, in: Staudinger (note 4), § 544 margin no. 12.

¹⁸⁴ See BGH, MDR 1999, p. 218.

¹⁸⁵ See supra, Set 2 – Introduction.

nate the contract with immediate notice. As mentioned above¹⁸⁶ the landlord has a right of termination, namely where the tenant (i.) does not pay the rent on time, (ii.) sublets the premises without the landlord's approval or (iii.) severely disturbs the sanctity of the home.¹⁸⁷ These important reasons are codified. However, other reasons which might be similar can be relied upon. Thus, Courts have accepted that unprovoked severe and repeated insults¹⁸⁸ or criminal acts or threats of criminal acts against the other party can amount to manifest breaches of a contractual obligation.¹⁸⁹ As indicated above, the landlord in most cases needs to send a special warning before he can terminate the contract.

Thus, if the tenant does not make the last two monthly rent payments, the landlord can, in principle, terminate the contract according to § 543 (II) (No. 1) BGB. Repeated severe insults of neighbours certainly endanger the sanctity of the house. Hence, the landlord is entitled to terminate the contract pursuant to § 543 (I) BGB.

A "clause résolutoire" would be void under German law. The rules on notice protection are mandatory. A contractual stipulation as the "clause résolutoire" would abrogate the tenant's protection. To give an example: with regard to the late rental payments, it excludes, *inter alia*, the possibility for the tenant to pay the rent arrears up to two month after *lis pendens* effect of the landlords' eviction claim before ordinary courts, § 569 (III) (No. 2) BGB.

Set 3: Rent and Rent increase

With regard to the lease of housing premises one has to distinguish between the net-rent (*Nettomiete*) as consideration for the use of the premises, and accessory charges (*Nebenkosten*) such as charges for insurance, sewage water, a caretaker/concierge and the consumption for water, heating and electricity. According to § 535 (I) (3) BGB, the landlord shall bear all charges imposed upon the object of the lease. In practice, virtually every contract contains a clause that the tenant shall bear all but a small proportion of the utility costs. The clause must, however, identify precisely which charges have to be borne by the tenant. If the charges are not passed onto the tenant, they are included in the agreed rent.

The negotiation of the rent is left to the private autonomy of the contracting parties. The landlord commits an administrative offence, under § 5 WiStG, and can be fined up to 50.000 Euro, if in times of a limited offer of housing accommodation he intentionally or with gross negligence demands a rent in excess of 20% of the rent charged for comparable premises,

Under German law, there is a complicated set of mandatory rules to control rent increases. German law distinguishes between two forms of rent increase rules: the negotiated increase and the increase by law. First, the parties can negotiate a consensual rent increase: the landlord can increase the rent when the tenant agrees to it (§ 557 (I) BGB),

¹⁸⁶ See supra, Set 2 – Introduction.

¹⁸⁷ The sanctity of the home is, *inter alia*, severely perturbed if the house rules are constantly violated, see LG Essen, WuM 2002, p. 337.

¹⁸⁸ LG Köln, WuM 1993, p. 349.

¹⁸⁹ LG Mannheim, ZMR 1977, p. 80.

or when the lease contract provides clauses for (i.) a graduated rent increase (§ 557a BGB, *Staffelmiete*), or (ii.) rent adaptation according to an official cost-of-living index (§ 557b BGB, so-called *Indexmiete*). Apart from these forms of negotiated rent increase, the landlord, secondly, can (i.) under certain conditions require the tenant to accept a rent increase up to the rent level customary in a certain area (§ 558 BGB, *ortsübliche Vergleichsmiete*), however, only within a cap of 20 % increase in three years; (ii.) increase the rent by 11% of the construction costs he invested in modernising the housing accommodation (§ 559 BGB); or (iii.) in the event that the parties agreed on a utility flat rate (*Betriebskostenpauschale*), he can increase the rent up to the amount that the costs for utilities have increased (§ 560 BGB).

Question 12: Settlement Date and Modes of Payment

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

A. German law

Rent is payable at the beginning and at latest on the third working day of each payment period (*Zeitraum*) as agreed in the contract, § 556 b (I) BGB. The majority opinion considers Saturday as a working day.¹⁹⁰ Usually, for housing premises, the parties agree to pay the rent on a monthly basis. There are no restrictions on modes of payment. It is common that the parties agree on bank transfer. The tenant must remit the money to the landlord's bank account at his own risk and expense, § 270 (I) BGB. The tenant does not bear the risk of delay caused by the bank, and can authorise his bank for payment on the third working day provided that his bank account has sufficient funds.¹⁹¹

The landlord has, by way of security for his claims arising from the lease, a right of pledge over the things brought upon the premises by the tenant, § 562 (I) BGB. It does not extend to things not subject to attachment, such as things the tenant requires for his work. The right of pledge is extinguished by the removal of the things from the land, unless the removal takes place without the knowledge of, against the wishes of, the landlord, § 562a BGB. In practice, the right of pledge gives the landlord a claim against the tenant to grant possession of the things in the premises. To enforce this claim, the landlord has to go to court. He is not entitled to enter the premises and remove items from the tenant.¹⁹² However, pursuant to § 562b BGB, the landlord has a very limited right of self-help to prevent the removal of belongings from the premises.

¹⁹⁰ However, if the third day is a Saturday, § 193 BGB applies which extends the time period to the following Monday; see Weidenkaff, in: Palandt (note 42), § 556b BGB margin no. 4, with further references.

¹⁹¹ Huber, *Leistungsstörungen*, Band 1 (Tübingen, 1999), § 5 IV 2; Heinrichs, in: Palandt (note 42), § 270 margin no. 7.

¹⁹² Lammel in: Schmidt-Futterer (note 38), § 562, margin no. 46.

B. PECL

According to Art. 7:102 PECL, a party has to effect performance at the time fixed in the contract, or if it is not fixed, within a reasonable time after the conclusion of the contract. This rule corresponds largely with § 271 (I) BGB in the general part of the German law of obligations. This rule would be replaced by Art. 7:102 PECL. However, the specific rule extending the due date to the third working day of a month pursuant to § 556b (I) BGB, would not be abrogated by the Principles. Thus, there would be no discrepancies with German law.

The PECL do not foresee a right of pledge.

Question 13: Requirements for Rent Increase

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

Under German law, the parties are free to negotiate a consensual rent increase at any time during the contractual relationship, § 557 (I) BGB. In practice, this seems to be the exception. More often, the contract includes clauses on progressive rent increase (§ 557a BGB, so-called *Staffelmiete*). The clause has to indicate the amount of the increased rent or the amount of the increase. This assists the tenant in determining whether he can bear the costs of the premises in the future. The landlord cannot increase the rent on grounds of average rents in the same area or due to construction measures undertaken during the duration of the progressive increase clause (§ 557a (II) (2) BGB). Secondly, there are clauses connecting the rent to an official cost-of-living index issued by the Federal Statistical Office, § 557b BGB. In both cases, the law provides that the rent needs to remain unchanged for at least a year before the next periodic rent increase can be effected. The landlord has to inform the tenant about the increase due to a rise in the index in a textual form (*Textform*), §§ 557b (III), 126b BGB. The textual form was created to respond to modern computer technologies. Thus, the landlord can either submit his demand in writing, including his signature, by post or fax, or use electronic communication, such as e-mail without specific electronic signature.¹⁹³

If the contract does not contain a rent increase clause, the landlord can require from the tenant to accept a rent increase up to the average rent level customary in a certain area, § 558 BGB (*ortsübliche Vergleichsmiete*), provided that the last rent increase took place at least 15 months prior to the date when the demanded increase was to take effect. As a general rule, this form of rent increase has a ceiling of 20 % in three years, § 558 (III) BGB. Therefore, the maximal rent increase will be 20 % in three years.

The average rent level customary in a certain area is not a fixed amount but rather a price range. It is evaluated by comparing the rents paid over the last four years with the

¹⁹³ Heinrichs, in: Palandt (note 42), § 126b margin no. 3 ff.; Wendtland, in: Bamberger/Roth, BGB (München, 2003), § 126b margin no. 3 ff.

rents paid for other premises similar in size, location and setting. The demand for an increase has to be in textual form, §§ 558a (I), 126b BGB and the landlord must state reasons for the rent increase. According to § 558a (II) BGB, he can rely on rental tables (*Mietenspiegel*), expert advisory opinion or three “sample” rents charged for comparable premises in the same area. Since the reform of 2001, a landlord can also base his demand on a so-called qualified rental table (*qualifizierter Mietenspiegel*), § 558d BGB, or a rental database, § 558e BGB. The rental table is a statistical measure of rents for premises which differentiates between certain categories and locations. It is issued by local authorities and approved by the landlord and tenant associations. A qualified rental table needs to be determined according to scientific standards and updated every two years, § 558d (II) BGB. § 558d (III) BGB contains a presumption that the rents listed in a qualified rental table constitute the rent level customary in a certain area. Rental data bases are not yet very common in Germany. They are supposed to be organised or approved by local authorities and landlord/tenant associations. According to the explanatory statement of the Reform Act 2001, there is only one database in Hanover, which is organised by a private incorporated society (*eingetragener Verein*) formed by different associations and local authorities.¹⁹⁴ The increase procedure is as follows: If the landlord demands a higher rent on grounds of the average rent level customary in the area, the tenant has two months to consider the demand. If he agrees, he has to pay the increased rent at the beginning of the third month after he received the landlord’s demand (§ 558b (I) BGB). If the tenant does not agree, the landlord can sue the tenant for acceptance after the two months period has passed (§ 558b (II) BGB).

As a third possibility, the landlord may increase the rent after he modernised or reconstructed the premises. However, the maximum increase is 11 % of the invested building costs allocated to the yearly rent, § 559 (I) BGB. And lastly, in case the parties agreed on a utility flat rate, the landlord can increase the rent up to the amount the costs for utilities have increased, § 560 BGB.

There are rules of profiteering laid down in § 5 Economic Criminal Code (WiStG).¹⁹⁵ The landlord commits an administrative offence, if he recklessly charges rental of 20 % above the customary level in times when there is a limited offer on the housing market. If § 5 WiStG applies, the contract is partially void according to §§ 134 BGB read with § 5 WiStG, and the tenant can claim the overpayment of rent on grounds of unjustified enrichment. § 5 WiStG is of particular importance when it comes to periodic rent increases.¹⁹⁶ In regard to the restitution of excessively high rent payments, one has to distinguish between the following cases: if, upon conclusion of the contract, (i.) the limited offer existed, and (ii.) the rent was 20% above the average rent level (or reached this level through the progressive increase at a later point in time) and later the housing shortage ceased to exist, the tenant can claim his rent overpayment for the whole period.

¹⁹⁴ BT-Drucksache 14/4553, p. 67. For details, see Stöver, Mietdatenbanken, NZM 2002, p. 279 ff.; Stöver, Mietdatenbanken nach neuem Recht, WuM 2002, p. 65 ff.; Szameitat, Sackgasse Mietdatenbank, WuM 2002, p. 63 ff.

¹⁹⁵ See also § 138 II BGB and § 291 German Criminal Code.

¹⁹⁶ BGH NJW 1984, p. 722. For details, see Emmerich, Flexibilisierung des Mietzinses bei der Wohn- Geschäftsraummiete – Staffel und Indexmieten sowie Mehrbelastungsklauseln unter Berücksichtigung neuen Rechts, NZM 2001, p. 690 ff.

If, however, there is sufficient housing to let at the time of the conclusion of the contract and the shortage emerges only later, and the rent is 20% above the average rent level, the Courts allow a claim for restitution only for the periods when the increases fulfilled the prerequisites of § 5 WiStG. In other words, only for the period when the shortage of houses existed and the rent was above 20% of the average rent level, will this claim be granted.¹⁹⁷

Question 14: Index clause

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

Under German law it is possible to link the rent to the costs-of-living index as elaborated by the Federal Statistical Office, § 557b BGB (so-called *Indexmiete*). If the contract contains an index-clause, the landlord cannot increase the rent on other grounds, with the exception of an increase after construction work for which the landlord is not responsible. Furthermore, the rent needs to remain unchanged for at least a year before the landlord can demand the next increase. The landlord has to inform the tenant about the increase due to a rise in the index in textual form (*Textform*), according to §§ 557b (III), 126b BGB.

Variant:

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

As mentioned above, the parties can agree on a progressive rent increase clause, § 557a BGB (*Staffelmiete*). This clause must indicate either the amount of the increase or the final increased rent in total, § 557a (I) BGB. The indication of a percentage does not fulfill this requirement since the amount of increase is not sufficiently transparent for the tenant.¹⁹⁸ Therefore, a percentage-clause would be void and the tenant only has to pay the rent originally agreed.

Question 15: Unlawful Rent Increase

By ordinary letter, L tells T that the rent will be increased by 10% in three months time to compensate for a general increase in the cost of living. No further justification is provided to support this claim. Without protesting, T pays the increased rent for 3 months. After this time, she begins to question the rent increase and consults a lawyer.

¹⁹⁷ OLG Hamburg, NZM 2000, p. 232; For the case of a decreasing rent level, see KG Berlin, WuM 2002, p. 27; KG Berlin, ZMR 2002, p. 116.

¹⁹⁸ Weidenkaff, in: Palandt (note 42), § 557a margin no. 1.

Can T claim money back? If so, can T off-set the sum to be repaid against future rent instalments on her own motion without judicial intervention?

A. German law

According to § 557 (I) BGB, the parties to the lease contract can agree on a rent increase. For such an 'amendment-contract' to exist, two reciprocal, corresponding declarations of will (*Willenserklärungen*), namely an offer and an acceptance by the contracting parties is required. An offer exists, when one of the parties declares to the other his intention to enter into a binding arrangement, provided that certain conditions are met and the other must assent to this proposal. The offeree must not only mentally accept the offer, but must also communicate this to the offeror. However, an offer can also be accepted implicitly, by acting in a way that an objective addressee can understand this as an acceptance. In general, declarations of will are to be interpreted from the point of view of an objective person in the position of the addressee.¹⁹⁹

In the present case, it is already unclear if L wanted to make an offer to conclude a contract or if he merely declared the rent increase unilaterally. Academic opinion highlights the fact that a letter from a landlord, asking for the tenant's acceptance of a rent increase can be considered an offer. However, a unilateral demand, e.g. an increase in rent based on grounds of effected modernisation works pursuant to § 559 BGB can equally be interpreted as an offer.²⁰⁰ In the present case, a reasonable tenant may interpret the landlord's letter as a contractual offer to increase the rent.

The question is therefore whether L's rental payments can be viewed as an acceptance of the offer. It is decisive that there is (i.) an inner will to accept the offer and (ii.) that this intention is communicated to the landlord. The given fact pattern is a borderline case. If the landlord demands the increase unilaterally according to §§ 559, 560 BGB, the payments of the increased rent cannot be seen as acceptance since the tenant had no intention to alter the contract.²⁰¹ One can already doubt whether T had an inner will to accept the offer since she was not even aware of the fact that she could reject it. Furthermore, she had no intention to declare anything when paying the increased rent. However, assuming that the tenant interpreted the letter as an offer, the majority of courts consider regular payments with no reservations as a form of acceptance.²⁰² When it can be proven that no inner will of acceptance existed matters are altered;²⁰³ for example, where the rent is paid but with misgivings, or if the landlord debits the sum directly from the tenant's bank account without the tenant's approval, or if the tenant indicates that the payments are being made only because he or she has no other choice. In

¹⁹⁹ See only Larenz/Wolf (note 83), p. 532 ff. with further references.

²⁰⁰ Weitemeyer, in: Staudinger, Bürgerliches Gesetzbuch Buch 2: Recht der Schuldverhältnisse, §§ 563-580a, Mietrecht 2 (Neubearbeitung, Berlin, 2003), § 557 margin no. 31.

²⁰¹ OLG Karlsruhe, WuM 1986, p. 166, 168; LG Berlin, NZM 2000, p. 1049.

²⁰² All decisions concerned increases on grounds of an approximation to the level customary in a certain area: LG Aachen, WuM 1988, p. 280; LG Berlin, WuM 1985, p. 311, see also Weitemeyer, in: Staudinger (note 200), § 557 margin no. 33.

²⁰³ Horst (note 128), margin no. 519.

most cases, as in the case at hand, there are no reservations expressed by the tenant. Hence, the decisive question is how many payments are sufficient to construe an acceptance. Some courts consider acceptance of an offer if the tenant pays the rent once or twice without protesting,²⁰⁴ while others demand a longer period.²⁰⁵ In this case, the rent was paid three times. Thus, it is highly unlikely that German courts would not interpret the payments as an acceptance, if they were to interpret the letter as an offer.

However, if one is of the opinion that the parties did not conclude an 'amendment-contract' and T may claim restitution, a set-off against future rent is possible. According to § 387 BGB, if two persons have mutual obligations which are of the same kind, either party may off-set his claim against a counter-claim as soon as his claim is due and he is able to effect the performance owed by him. The claim on grounds of unjustified enrichment is due at the given point of time but the payment of future rent instalments are not yet due, since it is a claim which will arise in the future (every month), § 271 (I) BGB. Nonetheless, § 271 (II) BGB contains the assumption that although a time for performance is fixed, the debtor may perform his obligation earlier. Early performance by the debtor is excluded if it would be to the detriment of the creditor, for example, if the creditor granted a loan to the debtor and would therefore lose out on interest.²⁰⁶ § 556b (II) BGB requires the tenant to inform the landlord of his intention to off-set his claim against the rent at least one month before the rent is due.

B. PECL

Also under the Principles the question arises as to whether the letter can be regarded as an offer and the payments as acceptance pursuant to Art. 2:201 and 2:204 PECL. Art. 2:201 (1) PECL defines an offer as a proposal to make a contract. It is doubtful whether the simple "demand of a higher rent" can be seen as an offer. Pursuant to Art. 5:101 (1)-(3) PECL, a contract shall be interpreted according to (i.) the common intention of the parties, or (ii.) the intention of one party if this party did not express its intention accurately and the other side knew the real intention, or (iii) an objective method, meaning that the judge shall refer to the meaning that reasonable persons, placed in the same circumstances as the parties, would have given to the contract. This rule must further apply *mutatis mutandis* to the declarations of will leading to the contract. However, according to Art. 5:101 (2) PECL, one could say that a reasonable person in the situation of the tenant would interpret the letter as an offer.

Under the Principles there are nonetheless added difficulties in construing an acceptance by conduct, 2:204 (1) PECL. Whether conduct amounts to an acceptance will depend upon the circumstances.²⁰⁷ The same difficulties as those found under German law arise. It is possible to argue that paying the rent twice without reservation can be regarded as

²⁰⁴ See only: LG Berlin, WuM 1989, p. 308 (tenant paid the rent for two months at once); LG Duisburg, WuM 1989, p. 192 (although in this case the tenant paid for many years); AG Leipzig, NZM 2002, p. 20 (two month), cf. also Weitemeyer, in: Staudinger (note 200), § 557, Rn. 33.

²⁰⁵ AG Bad Hersfeld, WuM 1996, p. 708 (five payments); LG Düsseldorf, DWW 1999, p. 377 (some months); see also LG Berlin, NJW-RR 1986, p. 236 (only one time is not sufficient).

²⁰⁶ Bittner, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, 2. Buch, Recht der Schuldverhältnisse, §§ 255-314 (Neubearbeitung, Berlin, 2001), § 271 margin no. 22.

²⁰⁷ Lando/Beale (note 92), Art. 2:205, p. 271.

an acceptance. Therefore, the rent increase is lawful and no off-setting would be possible in line with Art. 13:101 PECL.

Question 16: Deposits

What are the basic rules on deposits?

A deposit is not prescribed by German law. The parties must agree to it, which is the common practice.²⁰⁸ However, by law the deposit must not exceed three monthly rent payments, § 551 (I) BGB. The deposit only serves as a protection of the landlord's claims against the tenant. It has to be paid directly to a savings account with interest common for saving accounts and with a three months termination period, § 551 (III) BGB. After termination of the contract the landlord has to return the deposit including interest, unless he has a claim against the tenant. He can thereafter off-set his claim against the tenant's for reimbursement of the deposit. The landlord does not have to return the deposit immediately after the termination of the contract. He can wait and see whether additional claims may arise (for example, due to the fact that the tenant failed to renovate the apartment, a duty that was foreseen in the contract). As a general rule, a court will grant up to six months, but the time span depends on the particular circumstances, so a longer period may be possible.²⁰⁹ The landlord will, however, lose his right of retention²¹⁰ if the time limit has passed.

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 law on utilities (*Betriebskosten*) is heavily regulated in special Acts. The BGB contains only very few provisions with regard to utilities. According to § 556 BGB the parties may agree that the tenant has to bear the costs of utilities as defined in § 27 (1) II. BV. "II. BV" stands for Regulation on the housing cost calculation which comprises a full set of rules on the calculation of charges and encumbrances with regard to housing premises. The parties may agree that the tenant shall pay an appropriate lump sum each month to cover the cost of utilities. The landlord is required each calendar year to render an account, and the balances in favour of each party must be settled. According to § 535 (I) (3) BGB, the general rule in the law of lease is that the landlord shall bear all charges relating to the leased thing.²¹¹ In order to pass the charges on to

²⁰⁸ For details, see Derleder, Die Neuregelung der Mietsicherheiten und ihre Rechtsfolgen, WuM 2002, p. 239 ff.

²⁰⁹ OLG Düsseldorf, WuM 2002, p. 212.

²¹⁰ OLG Düsseldorf, ZMR 2002, p. 109, 110.

²¹¹ Cf. supra, Set 3 – Introduction.

the tenant there must be a contractual stipulation between the parties. With regard to a lease of housing premises, such stipulations are nowadays the norm; however, older contracts often contain provisions whereby the landlord bears the utilities or the tenant pays only a very low flat rate which covers all utilities, regardless of actual costs.

A clause containing the wording “the tenant shall bear all charges” will fail. This clause would be too indeterminate and therefore void. Thus, most contracts make reference to § 27 in conjunction with Annex 3 of the II. BV. This annex is normally attached to the contract. It contains a list of all relevant charges that have to be borne by the owner of the land and comprises an exact enumeration of costs arising from water supply, property tax, gardening, garbage collection, and illumination just to name a few examples.²¹² Matters are relatively straightforward if one tenant rents a house its entirety. He must bear the full costs. Where apartments in a block are leased to various parties, the method of calculation is naturally more complicated. It is clear that the costs have to be shared between the tenants but the allocation formula may vary. In modern premises there are often devices to register the exact consumption of gas and electricity. Therefore, the landlord will ask the tenant to conclude a separate agreement with a local electricity/gas distributor. This is in the interest of the tenant since he will pay the costs according to his consumption. In case of central heating and hot water, the landlord is in most cases obliged by law (§§ 5, 6 HeizkostenVO) to install read out devices in the apartment so the tenants share these heating costs according to their consumption. Furthermore, the HeizkostenVO set out special rules on how to distribute the costs for warm water and central heating, §§ 7 ff. HeizkostenVO.

With regard to costs that cannot be shared according to consumption, different methods of distribution are possible. Very often standard contracts provide for a distribution according to the size of the apartment in sqm, per capita or per accommodation unit (*Wohneinheit*).²¹³ It is clear that tenants have varying interests when distributing the costs. While singles prefer a per capita distribution, families favour a distribution according to the size of the apartment or accommodation unit. If the parties fail to agree on a particular method, § 556a (1) BGB provides that the costs shall be distributed according to the size of the living area, unless the law provides otherwise (e.g. with regard to heating and warm water). Should the parties agree on one model of cost allocation, this may only be changed by mutual consent. The landlord may however always opt for cost distribution according to consumption (§ 556a (II) BGB). This provision supports energy saving as if a tenant is required to pay in accordance with his consumption,²¹⁴ he has an incentive to consume less energy.

²¹² For a detailed description, see only M. Schmid, *Handbuch der Mietnebenkosten*, (5th Edition, Neuwied, 1999).

²¹³ “Wohneinheit” is meant in the sense of apartment. i.e., if there are eight apartments in a house, each apartment (independent of the size and number of tenants) has to bear 1/8 of the costs.

²¹⁴ Börstinghaus/Eisenschmidt (note 11), § 556a, p. 223.

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

Under German law, the basic obligations of a tenant are (i.) to pay the rent, § 535 (II) BGB, (ii.) to use the leased thing with due care and (iii.) to return it to the landlord after termination of the lease contract. The main obligations of the landlord are (i.) to grant the tenant possession of the leased thing, (ii.) to ensure the unhindered use of the leased thing, and (iii.) at least as a general rule, to bear all charges imposed upon the leased thing pursuant to § 535 (I) (3) BGB. Depending on the nature of a breach of contract (*Pflichtverletzung*) the primary remedies available to the other party are damages, and/or termination of the contract as well as abatement of the rent.

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)

A. German law

As mentioned in the introduction,²¹⁵ under German Law there is a mandatory control of standard business terms, pursuant to §§ 305 ff. BGB, which transposes the Council's Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.²¹⁶ It plays a crucial role for clauses in lease contracts.²¹⁷ Standard business terms are contractual terms formulated for a multitude of contracts which one party to the contract (the user) presents to the other party upon the conclusion of the contract. Contractual terms do not constitute standard business terms where they have been individually negotiated between the parties.

There are different "layers" of control: § 309 BGB contains a list of clauses that are invalid *ipso iure*. § 308 BGB contains a grey list of standard business terms that are normally invalid, but for whose assessment the judge has some discretion, and § 307 BGB contains a general clause for the review of subject matter. According to § 307 (I) BGB, standard business terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the person using such terms at an unreasonable disadvantage. An unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible. According to § 307 (II) BGB, an unreasonable disadvantage is assumed in case of doubt if a term (i.) is incompatible with essential basic principles of the statutory rule from which it deviates, or (ii.) restricts es-

²¹⁵ See *supra*, Introduction A 2. b.

²¹⁶ OJ 1993 L 95, p. 29. German law goes beyond the scope of the Unfair terms in consumer contracts Directive, see only Basedow, in: *Münchener Kommentar* (note 39), Vor § 305 margin no. 20.

²¹⁷ For a list of void clauses in lease contracts under the German AGBG, now incorporated in §§ 305 ff. BGB, see Basedow, in: *Münchener Kommentar* (note 39), § 307 margin no. 97; Harz, in: Schmid (note 40), Chapter 2 margin no. 221 and 337 ff. For an introduction to unfair terms in lease contracts after the reform of the Law of Obligations, cf. Heinrichs, *Das neue AGB-Recht und seine Bedeutung für das Mietverhältnis*, NZM 2003, p. 6 ff.

sential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved.

The scope of protection differs according to the contractual parties involved. While consumers who enter into a contract with a business person can – as foreseen in Directive 93/13/EEC – rely on §§ 307, 308 BGB and 309 BGB, contracts between business persons (which are not covered by Directive) fall within the scope of the control regime, but can only be reviewed under the general clause. The control regime further applies to pre-formulated contract terms even if they are intended for use only once, (§ 310 (III) BGB).

B. PECL

The Principles contain a control regime for standard business terms in Art. 4:110 PECL. As the Principles in general do not distinguish between consumer and commercial contracts, the control regime applies to all contracts.²¹⁸ Art. 4:110 PECL does not contain a black list of unfair terms. However, the Comment contains the list of black rules as annexed to the Directive 93/13 on unfair terms in consumer contracts and allows Courts and Arbitrators to use this list if they find it appropriate.²¹⁹ However, there is a difference between the Principles on one hand and the Directive and the German transposition on the other hand. While the Directive and § 309 BGB contain a black list with clauses that are *ipso iure* not binding, the PECL impose a sanction of voidability. A party may avoid a clause if it is unfair. However, avoidance under the Principles does not require the interference of a judge or arbitrator. Furthermore, pursuant to Art. 2:104 PECL, contract terms which have not been individually negotiated are void if the party invoking them failed to take reasonable steps to bring them to the other party's attention before or when the contract was concluded. Art. 5:103 PECL enshrines the so-called *contra proferentem* rule which exists also in German law in § 305c (II) BGB.

Question 19: Frequent Standard Terms

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

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

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

²¹⁸ Lando/Beale (note 92), Art. 4:110, p. 266.

²¹⁹ Lando/Beale (note 92), Art. 4:110, p. 268.

A. German law

a) A clause prohibiting a set-off would be invalid according to § 309 (No. 3) BGB. According to this rule, a provision by which the user's contractual partner is deprived of the right to off-set a claim which is undisputed or has been declared final and absolute is void. However, in most cases, its non-enforceability flows equally from the law of lease. According to the mandatory § 556b (II) BGB, the tenant may, despite such a contractual clause, off-set a claim arising from damages on grounds of a defect in the rented premises, from expenditures on the premises that the landlord has to refund or resulting from unjust enrichment due to overpayment of rent against the landlord's claim for the monthly rent. However, the tenant has to inform the landlord of his intention to off-set his claim against the monthly rent one month in advance in textual form.

b) So-called "clauses on small reparations" are common in tenancy contracts. In principle, they are valid provided that they (i.) limit the duty to bear the repair costs to those things that are frequently used by the tenant and (ii.) have a reasonable maximum ceiling. The limitation to certain objects is necessary because the tenant should not bear reparation costs of things he cannot use directly, such as pipelines, wires or glass panes. Courts are divided on what constitutes a reasonable maximum limit. For small repairs, the Federal Court of Justice has held as reasonable the sum of € 50.²²⁰ The Oberlandesgericht Hamburg has accepted up to € 75 for one reparation.²²¹ But a ceiling of between € 150 and € 200 for all reparations necessary in one year has been held reasonable if this amount is not above 6 – 9 % of the overall rent for a year.²²² The Oberlandesgericht Hamburg considered as unreasonable a limit of 10 % of the rent paid in a year.²²³ As a result, the clause at stake in Question 19 would be valid provided it identified those defective objects needing to be repaired at the tenant's expense.

c) The so-called "craftsmen clause" has been held to be invalid according to § 307 (I) BGB. It is alleged to be contrary to the principle of good faith.²²⁴ The landlord can only require that the work is effected in a "workmanlike" manner. If the tenant is capable of doing so he may personally renovate the property, which ought to be more cost-effective than contracting with a professional.

d) Such a clause would be invalid. As mentioned above,²²⁵ the basic rights form a value system that must be given effect in all areas of the legal system including the field of

²²⁰ BGH, WuM 1989, p. 324; BGH, WuM 1991, p. 381.

²²¹ OLG Hamburg, WuM 1991, p. 385.

²²² OLG Stuttgart, WuM 1988, p. 149.

²²³ OLG Hamburg, WuM 1991, p. 385.

²²⁴ OLG Stuttgart, WuM 1993, p. 528.

²²⁵ See *supra*, Introduction, A 1 c.

private law. Though fundamental rights do not bind private actors directly, they “radiate” through general clauses, such as § 307 BGB, into the realm of private law and have an indirect (horizontal) effect. Art. 9 GG protects the freedom to form corporations and, as such, a German court would overturn this clause.

In the case of invalid clauses, a registered tenant association can file a motion for an injunction in a competent court, §§ 3 (I) (No. 1), 4 Injunctions Act (*Unterlassungsklagengesetz*).

B. PECL

a) This clause would also fail pursuant to Art. 4:110 PECL. The blacklist referred to in the Comments declares such a clause to be voidable (No. 1 (b)).²²⁶

b and c) In cases b and c, the tenant may avoid these clauses if, contrary to the requirements of good faith and fair dealing, they cause a significant imbalance in the party’s rights and obligations arising under the contract to the detriment of the tenant, taking into account the nature of the performance to be rendered under the lease contract, all other terms of the contract and the circumstances at the time the contract was concluded, Art. 4:110 PECL. There are no precedents applicable to the given cases and it seems likely that a German court applying the Principles would come to the same result as under German law.

d) In case d, the influence of the German constitution will also apply if the Principles are incorporated into the BGB. Thus, this clause would be avoidable.

Question 20: Changes to the Building by the Tenant

T is a tenant in a building with 4 floors and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses alleging that if he were to do so he would have to give his permission to every tenant to do likewise, which would ruin the view of the house aesthetically. 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.

There is a vast body of jurisprudence on the question as to whether the tenant can demand the permission to install a satellite dish from the landlord. The German Constitutional Court has held that tenants may be allowed to install antenna dishes on their houses to practice their right to inform themselves without hindrance from generally accessible sources, as protected by Art. 5 (I) GG. But the ordinary courts have to weigh up in each individual case the property right of the landlord protected by Art. 14 (I) GG

²²⁶ Lando/Beale (note 92), Art. 4:110, p. 266.

and the freedom of information protected in Art. 5 (I) GG. One can sum up the basic Court practice as follows: A German tenant usually cannot demand permission to install an antenna dish if the house has cable television or an antenna. Cable television provides a tenant normally with 20-25 channels which satisfy information demands in general. It is common that foreign programs are also included in these channels. Thus, the landlord's property right will prevail over the tenant's right of freedom of information.²²⁷ If the German tenant can show that he has a higher information need, e.g. due to his profession, he can claim permission provided that he proves that this interest cannot be satisfied by other means such as decoded programs or via internet.²²⁸

However, the very limited possibility for German tenants to install antenna dishes may be contrary to European law, particularly with regard to Art. 10 ECHR and Art. 49 EC Treaty. The European Court of Justice affords indirect horizontal effect to the freedom to provide services (Art. 49 EC Treaty), meaning that it can equally be applied to a situation involving two private actors.²²⁹ The Commission of the European Communities is of the opinion that the freedom to provide services will be restricted if tenants cannot install antenna dishes in order to access channels from other European countries.²³⁰ As a consequence, European law will further curb the possibility of landlords to deny permission to install antenna dishes.²³¹

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?

Matters are different when a foreign tenant rents the apartment. Art. 5 GG grants foreigners a right to inform themselves about events in their home countries in their native language. In most cases, a foreign tenant can request the permission to install an antenna dish even if the premises are connected to cable television, unless a satellite dish provided for common use offers a wide range of programs from the tenant's home country.²³² In a recent case, a court required a landlord to allow a Polish tenant, who received one Polish state TV channel via cable, to install an antenna dish which enabled 14 addi-

²²⁷ BVerfGE 90, p. 27; LG Konstanz, WuM 2002, p. 210.

²²⁸ Berlin VerfGH, NZM 2002, p. 560.

²²⁹ ECJ, Cases C-51/96 and C-191/97, [2000] E.C.R. I-2549 – *Deliège/Ligue Francophone de Judo et Disciplines Associées ASBL*. With regard to the free movement of workers the ECJ goes a step further and accepts a direct effect between private actors, cf. ECJ, Case C-281/98, [2000] E.C.R. I-4139 – *Angonese/Cassa di Risparmio di Bolzano SpA*.

²³⁰ Commission Communication on the Application of the General Principles of Goods and Services – Art. 28 and 49 – Concerning the Use of Satellite Dishes, http://europa.eu.int/comm/internal_market/en/services/services/antenna_en.pdf.

²³¹ See Dörr, Das Recht auf eine Satellitenempfangsanlage unter Berücksichtigung der EU-Mitteilung zum freien Dienstleistungs- und Warenverkehr, WuM 2002, p. 347 ff.

²³² BVerfG, NJW 1994, p. 1147; BVerfG, NJW-RR 1994, p. 1232; OLG Karlsruhe, WuM 1993, p. 525 ff.; LG Köln, WuM 2001, p. 235.

tional Polish channels to be received.²³³ Importantly, the landlord is legally entitled to make his permission contingent upon a professional installation.²³⁴

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?

In this case a German court will be required to weigh the right to freedom of speech, as enshrined in Art. 5 (I) (1) GG, against a property right, as laid down in Art. 14 (I) GG. On the one hand, since T's property is not damaged nor disturbed physically by the poster (in the case of an antenna-dish, the dish must be fixed to the wall with screws) he can only advance "aesthetic" arguments. On the other hand, freedom of speech, as a right to participate actively in a political debate, is very important in a democracy.²³⁵ One must further consider the interests of the other tenants who may be perturbed by the poster and its contents. All relevant factors must therefore be taken into account, e.g. the size of the poster, its content, how long it is placed in view, whether it is affixed on the balcony or is stretched over the entire facade. The Landgericht Hamburg decided that the landlord cannot demand the removal of a poster sized 2m x 0,5m, affixed outside the window leading to the balcony which expresses the tenant's opposition to nuclear energy.²³⁶ The Amtsgericht Freiburg has held that a tenant can affix a political poster in his window.²³⁷ However, the Landgericht Tübingen ruled that such a poster must be removed if other tenants are offended by its political content.²³⁸ The tenant in that case had put a poster against Pershing II-missiles in his window and the law firm that rented rooms in the basement feared losing clients.

In a case concerning a dispute between two apartment owners, the Kammergericht Berlin refused to allow the defendant to cover the whole facade of the premises with banners against nuclear energy.²³⁹

In light of the foregoing, the landlord cannot demand the removal of the poster in this example, unless it covers a part of the facade or it severely disturbs the sanctity of the home.

If the poster affixed to the balcony would disturb public security or threaten public order, L could further ask the local authorities to remove the poster according to administrative law and procedure. In the given case neither public security nor public order is violated. This may change if the poster contained content of a grossly offensive or insulting nature.

²³³ AG Hamburg-Blankenese cited by Maaß/Hitpaß, NZM 2003, p. 181.

²³⁴ OLG Karlsruhe, WuM 1993, p. 525 ff.

²³⁵ BVerfGE 62, p. 330, 247; BVerfGE 71, p. 206, 220; BVerfGE 76, p. 196, 208.

²³⁶ LG Hamburg, NJW 1986, p. 320.

²³⁷ AG Freiburg, WuM 1987, p. 144 ff.

²³⁸ LG Tübingen, NJW 1986, p. 321 ff.

²³⁹ KG Berlin, WuM 1988, p. 181 ff.

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

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

There is no statutory provision prohibiting the landlord from keeping a spare set of keys to the apartment. However, as a general rule, the landlord may only enter with the tenant's consent. An exception to this rule applies to a case of imminent danger (see e.g. case 30). The right of the landlord to enter the apartment without previous notice in this circumstance is commonly provided for in standard contracts. In all other cases, a landlord who enters the apartment without the tenant's consent commits the criminal offence of trespass (*Hausfriedensbruch*) pursuant to § 123 (I) German Criminal Code.

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 so under what legal basis?

L is liable for damages. T's daughter can claim both under the law of (quasi) contract and torts. Although she is not party to the lease contract, she falls within its "protective umbrella", i.e. the so-called secondary duties of protection (*Schutzpflichten*) arising under the contract are extended to her. This concept is described as a contract with protective effects towards third parties (*Vertrag mit Schutzwirkung für Dritte*). This type of legal construct has been developed by the courts in order to circumvent some peculiar features of the German law of torts, which were widely considered to generate unjust results. Firstly, § 823 (I) BGB, which can be characterised as the main provision of the law of torts, does not allow for the recovery of pure economic loss. Secondly and more importantly, the provision for vicarious liability (*Haftung für Verrichtungsgehilfen*, § 831 BGB) allows the principal to avoid liability for torts committed by his auxiliaries as long as he can prove that he has selected and supervised them carefully.²⁴⁰ Needless to say that a direct action against the negligent assistant is possible, but economically often meaningless when the latter lacks the necessary means to pay for the damages. In order to close these gaps, academic opinion and the courts have developed the concept of contracts with protective effects towards third parties. In general, three requirements must be met in order to generate a protective effect towards third parties:²⁴¹ (i.) There must be a close relationship between the third party and the party to the contract (i.e. the person that would have the contractual claim if he or she suffered a damage due to the breach of a protective duty), usually referred to as 'proximity of performance' (*Leistungsnähe*); (ii.) The contractual party must have some interest in protecting the third party; in older cases Courts used to say that he must be responsible for the third party

²⁴⁰ See Markesinis/Lorenz/Dannemann (note 72), p. 276.

²⁴¹ See Markesinis/Lorenz/Dannemann (note 72), p. 279.

for better or for worse (*Wohl- und Weheverhältnis*), although in more recent cases this expression has not been employed. Typically parents want to protect their children and employers have an interest in ensuring their employees are not harmed. As mentioned previously, courts tend to interpret this condition very flexibly and apply it equally to cases involving pure economic loss alone; e.g. the liability of notaries or lawyers for damages caused to third parties resulting from a poor performance of a contract between the notary/lawyer and his client²⁴². (iii.) The party who caused the damage must have been able to foresee that the third party would suffer damage during the performance of the contract.

All three conditions are met. Firstly, T's daughter lives in the apartment and, therefore, has a close relationship with the contracting party and the performance of the contract. Secondly, T is responsible for his daughter's well-being and has an interest in her health and safety. Thirdly, L – knowing that T resides with his family in the apartment – could foresee that T's daughter may be harmed. As a consequence, the child falls within the “protective umbrella” of the lease-contract. Since all other requirements for contractual liability based on breach of contract (*Pflichtverletzung*²⁴³) are met, L is liable for damages caused to C. In addition, since L's negligence caused damage to C's health and body, she could further claim damages under the law of torts, § 823 (I) BGB.²⁴⁴

Set 5: Breach of Contract

On January 1st, 2002, the Act to Modernise the Law of Obligations came into force. This revision changed large parts of the General Part of the German law of obligations and, to quote *Schlechtriem*, “overhauled” the law of sales and construction contracts.²⁴⁵ The new system is based on a general concept of breach of an obligation, regardless of whether this obligation is created by contract or arises by virtue of the law, or by the recently codified pre-contractual duties of care to protect the prospective partner's real and personal rights and interests according to §§ 311 (II), 241 (II) BGB. The content of the obligation is determined by law and – in the case of contractual obligations – by the parties' agreement, unless party autonomy is restricted by legal norms. If a party deviates from the content of an obligation, this constitutes a breach (*Pflichtverletzung*). If there has been a *Pflichtverletzung*, the obligee has a wide variety of general remedies, which depend on additional prerequisites. The main remedies are: a claim for specific performance according to § 241 BGB, which in case of non-conformity is aimed at remedying the non-performance (e.g. §§ 437, 439 BGB for sales-contracts); termination of contract with *ab initio* effect (*Rücktritt* e.g. § 323 BGB for synallagmatic contracts), and a claim for damages according to § 280 BGB. In certain types of contracts, such as a tenancy contract, the obligee may further exercise a right of price reduction e.g. according to § 536 BGB (abatement of rent).²⁴⁶

²⁴² See only OLG Bremen, NJW 1977, 638.

²⁴³ For details, see Set 5: “Breach of Contract”.

²⁴⁴ For details, see Question 29.

²⁴⁵ Schlechtriem, (2002) Oxford U Comparative L Forum 2 at ouclfiuscomp.org.

²⁴⁶ For an overview of the Reform of the German Law of obligations in English, see Schlechtriem, (note 245), and especially Zimmermann, in: Bonell (Dir.), Centro di studi e ricerche di diritto comparato e

Question 23: Destruction of the house

- a) *L and T conclude a tenancy contract. Before T takes possession of the apartment, it is destroyed by fire for which neither party is responsible.*
- b) *Does it make a difference if the apartment is destroyed after transfer of possession to the tenant?*
- c) *Does it make a difference if the apartment has already been destroyed at the time of the conclusion of the contract without the parties' knowledge?*

A. German law

a) Due to the destruction of the premises, T cannot claim to be placed in possession according to § 535 (I) BGB. A claim for performance is excluded by § 275 (I) BGB, inasmuch as the performance of an obligation is impossible. § 275 BGB applies to all kinds of impossibility: objective impossibility (nobody can perform), subjective impossibility (only the obligor is unable to perform, someone else could), initial impossibility (performance was already impossible at the time when the parties concluded the contract), subsequent impossibility (performance has become impossible after conclusion of the contract) as well as partial and full impossibility. In the case at hand, T's claim is excluded because it is objectively impossible for L to perform his duties. Nobody, neither T nor any other person, can grant use of the completely destroyed apartment. Also, T is not entitled to claim damages according to §§ 281 (I), 280 (I) BGB since there is no culpable breach of duty (*Pflichtverletzung*).

On the other hand, L cannot claim payment of the rent. The two obligations of the granting of use and the payment of the monthly rent are synallagmatically connected. L has a claim for rent arising of the contract of lease, § 535 (II) BGB. But since L's obligation under the lease contract (i.e. to grant the use of the premises) is impossible, he is, therefore, relieved from performance. Equally he loses his claim to counter-performance, that is the monthly payment of rent by T, according to §§ 275 (IV), 326 (I) (1) BGB.

Often, the landlord has insured the house against fire. If the fire was not caused by L or T, the insurance will pay a compensation to L. T cannot claim this money from L. It is true under § 285 (I) BGB that an obligee may generally claim a substitute (*stellvertretendes commodum*) if the obligor is relieved from performance under § 275 (I) - (III) BGB. § 285 (I) states that, if, as a result of a circumstance under which § 275 (I) - (III) BGB relieves the obligor of the obligation to perform, the obligor obtains a substitute or a substitute claim for the object owed, the obligee may demand surrender of what has been received as substitute or an assignment of the substitute claim. This rule is based on the following ratio: The obligor is under the duty to deliver an object. If he is relieved from that duty he shall at least give any substitute he has acquired in the object's place.

straniero, No. 48 (Rome, 2002); Zimmermann, *EdinLR* 6 (2002), p. 271 ff.; Zimmermann, in: Birks/Pretto (Eds.), *Themes in Comparative Law in Honour of Bernard Rudden* (Oxford, 2002), p. 265 ff.

In the case discussed here, the money from the insurance is a substitute for the "substance" of the destroyed apartment; it does not constitute a substitute for the non-use of the housing premises. Thus, T can neither claim performance nor this substitute from L.

b) The answer to case b is the same as given in the answer to case a.

c) The tenant cannot claim possession of the premises if the fire occurred without the parties' knowledge before the contract was concluded. It is a case of initial objective impossibility. The tenant's claim for performance is excluded under § 275 (I) BGB. Furthermore, he is not entitled to claim damages according to § 311a (II) BGB, since the landlord did not know about the impossibility of the performance and was not responsible for his lack of awareness.²⁴⁷ However, *Canaris* argues that in case of initial impossibility an obligor not knowing about the impediment and therefore relieved from performance should at least be liable for the negative interest.²⁴⁸ His view is based on the analogous application of § 122 BGB, according to which a person who rescinds a contract for mistake must compensate the other party for damage that the other party sustained in relying upon the validity of the contract. *Canaris* argues that the case of initial impossibility is comparable with the case of mistake, since the obligor does not know that the apartment was destroyed. § 122 BGB makes clear that a party who wants to rescind a contract for mistake can only do so at the cost of paying the negative interest. Thus, this reasoning should be applied to cases of initial impossibility. The German legislature left this question to be solved by the courts.²⁴⁹ One has to emphasize that *Canaris'* view is not undisputed. Other scholars point out that an analogy cannot be drawn since both cases are different. It is not the mistake that relieves the obligor from performance but the impossibility. He does not have to perform even if he knew about the impediment. Hence, his position is much stronger than that of a person who rescinds the contract for error.²⁵⁰

For the sake of completeness, one has to point out that the landlord cannot claim rent when he is relieved from his part of the performance, §§ 275 (IV), 326 (I) BGB for the same reason as explained in case a.

B. PECL

a) As *Zimmermann* puts it, the Principles do not, of course, attempt to force a debtor to perform what he is unable to perform.²⁵¹ Thus T's claim of performance is bound to fail.

²⁴⁷ With regard to the practicability of the new § 311 a II BGB, see the critical remarks of Meier, *Neues Leistungsstörungenrecht*, Jura 2002, p. 187, 188 ff.

²⁴⁸ *Canaris* JZ 2001, p. 499, 507; *Canaris*, in: *Schulze/Schulte-Nölke* (note 16), p. 64 ff.

²⁴⁹ Cf. *Regierungsentwurf*, BT-Drucksache 14/6040, p. 166.

²⁵⁰ *Faust*, in: *Faust/Huber* (note 16), p. 220; *Dauner-Lieb/Dötsch*, *Schuldrechtsreform: Haftungsgefahren für Zwischenhändler nach neuem Recht*, DB 2001, p. 2534, 2539. For an English summary of the dispute, see *Zimmermann*, *EdinLR 6* (2002), p. 271, 299 ff.

²⁵¹ *Zimmermann*, *EdinLR 6* (2002), p. 271, 281; *Zimmermann*, in: *Bonell (Dir.)*, *Centro di studi e ricerche di diritto comparato e straniero*, No. 48 (Rome, 2002), p. 11.

Pursuant to Art. 8:101, read in conjunction with Art. 8:108 PECL, the obligee cannot claim performance where the obligor's non-performance is excused. A non-performance is excused if it is due to an impediment arising after the conclusion of the contract that was beyond his control and that he could not reasonably have been expected to take into account, or to have avoided or overcome. The fire, which has arisen after the conclusion of the contract, was outside L's control and could not reasonably have been foreseen. Thus, T cannot claim specific performance. Furthermore, a claim for damages is also excluded pursuant to Art. 8:101 (2) read in conjunction with Art. 8:108 PECL. Contrary to German law, the Principles do not provide a remedy to obtain a substitute the obligee acquired. However, in the given case, the result is the same as under German law, since the compensation from the insurance is the substitute for the destroyed house and not a substitute for the lost use of the housing premises.

b) As under German law the solution under the Principles does not depend on whether the apartment was handed over to the tenant. Thus, the answer to this question is the same as in case a).

c) If the apartment was destroyed prior to the conclusion of the contract, the tenancy contract is valid, Art. 4:102 PECL. The Principles treat the case of initial impossibility in the same way as other mistakes.²⁵² Thus, the obligor, in our case the landlord, may rescind the contract if he could not have known about the initial impediment. The Principles do not hold the obligor liable for the negative interest in this situation. Thus, the solution found under the Principles is the same as in the BGB if § 122 BGB is not applied analogously.²⁵³ If the obligor knew or could have known about the impediment, he is liable for the positive interest according to the general rules on non-performance, Art. 8:101, 9:301 PECL.

Question 24: "Double Contracts"

L concludes a tenancy contract with T1. Shortly after, he concludes another tenancy contract for 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 takes possession of the apartment. The two contracts are only discovered when T2 aims to take possession of the apartment. What are the legal consequences arising out of both contracts and the rights of the parties?

²⁵² Lando/Beale (note 92), Art. 4:103, p. 234.

²⁵³ Zimmermann, EdinLR 6 (2002), p. 271, 301.

A. German law

Under German law, a person is entitled to oblige himself to render the same performance as many times as he wishes to do so. All concluded contracts will be valid. Thus, a seller can sell the same thing to different customers and a landlord can conclude two contracts with tenants on the same apartment. Up to the point of the obligor's performance, the claims of the obligees are concurring. The obligor has a right to choose which contract he will perform.²⁵⁴

When one tenant moves into the premises, his possession is lawful, irrespective of whether he contracted first or second with the landlord, and the latter's right to choose ceases to exist.²⁵⁵ The other tenant (T2) cannot demand specific performance of his contract with the landlord. Although he may premise such a claim on § 535 (I) BGB, which obliges the landlord to hand over the rented thing, § 275 (I) BGB excludes the obligation to perform in case of subjective or objective impossibility. The case at hand concerns subjective impossibility since T1 could move out and, thus, it would be possible for L to grant the use to T2. However, in litigation in which T2 sues L for performance of the lease contract, in order to be relieved from performance L would have to prove that he is unable to evict T1 nor convince him to leave.²⁵⁶

As a remedy, T2 can sue L for damages. The fact that L handed over the premises to T1 constitutes a defect in law (*Rechtsmangel*). L does not possess the right to grant T2 possession of the premises anymore, necessary for the performance of the lease contract. Thus, a claim for damages arises based on §§ 536 (III), 536a (I) (2nd Alt.) BGB.²⁵⁷ In addition to the claim for damages, T2 can also terminate the contract with immediate notice based on an important reason, § 543 (II) (no. 1) BGB. Furthermore, he is not obliged to pay the rent, § 536 (I) (2) BGB.

B. PECL

Both contracts would also be valid under the Principles. T1 moved into the apartment after the contract was concluded with T2. Thus, the (subjective) impossibility occurred after conclusion of the contract. L's non-performance cannot be excused under Art. 8:108 (1) PECL. He contracted twice regarding the same apartment. This error was his alone. A diligent landlord would have checked whether he had rented the premises to someone else. Therefore, T2 can invoke all remedies as laid down in Chapter 9 of the Principles. A claim for performance is nonetheless excluded under Art. 9:102 (1) (a) PECL since it is impossible. The landlord is, however, liable for damages caused by non-performance, according to Art. 9:501 PECL. Moreover, T2 can terminate the contract in accordance with Art. 9:301 PECL and is entitled to reclaim any rent or deposit he may have paid in advance (Art. 9:307 PECL).

²⁵⁴ OLG Frankfurt, NJW-RR 1997, p. 77; OLG Schleswig, MDR 2000, p. 1428.

²⁵⁵ Harting, in: Schmid (note 40), Chapter 8 margin no. 114; Voelskow, in: Münchener Kommentar (note 30), § 541a margin no. 5; Derleder/Pellegrino, Die Anbahnung des Mietverhältnisses, NZM 1998, p. 550, 556.

²⁵⁶ Kluth/Grün, Mieterrechte bei Doppelvermietung, NZM 2002, p. 473, 474.

²⁵⁷ OLG Schleswig, MDR 2000, p. 1428; OLG Köln, ZMR 1998, p. 696.

Question 25: Delayed Completion

L is an investor and buys an apartment from a large 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 any delay unless directly responsible. L rents the apartment to T from 17/1/2003 without any special arrangements in the case of delay.

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

Has T any claims against L? Has L any claims against N?

A. German law

a) Rules on damages for delay of performance can be found in the general part of the law of obligations in §§ 280 (II), 286 BGB. Damages for delay in performance leave the obligor's duty to render performance unaffected. They compensate the obligee for loss suffered because the performance was not effected in time, especially for lost profits or expenses incurred as a result of the delay, provided the obligor acted with fault. Thus, T may demand compensation for delay in performance from L according to §§ 280 (I), (II), 286 BGB. The delimitation of delay and impossibility in the law of lease is very difficult. The rules of delay of performance are applicable if the debtor can still perform at a later point of time; otherwise the rules of impossibility would apply. Assuming that the contract was concluded for a longer period and contains a clause that the lease shall commence when use is granted, the delay cannot be regarded as a case of impossibility, as it would be if T leases housing premises only for a very short period.²⁵⁸ In the case at hand, T is in default with his part of performance, since he is unable to grant possession from January 17th, 2003 as foreseen in the contract. A special warning (*Mahnung*), which under German law is often necessary to put the obligor into default, is not necessary in this case since the parties agreed on a time for performance which can be determined with the help of a calendar (§ 286 (II) (No. 1) BGB). A claim exists only if the delay can be imputed to L. This is the case, if L acted intentionally or negligently according to § 276 (I) BGB. In my opinion, the landlord acted negligently. In purchasing a semi-completed apartment, he is aware or at least ought to have been aware of the contentious nature of the building permit. With regard to the rental of housing premises, courts formerly interpreted the promised date when possession was to be granted as a personal guarantee by the landlord, who, therefore, was liable even if it was established that he did not act intentionally or negligently.²⁵⁹ Thus, one can argue that

²⁵⁸ For the delimitation of impossibility and delayed performance, see Emmerich, in: Staudinger (note 4), §§ 535 margin no. 17; BGH, NJW 1992, p. 3226, 3228.

²⁵⁹ See only BGH, MDR 1970, p. 756 and Emmerich, in: Staudinger (note 4), § Vorbem zu 536 margin no. 12 with further references.

upon conclusion of the contract L guaranteed that T would be free to enter the apartment on January 17th, 2003 and is therefore required to compensate him for all costs caused by the delay of nearly a year.

b) Under German administrative law, a neighbour's appeal to the building permit has no suspensive effect, § 212a Federal Building Code (*Bundesbaugesetzbuch*). However, the neighbour can stop the building works by suing the local authority before the competent Administrative Court in order to obtain an interlocutory injunction which suspends the building permit, §§ 80 (V), 80a (I) (No. 2) Administrative Procedure Code (*Verwaltungsgerichtsordnung*). Though the building permit is ultimately held lawful, L cannot claim damages from N. There is no public law right upon which he could base his claim. Matters are different in cases before ordinary courts. Pursuant to § 945 ZPO, in a civil procedure case, a party that obtains a favourable interlocutory injunction and enforces it is liable for damages if the injunction was unfounded.

B. PECL

a) L can claim damages for non-performance. Under the Principles, non-performance may consist in a defective performance or in a failure to perform at the time performance is due, be it a performance which is effected too early, too late or never.²⁶⁰ In the case at hand, L did not perform at the time when performance was due, i.e. January, 17th 2003. Unlike the BGB, the Principles do not require a special warning to establish delay in performance, although in the given case even under German law this warning is dispensable. The range of remedies for non-performance under the Principles depends on whether the impediment causing non-performance can be excused, Art. 8:101 read in conjunction with Art. 8:108 (1) PECL.

A party's non-performance is excused if this party proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences. The term impediment covers every sort of event, such as natural occurrences, or acts of third parties.²⁶¹ One can argue that the non-performance cannot be excused in the case at hand. The delay was within the landlord's sphere of control, since one can say that he used the investor to ensure his performance. Thus, T2 can invoke all remedies laid down in Chapter 9 of the Principles. The most important remedy is a claim for damages pursuant to Art. 9:501 PECL.

b) In the absence of a contract between L and N, the Principles do not apply to possible claims L might invoke against N.

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

L rents an apartment to T. Stains of mildew have been found in some corners and, as a result, T wants a reduction in the rent

²⁶⁰ Lando/Beale (note 92), Art. 8:101, p. 359.

²⁶¹ Lando/Beale (note 92), Art. 8:108, p. 379.

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

Variant 2:

a) T failed to discover the mildew stains when inspecting the house prior to entering into the contract, despite the fact that they were already present. Does this preclude her from claiming a rent reduction?

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

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

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

A. German law

a) If the rented thing is affected by a defect which diminishes its fitness for the stipulated use, or if such a defect arises during the term of lease, the lessee is bound to pay only an appropriate part of the rent. According to § 536 (I) BGB an insignificant diminution in fitness is not taken into account. A defect is a negative deviation from the state or quality in which the leased thing is supposed to be. Mildew stains beyond doubt must be considered as a defect in the rented thing, as, under normal circumstances, housing premises will be rented without such stains. Mildew, moreover, puts the health of the tenant at risk.²⁶² Thus, T can claim a reduction in rent. A more difficult question to answer is to what extent. Firstly, the percentage of "the rent" against which any calculation should be made will be disputed.²⁶³ Most Courts tend to base their calculation on the net-rent,²⁶⁴ that is to say the rent minus utilities and costs for heating etc. In general, Courts assess the abatement in a percentage. The percentage varies according to size, duration and nuisance caused by the defect. Stains of mildew may entitle the tenant to reduce the rent by about 10-15%; however, if the living room, the kitchen and the bedroom are permanently damp and reveal significant mildew stains, an abatement up to 80% is possible.²⁶⁵

Variant 1

²⁶² See only OLG Celle, ZMR 1985, p. 10; LG Kassel, WuM 1988, p. 355

²⁶³ For details, see Gellwitzki, Das Leistungsverweigerungsrecht des Wohn- und Gewerberaummietrechts bei Gebrauchsstörungen am Mietobjekt, WuM 1999, p. 11, 15.

²⁶⁴ LG Heidelberg, WuM 1997, p. 42, 44; Harting, in: Schmid (note 40), Chapter 8 margin no. 162 with further references.

²⁶⁵ LG Berlin, GE 1991, p. 625.

§ 536c (I) BGB places a duty on the tenant to notify the landlord immediately should a defect occur. This T has dutifully done. According to § 563a (II) (no. 1) BGB, T can cure the defect on his own and reclaim the costs from L, provided that L is in default. As mentioned above, § 286 (I) BGB provides as a general rule that an obligee needs to send the obligor a notice in order to place him in default. The notification of the defect as such is not regarded as a notice.²⁶⁶ However, if the tenant combines the notification with a fixed deadline, the landlord will be held to be in default once the time-limit expires, provided that the given deadline was reasonable to enable the landlord to complete the work.²⁶⁷ Assuming that the period in question is reasonable, L is in default two weeks after he received T's letter, and T could order the renewal of the wallpaper. T may off-set his claims against the monthly rent in accordance with § 387 ff. BGB. However, § 556b (II) BGB provides that T must inform the landlord one month before the rent is due of his intention to off-set the renovation costs against the rent.

Variant 2

According to § 536 BGB, the tenant is permitted to reduce the agreed rent should the premises have a defect. This remedy is excluded if the tenant knew of the defect in the leased object when concluding the contract, § 536b BGB. If the tenant did not know of the existence of a defect due to his own gross negligence, the rent can only be reduced by the tenant if the landlord fraudulently concealed the defect. Thus, the answer to the given case depends very much on the particular circumstances. If the stain was well hidden, e.g. behind furniture, T will not be held grossly negligent in failing to identify the defect and may therefore reduce the rent. If the stain was clearly visible, T did not act with the necessary diligence, and would be prevented from reducing the rent unless L fraudulently concealed the defect.

If the state of the premises constitutes a threat to the health or life of the tenant or third parties, T could make a complaint to the local authorities. The relevant authorities may order L to take action to eliminate these risks.

b) Noise from a building site can be a defect with respect to § 536 (I) BGB if it is not customary to a given location.²⁶⁸ Therefore, T could claim abatement of the rent by around 10-20%, depending on the circumstances.²⁶⁹ This remedy is applicable irrespective of whether the landlord is at fault.

²⁶⁶ OLG Düsseldorf, ZMR 1993, p. 115.

²⁶⁷ Emmerich, in: Staudinger (note 4), § 536a margin no. 15.

²⁶⁸ BayObLG NJW 1987, p. 1950, 1951; LG Kassel, NJW-RR 1989, p. 1292.

²⁶⁹ See Harting, in: Schmid (note 40), Chapter 8 margin no. 351 with further references.

c) Loud noise from music at night over a definite period (not the annual birthday party) entitles the tenant to a reduction of between 20%²⁷⁰ and 50%.²⁷¹ Moreover, in this case, the landlord is liable regardless of fault, though he may seek redress from his neighbours under the law of tort.

B. PECL

a) The Principles contain a rule on price reduction. Pursuant to Art. 9:401 (1) PECL a party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time. It is not clear whether this rule will replace § 536 BGB. Unlike the Principles, the German BGB does not contain a single general rule on price reduction, but rather several rules which are each applicable to specific contracts, e.g. §§ 437 (No. 2), 441 BGB is the rule for sales contracts, § 536 BGB the rule for lease contracts and §§ 634 (No. 3), 638 BGB the rule for work contracts. Although a common base exists for the German rules on price reduction, each rule is adapted in accordance with the needs of the specific contract. As such, the buyer of a thing can only reduce the price if the object, at the time when the risk passes on to him (that is in most cases the handing over of the object, § 446 BGB), contains a defect which diminishes or destroys its value. A tenant, however, has entered into a long term contract and therefore can reduce the rent even if the defect occurs after he has moved into the premises. Importantly, however, a tenant cannot claim a reduction in price for an insignificant diminution in fitness, while the buyer can reduce the price if there is an insignificant defect.

Art. 9:401 PECL seems to be tailored to the law of sales or work contracts. It is applicable to cases where the defect exists when the obligation is performed.²⁷² Provided that the stains of mildew existed at the time when T moved in, he can abate the rent proportionately. However, if the stains occur after he moved in, it is doubtful whether the remedy laid down in Art. 9:401 PECL, applies since the wording of the rule applies to a “tender of performance not conforming to the contract” and not to a defect which occurs later.

Art. 9:401 PECL is a general rule of the general part of the law of obligations. One can argue that it sets out a general principle which has to be adapted to specific contracts. In our case, one can argue that this general rule would not affect the principle of abatement of rent laid down in German tenancy law.

Variant 1:

The Principles grant the tenant a claim for damages for non-performance, Art. 8:101, 8:108, 9:102 PECL. T does not perform his obligation to repair the defect within a reasonable time period. Therefore, T can claim damages for the repair costs and off-set them from the rent according to Art. 13:101 PECL.

²⁷⁰ AG Lünen, DWW 1988, p. 283 (partying neighbours during weekends); LG Dortmund, NJW-RR 1988, p. 1041 (neighbour arranged loud parties).

²⁷¹ AG Braunschweig, WuM 1990, p. 147 (loud music during the night).

²⁷² Lando/Beale (note 92), Art. 9:401, p. 431 (illustration no. 2).

Variant 2:

The Principles do not exclude the right of price reduction where the obligee was aware of the defect. Therefore, T has a claim arising from Art. 9:401 PECL.

b + c) See question 26a, T has a right to abate the rent proportionally.

Question 27: House to be used for a Specific Purpose

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

A. German law

In principle, the tenant bears the risk that he can use the leased premises for his purposes, just as every purchaser bears the risk that he can use a purchased thing. As a general rule the tenant will be bound by a contract despite the fact that he could not realise his envisaged business prospects.²⁷³ He will be similarly bound even though he cannot use the leased object at all due to a slump in his sales.²⁷⁴ There are, nonetheless, exceptions to this rule. The tenant may terminate the contract within the foreseen time period on the grounds of 'collapse of the underlying basis of the transaction' (*Wegfall der Geschäftsgrundlage*), as developed under § 242 BGB,²⁷⁵ now codified in § 313 BGB. Under this rule, it cannot be reasonably expected that a party should continue to be bound by a contract in its unaltered form, if (i.) the circumstances upon which a contract was based have materially changed after the conclusion of the contract, and (ii.) the parties would not have concluded the contract, or would have done so upon different terms if they had foreseen that change. Variation of the contract may be claimed with regard to all the circumstances of the specific case, in particular to the contractual or statutory allocation of risk.

It is doubtful whether the two parties based the contract on the sole purpose that the premises could be used as a surgery. In the law of sales, a buyer who informs the seller about the reason why he purchases a certain thing cannot rely on the doctrine of the collapse of the underlying basis of the transaction. i.e. if a buyer purchases a dress for a wedding and informing the seller about the reason for his purchase he cannot avoid the contract when the wedding is cancelled. Things may differ if the two parties agree that they only want the transaction for a specific reason. In the present case, it is very doubtful that both parties concluded the contract only with the purpose that the tenant can open a surgical practice in the leased premises. But even if this were the case, the risk underlying the use of the premises rests entirely within the sphere of the tenant. The

²⁷³ BGH, NJW 1970, p. 1312, 1313; BGH, NJW 1978, p. 2390, 2391 (for usufructuary lease).

²⁷⁴ OLG Dresden, OLG-NL 1996, p. 193, 194 (for leasing).

²⁷⁵ See Markesinis/Lorenz/Dannemann (note 72), p. 510 ff.; Zimmermann/Whittaker, Good Faith in European Contract Law, German Report - Case 25, p. 557.

Oberlandesgericht Celle²⁷⁶ held in a similar case that the tenant could not avoid the contract. In this case, a tenant opened a surgical practice in the leased premises. Later he wanted to terminate the contract, because amendments in the (public) Building Law made it impossible for him to use the premises for surgery. The Court denied him the right to terminate the contract for an important reason, since the risk not to gain profits with the premises falls into the sphere of the tenant. Only in cases where the principle *pacta sunt servanda* would endanger the tenant's economic existence, might the doctrine of the collapse of the underlying basis of the transaction be applicable. Thus, depending on the contract, the tenant can only give ordinary notice. However, since it is a contract for commercial purposes, this right may be restricted in the contract.

B. PECL

The Principles have introduced a mechanism to avoid hardship and to correct injustice resulting from an imbalance in the contract caused by supervening events which the parties could not have reasonably foreseen when they made the contract. Pursuant to Art. 6:111 (1) PECL, a party has to perform the contract even if performance has become more onerous. However, if performance of the contract becomes excessively onerous because of a change in circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it, provided that (i.) the change in circumstances occurred after the time of conclusion of the contract, and (ii.) the possibility of a change in circumstances was not one which could reasonably have been taken into account at the time of conclusion of a contract, and (iii.) the risk of the change in circumstances is not one which, according to the contract, the party affected should be required to bear, Art. 6:111 (2) (a)-(c) PECL. In the present case, it is doubtful whether the tenant could enter into negotiation with the landlord with a view to adapt or terminate the contract. Firstly, the "excessive onerosity" may be the direct result of increased cost in performance.²⁷⁷ The performance of the tenant is to pay the rent. This obligation will not be more costly because permission to use the premises as a surgery was denied. Performance will only become more onerous because the tenant cannot make as much profit with the leased thing as he thought he would. This is only an indirect result. Secondly, even if such indirect costs may be brought under the term "excessive onerosity", it is doubtful whether the change in circumstances occurred after the conclusion of the contract. The rules on zoning law and fire protection were in force at the time the contract was agreed. It was the administrative act of a local authority that enforced the prohibition and that has arisen after the conclusion of the contract. This could have been foreseen at the time when the contract was agreed. And thirdly, the tenant could have avoided the risk that he cannot use the leased thing as first envisaged easily. He could have negotiated the contract under the condition that the local authorities would grant permission to open a surgery in the premises or he could made inquiries about the admissibility of such an undertaking. In conclusion, one would say that also under the Principles the tenant has no right to enter into negotiation with the landlord with a view to adapting its contents.

²⁷⁶ OLG Celle, MDR 1999, p. 799 ff.

²⁷⁷ Lando/Beale (note 92), Art. 6:111, p. 325.

Set 6: Relationship between the Tenant and Third Persons

The relationship between the tenant and third parties is not, in general, governed by the law of contract. Instead, the tenant's rights are protected under the law of torts and the law of possession. Possession is a person's actual power over a thing, § 854 (I) BGB. § 862 (I) BGB gives the possessor a claim against interference with his lawful possession. He may demand that the disturber ceases the disturbance. If further disturbance results, the possessor may seek an injunction. Lawful possession is also protected under the law of tort. If there is an unlawful disturbance of the tenant's possession, he may claim damages namely under § 823 (I) BGB or § 823 (II) BGB read in conjunction with § 858 BGB. Furthermore, since disputes between neighbours are frequent,²⁷⁸ there are special Neighbour Acts of the German Länder. They deal with rights and duties of neighbours based on the principle of being mutually considerate.

Question 28: Neighbour Relations

T and N are tenants of neighbouring rooms in a shared apartment. How can T react if N continuously plays excessively loud music or constantly produces bad smells that penetrate into T's room?

Loud music and smell can disturb T's possession.²⁷⁹ Provided that they are unlawful, T can claim cessation from the disturber, or may seek an injunction, § 862 (I) BGB. Courts use the principles developed under § 906 BGB analogously as a yardstick to determine the unlawfulness of emissions.²⁸⁰ The tenant is not entitled to prohibit the intrusion of gases, vapours, smoke, soot etc. to the extent that the interference does not, or only immaterially prejudices the use of his premises. The same applies insofar as a substantial prejudice is caused, but the emissions are in conformity with local custom. This may be the case if the premises are situated in the countryside and if bad smells are produced by nearby farmyard animals. In the case at hand, neither extremely loud music nor the constant bad smell seems to be customary in housing areas. Thus, T can demand the cessation of the disturbance. Furthermore, provided that the excessive music and constant bad smells cause harm to T's health, he could claim damages according to § 823 (I) BGB. He is entitled to claim damages for pain and suffering if the music or the bad smell caused a psychic injury, e.g. sleep disorders caused by the constant loud noise at night, provided that this psychic injury constitutes a medically recognisable illness. T may also turn to his landlord and demand action. The contractual relationship obliges the landlord to prevent disturbance of the leased premises caused by third parties.²⁸¹

²⁷⁸ See in general, Auer, *Neuere Entwicklungen im privatrechtlichen Immissionsschutz* (Zürich, 1997); Deneke, *Das nachbarliche Gemeinschaftsverhältnis* (Köln 1987); Eggensperger, *Notwehrrecht* (Würzburg, 2000); Scholl, *Der Mieter als Nachbar* (Tübingen, 2001).

²⁷⁹ Bassenge, in: Palandt (note 42), § 826 margin no. 4.

²⁸⁰ BGH, NJW 1995, p. 132.

²⁸¹ BGH, ZMR 1996, p. 209.

Question 29: Damages caused by Third Parties

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

T may have a claim for damages against the building company or the neighbour under the German Law of Torts.²⁸² Since the lorry driver is an employee of the building company, T must base his action on § 831 (I) BGB which lays down the rule for employer's liability for auxiliaries (vicarious liability). An employer is liable for any damage which the auxiliary unlawfully causes to a third party in the performance of his work. The damages are wrongful provided that the elements of an action based on § 823 (I) BGB are satisfied: (i.) there must be a violation of one of the enumerated rights or interests, namely life, body, health, freedom, property, or any "other right" (*sonstiges Recht*) which was (ii.) unlawful, and (iii.) culpable (intentional or negligent), and there must be (iv.) a causal link between the defendant's conduct and the plaintiff's harm. Possession is a "*sonstiges Recht*" provided that the possessor has a position similar to the owner of the thing. This is the case when the possessor has the "negative" advantage usually attributed to the ownership, such as the right to stop others from interfering with the rented thing, but also positive advantages, namely the right to use and exploit the thing.²⁸³ A tenant who has a right to live in the premises can stop interference according to § 862 (I) BGB and can use the leased premises according to § 535 (I) BGB. Thus, he is protected under § 823 (I) BGB.

However, his claim for damages can only remedy losses sustained as a result of the accident. He is not the owner of the house, so he cannot claim damages for the destruction caused by the lorry. He can only claim damages he suffered for not being able to enjoy the use of the premises, e.g. the costs for a hotel for the time the house is reconstructed.

The claim for damages against the building company does not pose major obstacles, since the lorry driver acted negligently. The duty to compensate does not arise if the employer has exercised the necessary care in the selection and supervision of the employee, § 831 (I) (2) BGB. Then T would have to premise his claim against the lorry driver on § 823 (I) BGB, which will render enforcement difficult considering the low income of the driver. However, in the present case, the building company has not raised this defence.

A claim for damages against the neighbour according to § 823 (I) BGB will fail since it is difficult to establish that he acted intentionally or negligently. The requirement of

²⁸² For an introduction to the German law of torts in English, see Markesinis, *The German Law of Torts – A Comparative Introduction* (3rd Edition, Oxford, 1994), p. 35 ff. In German: Deutsch/Ahrens, *Deliktsrecht: unerlaubte Handlungen, Schadensersatz, Schmerzensgeld* (4th Edition, Köln, 2002); Fuchs, *Deliktsrecht* (Berlin, 2001); Kötz/Wagner, *Deliktsrecht* (9th Edition, Neuwied, 2001).

²⁸³ Medicus, *Bürgerliches Recht* (19th Edition, Köln, 2002), margin no. 607.

fault (*Verschulden*) would not, therefore, be met. Moreover, it is doubtful that the building company and the lorry driver can be regarded as N's auxiliaries (*Verrichtungsgehilfen*) in the sense of § 831 (I) BGB. They enjoy a wide scope of autonomy in the performance of their work whereas *Verrichtungsgehilfen* are those whose activities are characterised by a certain degree of dependence and subordination.²⁸⁴

Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

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

N can claim € 10 from T for the broken chisel according to §§ 677, 683 (1) BGB provided that the following conditions are met: N, in the words of the law the agent without mandate (*Geschäftsführer*), has to (i.) pursue a matter for another person (principal = *Geschäftsherr*), (ii.) without having received a mandate from him or being otherwise entitled to do so in respect of him, and (iii.) acts in accordance with the interest and the actual or presumptive will of the principal. In the case at hand, N pursued a matter on behalf of T or the owner of the apartment since both are responsible to prevent dangers stemming from the apartment. The second condition is also satisfied. N had no mandate to break into the apartment. It is doubtful, however, whether the third condition is met. Neither T nor his landlord expressed their views as to what to do should there appear to be a presumed leak in the gas pipeline. Thus, their interest and presumed will must be deduced. In general, one determines the interest and the presumed will objectively, i.e. from the view of a reasonable man.²⁸⁵ The starting point in time for the determination of the interest and presumed will is from the beginning of the agent's action.²⁸⁶ The risk of error concerning the principal's interest or will has to be borne by the agent. The Oberlandesgericht Karlsruhe²⁸⁷ held in a case where a client of a bank wrestled a bank robber in order to defend the banks' money and was shot in his knee, that the customer was not entitled to claim money for the damage suffered, since the bank had clearly expressed its will to hand over money in such situations in the interests of customer and employee safety. The acting client was not aware of this position, nor was he responsible for not having known about it. The court held that if the agent takes action although it is uncertain that his action is either necessary or wanted he has to bear the risk that his act was contrary to the principal's interest and will.

²⁸⁴ See e.g. BGH WM 1998, 257.

²⁸⁵ See Wittmann, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Buch 2 Recht der Schuldverhältnisse, §§ 652-704 (13. Bearbeitung, Berlin 1995), Vorbem zu §§ 677 ff. margin no. 47.

²⁸⁶ Larenz, Lehrbuch des Schuldrechts, Band II, Besonderer Teil, Halbband 1 (13th Edition, 1986), p. 443.

²⁸⁷ OLG Karlsruhe, VersR 1977, p. 936.

The case at hand is a borderline case. One may argue that from an objective point of view – since there was no danger –, the action was unnecessary and, therefore, neither in the interest nor will of the principal. The risk of such an error would therefore have to be borne by T. On the other hand, the error concerns facts rather than the will of the principal. One could argue that the threat did appear to be real and that the absent tenant had a very strong interest in verifying whether or not there was a gas leak. If N had phoned T and informed him of his observations, one can hardly doubt that T would have mandated N to break into the apartment and check the situation to prevent further damage.

Assuming N acted in T's interest and in accordance with his presumed will, he could claim reimbursement of expenditures (*Aufwendungsersatz*). The destroyed chisel is not an expenditure in the strict sense (which would presuppose a voluntary loss), but rather a damage. However, the agent can also claim damages for involuntary losses which are typically connected with his action.²⁸⁸

The costs for the repair of the broken door have to be borne by T. The owner of the door is T's landlord. He cannot claim damages from N; neither based on breach of contract (*Pflichtverletzung*, § 280 (I) BGB read in connection with §§ 677, 683 (1) BGB) nor based on the law of torts. N was not in breach of a duty nor did he act wrongfully when breaking into the premises. He was pursuing a matter on behalf of T and L and did not cause more damage than was necessary. The circumstances of this case would be different had T acted with gross negligence when breaking into the apartment and thereby caused more damage than a careful neighbour would have caused, e.g. by not only destroying the door but also some parts of the wall. However, if the undertaking has as its objective the averting of an imminent danger that threatens the principal, then the agent is only responsible for damages caused intentionally or by gross negligence, § 680 BGB.²⁸⁹

L can reclaim the repair costs for the destroyed door from T based on a breach of the lease contract since N, by forgetting to empty his garbage bin, negligently caused the situation which induced N to break open the door.

²⁸⁸ Sprau, in: Palandt (note 42), § 683, margin no. 9.

²⁸⁹ § 680 BGB applies also to cases where the agent is mistaken about the existence of an imminent danger as long as he , see Wittmann, in: Staudinger (note 285), § 680 margin no. 5.