

ITALY

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1. Introduction

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

The Fourth Book on Obligations¹ of the Italian Civil code of 1942 establishes the primary rules of tenancy law. These rules are inspired by the principle of private autonomy and, as such, they are of a non-mandatory nature.

Protection of the rights of tenants has been affirmed by 'special statutes', which have not been directly influenced nor inspired by the laws of other legal systems but are rather a compromise between the conflicting interests of tenants and landlords. This legislation has been developed in three main steps.

The first 'special statutes' on tenancy were introduced after World War I (1921), and this process of lawmaking continued until 1978 (that is the date of the first complete tenancy law statute). Although named 'statutes', these laws included merely exceptional and temporary provisions. They were founded on the rationale of distributive justice, and presupposed a failure of the free market to provide for sufficient housing provision. An economic crisis and a shortage in the housing stock - as a direct result of the two world wars - provoked high demand. Landlord's imposing consistently high rent further exacerbated this bleak situation. As a result, State interventionism in the market became essential.

These statutes introduced two special features concerning both the termination of contracts and increases in rent. Termination was denied and the law provided for the renewal of tenancy contracts. Rent increases were similarly prevented. This legislation created a great deal of legal uncertainty and greatly reduced the attractiveness of leasing property (for landlords and investors).²

The new regime was considered an assault on individual property rights and was reviewed by the Constitutional court in the 1970's.³ Whilst the Court did not find the regime to be unconstitutional, it did state that the regime relating to the legal renewal of tenancies ought to be substituted by systematised and definitive legislation as quickly as possible, or it would indeed find the regime to be incompatible with the Constitution.

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¹ B. INZITARI, *Locazioni e mercato immobiliare*, in: V. Cuffaro (ed.), *Le locazioni urbane. Vent'anni di disciplina speciale*, 1999, p. 159 et seq.

² B. INZITARI, supra note 1, p. 160.

³ See Const. court, 25 February 1975, n. 30, [1975] *Foro it.*, I, 798; Const. court, 15 January 1976, n. 3, [1976] *Giur. it.*, I, 1, 880; Const. court, 18 November 1976, n. 225, [1976] *Foro it.*, I, 2945.

The first, complete tenancy law statute for residential and commercial premises was introduced by L. n. 392/1978. This statute remains applicable to professional/commercial tenancy contracts and affects the duration and the conditions for termination. It establishes the minimum legal duration to be six or nine years, and fixes the legal grounds for termination of tenancy contracts (art. 29 L. n. 392/1978). For housing contracts, the statute of 1978 introduced legal standards required to determine the rent – for this reason it has been termed the “equo canone law” (*equo canone* meaning 'fair rent').

This statute was similarly founded upon the rationale of distributive justice, and was influenced by Article 42 of the Constitution, which articulates 'the social function of property'. During this period the debate on the Constitutional “right to housing” arose.⁴ This right was finally affirmed by the Italian Constitutional Court, which ruled that such a right is derived from articles 2 and 3 subs. 3 Const⁵, or in art. 42 subs. 2 Const.⁶

The statute n. 392/1978 contained several mandatory rules. The primary rules are:

- Contracts endure for at least four years. However, provided they have good reason for so doing, tenants are entitled to terminate at any time by serving six month's notice, (art. 1);
- Rent is not fixed by the parties but is instead calculated by legal criteria (art. 12);
- The statute does not stipulate any special requirements for the formation of a valid tenancy contract.

An additional tenancy statute was introduced in 1992 (L. n. 359/1992). This led to a partial deregulation of the market, as it excluded newly built premises from the application of “equo canone”, and allowed the contracting parties to derogate from the “fair rent” rules, provided that they accepted the obligatory assistance of landlord and tenant associations.

The Constitutional court has, however, held this provision to be unconstitutional as it imposed upon the parties the obligation to accept the assistance of these associations.⁷

The most recent statute (L. n. 431/1998) relates only to the housing regime, and it aims to remedy the failure of statute n. 392/1978. The “equo canone” statute had in practice dissuaded landlords from letting their property, thus increasing demand. The present statute aims at weighing property rights against the protection of the weaker party (tenants). It has therefore introduced a mixed system balancing mandatory and dispositive rules. However, L. n. 392/1978 remains

⁴ L. BARBIERA, *Dal diritto di abitazione al diritto di proprietà: un nuovo statuto di «proprietà» urbana nella legge sulla riforma della casa*, [1973] *Riv. dir. civ.* (RDC) I, 365 et seq.; T. MARTINES and others, *Il «diritto alla casa»*, in: *Tecniche giuridiche e sviluppo della persona*, edited by N. Lipari, Bari, 1974, 391 et seq.; D. SORACE, *A proposito di «proprietà dell'abitazione», «diritto d'abitazione» e «proprietà (civilistica) della casa»*, [1977] *Riv. trim. dir. e proc. civ.* (RTDPC), 1175 et seq.; M. BESSONE, *Equo canone e «diritto» all'abitazione nella prospettiva delle norme costituzionali*, [1978] *Foro pad.*, II, 83 et seq.; G. ALPA, *Equo canone e diritto all'abitazione*, [1979] *Pol. dir.*, 155 et seq.; L. FRANCIOSI, *Bisogni sociali e diritto all'abitazione*, [1981] *Dem. e dir.*, V, 128 et seq.; U. BRECCIA, *Il diritto all'abitazione*, (1980); A. DE VITA, *Il rapporto di locazione abitativa fra teoria e prassi*, (1985); M. TRIMARCHI, *La locazione abitativa nel sistema e nella teoria generale del contratto*, (1988), 9 et seq. In an European perspective, see *«Le droit au logement» (Journées Mexicaines), Travaux de l'Association Henri Capitant*, t. XXXIII, Paris, 1982.

⁵ See Const. Court, 7 April 1988, n. 404, in *Giur. it.*, 1988, I, 1, 1627, with fn. of A. TRABUCCHI, *Il diritto ad abitare la casa d'altri riconosciuto a chi non ha diritti!*; Const. Court, 20 December 1989, n. 559, in *Foro it.*, 1990, I, 1465; Const. Court, 19 November 1991, n. 419, in *Foro it.*, 1992, I, 302, with fn. of F. DONATI. Some previous judgements had denied the constitutional protection of «right to housing»: see Const. Court, 28 July 1983, n. 252, in *Foro it.*, 1983, I, 2628, with fn. of D. PIOMBO; Const. Court, 18 July 1984, n. 216, in *Giur. cost.*, 1984, 1467.

⁶ See Const. Court, 25 February 1988, n. 217, [1988] *Arch. loc.*, p. 291.

⁷ Const. Court, 25 July 1996, n. 309, [1996] *Foro it.*, 2601 fn. D. PIOMBO.

partially applicable also to the housing regime, where this most recent statute does not derogate from it. In fact, there are a number of rules which remain in force. The primary ones are the general dispositions concerning urban estates (as example, art. 2 – relating to sub-lease; art. 4 – relating to withdrawal of the tenant; art. 5 relating to continuation of tenancy contract in case of tenant's death; art. 7 – relating to continuation of tenancy contract in case of sale of the dwelling; Moreover, as pointed out above, also the commercial tenancy contracts' regime is still in force (art. 27 ff. L. n. 392/1978).

b) Basic structure and content of current national law:

aa) Private tenancy law

Rules on tenancy contracts concerning housing regime are based on the protection of tenants as regards:

- self determination at the moment of the conclusion of the contract (as example, the mandatory requirement of written form: see above, Set 1);

- minimal duration of the contract, and mandatory conditions for termination by the landlord (see above, Set 2);

- control of rent and of rent increase, which is, however, a dispositive rule (see above, Set 3).

Current tenancy law is state legislation, which is divided up into general private law and special statutes. The former normally has effects if the latter does not apply - as for example, freedom of form (art. 1325 n. 4) versus requirement of written form (art. 1 subs. 4 L. n. 431/1998), judicial evaluation of the importance of the breach of contract (art. 1455 cc) versus legal determination of the entity of the breach which must be considered sufficient in order to terminate the contract (art. 5 L. n. 392/1978). Moreover, there are rules which are general inside urban real estates' tenancy law, and which apply both to housing and commercial contracts (art. 7 – 11 L. n. 392/1978). Importantly, the relationship between general and special rules does not act to create a high level of legal uncertainty.

Current tenancy rules are mainly mandatory as regards the housing regime, whilst the provisions of the civil code are dispositive.

Tenancy contracts are not the only form of “lawful possession” of a premise for housing purposes. There is a real property right which is called the “right of housing” (art. 1022 ff. cc), which gives the possessor the faculty to use a premise for housing purposes, and which extends also to the possessor's family members. During the “*equo canone*” regime, this form of possession was often used by contracting parties in order to evade the mandatory rules on rent.

National and European consumer protection legislation does not play a relevant role in tenancy law as they are founded on different rationales, and their development has followed a distinct path being based on the notion of “consumer”. The “consumer” is a person who concludes a contract while he/she does not exercise a professional activity (art. 1469 bis subs.2 cc). Therefore, according to this definition, only if the tenant is a consumer will the consumer protection rules apply.⁸

The position of the tenant is considered an obligatory right, even if our system provides for the “*emptio non tollit locatum*” rule (1599 cc: tenancy contracts have effects against buyers, if their date is prior to the one of deeds of sale). This rule is mandatory in the special regime for housing (art. 7

⁸ Cf. C. ANDRINI, *La tutela dell'acquirente di casa di civile abitazione*, in: *La tutela del consumatore tra liberismo e solidarismo*, edited by P. Stanzione, (1999), p. 233 et seq.

L. 392/1978), according to which the clause which allows the landlord to terminate the contract in the event of a sale of the house is invalid. However, tenants are often protected against third persons by property rules (see above, Set 6).

bb) Social regulation affecting private tenancy contracts

Special legislation on houses owned by the State or other public entities and built for social purposes (that is to assign houses to people with low income) has been introduced. This legislation provides for rules concerning the lawful possession of such properties by tenants, and favours them with the possibility of becoming owners of these dwellings.⁹

As regards private tenancy contracts, the most recent statute (L. n. 431/1998) has introduced tax incentives for landlords who opt for the “special” tenancy contracts’ regime (see Set 3).

There is no public law measure to prevent private dwellings from remaining unoccupied.

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

Most Italians own the properties in which they reside.¹⁰ As such, the demand for housing remains at all times high. Nevertheless, real estate is no longer considered as highly profitable, owing in part to fiscal considerations.¹¹ Recent statutes have allowed the State or other public entities to sell properties to private parties.

Rent control regimes have, nonetheless, reduced the attractiveness of renting property both for tenants and for landlords/investors; with prospective tenants preferring to purchase a dwelling rather than to lease. Moreover, private persons who purchase their first home may avail of favourable loans and additional fiscal incentives.

The role of associations of landlords and tenants is residual, which applies only if the landlord and the tenant opt for the “special” regime, and accept that their contract reflects the general associations’ agreements (see above, Set 3). These associations conclude local agreements concerning both the duration and the rent-ceiling applicable to tenancy contracts in each urban district (art. 2 subs. 4 L. 431/1998). These local agreements take into account the criteria determined for “national agreements” between national landlords’ and tenants’ associations (art. 4 L. n. 431/1998).¹² These secondary legal sources are of course less accessible than ordinary legislation, but they are able to factor in knowledge derived from local markets. The original art. 4 L. n. 431/1998 stated that every local association’s agreement could approve a model contract applicable in each urban district. A recent statute (L. 8 January 2002, n. 2) has stated, however, that the national agreement must influence the general model in order for the local agreement to be valid (see art. 4bis L. n. 431/1998 added by L. n. 2/2002). This new rule has been introduced in order to improve the role of the “special” tenancy regime, which to date has been largely irrelevant in practice. This new rule, however, diminishes the role of local agreements.¹³

⁹ U. BRECCIA, *supra* note 4, p. 93 et seq.; V. DOMENICHELLI, *Edilizia residenziale pubblica*, in: *Dig. IV ed., Disc. Pubbl.*, V, 1990, p. 411 et seq.; N. ASSINI, *Edilizia residenziale pubblica*, in: *Enc. giur.*, XII, 1994.

¹⁰ B. INZITARI, *supra* note 1, p. 162.

¹¹ B. INZITARI, *supra* note 1, p. 162.

¹² L. Scarano, *Le nuove tipologie contrattuali*, in: *Il nuovo diritto delle locazioni abitative*, edited by S. Patti, (2001), p. 33 et seq.

¹³ F. LAZZARO/M. DI MARZIO, *Le locazioni per uso abitativo* (2002), p. 69 et seq.

If the tenancy contract observes the format of the local agreement, the landlord may avail of fiscal benefits. If not, the rent is free and the contract endures for at least four years (art. 2 subs. 1 L. n. 431/1998), but there is no fiscal benefit for landlords (see Set 3).

Tenancy law is often enforced before courts by landlords and tenants, though mechanisms for extra-judicial dispute resolution do exist. Art. 55 L. n. 392/1978 affords the tenant the power to meet unpaid rents, even when the landlord has proposed judicial action in order to terminate the contract for breach (see above, Set 3). As such, the tenant may later avoid an eviction order if payment has been made before the deadline fixed by the judge.

An additional peculiarity relates to the execution of tenancy law judgements, and the legal delay of eviction under art. 6 L. n. 431/1998, which relates to urban districts that are densely populated (see Set. 2, question 6).

Tenants have no access to legal aid. There is similarly no special jurisdiction for tenancy law, but only a special procedure concerning the notice for eviction (see *infra*). As such, tenants are not readily assisted in gaining access to the court system.

Set 1: Conclusion of the Contract

In essence, the conclusion of tenancy contracts is subject to general contract law principles.

The mere consent of both parties is sufficient to conclude a tenancy contract. As such, no additional requirements (e.g. actual possession, written form, or the assistance of tenants and landlords associations, etc) are imposed to render a lease enforceable before the courts (art. 1571 cc). Tenancy contracts afford tenants an exclusive right to freely use and enjoy leasehold property. Tenants are normally also entitled to grant possession of the leasehold property to third parties, even without the consent of the landlords (cf. art. 1594 subs. 1 cc, concerning subletting).

The statutes relating to the housing regime have, however, introduced some special rules that contradict these principles. Firstly, it is important to note a) that it is forbidden to sublet a property in its entirety (under art. 2 L. n. 392/1978); and b) the requirement of written form (under art. 1 subs. 4 L. n. 431/1998). These special rules are designed not to protect a tenants' right to housing, but rather to satisfy two main purposes: on the one hand, the written form performs an evidentiary role and acts in favour of the public interest by preventing tax evasion by landlords; on the other hand, if the total sublet was admitted, it would contradict the high standards of protection afforded to tenants by the 'special statutes'. In practice, if the tenant were to sublet the leased property in its entirety, this would reveal that he/she does not require the dwelling for him/herself. As a consequence, he/she would not be entitled to enjoy the legal protection of tenants, that is traditionally linked to the minimal duration of the contract, and to the legal ceiling of rents.

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?

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?

Prospective landlords are normally free to choose their tenants. Contracting parties are legally bound to conclude an agreement with anyone who asks for their services only in special cases (art. 2597 cc, concerning monopolies; art. 1679 cc, concerning public transport). In fact, according to the general principles of contract law, landlords may freely choose with whom to contract, and withdraw from negotiations if they respect the general requirement of good faith (art. 1337 cc).

As a consequence, it is necessary to evaluate if the circumstances described under a), b), c), d), e) are legitimate grounds to withdraw from negotiations, when the prospective tenant has relied upon the consent of the other party.

Landlords are under no obligation to enter into a tenancy contract.¹⁴ Yet, in the event of an unlawful withdrawal from negotiations, prospective landlords are obliged to pay damages.

The cases described above involve the question whether the good faith principle must or may be interpreted in accordance with the constitutional principle of equality. According to a widespread doctrine, the horizontal effect in private law relationships of fundamental rights can be realized by a constitutional interpretation of the general clauses (i.e. good faith, fairness, etc).¹⁵ Interpretation falls to all courts (basic courts, the Supreme Court, and, of course, the Constitutional court). However, in the Italian legal system, if a legal rule violates a constitutional principle it can be removed only by the Constitutional Court.

An important issue concerning the legal approach to discrimination (outside of tenancy law) is the protection of the fundamental rights of foreign nationals. It is widely accepted by legal doctrine that art. 3 (principle of equality) of the Italian Constitution similarly applies to non-Italian citizens.¹⁶

The scenarios outlined under a) and b) would probably be illegitimate grounds to refuse an offer to T. The former because of the constitutional protection of the family (art. 29 Const.). The latter because of the prohibition to discriminate on ethnic grounds (now fixed by art. 29 L.1 march 2002, n. 39, which has been implemented by Directive 2000/43/EC). Therefore, the rejection of T's offer, if based on discriminatory grounds, could be considered an abuse of T rights.¹⁷

It is important to note that tenancy law is influenced by the constitutional protection of the family unit. The decision of the Italian constitutional court, in affirming the "right to housing", found its justification in the need to protect those who reside in a property alongside the legally recognised tenant(s). The court's decision considered all additional members of the family as those to whom tenancy contracts will be legally assigned in the event of death of the tenant(s): see art. 6 L. 392/1978). The protection of family members can further be considered as relevant to all European countries, having been affirmed by art. 8 of the European Convention of Human Rights and re-affirmed by art. 9 of the European Charter of Fundamental Rights. Indeed, the French Supreme Court made reference to art. 8 of the European Convention in order to sustain the invalidity of the clause of a tenancy contract which forbade the tenant to offer her husband hospitality.¹⁸

The cases examined under a) and b) could, therefore, potentially concretise the horizontal effect in private law of fundamental rights arising from the national constitution and/or the ECHR. In both cases the ordinary courts would be competent to deal with a violation of the constitutional equality rule, because it concerns the interpretation of the general rule of good faith.

The cases considered under c) and d) would probably be legitimate grounds for denying a contract. L may refuse the offer to T because, for example, co-ownership regulation forbids inhabitants from playing the piano and/or keeping animals. This co-ownership regulation limits an individual's property rights (i.e. the right to use property as the owner sees fit), and, therefore, must be consented by every owner (art. 1117, subs. 4 cc). Also such co-ownership regulation, however, may be unconstitutional, in violating individual fundamental rights – in this case the denial of L

¹⁴ U. Breccia, (supra note 4), p. 149 et seq.

¹⁵ See G. Alpa, *Il «diritto costituzionale» sotto la lente del giusprivatista*, [1999] *Riv. dir. cost.*, p. 15 et seq.; Id., *Storia, fonti, interpretazione, Tratt. dir. civ.*, t. I (2000), p. 503 ss.; G. Oppo, *Sui principi generali del diritto privato*, [1991] *Riv. dir. civ.*, I, p. 447 et seq.; L. Mengoni, *I principi generali del diritto e la scienza giuridica*, in: *I principi generali del diritto*, (1992), p. 317 et seq.; P. Rescigno, *L'autonomia dei privati*, in: *Studi in onore di G. Scaduto*, 1970, II, p. 529 et seq.; Id., *Diritti civili e diritto privato*, in: *Attualità e attuazione della Costituzione*, (1979), p. 242 et seq.

¹⁶ Const. Court, 21 June 1979, n. 54 [1979] *Foro it.*, I, 1943.

¹⁷ U. Breccia, supra note 4, p. 147 et seq.

¹⁸ Cour Cass., 6 March 1996, III ch. Civ., in [1997] *Dalloz, Jurisprudence*, p. 167, fn. B. DE LAMY

should be evaluated with more attention. Nevertheless, a regulation prohibiting inhabitants from playing the piano and/or keeping animals would not be considered a violation of fundamental rights. Moreover, no case law exists concerning this issue.

In addition, L may refuse his/her consent because s/he fears a claim for damages by his/her neighbours if they are able to prove that the noise provoked by the dog [case c)], or by the piano player [case d)] is unbearable. Under these circumstances, the refusal of L would probably be legitimate.

T's incapacity in e) would be an additional legitimate reason to refuse her offer. In fact, contracts (including tenancy contracts) are invalid when concluded by a person who is not fully capable under Art. 1425 subs. 1 and 2 cc). Moreover, a capable contracting party must inform the other party about the existence of a potential cause of invalidity (art. 1338 cc).

If, however, L rejects an offer made by T's legal guardian, such a refusal could be judged discriminatory, and could give rise to the same consequences showed above.

Variant:

Avoidance of fraud is possible only if the consent of L would not have been given had it not been for T's deception (see art. 1439 cc). This is the only restriction imposed upon the right to avoid a contract for fraud. As such, the contract can be rescinded even if the fraud did not impact upon an essential element of the contract – this requirement, conversely, is necessary in order to avoid a contract for error (see art. 1429 cc). This is premised upon the principle '*fraus omnia corrumpit*'.

If avoidance of the contract is based on discriminatory grounds [as are the ones listed under a) – e)] the solution could be different – that is, the court could probably deny the right to avoid the contract. However, this solutions remains a supposition, because there are no cases about this question.

Question 2: Sharing with Third Persons

L rents an apartment to T. After some months, T wants to take into the apartment:

- a) her husband and children.**
- b) her boyfriend.**
- c) her homosexual partner.**
- d) her parents.**

Is this possible against the will of L? If not, what are L's remedies?

The prevailing doctrinal position states that tenants are entitled to grant possession of leased property to other persons, as they have the exclusive right to use and enjoy the apartment under the tenancy contract.¹⁹ Even if tenancy law does not expressly state this rule, it can be deduced from various articles. Firstly, tenants are entitled to sublease (art. 1594 subs. 1 cc and art. 59 n. 7 L. 392/1978). Secondly, art. 1588, subs. 2 provides for the liability of tenants for any damage caused by third parties who are granted use of the property. Thirdly, a number of rules relating to tenancy contracts seek to protect the position of tenants' family members, even if they are not parties to the tenancy contract (art. 1580 and art. 1584 cc; art. 6 L. 392/1978). As such, these persons are entitled

¹⁹ G. Gabrielli/F. Padovini, *La locazione di immobili urbani* (2001), p. 668 et seq.

to reside in the apartment, in the absence of an agreement to the contrary between the landlord and tenant.

T can therefore reside with other persons even against the will of L. As a consequence, the landlord cannot give notice to T on the grounds described under a), b), c), d), nor can he claim for damages. This does not mean, however, that a spouse and/or other family members become *ipso iure* party to the contract. Importantly, L cannot ask for an increase in rent, unless perhaps according to the terms of the contract signed by L and T, L must pay certain expenses arising out T residing in the apartment. A tenancy contract may similarly contain a clause expressly prohibiting T from taking any other persons into the apartment. It would be an interesting question whether such a term is always valid. As pointed out *supra*, the French Supreme Court has relied on art. 8 of the European Convention of Human Rights in order to deny the validity of a clause prohibiting a tenant from living with her husband. This decision finds its theoretical justification in the horizontal effect of the European Convention.

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.

As a general rule, tenancy contracts continue with the heirs of tenants, according to the general provisions on succession law. However, statute n.392/1978 entitles other persons to continue the contract in the event of T's death. These persons are the spouse and the relatives who live together with the tenant. Other statutes further confirm this rule. In the area of public housing, art. 12 d.p.r. 30 December 1972, n. 1035 states that the apartment is assigned to the spouse and the children of the dead assignee. As regards commercial tenancy, art. 37 L. 392/1978 states that tenancy contracts are assigned to those persons entitled to continue the enterprise of the tenant.

Therefore, in the cases listed under a) and d), the tenancy contract is legally assigned to the spouse and the relatives who lived together with the tenant (art. 6 L. 392/1978). In order to be legally assigned, the expressed consent of these persons is not essential.

With regard to scenario b), in 1988, the Constitutional Court ruled that an unmarried co-habitant is entitled to continue the contract under the same conditions. Of course, the surviving co-habitant must prove that (s)he has lived together with the tenant and that the relationship was continuous and permanent²⁰. However, the cited decision of the Constitutional Court concerns only heterosexual partners. Therefore, it remains uncertain whether the contract would be legally assigned to those parties listed under c), if they had been living together with the tenant. Such a solution could find its theoretical justification in the Constitutional court's decision, which was premised upon the "right to housing".

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

The answer to this question depends upon the criteria listed under question 2 (Sharing with Third Persons). As a general, unless otherwise prohibited from doing so by a clause in the contract, tenants are free to share a property with whomsoever they choose. As the contract was agreed and signed between L and T, the remaining students are not automatically parties to the

²⁰ Const. Court, 7 April 1988, n. 404 (*supra* note 5).

contract and are therefore not liable to pay the rent separately. Much will depend upon the interpretation of the contract in the circumstances.

Question 3: Sub-renting

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

T enjoys the right to sublet the property in its entirety only with the consent of the landlord (art. 2 subs. 1 L. 392/1978). However, the cited article concerns urban real estate, and applies only to total (housing) subletting. This rule is based on the idea that total subletting would contradict the high level of protection granted to tenants by 'special statutes', (see also *supra*, Short general introduction).²¹

This rule is partially confirmed by the temporary provision under art. 59 n. 7 L. 392/1978, according to which subletting is presumed, if the apartment is inhabited by persons who are not employed by the tenant nor are they his/her relatives – in a situation where the tenant partially sublets an apartment but does not reside there, a landlord may rescind the contract.

The cited 'special' rules on subletting ought to be viewed as supplementing the older rules contained in the civil code (art. 1594 subs. 1 cc). They allow tenants to sublet (partially or totally) without the consent of the landlord, unless prevented from so doing by a term in the contract (art. 2 subs. 2 L. 392/1978). In short, T is normally entitled to sublet a room in his apartment provided that he makes known to his landlord both the identity of the new tenant and the duration of the contract.

In the scenarios under consideration, the answer to the second question is probably yes, except that rules on rent increases are mandatory. As regards the third question, if T sublets a room without the permission of the landlord (if so required), or without having informed him (art. 2 subs. 2 L. 392/1978), the landlord is entitled to terminate the contract, and ask T for damages.²² Moreover, according to art. 1595 cc, landlords may require sub-tenants to pay overdue rent.

In the final scenario, T would probably owe the rent received from S to L as damages, according to the general principle of unjust enrichment or 'enrichment obtained by committing a tort' (art. 2043 cc, a general clause in Italian law).²³ According to this principle, if, for example, someone lives in the dwelling of someone else without the consent of the owner (or, more generally, without being entitled to stay there), he/she must pay for the damages, even if the owner has not suffered a pecuniary loss. In fact, the damages are determined by taking into account the hypothetical rent the occupant would have paid if he/she were entitled to reside in the apartment under a tenancy contract.²⁴ If the tenant does not vacate the premises when the contract expires, he/she must pay the monthly rent as the minimal amount of damages (art. 1591 cc), unless the owner can prove a greater loss.

In reality, as T sublets to a third party without the landlord's consent, and gains an economic benefit by committing a tort, the legal base of the remedy (sub Note) may in fact be found in tort law.

²¹ G. Gabrielli/F. Padovani, (*supra* note 20), p. 670.

²² G. Gabrielli/F. Padovani, (*supra* note 20), p. 671.

²³ See R. Sacco, *L'arricchimento mediante fatto ingiusto*, 1950, p. 23 et seq.

²⁴ Cass. 18 gennaio 2002, n. 550, in *Nuova giur. civ. comm.*, 2003, p. 13, with footnote of A. GNANI, *Retroattività degli effetti della risoluzione e contenuto dell'obbligo restitutorio*.

Question 4: Formal Requirements and Registration

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

Valid tenancy contracts for dwellings (under the housing regime) require a written form²⁵ under art. 1 subs. 4 L. 392/1978. This provision concerns only the housing regime, whilst all other tenancy contracts do not require a specific form (provided they endure for at least nine years: art. 1350 n. 9 cc).

However, if L obliges T to enter into contract without observing the writing form, this contract, though oral, is valid (art. 13 subs. 5 L. n. 431/1998).²⁶ In such cases, a contract may be upheld by the courts. If so, the court will impose the terms of the contract in accordance with mandatory rules (the rent, for example, must not exceed the amount determined by local associations' agreements as stated by art. 2 subs. 3 L. n. 431/1998).

Again, the requirement of a written form is intended to protect the public interest – that is, the interest of the State in preventing tax evasion.²⁷ Some scholars suggest that the requirement of a written form is inconsistent with the constitutional principle of equality; and that maintaining a different regime for tenancy contracts, depending upon their purpose (commercial or residential) is unreasonable.²⁸

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

An oral tenancy contract for a residential property is invalid, except where a landlord obliges his/her tenant to derogate from the written form (art. 13 subs. 5 L. n. 431/1998). In such cases, as stressed above (see retro, sub a), tenants ought to seek a court order to have the lease maintained and its provisions clearly defined (art. 13 subs.5, L. n. 431/1998). If successful, the contract is legally enforceable without any additional requirements.

In order to be legally enforceable, written contracts must similarly be registered.

Registration is necessary for two reasons. Firstly, art. 13 states that rent may only be sought if it is clearly settled within a written, registered contract. A higher rent set by an additional agreement between the parties that has not been registered, cannot be legally enforced. The constitutionality of this rule does, however, arouse suspicion.²⁹ Secondly, the original art. 7 L. 431/1998 outlined a specific penalty for a failure to register, or to pay taxes. In such cases, landlords could not serve an eviction notice, if tenants did not want to vacate the premises. Recently, this restriction was declared unconstitutional³⁰.

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?

²⁵ G. Gabrielli/F. Padovini, (supra note 20), p. 128.

²⁶ G. Gabrielli/F. Padovini, (supra note 20), p. 130.

²⁷ G. Gabrielli/F. Padovini, (supra note 20), p. 129; V. Cuffaro, *Le invalidità del contratto*, in: V. Cuffaro (ed.), *Le locazioni ad uso abitativo* (2000), p. 193.

²⁸ G. Gabrielli/F. Padovini, (supra note 20), p. 126; V. Cuffaro (supra note 28), p. 193.

²⁹ Trib. La Spezia, 2003.

³⁰ Const. Court, 5 October 2001, n. 333, in [2001] *Giust. Civ.*, I, p. 11.

Generally, every tenancy contract must be registered for fiscal purposes. If registration does not take place, the landlord is seen to be evading taxation and is therefore potentially subject to a number of penalties.

Contracts that endure for more than nine years must be registered in the real estate register (art. 2643 cc n. 8). This requirement is necessary in order to protect tenants rights against third parties. If the landlord sells the house, the tenant maintains his right to enjoy the benefits of the property for at least nine years, provided that the contract has been regularly registered in advance of the registration of the sale by the buyer (art. 1599 cc).

Question 5: Extra Payments and Commission of Estate Agents

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

There do not appear to be any rules against such covenant.

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.**

a) This request is lawful, according to the general rule concerning the ‘promise that someone else does something’ (art. 1381 cc).

b) As regards the case considered under b), the validity of the agreement is in question, as the agreement requires the tenant to quit before the final deadline outlined in the contract. In fact, according to art. 13 subs. 3 L. n. 431/1998, every agreement which derogates from the legal duration of a contract is invalid. This means, however, that the clause is invalid only if the duration is shorter than the legal duration, because the minimum duration aims at protecting the weaker party of the contract. As a consequence, this invalidity is interpreted as a ‘protective’ or ‘relative’ invalidity, that is only tenants may avoid the contract on the basis of art. 13 subs. 3 L. 431/1998.³¹ In order to evaluate the validity of the agreement under b), however, it is necessary to take into account that T requests from F a sum of money to leave the apartment before the final deadline. It is generally accepted by the majority of commentators that clauses that derogate from the protective mandatory rules are valid, if the protected party receives a sum of money or alternative benefit.³² This doctrine was affirmed when art. 79 L. n. 392/1978 was still in force – art. 79 stated the invalidity of every agreement derogating from protective mandatory rules, but only if the derogation favoured the landlord. Now this interpretation may apply also to art. 13 subs. 3 L. 431/1998.

According to the cited interpretation, the agreement under b) could be considered valid even if it were stipulated between the landlord and the tenant. In fact, the derogation would be

³¹ A. GENTILI, *L’invalidità del contratto di locazione*, in: V. Cuffaro (ed.), *Le locazioni urbane. Vent’anni di disciplina speciale*, (1999), p. 84 et seq.

³² V. Cuffaro, *supra* note 22, p. 168.

counterbalanced by a benefit of T. As a consequence, there is no reason to deny its validity if it is stipulated between the tenant and the successor tenant, as supposed under case b).

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?

This claim would appear to be lawful. Art. 1755 cc states that an agent may request payment for his/her services from both parties, but this rule is merely dispositive. L. 6 February 1989, n. 39 has, however, introduced public rules concerning agents' services. Art. 6 clarifies which public authorities are entitled to fix the amount of commission to be requested from each party; though this is applied only in the absence of a specific agreement in the agency contract.

Set 2: Duration and Termination of the Contract

The rules concerning both the duration and termination of tenancy contracts are arguably the most critical in Italian tenancy law, as they are the result of a trade off between the tenants' interest in retaining the leasehold property right for as long as possible and the landlords' interest in not being bound by contract for a long period of time. They also evidently have a constitutional relevance. Tenancy rights limit a landlord's proprietary rights, and the rule *emptio non tollit locatum* prevents him/her from selling the property as free from all obligatory rights. Tenants constitutional 'right to housing' and/or their 'right to work' (if, for instance, the leasehold property is used for professional purposes) are similarly balanced in this equation.

Whilst the Italian civil code fails to take into account the interests of tenants, the special legislation that has been developed has, for example, established a minimum duration for tenancy contracts. At present, tenancy contracts for residential purposes must endure for at least four years if freely negotiated by the landlord and the tenant (art. 2 subs. 2, L. 431/1998), at least three years if they include the rent ceiling fixed by local agreement between landlord and tenant associations (art. 2, subs. 3).

The minimum duration requirements were introduced for housing and commercial contracts by statute in 1978, thus ending the practice of legally renewing housing contracts via the exceptional and temporary provisions of the past. As previously outlined [supra, Introduction, sub a)], this approach was viewed as an assault on individual property rights, and was subject to review by the Constitutional Court.

In this first, systematised statute of 1978, the minimum duration requirement was one of several mandatory rules enacted in favour of tenants. In the most recent statute of 1998, this rule remains the only 'substantial' limit to the freedom of contract (the requirement of written form being a 'procedural' or 'formal' limit). The 1978 Act allowed landlords the power to terminate a tenancy contract for residential purposes by serving a simple notice of six months. The most recent Act entitles them to serve notice only with legitimate grounds; i.e. when their interests take priority over a tenant's right to housing. This new limitation is consistent with established practice in other European countries (e.g. French and Germany, for instance) and requires an examination of the interests of both parties.

One such legitimate reason for serving notice is the desire on the part of the landlord to sell his/her property. In such a scenario the economic interest of the landlord (in obtaining the full market value of the property) will prevail over the tenant's right to housing, unless the landlord is acting in a purely commercial capacity (i.e., the landlord must now be employed as a commercial landlord letting and selling property).

If the landlord does not serve notice, the contract is automatically renewed for a further four years, unless the minimal duration is for three years in which case the contract will be prolonged for an additional two years.

Question 6: Contract Unlimited in Time

- a) L and T have concluded a tenancy contract, which does not contain any limitation in time. Under which conditions and terms is L allowed to give notice? In particular: Can L give notice if she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?**

The validity of contracts unlimited in time is at issue here. Although duration is an essential element of tenancy contracts, unlimited contracts are not necessarily invalid. Default rules determine their minimum duration. One of these is foreseen in the field of commercial contracts (art. 27 subs. 4 L. 392/1978, provides for a minimum duration of six years for such tenancy contracts sub 1) – 2), nine years for hotel tenancy contracts). For residential properties, art. 1574 cc states that the duration of a contract unlimited in time is one year. However, this rule is inconsistent with the modern regime, according to which such contracts cannot last for less than four or three years. By analogy with the laws relating to commercial tenancy contracts³³, it is therefore argued that contracts unlimited in time are invalid, and are instead subject to the minimum duration rule.

Therefore, whilst tenants may terminate the contract at any time, with legitimate reasons, by serving notice of six months (art. 3 subs. 6 L. 431/1998), landlords cannot terminate the contract at any time.

As consequence, L is allowed to serve notice to T:

- a) Only after four years (or three years in certain circumstances) upon expiration of the tenancy contract by serving six months notice, if he has legitimate grounds (listed by art. 3 L. 431/1998) such as:
- 1) L wants to use the apartment for himself or for his family members, for housing or professional purposes;
 - 2) when he wants to use it for public, cultural, religious purposes (provided that he offers T an alternative apartment);
 - 3) when T is the owner of an appropriate apartment in the same municipal district (of course the tenant must disclose this fact);
 - 3) when the house has become significantly damaged and must be renovated.
 - 4) when T, without a legitimate reason, does not live permanently in the apartment.

³³ G. Gabrielli/F. Padovini, (supra note 20), p. 549.

5) when L desires to sell his property - provided that he has no other apartment except where he lives.

If L does not terminate within the time limit described under a), the contract is legally renewed. In this case, he/she can terminate the contract after four years (“normal” contracts) or after two years (“special” contracts) with a notice of six months before (see supra, Introduction to question 6). After the first deadline, however, the landlord must not invoke specific grounds to terminate the contract.

b) Let us assume that in a trial, L wins an eviction order with *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?

Unlike other legal systems³⁴, Italian law does not provide a ‘social clause’ as a defence for tenants against an eviction order, where T risks becoming homeless, is elderly or infirm.

T may have a legal defence under the temporary provision of art. 6 L. 431/1998, which concerns contracts concluded before L. 431/1998 entered into force. It provides for the suspension of an eviction order, if the house is situated in a highly populated municipal district. The suspension would last for six months; or eighteen months if the tenant is unemployed, is 65 years old, or has five or more children.

a) Generally, all litigation concerning tenancy contracts in urban estates is regulated by a special procedure (art. 447bis of the code of civil procedure), which aims at speeding up proceedings.³⁵ Firstly, the landlord must notify the tenant of the claim and the judge must fix the trial for a date not later than sixty days after a claim has been made to the judicial office. If the court upholds the plaintiff’s claim, the defendant will be required to leave the apartment.

a) The special eviction procedures are regulated by artt. 657 ff. c.p.c., which provide for an efficient trial (that is, «a cognizione sommaria»). The grounds for bringing such a special eviction procedure may include: a) breach of contract b) the expiration of the contract.

If the judge upholds the claim of the landlord, the procedure concludes with an eviction order.

The tenant may, however, opt for the “normal” procedure (outlined in sub a)

Question 7: Contract Limited in Time and Termination

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

Such a term is invalid, and, as a consequence, it is replaced by the mandatory rule under art. 2 L. 431/1998 (art. 13 L. 431/1998).³⁶ This rule, as stressed above, provides for a minimum duration of four (or exceptionally three) years.

³⁴ Cfr. art. 15-III *Loi Mermez*.

³⁵ See L. A. SCARANO, *Disciplina processuale delle controversie in materia di locazioni urbane*, in: S. Patti, *Il contratto di locazione* (1996), p. 341 et seq.

³⁶ G. Gabrielli/F. Padovini, (supra note 20), p. 510.

Housing contracts can last less than four or three years, however, only in two key situations (see art. 5, subs. 1 – 2, L. n. 431/1998):

1) if they are concluded for temporary needs (art. 5 subs. 1 L. n. 431/1998) - for example, because the tenant works in the town where the dwelling is situated. In this case they are valid if:

- a) the rent is fixed in accordance with the rent ceiling determined by agreements between landlord and tenant associations;
- b) the temporary need is declared in writing, and is formally proved by documentation attached to the contract (see D. M. 5 March 1999);³⁷

2) if they are concluded by visiting University students (art. 5 subs. 2 L. n. 431/1998). In such situations, the contract must respect the rent ceiling agreed by landlord and tenant associations, and must endure not less than 6 months and not more than 3 years.

Both contracts under 1) and 2) must be concluded in conformity with the additional rules stated by the local agreements made between landlord and tenant associations.

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?

This contract is normally invalid (see above, question 7), unless it falls under the cases listed above, question 7, a) or b).

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

The possibility for landlords to serve notice only once a year is invalid, as they may serve notice only once every four (or two) years.

The cause would probably be valid if applied to T, but only if it safeguards his position more fully than the law. The law allows him to terminate at any time with a notice of *six* months before the moment when he desires to vacate the premises, provided he has **legitimate grounds** (art. 3 subs. 6 L. 431/1998). If, however, he serves notice within the limit of *six* months before the *legal deadline* (four or three years by the conclusion of the contract), he need not invoke a specific ground for so doing.³⁸

A clause in a contract permitting tenants to serve notice before the legal deadline even without legitimate grounds are held to be legally valid, as they act in the tenants favour (art. 4 L. 392/1978).³⁹ However, a term restricting a tenant's ability to serve notice to once every year is most likely valid, provided the tenant is entitled to terminate the contract any time on serious grounds.

³⁷ G. Gabrielli/F. Padovini, (supra note 20), p. 515 et seq.

³⁸ G. Gabrielli/F. Padovini, (supra note 20), p. 500.

³⁹ G. Gabrielli/F. Padovini, (supra note 20), p. 561.

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?

In case of death of L, her heirs are not allowed to give immediate notice to T, because they substitute L in her contractual position.

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

In the case of sale, the buyer has no right to give anticipated notice, for as tenancy law states the “*emptio non tollit locatum*” rule is mandatory (art. 7 L. n. 392/1978). Though for contracts which do not fall within the category of urban real estate this rule is merely dispositive (art. 1599 subs. 1 cc).

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?

According to art. 2923 cc, in the case of an auction the buyer cannot serve an anticipated notice upon the tenant if the legally ascertained date of the tenancy contract is prior to the distraint (‘*pignoramento*’). However, if the rent is low, i.e. one third less than the ‘fair’ price, or the price fixed by the standard tenancy contract, the buyer's right will triumph over the rights of T. Art. 2923 c.c. does not outline the criteria used to calculate a ‘fair’ amount, which would probably be deduced by referring to the market price.

As pointed out above, these grounds are insufficient for termination.

Question 10: Tenancy “For Life”

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

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

Art. 1607 cc entitles contracting parties to conclude tenancy contracts for residential purposes which contain the explicit clause “for life”, or which endure for two years after the death of the tenants. This provision, which relates only to this form of tenancy contract, is exceptional and operates beyond the general rule of art. 1573 cc, which states that tenancy contracts concluded for other purposes (commercial or professional, etc) cannot endure for more than thirty years. If the contract contains the explicit clause "for life", L may serve notice before T's death according to the general contract rules (breach or frustration of contract) and the legal rules concerning tenancy contracts [*see* art. 1608 cc: landlords may serve notice if tenants fail to equip the apartment with sufficient enough furniture: this rule can be explained with reference to art. 2764 cc, according to which landlords retain a ‘legal guarantee’ on the furniture in the event of an auction. Landlords will

evaluate whether the value of the furniture is enough; if not, they may ask tenants for another guarantee (see art. 11 L. n. 392/1998, concerning deposit)].

Tenancy for life must be distinguished from a “real right of residence” to be registered in the land register. This right exists (art. 1022 cc), and may last for the entire life of the resident, but not more than this time limit. The landlord may give anticipated notice if the resident abuses his/her right (that is, he/she destroys the building, or sells it, etc), or if he/she does not use it for at least twenty years (prescription).

Question 11: Termination under Exceptional Circumstances

L and T have concluded a tenancy contract with or without time limit. Under what conditions and terms may one party give “exceptional” notice in unforeseen 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?**

One party may give “exceptional” notice in unforeseen circumstances under the following conditions:

- 1) Breach of contractual duties;
- 2) Impossibility to fulfil the contractual duties for force majeure (e.g. the destruction of the building by an earthquake);
- 3) One of the contractual duties has become too onerous for either party to perform.

As regards situation a), L has the right to terminate the contract only if T does not pay at least two month's rent (art. 5 L. n. 392/1978). In this case, however, L cannot give immediate notice, but he/she must bring an action against T, in order to obtain a judicial eviction order. Nevertheless, T may exempt himself/herself from liability, and prevent the contract from being rescinded if he/she pays the monthly rent ‘into the hands of the judge’ (art. 55 L. 392/1978). This possibility is allowed even if the landlord has brought a claim for rescission, and the trial has begun. This is an exception to the general rules on the rescission of contracts. In accordance with art. 1453 cc, if a party does opt for a judicial rescission of the contract, he/she may not seek to continue with the agreement at a later date.

As regards situation b), this is not a sufficient ground to terminate the contract.

As regards situation c), this contractual clause would probably be invalid, as it would offend against art. 55 L. 392/1978, which permits T to perform the contract, even when L has commenced an action against him/her. Indeed, art. 55 is a mandatory rule.

Set 3: Rent and Rent Increase

From the year 1978 until 1998 the Italian legal system imposed a legal rent ceiling for tenancy contracts for residential properties. As such, rents were not fixed by the parties, but were calculated and increased/decreased according to legal criteria. The rationale for proceeding in this manner was, again, the need to ensure distributive justice between the parties by reducing the ground rent of owners, and providing for a fair solution to the housing problem. This approach was further influenced by the constitutional principle on 'the social function of property' (art. 42 Const.). The economic and social benefit of this political project was limited. In practice, the mandatory 'fair rent' dissuaded landlords from letting properties, thus further increasing demand.

The most recent statute (L. n. 431/1998) sought to ameliorate the deficiencies of the previous one, and aims at weighing property rights against the need to protect the weaker party (or tenants). It states that the rent is to be freely negotiated between the parties (for 'normal' tenancy contracts), and determined by landlord and tenant associations (for special tenancy contracts). The only grounds for a reduction in rent which has been freely negotiated by the parties is outlined in art. 13 L. n. 431/1998.

According to this precept, an oral or written contract that has not been registered and which sets a higher rent than appears in the provisions of the registered contract will be invalid. As such, if the tenant is being cheated by his/her landlord, he may have the fictitious rent set aside and instead pay the registered rent [see *supra*, question 4, sub b)].

Question 12: Settlement Date and Modes of Payment

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

The rent is due in accordance with the terms of the contract. However, there are a number of restrictions imposed upon the possible modes of payment. Firstly, the deadline for the payment of rent cannot exceed one year (art. 13 sibs. 4 L. 431/1998). Secondly, landlords cannot request tenants anticipated payments of rents, if their amount exceeds more three months' rents (art. 2 – *ter* L. 12 August 1974, n. 351).

If there are no specific clauses imposing/excluding certain times and modes of payment, the rent is due on the first day of each period of time agreed (e.g. week, month, quarter, etc).⁴⁰

L has a right of prior distraint on T's furniture and other belongings to cover the rent and possible other claims against T (art. 2764 subs. 5 cc). This right exists even if the furniture belongs to a subtenant, provided that the landlord may require payment of the rent by him/her (art. 1595 cc, concerning the relationship between landlords and subtenants). In this case, landlords are directly creditors of the subtenants. However, art. 1595 cc does not provide for further specific conditions.

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

⁴⁰ G. Gabrielli/F. Padovini, (*supra* note 20), p. 366 et seq.

profiteering)? By whom are these rules enforced? (public ministry or national or local administrative agency etc).

For "standard" tenancy contracts, it would appear that there no rules covering the issue of rent increase in the housing statute. It is for the parties to the contract to determine the time and method of rent payments, in addition to the amount that the landlord is entitled to increase the rent.⁴¹ The commercial tenancies statute does establish special rules on rent increases, which may be enforced by the parties (art. 32 L. 392/1978).

For "special" tenancy contracts (i.e. contracts drafted in accordance with agreements between landlord and tenant associations), there are rules on the maximum permissible rent increase. These rules are private law rules, and may therefore be enforced by bringing civil proceedings. According to art. 5 D. M. of 5 March, 1999, rent increases cannot exceed the agreed rent ceiling agreed between the associations; or alternatively, the ceiling of 75% of the variation of INSTAT index (that is, the annual average increase of the cost of living as established by official statistics).

Question 14: "Index-clause".

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

See above, question 13.

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

See above, question 13.

Question 15: Unlawful Rent Increase by Contractual Amendment

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

The rent increase is not automatically effective, but must be negotiated by the parties. The present scenario would probably not be interpreted as a valid contractual amendment, as under art. 13 L. 431/1998 rent increases are invalid if they are not inserted into the written contract, which must already have been registered for fiscal purposes. As such, T need not pay the rent increases, and may get seek restitution, in accordance with the general rules concerning undue payments (art. 2033 cc).

Moreover, it must be recalled that even if the agreed rent exceeds the permitted ceiling, the Italian courts affirm that a tenant may not refuse payment.⁴²

⁴¹ G. Gabrielli/F. Padovini, (supra note 20), p. 358.

⁴² G. Gabrielli/F. Padovini, (supra note 20), p. 373 et seq.

It is unclear whether this rule would apply to the scenario outlined in Q15. If so, T would probably be unable to off-set the monies paid against future rent instalments, but must instead bring court proceedings against L to have the court nullify the contractual amendment.

Question 16: Deposits

What are the basic rules on deposits?

Deposits are a form of pledge,⁴³ according to which the tenant gives a sum of money to the landlord as a guarantee that he will perform his/her duty. The landlord must return the exact sum to T upon the termination of the tenancy contract, but he cannot acquire any additional legal interest as a result.⁴⁴ The only legal mandatory limit on deposits is outlined in art. 11 L. 392/1978 which states that the sum of money given as a deposit cannot exceed three monthly rent payments.

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?

Art. 9 L. 392/1978 outlines a list of utilities which must be charged to tenants: these are, for instance, the maintenance of lifts, the supply of water, electricity, heating and expenses resulting from the need to paint the property. Generally, tenants are legally bound to pay for all common utilities. This is to strike a balance between the landlord and the tenant, who is compensated by the advantages derived from statute n. 392/1978.⁴⁵

However, art. 9 L. 392/1978 is not mandatory and may be the subject of negotiation at the time of contracting, provided that the eventual outcome is equally or more favourable to the tenant (art. 79 L. n. 392/1978).⁴⁶ As stressed above, art. 79 L. n. 392/1978 has been abrogated by art. 14 subs. 4 L. n. 431/1998, which has cancelled the only restriction to the validity of such an agreement. As such, a clause which establishes a monthly lump sum to cover certain or all utilities would be valid.

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

In our system there are two main groups of provisions concerning the control of standard terms:

a) the rules which have implemented the Directive on Unfair Terms in Consumer Contracts in 1996 (*cf.* art. 1469*bis* ff. cc) are restricted to contracts between consumers and commercial parties.

⁴³ G. Gabrielli/F. Padovini, (supra note 20), p. 434.

⁴⁴ G. Gabrielli/F. Padovini, (supra note 20), p. 435.

⁴⁵ Cass. civ., 19 November 1994, n. 9807, in [1995] Guida al Diritto, p. 65; Cass. civ., Sez.un., 30/03/1994, n. 3132, in [1995], Giust. Civ. I, p. 1347.

⁴⁶ Trib. Milano, 21 June 1993, in [1994], Gius, p. 206

They apply also to tenancy contracts, but only if concluded by these parties.⁴⁷ They outline a role for consumer associations (art. 1469^{sexies} cc provides that consumer associations may seek to have certain abusive clauses overturned, and prohibit their future use).

b) the older rules concerning standard terms were introduced by the civil code of 1942 (art. 1341 – 1342 cc), which lists several abusive clauses. They apply to all contracts whether between consumers or commercial parties, and state that general standard terms are valid only if the weaker party is made aware of them or ought to have been aware of them. Moreover, the listed standard clauses do not have effect if they are not specifically undersigned by the weaker party. Therefore, if undersigned these clauses will bind both parties even if they are included in the list of abusive clauses.

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)

Under EC law, whilst any tenancy contract (even among a consumer and a non-commercial party) may have a profit-making objective, the landlord must be a professional landlord who is earning his living by renting property, in order to qualify as a commercial landlord (see the general definition of ‘professional’ contractor stated by art. 1469^{bis} cc). Of course, this evaluation is not based on abstractly defined criteria.

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, unless authorised to do so by court order.

Tenancy contracts require tenants to pay the rent and any other charges due under the agreement. A failure to pay rent is, therefore, a breach of contract. In the scenarios outlined, only one contracting party (the tenant) is prevented from raising objections, and, as such, this is abusive under the general rule of art. 1341 cc. Unless specifically undersigned by the tenant these terms can have no legal effect. If the contract is concluded between a consumer and a commercial party, this clause will be abusive under art. 1469 bis subs. 3 n. 3).

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

This clause would not be abusive, as it is not listed under art. 1341 cc. Moreover, art. 1609 cc requires the tenant to pay the cost of small reparations, therefore the present clause is in conformity with the law.

⁴⁷ G. Gabrielli/F. Padovini, supra note 20, p. 259 et seq.

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

The covenant sub c) is not abusive, because it is not listed under art. 1341 cc. Moreover, art. 1609 cc requires the tenant to meet the cost of any repairs which may arise during the 'normal' use of the apartment. This would most probably be the case for this scenario (see infra, question 26).⁴⁸

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

This clause has no effect unless undersigned by the tenant, as it allows only the landlord to evict. It would most likely be unlawful (art. 1343 cc), and discriminatory, and a violation of the constitutional fundamental freedom principle. Art. 18 of the Constitution affirms the fundamental freedom of citizens to join any association, whose purpose is lawful.

As outlined supra, Question 18, Introduction, art. 1469*sexies* cc allows consumer associations to promote consumers' rights vis-à-vis abusive terms.

Moreover, the cited directive has been implemented by L. 30 July 1998, n. 281, which further entitles consumer associations to promote the rights of the consumers listed under art. 1 subs. 2.

Question 20: Changes to the Building by the Tenant

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

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?

There is no case law addressing this issue. T has the power to use the leasehold property in conformity with the purposes stated under the contract. If the parties have not expressly stated in the contract what is and is not permissible, then T would not need L's permission to install a parabolic TV antenna, unless the 'condominial' rules of the apartment expressly prohibited such an action.

⁴⁸ There are no cases concerning re-painting of premises. The repair of frames, for example, is not considered to be a small reparation, and need not be paid by the tenant (Cass. civ., 18 October 1993, n. 6798 in [1994] Giust. Civ., I, p. 1359).

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?

T has the power to use the leasehold property in conformity with the terms of the contract, and, with legally mandatory rules. L could, therefore, not force him to remove the huge poster. Moreover, a contractual clause prohibiting T from displaying such a poster would probably be unlawful. However, such a problem has not been brought before the courts to date.

With regard to other possible changes to the building, there are cases concerning, for example, a change to an apartment in order to provide an elevator suitable for disabled persons.⁴⁹

As regards the relationship between landlords and tenants, the controversial point has centred upon the cost considerations of changing the structure of a building.⁵⁰

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

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

Again no case law exists on this issue, however, L probably does have a right to possess one set of keys. L is not allowed to enter T's apartment without his/her prior permission, and would commit a criminal offence if he/she were to do so. In such a scenario, T would probably be entitled to sue L for a "violation of his/her possession" relying upon art. 1168 cc. Again, no case law exists in order to satisfactorily address this issue.

Exceptional circumstances in which L may be entitled to enter T's apartment, without T's permission may include, for example: if L must repair the building, and T refuses to allow him/her to enter. The legal basis for such an action would be L's property right, which obliges L, as the owner, to maintain the building in a suitable condition, in order to allow the tenant to enjoy it (art. 1575 cc), and in order to prevent any harm to third persons (art. 2053 cc).

Question 22: The Landlord's Liability for Personal Injury

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

L is normally obliged to maintain the stairs, as this forms part of the structure of the building (see infra, question 26). Therefore, he/she is liable for any personal damages caused to C. As C is

⁴⁹ Pret. Roma, 15 May 1996, in [1996] *Arch. Locazioni*, p. 564, concerning the relationship between the owner of a dwelling and the rest of the owners.

⁵⁰ Pret. Busto Arsizio, 21 April 1997, in [199] *Arch. Locazioni*, p. 467.

not a party to the tenancy contract, L would be liable in tort. Art. 2043 cc (the general rule on liability in tort) would apply to this situation.

Under Italian law, the doctrine of “security obligations” applicable to third parties has been developed by the courts, outside of tenancy law. There are a number of celebrated cases concerning liability in medical cases⁵¹, where a surgeon has been declared contractually liable, even though the victim had concluded a contract with the hospital, and not with the individual surgeon. This doctrine has not met with unanimous approval.

Set 5: Breach of Contract

In examining the issue of breach of tenancy contracts, I will focus upon the special mandatory provisions which derogate from the general rules on contract law. Conversely, the general rules on contract law apply in cases of impossibility and delay (questions 23 and 25). Moreover, I will take into account the guarantees for vices’ discipline, which may be compared only with the sale’s regime (question 26).

As regard the non-fulfilment of tenants’ duties, and the subsequent resolution of the contract, the statute provides for three main rules, which operate to protect tenants. The majority opinion asserts that these rules concern only the housing regime.⁵²

The special rules are the following:

1) Firstly, art. 5 L. 392/1978

2) Secondly, art. 55 L. 392/1978

3) The third special rule applies if the tenant uses the leased property for an unlawful purpose (e.g. where the leasing of property for a commercial purpose is transformed into a lease for housing). Under article 80, the landlord must bring proceedings within three months of the day in which he first became aware of the property being used for a different purpose. This time limit is considered as a foreclosure (and not a prescription).⁵³

Question 23: Destruction of the House after Conclusion of the Contract

a) L and T conclude a tenancy contract. Before T takes possession of the apartment, a fire for which neither party is responsible destroys it.

L is obliged to hand over possession of the apartment to T. If a fire for which neither party is liable destroys the property, it becomes impossible for L to perform. Therefore, according to the general rules on contracts, which do not transfer property rights, the lease is frustrated (art. 1463 c.c.).

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

⁵¹ Cass., 22 January 1999 n. 589, in [1999] Foro It., I, 3332.

⁵² Cass. 28 April 1999, n. 272 [1999] FI, 1774.

⁵³ G. Gabrielli/ F. Padovini, (supra note 20), p. 616.

The contract is frustrated whether the apartment is destroyed subsequent to the transfer of possession to the tenant or before; the only difference in this scenario concerns the issue of proof. As T must take good care of the apartment once he acquires possession, he (and not the landlord) must prove that the fire was accidental and did not occur as a result of his actions or omissions.⁵⁴

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?

c) If, the apartment was already destroyed at the time of the conclusion of the contract, the contract is invalid because of the inexistence of its object (see art. 1346 c.c.).

Question 24: "Double Contracts"

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

The personal right of the tenant is subject to specific rules, which are different from the ones concerning property rights. In the case of double contracts, the former right takes priority over the subsequent contractual right, if T1 has taken possession of the apartment (art. 1380 c.c.). It is not necessary for T1 to have acted in good faith. Therefore, the contract of T2 has no effects against T1, even if it remains valid. Therefore, T1 may only seek damages against L.

If neither tenant has taken possession of the apartment, the first contract would take priority over the second if made by deed or if it has a fixed time entered in the agreement. If registration of the lease was required (necessary for tenancy contracts in excess of nine years) the first registered contract would prevail. This final rule is that applied to a 'double sale contract' (art. 2644 cc).

The case of the double tenancy contract, therefore, shows a possible 'real' effect of the personal right of the tenant.

Question 25: Delayed Completion

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

⁵⁴G. Gabrielli/ F. Padovini, (supra note 20), p. 621

procedure, the apartment is not available until 1/1/2004. Has T any claims against L? Has L claims against N?

A solution to this question can be premised upon the general principles of the Italian law of obligations and contract law.

If the completion of an apartment becomes temporarily impossible, L will not be held liable unless at fault. T would therefore have no claim against L in this scenario, as the delay cannot be imputed to L. This solution is premised upon art. 1256 subs. 2 cc. Impossibility exempts a debtor from liability if it is due to an unavoidable accident, to *force majeure*, or to the act or omissions of a third party.

L has no claims against N, as N has not acted unlawfully.

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

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

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

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

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

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

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

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

First of all it is important to note that the Italian code provides for different guarantees according to the nature of the problem affecting the apartment. The code distinguishes between 'vices' and 'failures'.

The former concern the structure of the apartment, and become relevant if they substantially diminish the possibility to use and enjoy the property. In such a case, the tenant may ask for the contract to be set aside or for a reduction in the rent (art. 1578 cc). T cannot ask L to renovate the apartment.⁵⁵

'Failures' refer to damage caused to the apartment through 'wear-and-tear' and/or age. In such cases, the landlord must restore the property to its original state and must guarantee the necessary repairs will be carried out (art. 1575 n. 2 cc). Only minor repairs (i.e. damage caused by wear-and-tear) must be met by the tenant (art. 1609 subs. 2 cc: what constitutes minor repairs must be determined by agreement or local customs). These rules are, however, non-mandatory and may therefore be excluded by a clause in the contract.

⁵⁵ G. Gabrielli/F. Padovini, (supra note 20), p. 248.

It is of course difficult to distinguish 'vices' and 'failures'⁵⁶, a task which falls to the courts.

- a) Stains of mildew may not be considered 'vices', as they do not impact substantially upon the use of the apartment. As a consequence, T cannot ask for a reduction in the rent nor for the contract to be set aside. Stains of mildew may, however, be considered as 'failures' which arise as a result of the age of the property. As such, the removal of the stains would fall to the landlord, which further implies a serious renovation of the apartment.

Where stains of mildew do not cause structural problems, they would fall into the category of 'small repairs', the cost of which would have to be met by T. Indeed, re-painting internal walls, for example, is normally adjudged to be a 'small' repair.⁵⁷

Variant 1. It is lawful that T has the repair done by a specialist, but he may probably not off-set the costs against the monthly rent payments for the reason outlined in question 15.

Variant 2 . As a general rule, landlords will not be held accountable for any problems in the apartment which the tenant is aware of / has been made aware of when agreeing to the lease (art. 1578 cc). This therefore prevents tenants from attempting to rescind the contract or reduce the rent due.

If the particular problem poses a danger to T's health and safety, though he/she was aware of the problem, the contract may be set aside. Stains of mildew are not sufficiently grave for this rule to apply.

In scenarios b) and c), T is not entitled to a reduction in the rent.

According to art.1585 cc, landlords must guarantee that tenants enjoyment of their property is not disturbed by third persons (art. 1585 subs. 2). However, this is not the case under b) and c) which concern 'material' nuisances, and therefore do not fall under the guarantee of art. 1585 cc. In a situation that falls under the scope of art. 1585 cc, the landlord is not required to reduce T's rents, but must instead protect the tenant by bringing an action against the offending third party in order to stop the nuisance. T may bring an action directly against the neighbours (at least in case c), where the conduct of his/her neighbours is unlawful. Italian courts have recently adopted a broad interpretation of art. 844 cc (injunction against intolerable nuisances), concerning property rights. Tenants can therefore avail themselves of this remedy in order to end nuisance.⁵⁸

Question 27: House to be used for Specific Purpose

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

⁵⁶ G. Gabrielli/ F. Padovini, (supra note 20), p. 244.

⁵⁷ F. Lazzaro / M. Di Marzio, supra note 13, p. 720.

⁵⁸ Cass. 11 November 1992, n. 1233, in [1994] Foro it., I, 205.

When leased property cannot be used for the purpose intended by both parties (even if not expressly stipulated in the contract) because of the denial of a licence by public authorities, the contract is frustrated. Tenants cannot ask for changes to be made to the property in order for it to conform to the requirements of the authorities.⁵⁹ Instead, the courts affirm that this circumstance must be considered as sufficient to frustrate the contract;⁶⁰ unless the property is only partially affected, in which case T can claim for the reduction of the rent.

If T has no interest in the remainder of the apartment, he can instead request rescission.⁶¹

There are special rules applying to mixed 'private-professional' tenancy contracts which are subject to a minimum duration requirement (art. 27 L. n. 392/1978). and to legal renewal except where there are specific grounds for eviction (art. 28 L. n. 392/1978).

Set 6: The Relationship among the Tenant and Third Persons

The relationship between tenants and third parties is linked to the question of the 'nature' of tenancy rights. The majority opinion asserts that tenancy rights are 'obligatory'. They do, nonetheless, display some 'property law' characteristics:

- Firstly, tenancy contracts persist despite a change in ownership [*emptio non tollit locatum*: see supra, question 9, sub b)].
- Secondly, tenants can avail themselves of some property law remedies. For instance, as possessor they are entitled to claim against eviction (art. 1168 cc); and can seek an injunction in the case of nuisance. They may also bring proceedings for damages.

Question 28: Neighbour Relations

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

T may bring a direct action against his/her neighbours in order to have the intolerable nuisances brought to an end (see supra, question 26).

It does not make a difference whether T is the tenant or the owner of the apartment. Moreover, it does not make a difference if T and N are tenants of the same landlord. Finally, there are no public law mechanisms to which the tenant may resort.

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged negligently by a lorry during construction work undertaken at a neighbour's house, which causes repair costs of 10000 € and entails T being unable to use two rooms for 2 weeks. The lorry has been driven by E, an

⁵⁹ G. Gabrielli/F. Padovini, (supra note 20), p. 627.

⁶⁰ Cass. 2000, n. 1203.

⁶¹ G. Gabrielli/F. Padovini, (supra note 20), p. 638 et seq.

employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?

If the building company or the neighbour are at fault, then T has a claim against both tortfeasors, according to the general rule of art. 2043 cc.⁶² The violation of the tenant's personal right may be considered as 'unjust damage' according to art. 2043 cc. This would mean that the right of the tenant is protected *erga omnes* by liability rules.

Moreover, the building company would be liable under tort law for the actions of its employee (the lorry driver). This is a strict liability rule (art. 2049 cc). The neighbour N who commissioned the building company may evade liability for the tort committed by the lorry driver, as the building company's activity is normally autonomous.

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

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

Negotiorum gestio is one of the sources of an obligation (art. 1173 cc). According to art. 2028 ff. cc, the requirements of *negotiorum gestio* are the following:⁶³ - *absentia domini* (the owner must not be present); - '*utiliter coeptum*' (that is, the activity of the third person must be founded on criteria of good administration)⁶⁴; - the absence of a legal duty to help;⁶⁵ - an awareness that the affair in question relates to another person. Moreover, the *dominus* must not have prohibited the activity of the third person.⁶⁶

In the case outlined above, these requirements appear to be satisfied - except, perhaps, for the '*utiliter coeptum*' requirement. The majority opinion asserts that this requirement is met if the court decides that the *dominus*, if present in the circumstances, would have performed the same activity as was performed⁶⁷; finally, it is sufficient that the third party's aim was to prevent unnecessary damage to the property of the *dominus*.⁶⁸

⁶² G. Gabrielli/F. Padovini, (supra note 20), p. 302.

⁶³ For more detailed information see U. Breccia, La gestione di affari, in: Trattato diritto privato edited by P. Rescigno, 9, 1°, 1984, p. 704 et seq.

⁶⁴ L. Bigliazzi Geri/U. Breccia/F. D. Busnelli/U. Natoli, Diritto civile, 3, Obbligazioni e contratti, 1988, p. 802.

⁶⁵ Cass. civ., 29 March 2001, n.4623

⁶⁶ App. Roma, 09 December 1991, in [1992] Nuova Giur. Civ., I, p. 805.

⁶⁷ Cass. 30 September 1952, n. 2927, in [1953] Foro it., I, 1144.

⁶⁸ Trib. Torino, 01 December 1986 in [1987] Giur. di Merito, p. 1187.

If N's activity is considered to be a case of '*negotiorum gestio*' (2028 cc), he/she will have a claim against T for expenses arising out of N opening the apartment door. T, on the other hand, can claim for damages if N has acted without observing due diligence (art. 2030 cc).

If, however, the case is not considered to be one of '*negotiorum gestio*', N has acted unlawfully, and T can claim for damages according to the general rule under art. 2043 cc.