

## **POLAND**

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## **A. INTRODUCTION**

This report provides an introduction to the Polish law of tenancy and a brief analysis of the changes this field of law has experienced in recent years. The last decade has witnessed comprehensive law reform in Poland, particularly in the ambit of civil law and civil procedure, primarily to enhance consumer protection. In addition to difficulties arising from an overhaul of the judicial system and transformations wrought by the re-privatisation process, a general lack of clarity further remains with regard to the ownership of private property and to the doctrine of restitution. As a result, the application of the law in this field has been in a something of a general flux.

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

#### **a. Historical background**

Prior to the outbreak of the First World War there were four varying legal systems in Poland, due to the successive partitioning of the country by Russia, Prussia and Austria. The systems which operated in the four emerging "districts" were based on the French system of the Napoleon Code and Civil Code of the Polish "Congress" Kingdom; the Russian civil law (Zvod Zakonov); the German Civil Code of 1896 (previously the Prussian Landrecht of 1794) and finally the Austrian civil code of 1811. These legal instruments remained in use until shortly after the conclusion of the War when, in 1919, the Codification Commission was established by Parliamentary statute. The role of the Commission was firstly to unify, then to codify the civil law. The first statutes issued concerned The Cooperative Law (1920), The Intellectual Property Protection, Trademarks and Unfair Competition Act (1926) and Civil Procedure (1928). The Code of Obligations was only adopted in 1933 and the Commercial Code followed a year later. It was much easier to adopt provisions concerning economic relations than those regarding other branches of civil and administrative law, which continued to be regulated by the four different district systems<sup>1</sup>. The underlying cause for such solutions was difficulties encountered in re-creating a common administrative system for the entire country.

The process of unification and codification came to a standstill with the onset of the Second World War, and it was only resumed after the war. Beginning in 1947 the entire legal system was remodelled to fit with the principles of the socialist economy. The Civil Code adopted in 1964 fully adopted the socialist typology of ownership and the principle of unity of public ownership. It also contained special rules on the effects of political decisions concerning the planned economy on the civil relationships between the parties.

It was only with the reforms of the 1990's that free market principles were introduced in the field of property law, allowing for the gradual evolution of the market for real estate and tenancy. There were different types of "property-like" rights that evolved during this period in order to circumvent the socialist principles that reserved the ownership of property for commercial or agricultural purposes to the State or to entities controlled or organised by the State. This report does not deal with them in great detail, however it is necessary to at least draw attention to the various

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<sup>1</sup> Extensively on these developments: Z. Radwanski "Prawo cywilne – czesc ogólna", Warszawa 1997, C. H. Beck; K. Pietrzykowski ed. "Kodeks cywilny. Komentarz, t. I", Warszawa 1997; Z. Resich, J. Ignatowicz, J. Pietrzykowski, J. I. Bielecki eds. "Kodeks cywilny. Komentarz", Warszawa 1972; J. Winiarz ed. "Kodeks cywilny z komentarzem", Warszawa 1989

forms of limited rights that have been in use and which have influenced the present shape of Polish tenancy law. This task is undertaken in this report in the section devoted to other forms of legal possession of premises for housing purposes.

## Development of Tenancy Law

The first tenancy law statute for the protection of tenants was adopted in the 1920's<sup>2</sup>, the main instrument used there for the protection of tenants being the fixing of rent at low levels. Some authors claim that the major housing crisis of the 1930's had been triggered by this law, as there was a rapid decline in the housing stock, which had already been depleted during the war years and due to a lack of proper administrative measures. The imposition of low rents decreased the number of renovations and improvements made to housing, resulting in a number of building collapses. It is interesting to note that the statutory limitation on the rent was not applicable to new buildings<sup>3</sup>.

During and after the Second World War some decrees were issued in order to meet demand and to regulate the post-war chaos: (i) Decree on housing commissions of 7 September 1944<sup>4</sup> which regulated the procedure for granting housing premises and made it conditional upon occupation/ profession, state of health and family status. This statute also fixed the rent at the pre-war level; (ii) Decree on public administration of housing of 21 December 1945<sup>5</sup>, which set out a special administrative regime for granting of tenancy in particular zones of the country – those most affected by the war; (iii) Decree on tenancy of 28 July 1948<sup>6</sup>.

The last decree has been the most influential, establishing the tenancy regime which for years became the backbone for tenant-landlord relations. It introduced for the first time the generally applicable rules on so called “reglamented” or regulated rent, which was adopted yearly on the basis of governmental regulations which again, led to the fixing of rent at a nominal value<sup>7</sup>. It was applicable to all tenancies, including those between private parties, if they had their source in an administrative decision. The level of the rent was insufficient to off-set the costs of repairs and maintenance necessary to keep buildings in a suitable condition. It was the court's caselaw that developed the general rule that tenants paying regulated rent (which at that time remained at the pre-war level) were required to participate in the costs of renovation and exploitation of the buildings, as far as these costs could not be covered by the rent itself. Such a situation arose, as under the law, landlords could not be forced to spend on the exploitation of the buildings more than the rent they were earning<sup>8</sup>. Somewhat extraordinarily the next rent increase did not take place until 1965 - some 15 years after the Supreme Court's judgement - and by means of a Regulation issued by the Cabinet of Ministers.<sup>9</sup> The last ministerial regulation on the level of rent was adopted only in 1992 and from 1994 onwards rent regulation has been one of the responsibilities of local authorities.

The later Act of 30 January 1959<sup>10</sup> was intended to serve as a codification of tenancy law provisions and it substituted the previous decrees. It is important to understand that these first decrees and statutes have been used primarily as means of implementing State housing policy based on the principles of social justice and were dependant on economic policy considerations, limiting

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<sup>2</sup> Act on the protection of tenants of 11 April 1924

<sup>3</sup> Polish Association of Property Owners [www.oswn.pl](http://www.oswn.pl)

<sup>4</sup> Decree on housing commissions of 7 September 1944 Dz. U. (Journal of Laws, quoted as Dz. U.) nr 4 item 18

<sup>5</sup> Decree on public administration of housing of 21 December 1945 Dz. U. 1946, nr 4 item 27; Dz.U. 1950, nr 36 item 337

<sup>6</sup> Decree on tenancy of 28 July 1948 Dz. U. 1950, nr 36, item 259; Dz. U. 1962 nr 47 item 227

<sup>7</sup> Some form of regulated rent will in fact be applicable to the end of 2004.

<sup>8</sup> Ruling of the Supreme Court of 15 November 1951, *Panstwo i Prawo* 1953, volume 1, pp. 138

<sup>9</sup> Council of Ministers Regulation of 20 July 1956, Dz. U. nr 35 item 224

<sup>10</sup> Act on tenancy law of 30 January 1959 Dz. U. nr 10 item 59

therefore the freedom of contractual relations<sup>11</sup>. In 1964, the new Civil Code was adopted. It devoted a separate chapter to tenancy provisions thus becoming *lex generalis* for tenancy relations.

The new housing act was not formally adopted until 10 April 1974<sup>12</sup>. Though in comparison with previous statutes it did limit the administrative distribution of tenancies and state control, it still maintained a special administrative regime for the establishment of a tenancy in areas faced by a housing shortage. In effect, due to a widespread shortage in housing the regime was applicable throughout the entire country. During this period a tenancy relationship between landlord and tenant could have its source either in contract, or in an administrative decision of a constitutive nature, which was the source of the right to premises<sup>13</sup>.

A number of provisions regarding tenancy law could and in fact still can be traced in acts concerning the military, police, border guards, etc as a special regime was established for the provision of housing to these particular groups – in such cases the tenancy relationship depended upon employment in a particular branch of the defence system (the so called serviceman's right to premises). Indeed, some authors have suggested that given the overwhelming involvement of public administration in the granting of 'tenant status', it ought reasonably to be taken out of the civil law realm altogether<sup>14</sup>. This suggestion was not however followed, much less ever seriously taken into account. It was not until 1994 that tenancy law underwent significant reform. In particular provisions regarding the administrative establishment of tenancy relationships were removed<sup>15</sup> and there was a move to “liberate” landlord and tenant relations<sup>16</sup> from administrative constraints. With regard to the protection of tenants, the 1994 Act provided that the landlord could only conclude the contract for an unlimited period of time, and only the tenant could demand that the contract be concluded for a limited period<sup>17</sup>.

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<sup>11</sup> More on this topic: Z. Radwanski “Najem mieszkani w świetle publicznej gospodarki lokalami”, Warszawa 1961

<sup>12</sup> Act on tenancy law of 10 April 1974 Dz. U. nr 14 item 84.

<sup>13</sup> J. Frackowiak “Powstanie najmu na podstawie decyzji o przydziale lokalu mieszkalnego”, *Palestra* 1974, nr 10, pp. 32.

<sup>14</sup> M. Andrełowicz, “Najem lokali w świetle nowych przepisów”, *PUG* 1958 nr 7, pp. 249; W. Brzezinski “Prawo mieszkaniowe”, Warszawa 1953, pp. 65.

<sup>15</sup> F. Zoll “Najem lokali mieszkalnych”, Kraków 1997, p. 95.

<sup>16</sup> K. Dybowski “Wybrane zagadnienia ustawy o najmie lokali mieszkalnych”, *Panstwo i Prawo* 1995/ 1, p. 45-51.

<sup>17</sup> K. Dybowski “Ustawa o ochronie praw lokatorów na tle wcześniejszych uregulowań”, *Panstwo i Prawo* 2001/11 p. 54.

Table nr 1 presents the general historical framework of the adopted acts and their subsequent amendments.

### **Structure of changes in Polish tenancy law**

Decree of 25 June 1954 on dwellings and houses in housing cooperatives <i>Dz.U. No 31 item 120</i>		Decree of Polish Committee of National Independence of 1947 on housing commissions <i>Dz.U. RP No 4 item 18</i>		Act of 11 April 1924 on tenant's protection <i>Dz.U. 1936 No 39 item 297</i>	
Decree of 21 December 1945 on public administration of housing <i>Dz.U. No 50 item 36</i>	Decree of 18 February 1955 on the organs responsible for public administration of housing <i>Dz.U. No 9 item 55</i>	Decree of 29 July 1948 on tenancy <i>Dz.U. 1958 No 50 item 243</i>	Art. 371, 373, 374, 380-382, 384, 389 of the Code of Obligations of 1934	Art. 21 of the Regulation of President of Polish Republic of 24 October 1934 on ownership of dwellings <i>Dz.U. No 94, item 848</i>	
Act on 6 June 1958 on rent collection and other state due charges arising from using land or buildings <i>Dz.U. No 35 item 156</i>		Act of 28 May 1957 on exclusion from public administration of houses and dwellings in the housing cooperatives <i>Dz.U. 1962 nr 47 item 228</i>		Act of 30 January 1959 Tenancy law <i>Dz.U. 1962 No 47 item 227</i>	
Act of 22 April 1958 on the reconstruction and maintenance of the buildings <i>Dz.U. 1968 No 36 item 249</i>			Act of 10 April 1974 Tenancy law <i>Dz.U. 1987 nr 30 item 165</i> Amendments of 16 July 1987 <i>Dz.U. 1987 No 21 item 124</i> , <i>Dz. U. 1989 no 20 item 108</i> Amendments of 23 march 1990 <i>Dz.U. 1990 No 32 item 190</i>		
Art. 67 of the Act of 2 July 1994 on tenancy law and housing subsidies <i>Dz. U. 1998 No 120 item 787</i>					
<b>Act on the protection of tenant's rights, communal housing stock and the Civil Code amendments of 21 July 2001</b> <i>Dz. U. 2001 nr 71 item 733 amended on 9 May 2003 Dz. U. 2003 nr 113 item 1069</i>					

Table nr 1, Source: E. Bonczak – Kucharczyk “Ochrona praw lokatorów, najem i inne formy odpłatnego używania mieszkań w świetle nowych przepisów”, Warszawa, Twigger 2002, pp 16-17; please note that the above table does not refer to relevant statutes and acts concerning the co-operative rights to residential premises – they are discussed in detail in section 2

#### **b. Recent law reforms**

At present, the core of Polish tenancy law consists of two components. The first is the Civil Code of 23<sup>rd</sup> April 1964, in which provisions specific to tenancy are contained in Part Three (Obligations), Title XVII (Tenancy and Lease), Section I (Tenancy), in Articles 659 to 692. Chapter I of this section comprises general provisions on tenancy, such as conditions that have to be met to create tenancy relationship, rights and duties of parties, and causes for termination of the relationship. It is applied to tenancy of all material objects. There is a distinct Chapter II applicable

exclusively to the tenancy of residential premises. It modifies and complements general provisions on tenancy contained in Chapter I. This combined application of provisions contained in Chapter I and Chapter II and other parts of the Civil Code has been rather well harmonised and does not raise major interpretative problems.

As the Civil Code contains mainly dispositive norms, parties to a tenancy agreement are granted a relatively wide scope of discretion. However, this margin is strongly limited by the second component of the core of Polish tenancy regime, which is the relatively new and highly controversial Act of 31<sup>st</sup> June 2001 on the Protection of Tenants' Rights, the Communal Housing Stock and the Civil Code Amendment.<sup>18</sup> (Further referred to as UOL). The name itself – on the protection of tenant's rights – suggests the biased position adopted by the legislator.

Its enactment represented, in fact, the realisation of a constitutional duty laid down in Article 75.2 of the Constitution to establish protection for tenants<sup>19</sup>. The Parliament was obliged to determine the scope and intensity of protection of residents in the UOL, since the Constitution does not address this issue. As the Constitution itself did not differentiate between various kinds of residents, it led to a common opinion that this protection should be established for all occupants of premises, regardless of the legal form of a 'lawful possession'. Indeed, the UOL has horizontal application to all occupants. Legal doctrine accepts that UOL establishes the minimum level of protection for tenants, and that it must be considered as *lex benignior praevalet* – in the sense that provisions found in other statutes can change the situation of the tenant only if they provide for a wider degree of protection<sup>20</sup>.

### c. Constitutional influences

One of the most characteristic features of the new Polish Constitution is an extensive and, for a number of commentators, excessively verbose part devoted to fundamental rights and freedoms. Chapter II in its entirety is devoted to economic, social and cultural freedoms and rights.

The 1997 Polish Constitution<sup>21</sup> establishes the protection of ownership and the right of succession, as well as other property rights, which may only be limited by means of statute and only to the extent that it does not violate the substance of such a right. Particularly articles 21 and 64 of the Constitution state that the Republic of Poland protects ownership and the right of succession, and that expropriation is only allowed for public purposes and for just compensation. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of the right<sup>22</sup>. One can similarly find provisions imposing upon public authorities the duty to pursue the satisfaction of the housing needs of citizens when conducting social and economic policies<sup>23</sup>. A specific obligation to protect the rights of tenants is further established by means of a separate statute (as set out in article 75). Interestingly, article 81 listing all of the above

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<sup>18</sup> Act of 31 June 2001 on the protection of tenants' rights, the communal housing stock and the civil code amendment Dz. U. 2001 nr 71 item 733, Further Quoted as the UOL – Ustawa o Ochronie Praw Lokatorów

<sup>19</sup> Art. 75.2 of the Constitution states "Protection of the rights of the tenants shall be established by statute"

<sup>20</sup> A. Maczynski, "Dawne i nowe instytucje polskiego prawa mieszkaniowego", Kwartalnik Prawa Prywatnego 2002/1 pp.65

<sup>21</sup> Konstytucja Rzeczypospolitej Polskiej of 2<sup>nd</sup> of April 1997, adopted by the National Assembly and accepted by the Nation in the constitutional referendum on 25<sup>th</sup> of May 1997, signed by the President of Poland on 16 of July 1997; published in Dz. U. 1997 nr 78 item 483

<sup>22</sup> The Supreme Court ruled that as a general rule, public interest should not prevail over the individual interest; decision of 18th November 1993, III ARN 49/93, OSN 1994, item 181

<sup>23</sup> In particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at the acquisition of a home by each citizen.

rights conditions that these “social” rights may be asserted subject to limitations specified by statute, which gives support to the view that these are not absolute rights.

The Constitution provides for the protection of consumers, customers, hirers and lessees in article 76. It states that public authorities should protect these groups against activities threatening their health, privacy and safety, as well as against dishonest market practices. The Constitutional Court in one of its judgements ruled that this article should be treated as a basis for protection against excessively high rents, at least as far as fighting unfair market practices is concerned<sup>24</sup>. The Tribunal stated that this basis further constitutes grounds for the introduction of statutory protection against owners who may abuse their dominant position by setting unfair or arbitrary rents. The statutory measures in this respect have further been influenced by European consumer protection legislation, including provisions on unfair contract terms, distance consumer contracts and contracts concluded away from business premises<sup>25</sup>. At the present date however, save the already mentioned UOL act, there is no other specific act protecting hirers and lessees.

Obligations laid down in articles 75 and 76 of the Constitution can be realised directly, through tangible actions of public authorities in the sphere of building premises or indirectly, through legal provisions creating taxation preferences for building contractors or limiting excessive rent increases<sup>26</sup>. These obligations rest first and foremost on public authorities. The Constitutional Court ruled that public authorities may not transfer these obligations to private parties, by limiting excessively their freedom to profit from ownership of property<sup>27</sup>. Should such a need occur, public authorities ought rather to revert to protecting tenants through direct subsidies or social housing<sup>28</sup>.

Apart from setting policy guidelines and imposing duties and limits on public authorities, the Constitution can be directly applicable<sup>29</sup> and the question which often arises is which provisions shall be directly applicable and which articles are designed merely to outline State policy in a given area. This is a matter of key importance in the field of tenancy law, especially with regard to the right of property ownership and similar rights. The Constitutional Court has now dealt with it in 10 separate cases since the new Constitution was adopted in 1997. The doctrine widely acknowledges that Constitution can only be directly applicable only when there is no secondary law regulating the matter in question – this guarantees the completeness of the legal system<sup>30</sup>.

As tenancy provisions and their interpretation are often controversial from a constitutional perspective, the Constitutional Court has been required to intervene not solely in the matter of the interpretation of relevant law, but it has further moved to repeal certain legal provisions as being unconstitutional.

In the year 2000, two judgements were handed down by the Constitutional Court which dealt with the limiting of property ownership and tenancy. The first ruling of 12 January 2000, P

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<sup>24</sup> Judgment of 12 January 2000, P 11/98 (OTK ZU nr 1/2000, item 3)

<sup>25</sup> For a detailed review of changes please consult the National Programme for the Preparation for Accession issued yearly by the Office for the European Integration, available at [www.ukie.gov.pl](http://www.ukie.gov.pl)

<sup>26</sup> “Problematyka ochrony praw lokatorów w orzecznictwie Trybunału Konstytucyjnego pod rządami Konstytucji z 2 kwietnia 1997r.”, pp 30 - 32 [in:] “Synteza informacji o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2002r.”, Wydawnictwa Trybunał Konstytucyjny, Warszawa, May 2003; also available online at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl)

<sup>27</sup> Judgment of 10 October 2000; P 8/99 OTK ZU nr 6/2000, item 190

<sup>28</sup> Judgment of 4 April 2001; K 11/00 OTK ZU nr 3/2001 item 54

<sup>29</sup> Article 8 of the Constitution

<sup>30</sup> See to this effect: P. Granecki “Commentary to the Constitutional Tribunal Ruling of 4 December 2001, SK 18/00”, Palestra 2002/11-12/215 and A. Szpunar “Commentary to the Supreme Court Judgment of 26 September 2000 III CKN 1089/2000”, Przegląd Sadowy 2001/6/130



11/98<sup>31</sup> concerned a violation of the Polish Constitution and the First Protocol to the European Convention for the Protection of Human Rights by virtue of the Act of 2 July 1994 on tenancy law and housing subsidies. The court ruled that the obligation of the landlords to apply fixed, regulated rents in the case of a tenant who received premises on the basis of an administrative decision violated both provisions and infringed the principle of private property ownership.

The second ruling of 10 October 2000 P 8/99<sup>32</sup> concerned the same act and the violation of the Constitution by subjecting landlords to the obligation of covering the costs of maintenance of the premises even though these costs have not been off-set by the level of rent, which at the time was fixed by public authorities. This provision has further been repealed as unconstitutional. As was mentioned previously, due to the heavy criticism of the interested parties and the double ruling from the Constitutional Court a new act was adopted – UOL, which further aims to limit rent increases.

Article 9.3 of the UOL established that the maximum admissible single increase in the rent depended upon two factors: the inflation rate in the previous year<sup>33</sup> and the level of the rent in the apartment concerned. The admissible increase was defined as a certain percentage of the inflation rate that was dependent upon the level of the current rent. Generally speaking, the lower the rent, the higher single rent increase was allowed.<sup>34</sup>

Not surprisingly, these terms have been challenged before the Constitutional Tribunal four times within the past two years. These limitations were widely perceived as overly restrictive for the owners as the scale of a single increase became very modest. It is assessed that these heavy limitations made the rent increase much lower, from 14% in first half of 2001 to 3% in the second half of the same year, when the UOL came into force.<sup>35</sup> This mechanism would appear to function correctly for those tenancies for which the rent was set on a market basis, as there was usually no need to drastically increase the rent. The 150% yearly margin over the inflation rate seemed to provide a sufficiently ample place for rent increase. However, this mechanism did not allow low rents that had been set in the past, deeply below market level and below the costs of apartment's upkeep, to reach this market level within a reasonable and foreseeable period. The Constitutional Court, declared article 9.3 of the UOL incompatible with the Constitution in October 2002, and rendered it invalid.<sup>36</sup> The Tribunal held that the legislator infringed upon the right of ownership by means of an excessive, one-sided and illegitimate limitation of the right to derive benefits from property. It also stated that although it is admissible to limit the level of the rent for the residential premises, on the basis of the solidarity principle<sup>37</sup>, this limit cannot go below the level necessary for the proper maintenance of the premises, which is the present situation. As from the day of the ruling the rent increases cannot be fixed<sup>38</sup>, the provisions regarding the limitation of increases to maximum one every 6 months remain in force.

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<sup>31</sup> Judgment of 12 January 2000, P 11/98 OTK ZU 1/2000 item 3

<sup>32</sup> Judgment of 10 October 2000; P 8/99 OTK ZU nr 6/2000, item 190

<sup>33</sup> Measured by the increase in retail prices for the previous year and officially published by The Main Statistical Office.

<sup>34</sup> If the yearly rent did not exceed 1% of the recuperation value of the apartment – the increase could not exceed 150% of the inflation rate; if the yearly rent was between 1% and 2% of the recuperation value of the apartment – the increase could not exceed 125% of the inflation rent; if the yearly rent exceeded 2% of the recuperation value of the apartment – the increase could not exceed 115% of the inflation rate;

<sup>35</sup> Inflation rate was around 5%

<sup>36</sup> Judgment of 2 October 2002, K 48/01, Dz.U. nr 168, poz. 1383.

<sup>37</sup> According to solidarity principle the whole society should assist those, who are not capable to provide basic living conditions for themselves and their families on their own. More on the principle in: "Problematyka ochrony praw lokatorów [...]", *Ibidem*, pp. 34 - 36 [www.trybunal.gov.pl](http://www.trybunal.gov.pl)

<sup>38</sup> The Constitutional Court took into account the principle of certainty of law and ruled on the temporary application until 31<sup>st</sup> December 2004 of provisions limiting rent increase to 3% of the recuperation value of premises for which previously rules on regulated rent applied. Compare with answers to Set 3 – Rent and Rent Increases

It is worth noting here that in fact the European Convention for the Protection of Human Rights and the case law of the European Court of Human Rights<sup>39</sup> would most probably not support the claims of the Landlord organisations since it is more liberal in respect of these limitations than the Polish Constitutional Tribunal<sup>40</sup>.

## **2. Basic structure and content of current tenancy law in Poland**

### **a. Acts and Regulations**

There is no a single “housing law” in Polish legal system. On the contrary, provisions on housing are scattered in a variety of different legal acts. This serves as a manifestation of the legal complexity of the subject matter caused by a number of factors, including historical considerations of the socialist economy, the various forms of ‘lawful possession’ of a dwelling, differentiated regulation of public and private housing, occasional but important interventions by the Constitutional Court, and evolving processes of privatisation and re-privatisation. As a consequence, the housing legislation remains ambiguous for the majority of occupants.

Polish tenancy law to this day is characterised by a multiplicity of statutes and regulations: The Act on tenancy law and housing subsidies of 2 July 1994<sup>41</sup> as well as the Civil Code of 1964 with subsequent modifications, the Act on the rules applicable to the transfer of housing stock of public enterprises of 12 October 1994<sup>42</sup> and the Act on co-operative housing of 15 December 2000<sup>43</sup>, constitute the basis of tenancy rights. It was with the acts on protection of tenant’s rights and communal housing stock and the Civil Code amendments of 21 July 2001<sup>44</sup> that the Parliament attempted to clarify the situation and reform tenancy law, but one can barely call it a success. It was criticised extensively by the Constitutional Court (as illustrated in the previous section of this report) and Parliament is currently working on amendments.

In addressing the substance of the UOL, occupants of all dwellings are afforded a high standard of protection, regardless of the legal form of a “lawful possession” or public/private sector. The application of the standard is horizontal and covers a wide range of obligatory and proprietary relations, including that of tenancy itself. These provisions are mandatory and cannot be exempted from, even in the event of an agreement between the parties. It should nonetheless be highlighted that the UOL has established merely a minimum level of protection for occupants. It can be applied only insofar as other statutes, including the Civil Code, do not regulate more favourably the occupant’s position.<sup>45</sup> Yet, given the scope and intensity of the occupant’s protection afforded by

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<sup>39</sup> Polish cases in the European Court of Human Rights are discussed in part 3 C - Tenancy law in Polish Courts and effective access to justice. More on international obligations in this field: K. Krzekotowska, I. Krzekotowska-Olszewska, “Ochrona lokatorów w świetle prawa międzynarodowego i europejskiego ze szczególnym uwzględnieniem prawa niemieckiego”, *Mieszkalnictwo i Prawo*, Maj 2003

<sup>40</sup> P. Urbanek, “Europejski Trybunał Sprawiedliwości, Ingerencja w prawo własności”, *Gazeta Prawna* 170/2001, 18 December 2001, p.24; For the scope of the freedom of the state to limit ownership with regard to article 1 to the First Protocol to the European Convention for the Protection of Human Rights see case *Immobilienbank AG v Italy*, ruling of 28.07.1999, application nr 22774/93

<sup>41</sup> Act on tenancy law and housing subsidies of 2 July 1994 Dz. U. 1994 nr 120 item 787

<sup>42</sup> Act on the rules applicable to the transfer of housing stock of public enterprises of 12 October 1994 Dz. U. 1994 nr 119 item 567

<sup>43</sup> Act on co-operative housing of 15 December 2000 Dz. U. 2001 nr 4 item 27

<sup>44</sup> Act on protection of tenant’s rights, communal housing stock and Civil Code amendments Dz. U. 2001 nr 71 item 733

<sup>45</sup> Article 4

UOL, it would be a challenging task to find any legal act under Polish law that would be more favourable for occupants. The principal protective aspects of this Act cover the most sensitive issues lying at the intersection of parties' interests. It protects an occupant against, *inter alia*, (a) unfavourable terms and conditions of a contract, (b) sudden or ungrounded termination of a contract, (c) sudden and excessive rent increase and other similar fees, (d) eviction and homelessness.<sup>46</sup> Furthermore, the Act regulates in detail some other aspects of the rights and duties incumbent upon parties and the tasks imposed on local authorities.

The Constitutional Court has indicated in its judgement of 2 October 2002<sup>47</sup> the direction in which tenant protecting regulation ought to be developing constitutional principles. It recommended the adoption of provisions regulating the initial level of rent, and in particular making the level of the initial rent dependent upon the standard of the premises and its location. One of the methods proposed was obligatory publication of data on the average level of rent for premises of a given standard in a given area. This solution, it is argued, would thus prevent the abuse of a dominant position by the landlord and unjustified rent increases.

## **b. European Community Law and national consumer protection**

European Community law has strongly influenced the development of the Polish legal system in the field of consumer protection. Separate legal acts have been adopted and changes have been introduced to the Civil Code to cover standard form contracts. Prior to the implementation of European legislation, all consumer contracts (including standard terms) were governed by the same set of rules as commercial transactions. An amendment to the Polish Civil Code in the year 2000, modelled upon European legislation, has elevated consumer protection to a level not known previously. Obligations flowing from the Association Agreement and the National Programme for the Adoption of the *Acquis* led to the adoption of a number of statutes that serve to construct an institutional framework for protection of consumer rights. This structure has been established by virtue of the Act on protection of Competition and Consumers<sup>48</sup>. Poland has also implemented the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the Directive 85/577 of 20 December 1985 on protection of consumers in respect of contracts negotiated away from business premises. This was carried out via the Act of 2 March 2000 on the protection of some consumer rights and liability for damage by dangerous product,<sup>49</sup> which contains an exemplary catalogue of standard terms that cannot be included in contracts involving consumers<sup>50</sup>.

A consumer's right to information with regard to his/her rights and representation plays an important role in the Community Consumer Strategy<sup>51</sup>. Accordingly Polish law has been amended to provide for consumer information, education and the development of non-governmental consumer organisations. The activities<sup>52</sup> of these bodies are regulated by the Act on Protection of Competition and Consumers, of 15 December 2000. This matter is subsequently discussed in Section 3C of this report.

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<sup>46</sup> See also, E. Bonczak-Kucharczyk "Ochrona Praw Lokatorów", Warsaw Twigger, 2002, pp. 51ff

<sup>47</sup> Judgment of 2 October 2002, K 48/01 OTK ZU nr 5 A/2002 item 62

<sup>48</sup> Act on protection of Competition and Consumers of 15 December 2000 Dz.U. 2000 nr 122 item 1319 with subsequent amendments

<sup>49</sup> Act of 2 March 2000 on the protection of some consumer rights and liability for damage by dangerous product Dz.U. 2000 nr 22 item 271

<sup>50</sup> Detailed analysis of the Standard Terms of Contract and their control can be found in this report in Set 4

<sup>51</sup> As voiced in the Community Consumer Strategy for the years 2002 - 2006

<sup>52</sup> These provisions are referred to in greater detail in Part 3B on the role of associations

One has to note that the scope of application of the legislation on the consumer protection will be limited in the case of tenancy relationship. Apart from the general rules in the Civil Code specific consumer protection measures have been devised to protect a weaker party in a contract concluded with another, who acts in a commercial/ business capacity. At present, due to historical developments and the structure of the premises ownership in Poland not many tenancy contracts are concluded where one of the parties acts in the commercial capacity, therefore it is not likely that the *lex specialis* consumer protection measures will find application to the contracts in question. As it was already presented tenants rights are asserted in the UOL, which is applicable regardless of the capacity in which the parties act (i.e. in the course of the business/ commercial transaction or privately). Moreover, above three quarters of the rented premises are owned by communal authorities or housing co-operatives and their conduct on the tenancy market and obligations towards the tenants are additionally regulated in detail in statutes.

### c. Legal concept of the tenancy contract

Tenancy is widely recognised in the jurisprudence as an **obligatory right**. Indeed, it has not been placed within Part II (Property and Other Proprietary Rights) but rather it is regulated in Part III of the Civil Code (Obligations). This 'obligatory' aspect of tenancy law is fully visible in the fact that the validity of a tenancy contract does not depend upon the landlord being the owner of the rented dwelling. Indeed, the contract will be valid even in the event that the landlord's rights to the object of the tenancy agreement are limited and even if he does not enjoy the full right of disposal. What is important is not the legal status and ownership of the object of the tenancy relation, but whether the landlord fulfils his obligations to the tenant. He is obliged to ensure that the tenant can use the object of tenancy and exercise his rights peacefully and without disturbance.

Nevertheless, the tenancy of residential premises has some features of a real property right. It is the result of State interventionism in the housing issue with a view to strengthening the tenant's position in relation to third persons. Firstly, the tenant's right of use (of an apartment) is protected by rights which are normally assigned to the protection of full ownership. Thus, the tenant acquires protective safeguards, effective *erga omnes*, against all third persons. Secondly, in the event of a transfer in ownership (of an apartment, for example), the tenant's right will become equally effective against the person who acquires the property, who thereafter is liable to fulfil all duties flowing from the tenancy contract. As such, a tenant's rights may become effective as regards a wider circle of persons than the original landlord.

The Civil Code defines tenancy as a legal relation which results via contract, by which a landlord assumes an obligation to provide an object for a tenant's personal use for a specified or non-specified period of time. The tenant similarly assumes a bilateral obligation to pay the landlord an agreed rent for the use of the object of the contract. As a consequence, administrative decisions no longer constitute of themselves a source of tenancy relations. Even in the event that a dwelling is let by a public entity, a formal contract meeting all requirements specified by tenancy provisions is required.

The definition of tenancy specifies all necessary elements that must be concurrently determined by parties in order to enter into a tenancy relation. These so-called *essentialia negotii* mean that parties should specify at least the object of the tenancy agreement and the amount of rent necessary to create the tenancy relationship.<sup>53</sup> Although rent is most commonly paid in cash, it

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<sup>53</sup> Of course, any party may add other requirements aside from *essentialia negotii*, in which case the contract will be concluded when parties reach a consensus or 'meeting of minds'.

could be validly specified in kind, be it in corporeal objects or in services. Until recently if parties agreed upon a cash payment, it was required by law that payment be made in Polish Zloty<sup>54</sup>. Imminent EU enlargement has prompted a reconsideration of this restrictive provision by the legislature and article 5 of the UOL has been amended to delete this clause<sup>55</sup>.

The tenancy relation arises *solo consensu*. Once parties have agreed on the two essential components previously mentioned, a tenancy relationship arises, without the need for a 'handing over' of possession of the rented premises to the tenant. Non-performance of this legal duty will empower the tenant to resort to any and all remedies envisaged for breach of an *existing* contract.

The principal obligations of the landlord may be summarised as follows: (a) delivery of a specified property in a suitable state, (b) maintenance of the property in a due state during the entire period of tenancy, (c) ensuring a peaceful and undisturbed tenure. The principal obligations of the tenant are: (a) to make payment of the agreed rent in a due place and at a due time, (b) to take due care and diligence in the use of the property for the duration of the tenure, and (c) to return the property in a suitable state upon termination of the tenancy agreement.

#### **d. Other forms of lawful possession of premises for housing purposes**

Whilst **full ownership** is the proprietary right afforded the highest degree of protection in the Polish legal system, both constitutionally and by statute law, **the co-operative right to residential premises** remains an important additional legal power.

With developing processes of privatisation and re-privatisation of state assets, full ownership is growing rapidly on the housing market. The mid-1990s further witnessed a substantial rise in activity by developers, who began to offer individuals full ownership of newly constructed independent premises<sup>56</sup>. Finally, a major reform of the co-operative law in the year 2000 has further opened the door for the replacement of restrained co-operatives rights (to be described below) into a right to full ownership of independent residential premises.<sup>57</sup> Although the process of replacement has been cumbersome and time-consuming, it is steadily advancing.

Nonetheless, the co-operative right to residential premises remains an important legal institution that is still widely used for housing purposes. It is very common in Poland as the co-operative system long before the 1990s was recognised by state authorities as the principal system for the provision of accommodation<sup>58</sup>. In fact the specific rules concerning housing co-operatives have been laid down firstly in the Governmental Decree No 269 of 28 May 1954 on housing co-operatives and its aims<sup>59</sup>, which was thereafter substituted by the Council of Ministers Decree No 81 of 15 March 1957. For the first time the latter act distinguished between the various co-operative

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<sup>54</sup> Article 5, section 3 of the UOL

<sup>55</sup> Amendment of 9 May 2003 Dz.U. 2003 nr 113 item 1069; Critically on these developments E. Bonczak – Kucharska “Wyrazne oslabienie najemców”, *Rzeczpospolita* 22.05.2003

<sup>56</sup> At present approximately 4,3 million flats are owned, as such 29,5% of the total housing stock in Poland constitutes flats held under full ownership, whilst 25,6% of flats are held with a co-operative ownership title.

<sup>57</sup> Almost 52% of flats have been purchased after 1995 out of the stock of communes and cooperatives.

<sup>58</sup> Extensively on the subject of co-operatives in the European Union and Poland compare: I. Krzekotowska, “Spółdzielczosc w Unii Europejskiej - statut spółdzielni europejskiej, a polska spółdzielczosc mieszkaniowa”, *Mieszkalnictwo i Prawo*, Sierpień 2003.

<sup>59</sup> Governmental Decree No 269 of 28 May 1954 on Housing co-operatives and its aims; *Monitor Polski* No 59 item 792.

rights, i.e. the **co-operative right to residential premises, the co-operative right of ownership of premises and the co-operative right of ownership of a house.**

The primary difference between the right to residential premises and the co-operative right of ownership of premises was that the first right was an obligatory right, was non-transferable and non-hereditary while the second was limited *in rem* and was therefore transferable and hereditary; although in both cases it was the co-operative who remained the owner<sup>60</sup>. A number of amendments and new statutes regulating the rights of co-operative tenants have been introduced, but for the purposes of this study we will limit ourselves to the most recent measure, that has reformed the entire system, i.e. The Act on Residential Co-operatives, dated 15 December 2000<sup>61</sup>.

The key distinction between tenancy and a co-operative right to premises lies in the particular personal qualification of the parties, that is membership. It is interesting to note that article 3 of the Act on Residential co-operatives sets out that any natural person can become a member of a co-operative, even if he/she does not have legal capacity or has limited legal capacity, which means that at present minors can legally become members of co-operatives. Unless the statute of the co-operative provides otherwise, a legal person can become a member, but not for the residential purposes. Although adherence to the co-operative is a prerequisite, the co-operative right to premises is only created by means of a contract concluded between the member and the co-operative<sup>62</sup>. In the specific case of minors, the general rules of the Civil Code will apply to the conclusion of the contract by a person with limited legal rights. The contract must be concluded in writing otherwise it is held to be invalid.

A member of a co-operative must contribute to the costs of construction of the premises<sup>63</sup>. Sometimes an additional contract will be required for the building of the premises (in the case of a new development). Such a contract obliges the parties to conclude a co-operative residency contract once the premises have been built. A member of a co-operative shall further be required to contribute to expenses arising from the maintenance and exploitation of the common co-operative property and other fees specified in statute and the co-operative's charter. Co-operative authorities must notify the members about the changes in the 'exploitation costs', whilst members have the possibility to challenge the changes, firstly with the co-operative authorities and, if that fails, before the courts. The co-operative right may be established solely for a non-specified period of time. It is important to note that the co-operative right to residence or premises will cease at the same moment as a party's membership of the co-operative, or on the basis of a decree by the co-operative authorities. If the right to residence ceases, the costs of construction are reimbursed after 'indexation' according to the present value of the premises.

If the Act on residential co-operatives does not regulate a particular issue, the UOL will apply appropriately, unless the statute of the given co-operative provides solutions that are more favourable to the members<sup>64</sup>.

Although there is a general tendency to favour the co-operative rights of ownership - and the authorities are indeed taking steps to facilitate the transition from rights of residence to ownership -

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<sup>60</sup> K. Pietrzycki "Spółdzielnie mieszkaniowe, Komentarz"; Warszawa; C.H. Beck 2001, pp. 28.

<sup>61</sup> Act on residential co-operatives of 15 December 2000; Dz.U. 2000 No 4, item 27; Article 1 of the residential co-operatives establishes that the main aim of co-operatives is to fulfil the housing demands of its members and their families by providing them with suitable premises.

<sup>62</sup> Article 9.4 of the Housing Co-operatives Act.

<sup>63</sup> The exact rules on the calculation of the contribution must be outlined in the statute of the co-operative. Generally, the contribution will amount to the difference between the real costs and the state subsidies awarded to the co-operative.

<sup>64</sup> Article 17 of the Residential Co-operatives Act.

the rules on co-operative rights to premises continue to play a highly important role in Polish law, a situation that is unlikely to change for the foreseeable future<sup>65</sup>.

#### e. Social regulations affecting private tenancy contracts

When discussing the problems of tenancy and housing we must further distinguish between legislative measures and the general social and housing policy. Tenancy law has been adopted on the central level solely in the form of acts, statutes and regulations issued by Parliament and the relevant ministries, whilst social and housing policy is implemented both by central and local authorities, in accordance with article 163 of the Constitution, which provides that local self-governments shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities. In effect they carry out certain aspects of housing policy directly and independently of central authorities, while other functions are performed as delegated powers. Amongst the three existing administrative levels of local government, the foremost role in housing matters is played by the smallest administrative division called the commune or '*gmina*'.

The authorities typically adopt **Guidelines for the Housing Policy**<sup>66</sup>. This document specifies the general direction of the development of housing policy in Poland and outlines the primary instruments to be employed in fulfilling the housing needs of citizens. For instance, in a policy document of 1994 we read of the aim to satisfy the housing need of citizens via the allocation of communal housing, we read of support for new crediting programmes for the construction of new properties, and the adoption of tax deductions and advantages for taxpayers investing in housing for lease and finally of a necessary reform of rent levelling<sup>67</sup>.

On the governmental level it is **the State Office for Housing and Urban Development** that is the central authority responsible for spatial planning and housing development and the real estate economy<sup>68</sup>. The Office's chief statutory tasks are: to implement housing policy, formulate and introduce systems of housing construction financing, realise spatial policy, formulate and introduce systems of efficient urban development and of management over existing housing stock, prepare government programmes for the development of the municipal infrastructure, lay down the rules of real estate management (including the formulation of conditions for the development of the real estate market), confer professional qualifications and licences in the field of real estate management, real estate valuation and real estate agency services, as well as maintain registers of persons holding these licences, to perform legally-envisaged tasks connected with the functioning of employees' garden plots, and to engage in administrative jurisdiction in the field of spatial, housing and real estate economy<sup>69</sup>.

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<sup>65</sup> K. Kaminski "Spółdzielcze własnościowe prawo do lokalu w świetle nowelizacji ustawy o spółdzielniach mieszkaniowych"; *Mieszkalnictwo i Prawo*; Styczeń 2003 r.

<sup>66</sup> [www.kprm.gov.pl](http://www.kprm.gov.pl)

<sup>67</sup> On the use of tax incentives in housing policy in Poland please compare: P.Rybaczuk "Niektóre aspekty stosowania podatkowej ulgi na wynajem", *Doradztwo Podatkowe* 2001/1/41 and J.Sekita "Ulga z tytułu budowy domu z mieszkaniem na wynajem", *Doradztwo Podatkowe* 2001/12/36.

<sup>68</sup> Act on selected forms of support for housing construction (chapter 4a), and among others, by: the law of 21 August 1997 on the real estate economy (Dz.U. 2000 No. 46, item 543, with subsequent amendments), the Act of 7 July 1994 on land utilisation (Dz.U. 1999 No. 15, item 139 with subsequent amendments), the Act of 21 June 2001 on housing subsidies (Dz.U. No. 71, item. 734), the Act of 30 November 1995 on state assistance in repaying some housing loans, the reimbursement of guarantee premiums paid out by banks and on an amendment to selected acts (Dz.U. 1996 No 5, item 32 with subsequent amendments) and the Act of 7 June 2001 on collective water supply and discharge of wastewater (Dz.U. No 72, item. 747); regulation of 12 October 2000 on the rules for calculation of tariffs in heating (Dz.U nr 96 item 1053).

<sup>69</sup> [www.umirm.gov.pl](http://www.umirm.gov.pl)

With regard to the centralised level of government, it is difficult to say whether the national policy favours any particular legal form of ‘lawful possession’ of an apartment. On the one hand, a major reform of the co-operative law in 2000<sup>70</sup> introduced the possibility for a transformation of the co-operative right for residential purposes into full ownership. On the other hand, in the same year the National Housing Fund was established in order to provide ‘cheap credits’ for the construction of residential premises financed partially by the state budget. It can, however, only be employed for the establishment of a tenancy and a co-operative right, with the exclusion of full ownership of such premises.<sup>71</sup>

### Social regulation at the local level

At the local level it is communal authorities that are responsible for the creation of proper conditions for the fulfilment of the housing needs of citizens. This particular task is carried out as a direct responsibility of these agencies and with the use of their own finances. A commune is under a statutory obligation to provide social housing and substitutive housing via the **Communal Public Housing Stock**<sup>72</sup>.

The Communal Public Housing Stock is comprised of premises owned by the Commune, by communal legal persons or communal companies. It is worth noting that in most occasions only part of it is used for social or substitutive housing, the rest is leased on the basis of contracts concluded between the commune or its legal persons and the tenants. In fact almost 25% of the premises in total are being leased from the communal housing stock and a number of tenants prefer communal landlords to private. First, public ownership gives occupiers an informal guarantee and a sense of security that they will be able to stay in their premises as long as they fulfil all the requirements enforced by the communes’ authorities.<sup>73</sup> This sense of security is strengthened by the obligatory requirement that municipal/communal tenancies be, in principle, established for a non-specified period of time. Secondly, the rents and fees in public housing are considerably lower than those in the privately rented housing sector. This is caused by a reluctance on the part of local authorities to increase rents for fear that it will have unfavourable political repercussions and that it would have an adverse economic impact upon low-income families prompting them to resort to subsidies (which are similarly paid by local authorities).

Every five years Communes adopt the **Multi-Annual Programmes for Management of the Public Housing Stock**<sup>74</sup> as well as local law on the rules applicable to the lease of premises from Communal Public Housing Stock. It has been concluded that it is outside the competence of local authorities to subject tenants to additional obligations in relation to a tenancy contract under local law<sup>75</sup>. In the multi-annual programmes communes must forecast the size and technical condition of the premises of its public housing stocks<sup>76</sup> and what are going to be the sources of financing of the communal housing policy in the future<sup>77</sup>. Moreover the programme must set out the basic assumptions as to communal policy on rent - as these guidelines will form the basis for the adoption

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<sup>70</sup> Act of 15 December 2000 on housing co-operatives, Dz.U. of 2001 No. 4 item 27.

<sup>71</sup> Act of 26 October 1995 on some forms of supporting housing, Dz.U. of 2000 No. 98 item 1070.

<sup>72</sup> Article 4 of Act on the Protection of Tenant’s Rights.

<sup>73</sup> Similarly: K. Milewska, „Krzywdą czy nadmierne zadania”, *Rzeczpospolita*, 28.01.2000.

<sup>74</sup> Article 21 of the Act on the Protection of Tenant’s Rights.

<sup>75</sup> Judgment of 20 March 2002 of the Supreme Administrative Court in Wrocław II SA/Wr 177/02, OSS 2002/3/73

<sup>76</sup> This is required mainly to decide upon the level of demand and whether there is a need for communal investments in building and renovation, as well as to forecast which parts of the communal housing stock should be sold to tenants or be transformed into full ownership rights.

<sup>77</sup> In fact communes are required to show the costs divided into 5 categories – exploitation, renovation, modernisation, management and finally investment. The numbers provided are binding for the future communal budgets.



of rent by the communal organs. It is possible for example to set out different guidelines for rents depending on whether it is rent for social housing or a regular lease; it would also be possible to decide that the level of rent is to be established on the basis of tenders, or to differentiate rents depending on the conditions and quality of the premises.<sup>78</sup> These guidelines must be established in a proper manner as they will form the binding basis for any subsequent rent increases carried out by the commune. Furthermore, the programme ought to address the question of management of the public housing stock – it is intended to act as an incentive for the realisation of a proper study and to thus ensure better local law-making in the field.

Communes should moreover adopt local law on the rules applicable to the lease of premises from the Communal Public Housing Stock. This law is required to specify the criteria for deciding upon the eligibility of a potential tenant for the conclusion of a tenancy contract for an unlimited period of time or for the provision of social housing. In addition, concerns as to proper procedure and adequate social control of decision making must be addressed; i.e. thought must be given to the role of such agencies in handling applications and, indeed perhaps more importantly, how such applications, procedures and deadlines may be reviewed, perhaps through the establishment of a social commission, for example.

Communes are further under statutory obligation to provide both 'social' and so called 'substitutive' housing<sup>79</sup>. A commune is under a duty which goes further than **creating apt conditions for housing**, as it is required to **satisfy housing needs** of low-income households through the public housing stock and other expedient means. This role appears all the more important as the private sector has been unable to accommodate those needs due to the limited financial resources of potential occupants and scarce public financial support. In practice, communes usually resort to the provision of so-called "social premises", that is apartments of decreased standard, value and rent. There are a number of important differences between contracts concluded for 'social premises' and other tenancy contracts that a commune may conclude. Firstly, 'social premises' contracts can be concluded only if the court has granted the right to social premises (which takes place during the eviction proceedings brought against a person)<sup>80</sup>. In such a case a commune must fulfil this duty by providing such premises. Further, if a person does not hold any right to tenancy stemming out of contract concluded by her/him or any other title and she/he has an income below a certain level (as set out by commune in the local law) she/he may be eligible for social housing. These contracts are always limited in time, they can be prolonged if the situation of the tenant requires such action. However it must be noted that social premises are meant as a temporary form of relief only and are not a standard solution. This is so, mainly because the rent for social premises is set at a level not exceeding half of the lowest rent set out by the commune for other premises. If the level of income of the social premises tenant increases above the set level the contract expires and he is required to leave the premises, as well as to pay damages for the period between the increase of income and leaving the premises. The level of damages is equal to the normal rent set out for other tenants.

Social premises are also made available to tenants in the event of an eviction procedure. One must bear in mind that for the execution of the court's judgment on eviction it is not necessary that the

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<sup>78</sup> See E. Bonczak – Kucharczyk "Ochrona praw lokatorów, najem i inne formy odpłatnego używania mieszkań w świetle nowych przepisów", Warszawa, Twigger 2002, pp. 157.

<sup>79</sup> Substitutive housing is mainly used for tenants who have had to move out because of the unsuitable conditions of the premises and it is assumed in law that the provisions concerning this regime will cease to apply as of 2015.

<sup>80</sup> The obligation for the courts to decide in every eviction case on the right to social premises so as to avoid additional proceedings has been introduced in order to circumvent the case law of the Supreme Court which in the absence of a lack of proper legal rules did not want to commit courts to such a practice, see also Z. Bidzinski "Status prawny lokali i ich dysponentów", Warszawa 1998, p. 88

tenant accepts the social premises provided by the commune<sup>81</sup>. Article 14, section 6 of the UOL provides only that the commune must make an offer of social premises and the offer of a contract. Should the tenant reject the offer he rescinds the right to demand social premises and may be evicted regardless of other factors. The eviction is merely suspended from 1st of November until 31st of March each year.

It is worth noting that the legislator has excluded the application of 'social premises' rules (i.e. the obligatory decision of the court on the right to social premises) in the case of an eviction order based on an accusation of family harassment and/or abuse. There is equally a number of cases where a court cannot declare a person unfit to hold social premises, for example in the case of a pregnant woman, a minor, a pensioner, a person with limited legal capacity, the disabled, sick, unemployed, and/or an invalid requiring social service assistance, and other people who may be similarly included under the local law. It is clear that the aim of this provision is to safeguard the position of the tenant. Importantly, this constitutes a high degree of protection, particularly in the case of unemployed persons as the Act on the protection of tenant's rights fails to specify who will be considered as an unemployed person for the purposes of the statute<sup>82</sup>.

### Direct public subsidies

The principal form of direct public intervention in the housing sphere is the **tying the rent increases** with the level of inflation and with the recuperation value of the apartment<sup>83</sup>, and **housing allowance** that was first introduced in 1994<sup>84</sup>. Individual public subsidy is intended to protect low-income households by covering the costs of accommodation. As the entitlement is horizontal - in the sense that it is granted to all occupants of apartments regardless of title - tenants and sub-tenants are included. Importantly, there has been a steady growth in the number of households eligible for housing allowance. Whereas in 1999, just 6% of households were eligible, this figure had grown to 7,6% by the year 2000, and to 9,3% by the year 2001. In addition, the housing allowance paid has further increased and in 2001 it was 16% higher than in the year 2000<sup>85</sup>. It is important to note also that in the year 2001 more than 28% of tenants were overdue in rent payments and other charges, and within that percentage approximately 8% were overdue with rent payments for more than 3 months<sup>86</sup>.

Housing allowance is only granted if the average monthly income per member of a household does not exceed 175% of the lowest pension in a one person household and 125% of the amount for a household comprising of more than one member. The allowance is further dependant upon the so-called 'normative usable floor space', which is calculated per member of a household. In this case, the space may not exceed 35 square metres, 40 sq.m for 2 inhabitants, 45 sq.m for 3, 55 sq.m for 4, 65 sq.m for 5, and 70 sq.ms for 6 inhabitants. The amount of payable allowance is the difference between the expenses per square meter of usable floor space and the rent with expenses generated by the household itself. It amounts to 15% of the household income (if it is a one person household), 12% (in 2 to 4 persons household) or 10% (in the case of a household comprising of 5 or more persons).

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<sup>81</sup> See to this effect: C. Podsiadlik "Roszczenia odszkodowawcze właściciela lokalu mieszkalnego", *Monitor Prawny* 2002 nr 20/933

<sup>82</sup> For example, would a person who has never worked be considered as unemployed?

<sup>83</sup> Recuperation value is understood as costs of upkeep of the apartment in a proper technical condition

<sup>84</sup> It is now regulated by Act of 21 June 2001 on housing subsidies Dz.U. 2001 No 71 item 734.

<sup>85</sup> Institute of Housing Policy "Housing monitoring, 2001 report", Warsaw, June 2002.

<sup>86</sup> Central Statistical Office – data for the year 2001, <http://www.stat.gov.pl/english/index.htm>

Although the decision to grant an allowance is made ultimately by local authorities, their capabilities are limited by modest, usually insufficient, financial means transferred from the State budget. Thus, the extent of the financial assistance provided by local authorities depends very much upon political prioritisation and allocations made by the State budget<sup>87</sup>.

### **3. Summary account on “tenancy law in action”**

#### **a. Economic background**

During the preparation and adoption of the UOL, towards the end of the Parliamentary session, tenancy rules were considered to be of critical importance to a significant section of Polish society. In the run-up to the parliamentary elections, the UOL was thus the subject of much political campaigning. The government’s initial bill was significantly amended during the legislative process to accommodate fears disseminated by tenants that the new act would lead to a weakening of tenant’s rights.<sup>88</sup> The result is an inconsistent Act, with a negative imbalance in favour of tenants.

As such, besides a series of examples of poor drafting employed during the legislative process, it has been this overwhelming politicisation of the UOL, which has prompted calls for reform and amendment. Moreover, despite the apparent protection afforded, the Act has had a discernible detrimental impact not only upon the owners of property - whose rights have been severely limited - but also upon tenants.

In the wake of the introduction of the UOL, owners became reluctant to let their property, particularly to those categories of persons afforded strongest protection under the Act. Accordingly, the supply side, judged by the number of premises to rent, has dropped significantly, in some regions by as much as 75%.<sup>89</sup> Evidently, contrary to the lofty intentions of the legislator, over extensive and vigorous protection of one party to a tenancy relation can operate in direct opposition to that aim. Developers also suffered as investors lost interest in investing money in construction of buildings for rent since this type of investment appeared to be overly risky. Moreover, a number of previously constructed properties were reported to have remained empty as their owners awaited more favourable legal conditions.<sup>90</sup> Indeed, as a direct consequence the housing market has diminished.

Excessively restrictive provisions further led to unfavourable practices, in particular a proliferation of various dubious methods of circumvention of restrictive provisions. This, added to unclear and vague formulations in a number of provisions, has heightened legal uncertainty.<sup>91</sup> The increased risk in renting has further led to a change in market habits. To compensate for the increased risk of renting a dwelling, some owners began to demand higher rents and cash deposits as a guarantee. The State budget is similarly believed to be deriving less tax benefits than before the introduction of the act in question. In brief, the new act appears to be detrimental to all, except perhaps to current occupiers. These drawbacks prompted a number of observers to label the UOL, the 2001 legislative freak.<sup>92</sup> Heavy criticism of the act has thus forced a Government re-think and a

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<sup>87</sup> See also Z. Bidzinski “Nowa regulacja prawna w zakresie ochrony lokatorów”, *Kwartalnik Prawa Prywatnego*, Rok X: 2001, z. 4.

<sup>88</sup> F. Zoll, “Najem lokali mieszkalnych”, Zakamycze, Krakow 1997.

<sup>89</sup> L. Michniak, „W naszym interesie”, *Rzeczpospolita*, 11.02.2002.

<sup>90</sup> G. Blaszcak, R. Krupa; „Prostowanie tego co złe”, *Rzeczpospolita*, 06.02.2002.

<sup>91</sup> Z. Kubinski, “Pseudoochrona”, *Rzeczpospolita*, 11.02.2002.

<sup>92</sup> R. Krupa-Dabrowka, “Cztery grzechy główne”, *Rzeczpospolita*, 07.09.2002.

re-assessment of the entire tenancy law regime, as well as the beginning of a serious process of amendment. As things stand at present, the UOL is still fully in force, although it has been amended to remove limitations vis-à-vis the duration of a tenancy contract<sup>93</sup>.

In 1998 there was an estimated number of 7,8 million flats in Poland. 55% of these have been owned (29,5% full private ownership and 25,6% co-operatives ownership) whilst 45% have been rented – out of 3,5 million only 0,3 million, that is 3,9% of the stock have been rented from private owners. 19,5% of the flats were the property of communes, 5,2% belonged to undertakings (typically public) and 16,7% were the property of co-operatives. According to the National Population and Housing Census carried out in the year 2002, there are 325 flats for every 1000 inhabitants which - in comparison to other European Union countries - places Poland at the very bottom of the list<sup>94</sup>.

### Legal titles to the housing premises in 1998

Status of the premises	City		Countryside	
	Mln	%	Mln	%
Total	7,8	100	3,9	100
<b>Owned Premises:</b>	<b>4,3</b>	<b>55</b>	<b>3,7</b>	<b>95</b>
- full ownership	2,3	29,5	3,7	95
- housing cooperatives	2,0	26,6	-	-
<b>Rented Premises:</b>	<b>3,5</b>	<b>45</b>	<b>0,2</b>	<b>5,0</b>
- owned by communes	1,5	19,2	0,1	2,5
- owned by employers	0,4	5,2	0,1	2,5
- private owners	0,3	3,9	-	-
- owned by cooperatives	1,3	16,7	-	-

Source: "National Report for the Special Session in the UN General Assembly", New York; June 2001, based on the National Statistical Office' s data

### b. The role of associations and alternative dispute resolution

Landlord and tenant associations do not have long history in Poland. They have become active only in the last decade or so; an occurrence evidently connected with the process of reclaiming nationalised property and a growth in the market for new developments. Landlord associations have become particularly effective in pursuing their interests and in lobbying governments and parliamentarians for legislation favourable to the overall development of the housing sector.

The Act on the Protection of Competition and Consumers of 15 December 2000 is applicable to all kinds of consumer interest organisations – including tenant and landlord organisations. The Act provides in its article 39 that these organisations represent the interests of their members vis-à-vis public administration at a central and local level and that they actively participate in the development of the government's consumer policy. In particular these

<sup>93</sup> The latest commentary on the UOL: M. Olczyk, M. Pecyna, F. Zoll "Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie kodeksu cywilnego. Komentarz", Dom Wydawniczy ABC, Warszawa 2002.

<sup>94</sup> For detailed data see: <http://www.stat.gov.pl/english/index.htm>

organisations have the right to issue opinions on proposals for legal Acts and any other documents setting out government policy in a given area; prepare and carry out consumer education programmes; test products and services and publishing the results; publish research results; provide free legal counsel and actively participate in cases before courts. It is also possible for the organisations to take part in standardisation carried out on a national and local level. In fact public administration can delegate to them certain tasks in the field and in that case they are eligible for public financing.

Until now there have not been any major tensions between tenants and landlord associations, as both groups have been criticising governmental policy in the field, calling for major reforms of the system. Landlord organisations have been most effective in educating their members on the various aspects of contract conclusion and termination. They commonly publish regular bulletins with reviews of amendments to legal acts, as well as model contracts and the various clauses and conditions that must be satisfied to validly terminate a contract. This results in a simplification of dispute resolution between parties to a contract before a court. Effectively, it is a substantial contribution to the process of raising legal awareness in society.

In 1991 the first **Consumer Conciliation Tribunal** was established at the Commercial Inspection Office. The Act on Commercial Inspection Office, of 15th December 2000, enabled development of the network of **consumer arbitration courts** in accordance with the European Commission's Recommendation 98/257 of 30 March 1998 on consumer arbitration. These arbitration courts are dealing with consumer disputes on sale of goods and services. rulings have the power of a Common Court judgment. However, one ought to note that these provisions are not applicable to tenancy contracts. This limitation is as a result of the high standard of tenant protection required by law. The power to issue an eviction proceeding rests solely with the courts.

There is nonetheless a form of obligatory **conciliation procedure**, as introduced by article 12 of the UOL, in relation to the parties to a tenancy contract. If a tenant is in arrears with the rent or utilities (for a period of at least three full payment periods), and his household income makes him eligible for social housing provided by a commune, the tenant cannot be served notice unless the landlord firstly proposes a settlement of the overdue rents and utilities. The settlement must include at least a statement on instalments for payment of overdue rates (the instalments cannot be higher than the monthly rent itself), cancellation of interest rates calculated for the overdue payments until the day of settlement and information on the effects of non-acceptance of the settlement. This new instrument has been widely criticised by legal commentators as constituting a compulsory form of crediting of the tenant by the landlord, and for infringing the core of the property ownership<sup>95</sup>. To be valid the settlement must be concluded in writing; the legislator gives the tenant a month to accept the landlord's proposal. There is a presumption that if the tenant does not accept the landlord's proposal the settlement has been reached according to the landlord's proposal. After concluding the settlement, notice can be given if the tenant again is in arrears for another two months with payments arising out of the settlement. A settlement that infringes these procedures and conditions in any way is held to be invalid.

### c. Tenancy law in Polish Courts and effective access to justice

Besides the caselaw of the Constitutional court, an important role has further been played by common courts who are empowered to settle the majority of tenancy disputes. Material jurisdiction

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<sup>95</sup> To this effect please compare M. Nazar "Ochrona praw lokatorów, cz. II", Monitor Prawny 2001, nr 20/ 1011.

(*'ratione materiae'*) has been principally assigned to the lowest level of common courts, that is District Courts, which at present in tenancy proceedings are obliged to follow a simplified procedure, as set out in article 505(1) section 2 of the Civil Procedure Code <sup>96</sup>. In practice, the simplified procedure does not necessarily mean shorter proceedings - owing to the excessive workload of a number of courts and overly formal, inflexible procedural rules. One has to remember that the cases are assigned to different courts also according to the "worth (or value) of the dispute". The Civil Procedure Code sets out in article 23 that in case of proceedings concerning the existence, invalidity or rescission of the tenancy contract, the worth of the dispute is equivalent to the overdue rent in case of contracts limited in time <sup>97</sup> and 3 months rent in case of contracts unlimited in time.

Rulings issued by a District Court can be challenged before the Regional Court. It is explicitly stated in article 393, Section 1 of the Civil Procedure Code that court's decisions concerning rent cannot be challenged before the Supreme Court. This particular solution was adopted by Parliament as tenancy cases typically rarely exceed the minimal limit of the value of the case where the appeal is possible (that is 10.000 PLN). However the Supreme Court stated in its judgment of 12 August 1997 <sup>98</sup> that in cases concerning the rescission of a contract and an eviction procedure appeal is possible, regardless of the value of the case. The appeal will not, however, be admissible if a party to the proceedings bases an appeal solely on an eviction procedure.

Although judgements of the Supreme Court do not have the force of binding precedent as in the common law system, in practice they strongly affect the jurisprudence of courts situated at lower levels of the judicial hierarchy.

A number of cases brought against Poland to the European Court of Human Rights concern a breach of article 6 § 1 of the Convention, which states that in the determination of one's civil rights and obligations everyone is entitled to a hearing within a reasonable time before a tribunal. Case of *W. M. v. Poland* <sup>99</sup> concerned the length of proceedings in the eviction of a tenant, which lasted for 10 years, and in fact were still pending before the national court when the European Court of Human Rights was delivering its judgment. Similarly case *Uthke v. Poland* <sup>100</sup> related to proceedings of eviction that have taken 9 years. An analysis of the actions before national courts reveals just how complex tenancy relations have become in Poland. The case primarily involved a staying of proceedings (and an exchange of documents between civil and administrative courts that were involved in establishing the tenancy rights of the defendants). Of course these are extreme cases but they illustrate that in practice access to justice as far as tenancy relations are concerned in Poland is far from a suitable model.

### **Effectiveness of the rulings**

A situation whereby rent is overdue for a period in excess of 3 months may form the basis for an eviction order. Nonetheless, in the year 2001 a mere 3% of tenants who met these requirements for eviction were served with such an order. The number has decreased when compared to 2000 by 2,5 times. This clearly reveals the eviction process to be less than straightforward or reliable, particularly for landlords, though the implementation of evictions does

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<sup>96</sup> Act of 17 November 1964 on the Civil Code Procedure Dz. U.64 nr 43 item 296 the amendment has been introduced by the Act of 24 May 2000 on amendments in the Civil Procedure Code Dz.U. 00 nr 48 item 554.

<sup>97</sup> But no more than the rent value of one year

<sup>98</sup> Judgment of 12 August 1998, III CZ 50/97, OSNC 1998, z. 1, poz. 14.

<sup>99</sup> Judgment in the case of *W. M. v. Poland* of 14 January 2003, application no 39505/98.

<sup>100</sup> Judgment in the case *Uthke v. Poland* of 18 June 2002, application no. 48684/99.

appear to be on the increase (which is probably due to the transfer of the obligation to provide social housing to communes).

Table nr 2 represents an illustration of the eviction suits brought before courts, eviction orders issued and implemented in practice:

Year	Eviction suits		Eviction orders issued by courts		Implemented evictions	
	Number	%	Number	%	Number	%
2000	1496	100	723	48	223	15
2001	616	100	300	49	187	30

Source Institute of Housing Policy “Housing monitoring, 2001 report”, Warsaw, June 2002, p. 56.

#### 4. Principles of European Contract Law

The Polish government is of the opinion that the existence of a plurality of private law systems in the area of the European Union does not create significant obstacles for the proper functioning of the Internal Market<sup>101</sup>. It does however stress that a unification of national contract laws would contribute to a lowering of the cost of business transactions. The Polish government similarly underlines that the primary costs of multinational transactions arise mainly as a result of divergences between Member States legal systems, particularly with regard to the conclusion of a contract, its validity and its legality. It has thus stated that the primary focus ought to remain on facilitating and increasing co-operation in this field<sup>102</sup>.

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<sup>101</sup> Urząd Ochrony Konkurencji i Konsumentów, Departament Polityki Konsumenckiej, “Strategia Europejskiego Prawa Umów” (Strategy for the European Contract Law) [www.uokik.gov.pl](http://www.uokik.gov.pl); Office for Competition and Consumer Protection.

<sup>102</sup> For more comments of Polish doctrine on the European Contract Law please refer to: Ch. v. Bar “Od zasad kodyfikacji: perspektywy europejskiego prawa prywatnego”, Kwartalnik Prawa Prywatnego 2002 nr 2; J. Rajski “Kierunki rozwoju europejskiego prawa kontraktów”, Kwartalnik Prawa Prywatnego 2002 nr 1; Cz. Zulawska “Uwagi o “europeizacji” prawa umów”, Kwartalnik Prawa Prywatnego 2001 nr 2.

## B. QUESTIONNAIRE

### Set 1: Conclusion of the tenancy contract

There are no specific requirements as to the conclusion of the tenancy contract. The general provisions of the Civil Code on the conclusion of contracts modified by special regulation for the protection of the rights of the tenants will be applicable.

#### 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?*

General rules on the formation of the contract in the Polish Civil Code stipulate that press announcements, advertisements, price quotations and other information directed at a general public or even particular persons shall be deemed to constitute not an offer but an “invitation to conclude a contract”<sup>103</sup>. If parties are conducting negotiations for the conclusion of the contract it will be considered to have been concluded once the parties agree to all terms that have been subject to negotiations. Polish law, similarly to German, takes the position that the underlying principle of civil law is freedom to enter into the contract. Therefore one can construe that in none of the cases (listed above) will the potential Landlord be forced to conclude a contract, especially if we are dealing with the parties acting in a non-commercial capacity. However, even if the contract has not been concluded, the party that has commenced or conducted negotiations contrary to good customs, particularly without the intention of concluding the contract is liable for damages that the other party suffered – the **legitimate expectation principle**.

Poland has not yet implemented the Directive 2000/43/EC on the principle of equality, prohibiting discrimination on ethical grounds and it is hard to envisage what legal measures will be introduced in that field. Even without the implementation of the directive tenancy rights are at present very strongly protected by virtue of the UOL.

The Polish Constitution in article 32 provides that everybody is equal before the law and everybody has the right to fair treatment by the public authorities. Section two of this article states that no one can be discriminated against for any reasons with respect to his political, social and economic rights<sup>104</sup>. As was previously outlined in the introduction to this report, article 8 of the Constitution states that Constitutional provisions can be directly applicable. It is disputed by the doctrine whether this particular anti-discriminatory provision would find direct applicability in the

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<sup>103</sup> Article 71 – 72 of the Civil Code

<sup>104</sup> The wording of section 2 of article 32 of the Constitution implies that it is a general prohibition, addressed not only towards public authorities. However its direct application is arguable.



case of a tenancy relationship, as the Constitution can be directly applicable when there is no secondary legislation dealing with the matter. With regards tenancy law it is secondary legislation that regulates the situation, although it only addresses the issue of non-discrimination as far as termination of the contract is concerned. In Poland, 45% of premises are leased (the remainder is inhabited on the basis of ownership rights) and 19% are rented from communes acting in their capacity as public authorities who are bound by the constitutional principle of non-discrimination in all their actions.

The autonomy of the parties and freedom of contract principle produce the effect that the landlord is not obliged to sign a contract with a person listed under b). However, should he conclude the contract thereafter he may not discriminate against the other party citing religion or ethnic origin as a reason for the termination of the contract. A notice directed at any person must be in writing and the landlord is obliged to give grounds and reasons for termination of the contract. Should he fail to comply, the notice is deemed to be ineffective.

Should the landlord conclude the contract with a person of limited legal capacity and under custody it will be treated as an example of *negotiorum claudicans*. The Civil Code provides in articles 8 to 23 that it is necessary to obtain the consent of a guardian for any action by which this person undertakes obligations or disposes of his/hers rights. The validity of a contract concluded by a person of limited legal capacity, without the prior consent of his/her guardian, must be subsequently affirmed by said guardian. Alternatively, a person of limited legal capacity can validate the contract by him/herself, once he/she gains full legal capacity. More importantly, the other party to the contract cannot argue as a defence that the contract was agreed without the prior consent of the guardian. However, the other party may set the date for the guardian to convalidate the contract. He/she is freed from the obligation of performance of the contract after the lapse of the time prescribed<sup>105</sup>.

One peculiarity may be found in the Act on Residential Co-operatives which states that any natural person can become a member of a co-operative, even if he/she is not legally capable or has limited legal capacity, which means that at present minors can legally become members of co-operatives. However, a member of the cooperative will be required to conclude a contract with the housing cooperative on the basis of which the cooperative will grant him/her the right to the premises and the member will be under an obligation to contribute to the costs of construction and pay the charges. This implies that the general rules on the conclusion of the contract by a minor will also apply in that case.

### **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?*

It is established under the Civil Code that a landlord may rescind a contract on the grounds of error or fraud. Article 84 of the Civil Code provides that a person who, when making a declaration of intention, was in error as to its content may rescind the declaration only when it may be assumed that he would not have made such a declaration but for this error. If the declaration of intention has been directed to another person, rescission is only possible if the error has been induced by that person even in an absence of fault, or when that other person knew about the error or could have easily noticed it.

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<sup>105</sup> More on the topic of convalidation A. Szpunar "O konwalidacji niewaznej czynnosci prawnej", *Panstwo i Prawo* 1986 nr 5, pp.20

If the error has been induced by the other party, it will qualify as fraud and a rescission of the contract is possible even if the error has not been significant (i.e. there is a possibility that the party would have concluded the contract even had they known the truth)<sup>106</sup>.

Rescission must be executed in writing for evidentiary purposes (the so called *ad probationem* form). It must be directed to the person with whom the contract has been concluded, and if that is not possible, then to the person who has a legal interest in the effectiveness of the original agreement. A right of rescission must be executed within one year following an error becoming known to the landlord. Rescission of the contract takes effect *ex tunc*.

Especially worthy of note is an issue not dealt with until recently either by case law or in the literature; i.e. how are the provisions on the rescission of contract to be applied in the case of a tenancy contract, bearing in mind the generally strong paternalistic trend in favour of the tenant and *numerus clausus* on terminating a tenancy arrangement. Assuming that the contract is rescinded the landlord will have the right to damages for the rent on the basis of the UOL, restitution of property on the basis of article 222 of the Civil Code and damages for deterioration of the general condition of the premises on the basis of article 229 of the Civil Code. The time limit for bringing forward such claims is one year.

## **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?*

There are a number of rules in Polish tenancy law applicable to the sharing of an apartment with third persons who themselves are not subject to a tenancy contract.

Article 680 of the Civil Code establishes a general rule that both spouses are deemed to be parties to the tenancy contract, regardless of their particular financial arrangements. A contract concluded by one of the spouses automatically includes the other as a party to the deal. It is assumed that the contract is concluded in order to fulfil the basic housing needs of the family. Even more so, the doctrine takes the position that the tenancy rights of both spouses are inseparable; as such notice of the termination of a tenancy agreement must be issued to both spouses, otherwise it will fail produce any legal effects<sup>107</sup>. Moreover, the tenant further takes on certain 'alimentation obligations' towards his/her spouse, children and parents stemming from the Family Code<sup>108</sup>, the landlord's consent is not required and he cannot object to them moving in<sup>109</sup>.

The landlord's consent is required for a decision to take any other persons into the apartment, both in the case of subletting by the tenant and *usus* of the premises by third parties<sup>110</sup>. Infringement

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<sup>106</sup> Article 86 of the Civil Code

<sup>107</sup> J. Kasprzyśzyn "Skutki wypowiedzenia najmu lokalu mieszkalnego jednemu z małżonków.", *Przegląd Sadowy* 2000/10/18

<sup>108</sup> Obligations of alimentation are regulated in the articles 128 – 144 of the Family Code of 25 February 1964 Dz.U. 64 nr 9 item 59

<sup>109</sup> Article 688 of the Civil Code

<sup>110</sup> *Ibidem*

of this obligation by the tenant gives the landlord grounds to issue a month's notice and terminate the contract. This remedy is logical if we consider that the rights of the persons living in the same apartment could be later transformed into a full tenancy right upon the death of the tenant. This issue will be discussed more fully below.

### **Variant 1**

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

Article 691 of the Civil Code regulates this matter and lists the individuals that may become parties to a tenancy contract upon the death of the tenant, provided that they lived permanently with the tenant in the same apartment. The group is comprised of the tenant's spouse (who was not a co-tenant), children, other persons towards whom the tenant had 'alimentary' obligations and any other person with whom the tenant was in fact cohabiting. The situation of spouses, children and parents is established in a clear manner, some doubts may arise with reference to a boyfriend or homosexual partner, but only due to the fact that it will have to be established first if cohabitation has indeed taken place. Cohabitation is to be understood as a relationship closer than the mere sharing of one apartment in a common household or taking care of the older member of a family<sup>111</sup>; it must resemble a marital relationship in its nature. Usually, unless the contract establishes otherwise, the landlord's permission is required to allow a tenant to share the premises with a boyfriend or partner. This is due to the fact that the landlord's consent will result in a transformation of their rights; their right to live in the premises will become a full tenancy right upon the tenant's death. The Supreme Court Judgment of 18 September 2002<sup>112</sup> stated that there is no basis to differentiate in any way between the particular situations of individual who satisfy the criteria set out in article 691 of the Civil Code.

Furthermore The Supreme Court in another judgment<sup>113</sup> delivered on the same day ruled that accession to the tenancy contract takes place *ex lege* at the moment of the death of the original tenant, with the consequences *ex tunc*. The Court's decision is of declaratory and not constitutive nature. The fact that there was notice given to the original tenant is not taken into consideration if the notice period has not lapsed before the accession to the tenancy contract. In fact, according to the Supreme Court the inheritors enjoy exactly the same protection as the original tenant (i.e. their rights are effective *erga omnes*, and the tenant's right of use (of the apartment) is protected by standards which are normally assigned to the protection of full ownership – on the basis of article 690 of the Civil Code, and these rights are effective also against the landlord<sup>114</sup>.

### **Variant 2**

*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?*

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<sup>111</sup> J. Pokrzywniak „Commentary to the decision adopted by the Supreme Court on 21 May 2002, III CZP 26/02”, Monitor Prawniczy 2003/7/328

<sup>112</sup> The Supreme Court Judgment of 18 September 2002, III CKN 599/00

<sup>113</sup> The Supreme Court Judgment of 18 September 2002, III CKN 937/00

<sup>114</sup> The Supreme Court Judgment of 19 February 2002, IV CKN 769/00, OSNC 2003/1/13

It is for the parties to the contract to establish if and under what conditions subletting may occur. The landlord may stipulate that his consent is necessary in each and every case, and if so this will constitute a valid term of the contract. On the other hand, the UOL clearly states in article 11.3.3 that letting, subletting, or providing the premises (either wholly or in part) for use, without the consent of the landlord may constitute grounds for the issuance of a month's notice and for the termination of the contract.

The fact that the landlord has concluded a contract with just one person is of no relevance to him as far as the payment of rent and utilities are concerned. The Civil Code in article 688 clearly establishes that all persons living with the tenant bear responsibility for the payment of rent and utilities for the duration of the lease.

### **Question 3: Subletting**

*Does, and if so under what conditions, T possess the right to sub-rent a room in his apartment to S? Can L 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)?*

All of the above considerations apply in this case. The amendment of article 5 of the UOL in May 2003 which removed an *expressis verbis* prohibition of valorisation clauses seems to imply that now it would be possible to include in the contract the clause conditioning the subletting on a rent increase<sup>115</sup>.

### **Question 4: Formal Requirements of the Contract**

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

Tenancy contracts arise *solo consensus*; i.e. a tenancy contract is concluded when the parties have agreed on all of the terms of the contract. Nonetheless, Article 660 of the Civil Code provides that real estate or premises tenancy contracts concluded for a period in excess of one year should be concluded in writing. Non-compliance with this obligation results in an *ex lege* transformation of the contract into a tenancy contract of unlimited duration. This type of condition is called *forma ad eventum*. The requirement regarding the form of the contract was devised as a form of tenant protection and it has served its purpose well as almost all tenancy contracts are concluded in writing. That does not mean that an oral contract will not be valid. According to the general rules on the form of a contract, if a statute requires a written form without stipulating invalidity in the event of non compliance such a requirement is treated as a form stipulated for evidentiary purposes, the so called *forma ad probationem*. Such non-compliance would result, in the case of conflict, in the exclusion of evidence given by witnesses or hearing of the parties to the conflict. However, this rule is not applicable when the form was stipulated in order to ensure a particular result, therefore in the

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<sup>115</sup> So: E. Bonczak – Kucharska “Słabsza ochrona najemców”, *Rzeczpospolita* 2003.05.22

case of a tenancy contract, an oral contract is valid and it will be possible to conduct the hearing and give evidence by witnesses.

Polish law requires a written form under the threat of invalidity - the so called *forma ad solemnitatem* - in the case of notice being sent to the Tenant.

The tenancy contract does not need to be registered in a public register to be effectively protected by the law. Nevertheless according to article 16 of the Act on the Eternal Books and Mortgages<sup>116</sup> a tenancy contract can be registered in an eternal book of the property, commonly referred to as the mortgage register. These are public registers kept by the district court relevant to the location of property. Registration of a contract requires an application to the district court. The application would require that the tenancy contract is confirmed by a notary, which would significantly increase transaction costs. These registers mainly serve as the proof of a right to real property and there is a presumption that they are in conformity with the legal status of the property. Some rights concerning property can be created only upon registration in the register, but as it was mentioned, this is not necessary for tenancy contracts. The only reason why parties to a lease contract would want such registration is that the registrar provides a system of priority of rights<sup>117</sup>. However considering that such registration, due to the overload of work in the district courts, takes a long time, and that it significantly increases transaction costs for the Tenant, as he has to bear the costs of involving the notary - since it is in his interest - it is very unlikely that the parties to the contract establishing tenancy of the premises for housing purposes would decide to carry out such a registration.

#### **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?*

It is highly unlikely in Polish practice that a landlord would seek payment of “key money”; rather he/she would most likely request a higher rent than make a dubious additional profit from the “key money”. The normal practice is to include in the contract a standard term, commonly used, stating that the costs of conclusion of the contract, should any occur, are met by the tenant. As a contract need not be drafted by a notary or registered with any authority besides the tax offices it is highly unlikely that such a term would ever be used. The tax that the landlord pays on profit derived from the tenancy cannot be treated as a transaction cost and will not be recoverable, however the landlord takes that into account when calculating the rent level. In any case the costs of conclusion of the contract, if there are any, must be properly documented.

#### **Variant 1**

*The sum of 500 € is requested from T by F who is the current tenant in the house, because F promises to make L accept T as her successor;*

According to Article 391 of the Civil Code it is possible to conclude a contract between two parties whose object would be a performance of an act or an obligation by a third party. The contractual relationship would arise between F and the future tenant, and no contractual obligations are imposed on the third party. F, as promisor, will be liable to the promisee T, if the third party, in our case the landlord refuses to perform or to act in accordance with what the promisor has promised. If the landlord for whatever reason refuses to conclude the contract, F shall be obliged to pay

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<sup>116</sup> Act on the Eternal Books and Mortgages of 6 July 1982 Dz.U 2001 nr 124 item 1361.

<sup>117</sup> Article 17 and 20 of the act on the Eternal Books and Mortgages.

damages to T. The rules applicable to non-performance will be applicable to the contract between F and T. On the basis of the above one can conclude that variant 1 is possible and legally enforceable.

### **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?*

Commonly estate agents in Poland conduct their business on the basis of provisions on contract of mandate, regulated by the Civil Code in articles 734 – 751 or agency contracts regulated under articles 758 – 764. A contract of mandate is always remunerated unless the contract itself or the particular circumstances provide differently. If the parties have not agreed on the extent of remuneration, a tariff commonly used by the mandator shall be used. If the mandator did not specify the tariffs and the remuneration has not been set up differently it should be “appropriate for the work done”. Remuneration is payable after the conclusion of the contract. In case of an agency contract, remuneration is set as a percentage of the value of the contract<sup>118</sup>. A commission of two monthly rents will be in accordance with law. Under law the landlord is not supposed to pay for the services of the agency as he did not conclude the agency contract. However it is worth pointing out that it is not uncommon that the agency will have two contracts – both with the landlord and with the prospective tenant, and charge both of them for its services.

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

The traditionally most important and indeed principal division of tenancy contracts under Polish law is that between contracts limited in time and those unlimited in time. If parties have not specified a time limit for the duration of the contract it is assumed that they have wished to establish the contract unlimited in time. The contract limited in time can be concluded for any specified period. However, in order to prevent parties from endeavouring to circumvent provisions on unlimited tenancies; e.g. by concluding successive tenancy contracts limited in time, one after another, the duration of a contract with a time limit is fixed at not less than three years. Stipulating a shorter period has the effect of automatically transforming the contract into one of an unlimited duration. As it was believed that parties may further attempt to circumvent this three year limit by means of stipulating a *conditio iuris* whose occurrence would automatically terminate a contract, the range of legally admissible conditions was severely limited to three strictly defined situations.<sup>119</sup>

Concrete rules on the minimum duration of the tenancy contract are accompanied by more subtle provisions on the maximum duration. Once a contract has been in operation for ten years, it transforms itself *ipso iure* into a contract unlimited in time. This provision was envisaged to combat attempts to avoid the protective regime of the unlimited tenancy by concluding successive long-term limited tenancies.

These time limitations imposed upon individual party autonomy have in effect prohibited the use of so-called ‘occasional tenancies’<sup>120</sup> and have had unfavourable side-effects for the housing market. For example, certain apartments are available only for short time periods, and some ‘occasional tenancies’ have been pushed out of the lawful, controlled and taxed market into the ‘black market’.

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<sup>118</sup> E.Rott – Pietrzyk Commentary to the Supreme Court’s judgment of 28 October 1999., II CKN 530/98” OSP 2000/7-8/118

<sup>119</sup> Art. 5.4 of the UOL

<sup>120</sup> i.e. the tenancy contracts concluded for a short period of time.

It is perhaps of little surprise therefore that, as the pressure for reform steadily grew, the Polish government proposed an amendment that was quickly approved by Parliament.<sup>121</sup> As from 15<sup>th</sup> July, 2003, the various conditions discussed are no longer valid. This means that contracts limited in time can be validly concluded for a period shorter than three years and/or with *conditio iuris*. Besides the positive consequences of this step, it may be quite safely expected that this will lead parties, especially landlords, to move from the protective regime of unlimited tenancy to the far more dispositive regime of limited tenancy.

### **Duration of the contract and the scope of protection**

The difference between tenancy contracts limited and unlimited in time is not only their duration but also the differentiated scope of tenants' protection and the closely associated scope of parties' decisional freedom. As the contract unlimited in time has been intended by the legislator to meet the permanent housing needs of most families, this is the primary target of protective provisions. Here, freedom of contract has been particularly heavily restricted through a number of mandatory rules established with a view to ensuring the stability of the tenancy relationship and strengthening the tenant's position in relation to the landlord. As a result, the tenancy contract unlimited in time reveals a particular asymmetry between the parties' rights with regard to its termination.<sup>122</sup> On the other hand, the tenancy agreement limited in time seems to play merely a complementary role and, as such, is subject to freedom of contract to a greater extent and is less permeated by protective mandatory rules, as regards notice periods and grounds for termination.

### **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 rules on termination of contract are one of the most clear examples of asymmetry between the rights of tenants and landlords. The tenant may terminate a contract unlimited in time by giving notice in the manner agreed under the contract. If the parties have not specified the notice period, it will be dependent upon the frequency of the rent payments; e.g. most commonly rent payments are made monthly, and in such a case three months notice is required. The tenant is not required to give any reason for the termination of the contract which may be carried out in any manner<sup>123</sup>.

On the other hand, the rules on termination of contract by the landlord are strictly defined by statute, including grounds, notice periods and the form to be followed. The UOL sets forth a *numerus clausus* of eight grounds (and an additional rule concerning public apartments) that have to be pursued to lawfully terminate the tenancy contract; and notice periods within which occupiers must leave housing premises.<sup>124</sup> The reason for termination of the contract must be stated in a written notice otherwise it will be void.

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<sup>121</sup> Act of 9 of May 2003 on the amendment of the Act on the protection of tenants' rights, the communal housing stock and the civil code amendments., Dz.U. 03 item 113

<sup>122</sup> H. Ciepla, „Kodeks Cywilny. Komentarz”, in G. Bieniek, H. Ciepla, S. Dmowski, J. Gudowski, K. Kolakowski, M. Sychowicz, T. Wisniewski, Cz. Zulawska, „Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania. Tom II”, Warszawa, Wydawnictwo Prawnicze, 2001; Art. 673 of the Civil Code.

<sup>123</sup> However, if the tenancy contract has been concluded in writing, it should be terminated in the same form.

<sup>124</sup> Art. 11 of the UOL

The nine grounds that can be pursued by the landlord to terminate a tenancy contract could be grouped in the following four main categories. The first one comprises various types of breach of tenant's duties, such as improper conduct, improper use of the rented dwelling, or non-payment of rent. In each case one month's notice is required. However, the UOL often imposes additional duties upon the landlord before a notice to quit will be valid, such as the duty to issue the tenant with a reminder in writing or impose an additional deadline for compliance with his/her duties.<sup>125</sup>

The second group is for tenancies of apartments whose rent is less than the 3% of its 'recuperation value', i.e. those which do not yield any profit for the owner or only losses, may be terminated by the landlord by virtue of additional grounds. Where the tenant does not live in the rented housing for twelve months or possesses another habitable dwelling located nearby, the landlord may terminate the contract with six month's or one month's notice respectively. The legislator decided that since the tenant has another dwelling and the apartment does not produce profits for the landlord there is no longer a valid reason to support the tenancy relationship.<sup>126</sup>

The third set of grounds for termination covers a conflict of interest between the housing needs of the landlord or his close relatives, on the one side, and interests of the tenant, on the other. As the legislator attached primacy to the former, the landlord will be allowed to terminate the contract. Depending on whether the landlord provides the tenant with an alternative accommodation, the period before the latter must leave premises varies from six months to three years (*sic!*).<sup>127</sup>

The fourth category allows the landlord to resort to the courts to dissolve a tenancy relationship due to 'important reasons', which is a flexible vehicle covering unusual circumstances that take place when the tenancy relationship is in operation.<sup>128</sup> Although this widens and makes the rigid set of grounds for termination flexible, the judiciary has tended to interpret this clause in a rather restrictive manner. In one such case settled in May 1999 under the Act of 2 July 1994 on tenancy law and housing subsidies, the Supreme Court pronounced that an 'important reason' for termination occurs where the rented apartment becomes indispensable to the landlord, for instance for personal or family reasons, and is not necessary for the tenant.<sup>129</sup> One must note here that the UOL adopted in 2001 took into account this line of interpretation and included it among the grounds for termination under the third category described above.

### Particular solutions

If the renovation of the house necessitates the tenant to move out of the rented apartment, then the landlord may terminate the tenancy contract with a month's notice. The landlord, however, is obliged to provide at his own expense another apartment of not lower standard and not higher rent, located in the same town. The renovation cannot last for more than one year.

If the landlord wishes to use the place for himself or for family members, the UOL singles out two separate legal situations. Firstly, if the tenant has another dwelling that might be used for housing purposes, located in the same town and of not lower standard, then the landlord may terminate the tenancy contract with a notice of six months. In practice, it sometimes takes place when the landlord himself provides the tenant with such a dwelling. Secondly, if the tenant does not have such an apartment and the landlord does not intend to provide it, then the latter may give a notice to quit the premises. This is one of the most controversial grounds for termination of the tenancy contract as it

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<sup>125</sup> Art. 11.2 of the UOL

<sup>126</sup> Art. 11.3 of the UOL

<sup>127</sup> Art. 11.4 and Art. 11.5 of the UOL

<sup>128</sup> Art. 11.10 of the UOL

<sup>129</sup> Supreme Court, II CKN 362/98, 27.05.1999



allows, and indeed is increasingly used, for getting rid of undesirable occupants that cannot be removed on the basis of other grounds. The legislator introduced, however, an unprecedented three years notice period before occupants must leave premises, during which they should be able to find alternative accommodation. In order to dissuade and punish abuses of this ground, the legislator established stringent penalties where the landlord had terminated tenancy on the grounds that he (or his close relatives) had wished to move into the rented dwelling and after its repossession, he (or his close relatives) did not do so.<sup>130</sup>

- b) *Let us assume that in a trial, L wins a title for eviction which acquires res iudicata effect. How will the execution of the title be normally enforced? Does T have any legal defences in the execution procedure if she does not find another apartment and risks becoming homeless once the title is executed?*

After issuance of the judicial order to leave rented premises and subsequent acquisition of *res iudicata*, in the usual course of action the landlord would apply to the court for an **enforcement clause**. The court would examine whether the order fulfils all legal requirements stipulated by law so as to be lawfully enforced. Once the clause is granted, the landlord has to apply to a court bailiff for the execution of the order. The bailiff usually begins with summoning the tenant to quit voluntarily the unlawfully occupied premises and only after non-performance of this duty does he commence coercive execution of the order.<sup>131</sup>

Once the final and valid order has been granted, there are no additional legal defences to its execution, except for the timing of the execution of the order. For humanitarian reasons, a bailiff cannot carry out the order from 1<sup>st</sup> November to 31<sup>st</sup> March each year if the tenant does not have a substitutive dwelling<sup>132</sup>. This is known as the ‘period of protection’.

Other considerations, such as impending homelessness and the lack of another apartment are irrelevant at the execution phase. These matters are, however, examined during a trial before an eviction order is issued. In each case, the court must examine the manner in which the rented apartment has been used, as well as the financial and family situation of the tenant in order to determine whether the tenant should be granted the right to ‘social premises’. Several categories of persons specified by the UOL, such as pregnant women, minors or the disabled, the bed-ridden, low-income pensioners and the unemployed, are entitled to be granted the right to social premises.<sup>133</sup> Most surprisingly, the financial standing or actual housing possibilities are least relevant in establishing this right. Communal authorities can issue local laws adding further categories of persons to whom the court can grant the right to ‘social premises’. However, as the existing catalogue is very broad and the local authorities have already serious problems with providing social premises to those who have been given the eviction order, they are reluctant to inflate the catalogue of persons entitled to it.

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<sup>130</sup> The penalty is indeed heavy. In brief, the tenant would be entitled to move back to his previous apartment or demand the landlord to contribute to the rent and utility bills that are paid in the new apartment for the period of one year. Moreover, regardless of the tenant’s decision, the landlord would be liable to pay 15% of the recuperation value of the apartment.

<sup>131</sup> Art. 1046 par.1-3 of the Code on Civil Procedure

<sup>132</sup> The scope of this prohibition seems to be contentious. The prevailing view is that it covers all tenants rather than only some categories that are specified in article 14.4 of the UOL. Nevertheless, article 17 of the UOL clearly excludes its application to persons found guilty of family abuse. The statute does not necessitate a prior judicial ruling establishing the actual abuse.

<sup>133</sup> The only, and rather peculiar, exception where the court may refuse to grant a social dwelling, is where the eviction order was caused by the abusive treatment of the family.

The rationale behind creating the catalogue is that some categories of weaker social parties require special state protection and thus cannot be expelled and become homeless. A new bill to amend the Code on Civil Procedure advances as far as to forbid eviction if the person to be evicted faces homelessness, regardless of the cause of the eviction. This would make eviction orders completely unenforceable. At present, the excessively large catalogue of tenants entitled to social premises accompanied by the scarcity of housing resources in a number of communes has led to the practical unenforceability of judicial orders in many local communities. As the court suspends execution of the order until the commune offers social premises it sometimes takes years until the apartment becomes available and the execution of the eviction order can be carried out. This in turn has led some landlords to decide not to initiate the eviction procedure at all.

### **Question 7: Contract of Limited Duration and Termination**

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

Before the last amendment a tenancy contract limited in time must have been concluded for at least three years period. In case of stipulating a shorter span of time, the contract *ex lege* transformed itself into that of unlimited duration.<sup>134</sup> The only exception to this rule concerned social housing provided by local authorities. In the case of such contracts they must be limited in time and the statute does not state what is the time limit here.

With the last amendment to the UOL, which entered into force on 15th July 2003, the three-year limit has been abolished. This means that contracts limited in time can be lawfully made for a period shorter than three years.

### **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?*

After entry into force of the last amendment to the UOL, the automatic renewal every year could be lawfully stipulated. Before that amendment, the tenancy contract limited in time was required to have been concluded for at least a three-year period or risked being *ex lege* transformed into a contract unlimited in time.<sup>135</sup> Accordingly, the automatic renewal every year could not be lawfully stipulated. Parties could only lawfully conclude at least a three years contract and then designate at least a three years automatic renewal.

Aside from the time limitation, the regime of tenancy contracts limited in time is governed principally by dispositive norms that may be displaced by parties' arrangements, including those on the period of notice and/or grounds for contract termination. Parties may thus freely decide on the time limit within which a notice of termination must be given, including the specified three months notice before the expiration of the contract. They may also freely determine grounds for termination

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<sup>134</sup> Art. 5 of the UOL.

<sup>135</sup> Art. 5 of the UOL.

of the contract.<sup>136</sup> The scope of freedom in designation of grounds for termination is very wide. However, it cannot be interpreted as far as to eliminate the requirement of specifying grounds for termination. Therefore, the reasons for termination must be specified in the contract and consequently referred to where written notice is given.

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

All of the above considerations apply to the tenant as well.

### **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?*

The new landlord may not validly give an immediate notice to the tenant on the grounds that he has assumed ownership of the rented apartment in the wake of hereditary succession. Thus, the landlord has to pursue all the usual grounds for termination of the tenancy contract, described above.

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

Article 678 of the Civil Code states that in the event of the sale of the leased property the buyer automatically becomes a party to the tenancy contract, in the place of the seller. This does not however prevent him from giving notice as prescribed in the rules. The buyer of the leased house does not enjoy any special, additional grounds for termination of the tenancy contract.

*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?*

If the landlord is declared bankrupt, this does not affect the tenant's legal situation. The tenancy relationship remains in operation. Even if the rented property is sold in the course of bankruptcy proceedings by the Official Receiver in Bankruptcy Estate, who manages the assets of the bankrupt party, the buyer substitutes the bankrupt landlord in the existing tenancy relation, pursuant to the same rules which are applied to the case b).<sup>137</sup> This therefore means that the new landlord cannot give immediate notice to the tenant.

### **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?*

Each tenancy contract must be concluded pursuant to the provisions on limited tenancy or unlimited tenancy. The atypical and elusive nature of the tenancy 'for life' and its rare occurrence in Poland make its allocation to one of the two categories particularly problematical.

On the one hand, it could be argued that this is a peculiar type of a tenancy limited in time as the duration of the contract is limited by *dies ad quem*, or, more precisely, *dies certus an, incertus quando*, the condition being the death of the tenant. As the occurrence of this condition is certain,

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<sup>136</sup> Art. 673 section 3 of the Civil Code

<sup>137</sup> Art. 50 of the Bankruptcy Law and art. 1002 of the Act on The Civil Code Procedure

one could defend the thesis that tenancy for life represents a special type of tenancy limited in time. Therefore, on this assumption the contract may be lawfully concluded. However, after ten years as from the conclusion of the contract, it would automatically convert into a contract unlimited in time. As a result, before the lapse of the ten years deadline, the termination of a contract could be governed by the contract as regards the notice period and grounds for termination, whereas after the lapse of ten years it would be governed by the protective and detailed regime of unlimited tenancies with the strictly specified catalogue of grounds for termination and time limits for notice.

On the other hand, one could argue that the conclusion of a tenancy ‘for life’ in the form of a contract limited in time represents an attempt to circumvent the mandatory and protective regime of tenancies unlimited in time. It could be claimed that this regime was precisely envisaged to regulate long-term tenancies, to which the tenancy ‘for life’ undoubtedly should be assigned. If this interpretation is followed, termination of the contract would be certainly admissible pursuant to one of eight standard grounds.

One of the legal instruments used in order to provide tenancy for life is the servitude of dwelling. It has been rarely used in the 90’s however it is still common in rural areas. The doctrine acknowledges that the Act on the Protection of tenant’s rights – the UOL is applicable not only to tenancy contracts as such, but also to the contract establishing servitude of housing premises and the right of use of premises for housing purposes<sup>138</sup>. Articles 296 – 303 of the Polish Civil Code provide basic rules on personal servitudes, among them one can find the servitude of premises for housing purposes. Any real estate can be subject to servitude established for the benefit of a natural person. The scope of servitude and the mode of execution, unless otherwise agreed, according to the needs of the benefactor, taking account of the rules of social coexistence and the local customs. Personal servitude cannot be extended outside the lifespan of the benefactor. The benefactor of the “housing servitude” has got the statutory right to take into the apartment his spouse and minor children. Other persons can benefit from his right only if he supports them or if they are indispensable for keeping the household. Minor children may benefit from this right also after reaching the age limit. The Civil code provides that it is for the parties to decide whether the children, parents or spouse of the benefactor will retain the “housing servitude” right after the benefactor’s death. The “housing servitude” encompasses the right to use rooms and appliances destined for the common use of the inhabitants of the building. Other matters between the owner of the estate burdened with servitude and the benefactor are regulated by the rules on *usus*. Should the benefactor of the servitude abuse his right the owner of the premises may demand to be discharged of the obligation of servitude by means of payment. All the rules on the protection of tenant’s rights will be appropriately applicable.

### **Question 11: Immediate Termination under Unusual Circumstances**

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

Under the UOL, there are no separate legal bases that grant the landlord the right to give a notice with the effect of immediate termination of the contract. Each ground for termination require the lapse of a certain notice period, ranging from one month to three years, before the tenancy relationship becomes terminated. Nevertheless, one should mention that in the case of unusual circumstances being at the same time ‘important reasons’, as laid down in Article 11 of the UOL, the landlord may apply to the court for dissolution of the tenancy relation and the eviction order.<sup>139</sup>

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<sup>138</sup> M. Nazar “Ochrona praw lokatorów, cz. II”, Monitor Prawny 2001 nr 19/961

<sup>139</sup> For details see answer to question 6.

However, as this might be achieved only through court proceedings, the termination is always far from immediate.

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

In order to terminate a tenancy relationship on the grounds of non-payment, the tenant must be in default of at least three rents. The landlord should then inform the tenant about his intention to terminate the contract and at the same time allow him an additional one month for payment of all due rents, and only then may the landlord lawfully bring the contract to an end by means of one month's notice<sup>140</sup>. Therefore we must conclude that the landlord cannot give immediate notice to the tenant if the tenant has failed to pay the two last monthly rents. Even if the landlord satisfies the first two requirements,<sup>141</sup> the tenant will be obliged to leave the rented premises only after four months from the date of non-payment. Moreover, in some cases, where the tenant does not pay the rent due to his poor financial standing - i.e. where the income per capita in the household does not exceed the level that enables to apply for social premises - the landlord may serve notice only after having proposed a settlement for all due rents<sup>142</sup>. Regardless of the effectiveness of this proposal, which is usually deemed low, its introduction in 2001 prolonged further the procedure necessary for termination on the grounds of non-payment.

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

No, he cannot. The landlord should first call the tenant in writing to improve his behaviour and only after ineffective lapse thereof the landlord may serve one month's notice.<sup>143</sup>

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?*

In principle such a clause is not valid under Polish law as it constitutes an attempt to circumvent the basically mandatory regime intended to protect tenants. Accordingly, the landlord must fulfil several requirements before the tenancy relationship can be validly terminated (which concern the grounds for termination and notice periods and their form. For details please compare point a. above).

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

One general regime governs rents and their increase under Polish law.<sup>144</sup> Most provisions on rents are contained in the UOL and are mandatory. At the outset, it should be mentioned that the UOL has divided all pecuniary charges that the tenant may be potentially bound to pay into two distinct categories: the rent which covers charges determined by and thus dependent on the landlord (further, 'the rent'), and charges independent of the landlord, such as charges for electricity, water,

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<sup>140</sup> Art. 11.2.2 of the UOL.

<sup>141</sup> This is lawful yet not commonly used.

<sup>142</sup> Art. 12 of the UOL, on details of the settlement procedure see also Introduction – part 3b.

<sup>143</sup> Art. 11.2.1 and Art. 13 of the UOL.

<sup>144</sup> Except for Associations of Social Housing (Towarzystwa Budownictwa Społecznego) being subject to a separate set of rules.

gas, etc (further, ‘other charges’).<sup>145</sup> *Tertium est non datur*. This division is of practical importance as the landlord may basically demand only the rent. Payment of other charges may be demanded by the landlord only in cases where the occupant has not concluded a separate contract with a provider of utilities.<sup>146</sup> Nevertheless, other charges may not be a lawful source of revenue for the landlord. Thus, the UOL intends to invalidate a practice that was occurring in the past when the landlord derived benefits not only from the rent but also from sums paid by the tenant for utilities. Under the UOL this practice would be unlawful as other charges paid by the tenant in excess and received by the landlord would be considered undue and could be recovered.

The increase of the rent and the other charges are governed by a different set of rules. While the former is subject to detailed restrictions (to be described below), the latter may be validly increased under the condition that it was imposed by the provider. The landlord will be then obliged to submit to the tenant a list of charges and give a reason for the increase in writing.<sup>147</sup>

There are a number of costs that are borne by the landlord who is under a statutory obligation to pay. He cannot transfer these costs to the tenant, unless this agreed beforehand in the contract. This transfer would take the form of higher rent charges as in the eyes of the law it is the landlord who remains liable for these costs.

**Table nr 3 presents the types of costs for which the landlord is statutorily made liable:**

Statutory obligations generating costs	Sanctions for non compliance with obligations
Technical maintenance of the building <sup>148</sup>	Fine
Recuperation/ upkeep of the apartment in condition fit for habitation <sup>149</sup>	Providing substitutive premises for the tenants in case of building demolition and covering the costs of the moving
Administration costs – book keeping requirement for tax reasons <sup>150</sup>	Fine
Maintenance of order and clean-up <sup>151</sup>	Fine
Providing building insurance <sup>152</sup>	In case of unexpected chance events that would have been otherwise covered by the insurance, providing substitutive premises
Payment of real estate tax <sup>153</sup>	Fine or pecuniary damages
Charges for overdue costs <sup>154</sup>	Obligation to pay the costs generated by tenant regardless of the delay in the rent payments

<sup>145</sup> Art. 9.5 of the UOL

<sup>146</sup> Art. 9.6 of the UOL

<sup>147</sup> Art 9.1 and Art. 9.2 of the UOL

<sup>148</sup> art. 61 of the Building act; art. 662 § 1 of the Civil Code

<sup>149</sup> art. 11.9 of the Act on the protection of the rights of the tenants

<sup>150</sup> art. 44 and 45 of the Act on the Income tax for natural and legal persons

<sup>151</sup> art. 5 of the Act on maintenance of order and cleanness in communes

<sup>152</sup> art. 11.9 of the Act on the protection of the rights of the tenants

<sup>153</sup> art. 2 of the Act on the local taxes and charges

Source Polish Association of Property Owners [www.oswn.pl](http://www.oswn.pl)

### **Question 12: Settlement Date and Modes of Payment**

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

The settlement date is usually determined by the parties. In the absence of an express term in the contract, the settlement date will be fixed by statute law, depending upon the duration of the tenancy contract. If the duration is less than one month, then the entire rent is paid in advance. If the duration is in excess of one month or the contract is unlimited in time, then the rent is supposed to be paid monthly, on the tenth day of each month.

The parties are free to determine the mode of payment. The right of pledge is referred to in answer to question 21.

### **Question 13: Requirements for Rent Increase**

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

#### i) The notice period for a rent increase

The landlord may increase the rent by giving the tenant sufficient notice of at least one month before the increase becomes fully effective.<sup>155</sup> The increase of other charges independent of the landlord may be made by means of an immediate notice containing a list of charges and stating the reason for the increase as imposed by the provider.

#### ii) The frequency of rent increases

The rent may not be increased more often than every six months while there is no restriction on frequency of increases of other charges independent of the landlord. As a result, goods/services providers may freely increase the latter.

#### iii) The maximum single rent increase

Previously Article 9.3 of the UOL established that the maximum admissible single increase in the rent hinged upon two factors: the inflation rate in the previous year<sup>156</sup> and the level of rent paid in the apartment concerned. The admissible increase was defined as a certain percentage of the inflation rate, that was dependent upon the level of the current rent. Generally speaking, the lower the rent, the higher single rent increase permissible. Still the level of increase was fixed. As these limitations were widely perceived as overly restrictive for property owners, Article 9.3 was

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<sup>154</sup> art. 61 of the Building act, art. 662 § 1 of the Civil Code

<sup>155</sup> Art. 685(1) of the Civil Code

<sup>156</sup> Measured by the increase in retail prices for the previous year and officially published by The Main Statistical Office.

challenged before the Constitutional Court, was declared unconstitutional and rendered invalid.<sup>157</sup> To conclude therefore, as things stand, there is presently no limitation imposed upon a single rent increase, nor upon additional charges.

iv) The maximum chargeable rent

Despite the recent judgement of the Constitutional Court, the protection of tenants remains strong, as there is another perimeter of defence in the form of the maximum level of rent for all tenancies that were leased before the UOL was adopted, and to which the regulated rent provisions were applicable. The rationale behind this provision was that the rent increase could not lead to a situation in which the yearly value of the rent exceeded 3% of the recuperation value of a given apartment.

This limitation is in operation not only with regard to most public sector apartments but also to most private sector apartments that were leased to tenants before the introduction of the free-market economy in the early 1990. Before that time, State authorities used to assign people to private apartments at their discretion and set prices at a very low level, thereby imposing the main burden of maintaining the rented apartment on owners. The rent set by State authorities was called 'regulated rent'. To ensure an evolutionary shift from the state-management of housing provision to a more market-oriented model, old apartments covered by the 'regulated rent' before the UOL's entry into force, are also subject to the 3% ceiling. However, even the 3% level does not, in most cases, permit the owner to cover all the expenses associated with the building's maintenance and its renovations, let alone derive profits from property. According to some landlords' associations, the rent can cover all costs connected with the upkeep of an apartment if it is set on the level of 4-9% of the recuperation value, while the rent in the European Union's states is declared to vary from 4% to 15%<sup>158</sup>. In practice, the actual level of the rent set by local authorities rests much below the cap, usually approx. 1% of the recuperation value, as the authorities are often fearful of political repercussions which may result from rent hikes and an increase in the number of persons resorting to housing benefit. Not surprisingly then, the rent covers, in average, only 68% of maintenance costs of the local housing fund.<sup>159</sup>

The UOL sets out, however, that the ceiling will be in force only until the end of 2004.<sup>160</sup> Given the political strength and prominence of the tenants' associations, the prolongation of the time limit is likely. However, to date there are no reported government plans to do so.

In the case of all other apartments the maximum chargeable rent is subject to the market only.

### **Question 14: Index Clause**

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

With the introduction of the UOL, in 2001, it became unlawful to continue the practice of founding a tenancy contract upon any kind of index-clause. This was based on the a need to protect

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<sup>157</sup> The Constitutional Tribunal Ruling of 2 October 2002, K 48/01, Dz.U. nr 168, item 1383. For detailed discussion of the judgement, see the introductory part.

<sup>158</sup> *Ibidem*

<sup>159</sup> Instytut Gospodarki Mieszkaniowej, „Informacje o Mieszkalnictwie za 2001”, Warsaw: 2002, p. 9

<sup>160</sup> Art. 28.2 of the UOL



tenants.<sup>161</sup> However, as the lofty intention to defend tenants did not explain convincingly to many observers why the prohibition of index-clauses was desirable, it was roundly criticised. As a result, the last amendment to the UOL that came into force on 15 June 2003 has abolished this limitation and, as the things stand at present, index-clauses are generally fully admissible.<sup>162</sup> In particular, the stipulation of the index-clause described in the case is lawful.

### **Variant**

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

As from the 15<sup>th</sup> June 2003 progressive rent arrangements, in general, can be validly stipulated. However, the question which arises here is whether the rent increase following the stipulation of an index-clause must meet the requirements described above in Question 13 as to the frequency of rent increases (ii), and the ceiling of the rent (iv).<sup>163</sup> This question remains highly controversial. Some commentators appear to support the view that the index-clause contained in a tenancy contract could be shaped according to the unconstrained will of the parties, that is without regard to these two requirements.<sup>164</sup> The only safeguard for the tenant would be the general provisions on consumer protection enshrined in the Civil Code, particularly provisions on abusive clauses. However, such an interpretation seems not entirely convincing as it would readily cede landlords the power to circumvent the elaborate system of protection of tenants via the introduction of a simple index-clause. One may doubt whether this was the true will of the legislator.

As these doubts have not been dispelled so far, it is not possible to provide a definite answer to this question.

### **Question 15: Unlawful Rent Increase**

*By ordinary letter, L tells T that the rent will be increased by 10% in three months time to compensate for 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 justification. After this time only, she gets doubts and consults a lawyer. Can T get some money back? If yes, can T off-set the sum to be repaid against future rent instalments on her own motion without judicial intervention?*

An unlawful rent demand that has been satisfied by the tenant or any other person acting in his name is considered undue and, as such, is governed by the Civil Code provisions on undue performance and unjust enrichment.<sup>165</sup> All sums unduly paid to the landlord may be easily recovered before the court. However, to avoid cumbersome court proceedings and a deterioration of relations with the landlord, the tenant would rather tend to off-set the sum to be repaid by the landlord against rent instalments. The tenant is certainly entitled to do so but only in respect of those rent instalments that have already been due, i.e. whose time limit for payment has been met.<sup>166</sup>

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<sup>161</sup> Art. 5.3 UOL

<sup>162</sup> Article 5, Act of 9 May 2003 on the amendment of the Act on the protection of tenants' rights, the communal housing stock and the civil code amendment., Dz.U. 03 item 113

<sup>163</sup> The question of the notice period (i) is irrelevant here. As regards the question of a maximum single rent increase (iii), this is no longer in place and therefore it has been omitted above, as well.

<sup>164</sup> E. Bonczak-Kucharczyk, "Wyrazne oslabienie najemców", *Rzeczpospolita* 22.05.2003

<sup>165</sup> Arts. 415-414 of the Civil Code

<sup>166</sup> Arts. 498-505 of the Civil Code

In view of the foregoing, under the circumstances of the case, the tenant may sue his landlord before the court demanding the recovery of the unduly paid monetary sum. Alternatively, he may decide to off-set the sum to be repaid by the landlord against due rent instalments by way of a declaration submitted to the landlord.

### **Question 16: Deposits**

*What are the basic rules on deposits?*

Under Polish tenancy law, the deposit is not an obligatory component of the tenancy contract, however, it is a common and deep-rooted practice.

As regards the pecuniary boundaries of the deposit, the UOL prescribes a ceiling in the amount of twelve month's rent calculated at the moment of the contract conclusion.<sup>167</sup> The possibility of stipulating such a high deposit was supposed to give landlords some sort of compensation for increased level of tenants' protection as regards non-performance and contract termination. Since termination of the contract on grounds of non-payment may take anything from several months to several years in the worst case,<sup>168</sup> a stipulated high deposit was to cover lengthy periods before the rented apartment is vacated. Although there is no available data, it seems that the average stipulated deposit has gone up in the wake of the UOL's introduction. Nonetheless, the actual amount of stipulated deposit rarely meets the ceiling of twelve month's rent.

Eventually, one should note a very peculiar method of the deposit's valorisation under Polish law. It is not associated with any price index or the rate of inflation but with the actual rent increase of the rented apartment. The amount of the deposit to be paid back to the tenant is obtained by multiplying the amount of the rent at the moment of the contract conclusion and a certain, concurrently agreed, co-efficient. However, the deposit to be repaid to the tenant is based not on the amount of the rent stipulated in the contract but the amount of the rent at the time of termination.<sup>169</sup> This is, therefore, not a mechanism of valorisation as such, because it is not capable of retaining the actual value of the paid deposit. If the rent remains on the same level for the entire duration of the contract, the tenant will be given back precisely the amount that he had paid on the day of entering into the contract, regardless of the rate of inflation. He will, as such, "lose out" as the purchasing value of his deposit will be lower according to the rate of inflation. Therefore, this instrument might persuade the landlord to maintain the rent on the level agreed upon by the parties on the day of the contract conclusion as the more the rent has been increased, the higher the deposit to be repaid.

### **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?*

This is a subject matter subject to freedom of contract. Although either party may be encumbered with the obligation to pay all or some utility bills, it is usually the tenant who is so burdened. He may have a contract with a certain good/service provider in operation, under which he pays utility bills directly. In such a case, the landlord may receive only the rent. Alternatively, the tenant may

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<sup>167</sup> Art. 6.1 UOL

<sup>168</sup> See Questions 6 & 11 above.

<sup>169</sup> Art. 6.3 UOL

pay the landlord utility bills, most often against producing bills, invoices and other documents. The landlord will then receive the rent and additional amounts to pay for utilities. As stated before, the latter sums cannot be a source of additional revenue for the landlord<sup>170</sup>.

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

The principal obligations of the landlord in the performance of contract could be summarised as follows: (a) delivery of the specified property in a due state, (b) maintenance of the property in a due state throughout the entire period of tenure, (c) ensuring peaceful and undisturbed tenure.

The principal obligations of the tenant are as follows: (a) payment of the agreed rent in a due place and at due time, (b) using the leased property with due diligence and care, (c) delivering the property back upon termination of tenancy.

#### **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)*

Presently there are two types of control of standard terms – general and individual. Individual control is provided for in Title III, articles 384 – 385 of the Civil Code. It is carried out incidentally in a dispute between parties before any court, if one of the parties raises the plea of inapplicability of a certain provision deemed to be unfair. The Court decision declaring inapplicability of a term to the contract is enforced only between those parties. *Locus standi* is then obviously limited to the parties concerned.

Besides this individual and incidental control, there is also a special procedure envisaged as a general control of standard terms<sup>171</sup>. As regards the scope of the control, it has been extended by national legislation, yet implicitly, to contracts between non-commercial parties. The general control of standard terms is carried out only by the Warsaw Regional Court, which is also the Anti-Monopoly Court. This is to ensure uniformity and a high level of competence in the field. As court decisions on unfairness or abuse would be effective *erga omnes*, *locus standi* is very wide. It is, in fact, a type of *actio popularis* as the control can be triggered<sup>172</sup> by an individual concerned, by certain State authorities, even any person that only potentially – given the content of an offer – could become a party to the contract. Such an application can be brought also by a consumer organisation, including an organisation appearing in the Official Journal of the Communities' list of EU organisations entitled to commence proceedings, if they want to challenge the standard terms of contracts used in Poland, that threaten the interests of consumers in a Member State where the given organisation is situated. In this particular procedure the parties cannot reach a settlement. The court's ruling that a standard term is abusive is of declaratory nature<sup>173</sup>. The ruling is effective towards third parties from the day of its registration in the register maintained by the National Office for the Protection of Competition and the Consumer.

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<sup>170</sup> Article 9 section 5 of the UOL

<sup>171</sup> Part of the doctrine raised also that in some cases if it is customary to use standard contracts. An omission of a standard term normally applied could be assessed by the court in general, the so called abstract control procedure, see to this effect: A: Swistak "Abstrakcyjna kontrola wzorców umownych w praktyce.", *Panstwo i Prawo* 2003/5/55

<sup>172</sup> Article 479 of the Civil Code Procedure; compare: E. Letowska "Nizszy poziom abstrakcji", *Rzeczpospolita* 2001.09.03

<sup>173</sup> M. Jagielska "Nowelizacja Kodeksu cywilnego: kontrola umów i wzorców umownych.", *Monitor Prawniczy* 2000/11/698

Moreover, in relation to consumer contracts Article 385<sup>3</sup> of the Civil Code lists the terms of contract which in the case of doubt shall be deemed unlawful. Among these one can find for example: terms that exclude or significantly limit the possibility of off-setting claims by the consumer with the claims of another party; terms that allow the other party to transfer the rights and obligations stemming from the contract without the consumer's agreement; terms that make the conclusion of a contract conditional upon future contracts of a similar nature; terms that reserve for the other party the singular right to alter, without important reasons, the essential features of the contract and its performance; terms that exclude the jurisdiction of the Polish courts or submit the matter to a Polish arbitration court.

According to Polish jurisprudence and legal doctrine, standard terms shall be understood as any term that has been formulated before the conclusion of the contract in such a way that the other party did not influence its meaning<sup>174</sup>. If the landlord acts in a non-commercial capacity the general provisions of the Civil Code apply. They provide in particular that the standard contract used by one of the parties, especially the general conditions, standard terms, templates and rules of conduct are binding on the other party if they have been delivered at the conclusion of the contract. If the use of standard contracts is customarily accepted in a given contractual relationship the template is deemed to be binding also if the other party could have easily determined its contents<sup>175</sup>. One has to consider that although it is customary to use standard contracts that are devised by landlords' associations, there is indeed such a multiplicity of them that it is not very likely that the court would use this provision against the tenant.

It is indeed doubtful that any court would treat the use of standard terms prepared by a landlord association as a consumer contract. In the case of consumers' contracts, if a standard contract is used then all the provisions that have not been negotiated individually are not binding, if they create the rights and obligations of the party in a manner contrary to good practice and contravene his interest<sup>176</sup>. This rule is not applicable to terms of contract concerning charge or price, if they have been formulated in a clear manner. The party to the contract that relies on the provision bears the burden of proof that the terms have not been individually negotiated.

### **Question 19: Frequent Standard Terms**

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

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

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

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<sup>174</sup> F.Zoll "Natura prawna wzorców umownych.", *Panstwo i Prawo* 1998/5/46

<sup>175</sup> Article 384, 385 of the Civil Code

<sup>176</sup> Article 385<sup>1</sup> of the Civil Code, see also R. Stefanicki "Dobre obyczaje w prawie polskim.", *Przegląd Prawa Handlowego* 2002/5/23

As a general rule, if the landlord has not acted in a commercial capacity, the general Civil Code rules concerning standard terms will apply. The validity of these clauses will be assessed according to the general regime and not the one provided for by consumer contracts. While it is true that a standard term limiting the party's right to off-set her claims against the charges demanded by the other party is specifically listed in article 385(3) of the Civil Code as not binding, one must be conscious of the fact that this is a provision applicable to consumer contracts. It would then seem that parties have got the right to include such a term in the contract, especially as it would not limit or waiver the tenant's right to claim damages for any costs incurred, established on the basis of article 677 of the Civil Code. However such a term must be assessed in view of the Supreme Court Resolution of 19 March 1975<sup>177</sup> which clearly stated that the tenant has the right to off-set the costs of reparations, for which the landlord is responsible, against the rent, on the basis of article 663 of the Civil Code. Effectively, parties to the contract may not exclude the right to off-set costs of such reparations.

The requirement that the tenant bears the costs of small reparations, up to 100 Euro per annum would be legal. In fact, it is explicitly stated so in the Civil Code and the UOL, that unless otherwise agreed by the parties, the tenant must bear the cost of all small reparations. Article 681 of the Civil Code lists in particular what would be considered a small repair: mending of floors, doors and windows, painting the walls, floors and the inside of the entrance doors, as well as the cost of insignificant repairs necessary after the installation of technical appliances providing light, heating and water, etc. There is no statutory maximum limit on the costs of what would constitute such small reparations. The Civil Code does not address who is to carry out the repairs and leaves the decision to the parties. It would seem then that the parties can agree that the apartment must be repainted by a professional painter and that the cost is to be borne by the tenant.

A term reserving the right of immediate notice should the tenant become a member of a tenants' association will not be legally enforceable, since article 11 of the UOL provides *numerus clausus* on grounds for serving notice. This matter is discussed extensively in this report in answers to set 2.

A tenant's association will not have the right to challenge any of the mentioned terms, as the landlord is not acting in a commercial capacity. As was previously mentioned if these standard terms have been delivered to the tenant before the contract was concluded they will constitute part of the contract and will be binding, unless they are found contrary to any mandatory provisions of law.

### **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.*

On the basis of article 684 of the Civil Code, the tenant is granted the right to install an electric light, gas, telephone line, radio and other similar appliances, unless their installation infringes the law or is a threat to the safety of the premises. Therefore one can conclude that the tenant has the right to install a parabolic TV antenna on his balcony and there is no need to obtain the landlord's

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<sup>177</sup> The Supreme Court Resolution of 19 March 1975 III CZP 13/75 with commentary by: Radwanski Zbigniew OSP 1975/12/265

consent. This view is reinforced by the second sentence of article 684 which states that the landlord is in fact obliged to assist the tenant in the installation process, including the reimbursement of the costs. Additionally, article 676 of the Civil Code provides that if the tenant has improved the leased property the landlord can either decide to keep the improvement and pay the cost or demand the restitution to the original state, unless it was agreed otherwise in the contract.

In any case the landlord will not be able to refuse instalment of the parabolic antenna, unless for example there are building restrictions stemming from local laws.

### **Variant 1**

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

This would not matter, as the tenant can enforce his rights on the basis described above.

### **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?*

Similar considerations to those outlined above apply. The landlord will have no right to demand the removal of the poster, unless there are restrictions arising from the local laws, which may for example prohibit the display of particular forms of advertisement, poster or notices for aesthetical reasons.

### **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?*

Taking into account the provisions of The Act on the Protection of Tenant's rights it would seem that the landlord has the right to keep one set of keys to the apartment rented to T. Article 10.1 of the act sets out exactly under which conditions the Landlord may enter the apartment without the tenant's permission. If there is an imminent danger of damage the tenant is obliged to make the premises available in order to eliminate that danger. If he refuses, or if he is absent, the landlord has the right to enter the premises accompanied by members of the police, communal guard or fire brigade. If the premises have been opened in the tenant's absence, the landlord is obliged to secure the premises and the property inside until the arrival of the tenant. He is further required to prepare a report of these actions.

Considering the fact that the tenant is obliged to make the premises available to the landlord for periodical repairs only after a prior appointment, one can conclude that the landlord does not have the right to enter the property without the tenant's knowledge.

The only occasion on which the landlord would have a legitimate right to enter the property without the tenant's consent would be in order to execute of the statutory right of pledge on movable property of the tenant if the latter is in arrears with the rent and utilities, in excess of a

year<sup>178</sup>. The landlord has the right to object to the removal of properties subject to pledge and he can retain these at his own risk until the overdue rent is paid. To execute the right of pledge the landlord would presumably contravene the conditions set out in article 10.1 of the UOL, but even this would not constitute a criminal offence.

Article 690 of the Civil Code states that provisions relating to the protection of ownership are applicable and can be invoked to protect the right to use the leased property by the tenant. The Supreme Court has long established in its ruling of 28 November 1975 that on the basis of that article the protection of a tenancy right is effective not only against third parties but also against the landlord, regardless of the additional claims the tenant may be granted on the basis of any *lex specialis* devised to protect the tenancy relationship. The wording of article 690 does not give any grounds to exclude the landlord from the scope of its application<sup>179</sup>. Article 222 of the Civil Code reveals that the owner of property may demand restitution from any person in factual possession, unless the other party has a valid counter-claim. If the other party infringes the owner's rights in another manner, the owner will have the right to demand the termination of such an infringement. Yet, the tenant may similarly execute the proprietary rights established under article 222 against the owner himself and demand a return of possession of the property and a termination of any infringement of his rights as tenant. T could further claim damages for the defective performance of the contract on the basis of the general rules in the Civil Code.

## **Question 22: The Landlord's Liability for Personal Injury**

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

L's liability in this case would be established on the basis of tort (article 415 of the Civil Code) and not on the basis of contract. Article 443 of the Civil Code states that the fact that performance or non-performance, which were the source of the tortious damage, constitute performance or non-performance of an existing contract does not preclude a claim for damages on the basis of tort, unless the contract provides to the contrary.

L's liability in tort would vary, depending on his property rights. If he is the sole owner of the building and of all the flats then he is solely responsible for maintaining order and keeping the premises in an appropriate condition for the use of all his tenants. On the other hand, if the building comprises different flats owned by different owners, they would all be jointly responsible for the maintenance of the stairs, elevators, etc. If the claim for damages has been satisfied by one of the landlords he can therefore claim reimbursement from the others in equal parts.

On most occasions, the landlord (or landlords, if there are more rented flats in the building) would entrust the maintenance of the stairs, elevators, pavements etc to a concierge or hire a suitable company. Article 429 of the Civil Code provides that where the Landlord entrusts the performance of a duty to another party he is responsible for any resultant damages, unless he can prove that he was not at fault when choosing the person/enterprise entrusted with the performance of said duty.

## **Set 5: Breach of Contract**

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<sup>178</sup> Article 671 of the Civil Code

<sup>179</sup> The Supreme Court judgment of 28 November 1975 III CRN 224/75

### **Question 23: Destruction of the house**

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

As was previously mentioned, the tenancy contract arises solo consensus, so the transfer of the keys or possession of the premises to the tenant is not a necessary element of the contract. Articles 471 – 486 of the Civil Code establish the general regime of liability and damages for non-performance of the contract. Article 471 sets down the rule that the party to the contract will not be liable for non-performance or invalid performance if it is the result of circumstances for which he/she bears no responsibility. However, a party will be responsible for a failure to exercise due care.

It does not matter if the apartment is destroyed before or after transfer of possession to the tenant. The key issue for establishing the rights of the parties is whether the defect in the property occurred before or after conclusion of the contract, added to the tenant's awareness of the state of the property at that moment.

If the defect occurred after the conclusion of the contract, the tenant will be entitled to damages (in the form of a rent decrease, if the defect limits the use for which the property was supposedly fit) and the right to serve immediate notice (if the defect renders it impossible to use the property for the agreed purpose, and/or it is impossible to remove the defect, and/or the landlord despite having been warned about the defect has failed to remove it in due time).

If the defect occurred before the conclusion of the contract, and the tenant was unaware, the tenant will have the right to demand a rent decrease (if the defect limits the use for which property was supposedly fit) and the right to serve immediate notice (if the defect renders it impossible to use the property for the agreed purpose).

The Civil Code also regulates performance and non-performance of concurrent obligations, such as arise in tenancy contracts, in articles 487 - 497. The general principles on non-performance remain applicable unless the rules on concurrent obligations provide otherwise. Specifically article 493 of the Civil Code stipulates that in a case where one of the correlated obligations becomes impossible to perform as a result of circumstances for which the obliged party bears the responsibility, the other party to the contract may choose between damages or rescission of the contract. On the other hand, article 495 stipulates that where one of the concurrent obligations becomes impossible to perform, as a result of circumstances for which neither party bears responsibility, the contract ceases to exist and the parties are obliged to transfer whatever was given or paid in performance of the contract.

Article 662 of the Civil Code establishes that the landlord should deliver the property in a state fit for the agreed use and maintain it in such a state throughout the duration of the contract. Paragraph 3 of said provision states that should the object of the property be destroyed in circumstances for which the landlord is not responsible, he will not be required to restore the object to its previous state.



## **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 Polish civil law adopts the position that the impossibility to perform a contract will render the contract invalid<sup>180</sup>. In the case of impossibility of performance, the party to the contract that knew about it and did not reveal it to the other party, will be liable for damages that the other party suffered by concluding the contract unaware of the impossibility of performance. It must be highlighted that the concept of impossibility of performance is different from the common understanding of the term.

The Supreme Court's Judgement of 8 May 2002<sup>181</sup> ruled that article 387 of the Civil Code reveals that the impossibility of performance - regardless of whether this was 'primary' or 'secondary impossibility' (the difference refers to the impossibility to perform either before or after the conclusion of the contract) - is objective in its character, and means that neither the party to the contract nor any other person would be able to perform it.

From the above considerations one can draw the conclusion that the case of a double tenancy contract cannot be subsumed under the concept of prior impossibility, which renders the contract void, as the object of the contract has not ceased to exist. Therefore the normal regime for contractual obligations will apply<sup>182</sup>. Both contracts will be valid, however Tenant 1 will be in a more favourable position than Tenant 2 due to the fact that he has obtained possession of the premises. As already mentioned in the course of this report (as for the peculiar nature of tenancy right and its protection against third parties please refer to introductory remarks to set 6 and some remarks on articles 690 and 222 of the Civil Code in answer to question 21) tenancy is obligatory right with additional proprietary protection. Article 222 provides that owner of the property can demand its restitution, unless the party in possession of the alleged property has valid claim against his right. This article may be invoked by the tenant against any other person. In the particular case we are considering, there is a collision of rights<sup>183</sup>. Such a collision can be solved by establishing a preference among the rights or by establishing a reduction of the competing rights. The so-called **preference system** results in satisfying one party, whose claim arose first (in the case of tenants 1 and 2, it would be tenant 1 who would profit because he was the first to take possession of the premises). The **reduction system** allows for partial satisfaction of the claims of all parties. In the Polish legal system there is no predefined inclination for any one of the mentioned systems. For example, with regard to limited proprietary rights the preference system in use is the *prior tempore potior iure* (article 249 of the Civil Code) - the determinant factor is thus the time when the rights were created or registered in the mortgages registrar. The proportionate reduction system is used for example in article 1036 of the Civil Code Procedure, when the sum obtained in execution proceedings is insufficient to satisfy all claims in the same category of priority. There is no case law regarding concurrent claims arising out of tenancy contracts, but considering the fact that for

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<sup>180</sup> Article 387 of the Civil Code

<sup>181</sup> The Supreme Court's Judgment of 8 May 2002 III CKN 1015/99

<sup>182</sup> see P. Granecki "Culpa in contraendo", Przegląd Prawa Handlowego 2001/3/9

<sup>183</sup> On the collision of the rights of the parties: A. Szpunar "O Kolidacji praw podmiotowych", Kwartalnik Prawa Prywatnego 1996/4

settling limited proprietary rights the preference system is used, the same would appear to apply in the case of tenancy contracts.

The general principles of the Civil Code on obligations will apply in order to determine ways to compensate. According to article 361 the party obliged to provide damages is responsible for the *damnum emergens* and *lucrum cessans* unless statute law or the contract provide otherwise. The injured party has the right to choose how he/she desires to be satisfied, either by performance of the contract or pecuniary damages<sup>184</sup>. However, if performance of the contract is impossible or it would involve excessive difficulties or costs the satisfaction will be limited to pecuniary damages<sup>185</sup>. Consequently, tenant 2 can claim damages both on the basis of article 361, article 471 and 495. Eventually according to the Judgement of the Supreme Court of 10 January 2003<sup>186</sup> regardless of the legal basis for claim for damages, satisfying the damages precludes the possibility of raising another claim for damages resulting from the same situation. Such a conclusion is inherent to the essence and the function of damages as an instrument of civil law

If tenant 1 refuses to terminate his contract, the landlord will be unable to perform his obligation towards tenant 2 for delivery of possession of the property. If so, the only option for tenant 2 would be to rescind the contract or bring a claim damages for non-performance.

### **Question 25: Delayed Competition**

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

On the basis of article 477 the tenant will be able to demand performance of the contract and damages for the delay in performance. After setting the landlord an additional deadline for the performance of the contract, if this proves ineffective, on the basis of article 491 the tenant will thereafter be able to rescind the contract and bring a claim for performance and damages.

The tenant will further have the right to rescind the contract on the grounds that the performance of the contract after the deadline is of no use, due to the fact that it does not satisfy the aim of the contract, a reality that was obvious to the other party.

Any intervention by the neighbour challenging the building permit under the rules of administrative law will effect a suspension of the construction work, which will not be allowed to proceed until the building permit decision is final. This solution, although time consuming for the investor and contractor is not unsound, especially in light of the fact that should the building permit be cancelled the contractor will be obliged to pull down any construction, no matter how advanced the works have been. Even if the neighbour is unsuccessful in challenging the building permit the landlord will be unable to claim any damages against him. Under Polish law, N is simply executing his right

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<sup>184</sup> Article 363 of the Civil Code.

<sup>185</sup> to this effect see commentary by M. Krajewski to Supreme Court's judgment of 20 March 2002 V CKN 948/00, glosa OSP 2003/1/6 : in case of impossibility of performance for which the debtor is responsible, the claim for performance of the contract *in natura* is transformed into a claim for damages for non-performance of the contract.

<sup>186</sup> The Supreme Court's Judgment of 10 January 2003 V CK 480/02.

to challenge an administrative decision and cannot be held liable for damages other parties have suffered because of any resultant delay.

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

*L rents an apartment to T. T wants to diminish the rent because stains of mildew have been found in some corners.*

According to articles 662, 663 and 664 of the Civil Code, L will be obliged to deliver the property to T in a state fit for the use specified in the contract. If the property is defective, and as a result its utility for the agreed purpose is limited, T may either require L to perform a repair, or to claim a proportionate reduction of the rent. The right to rescind the contract will only be available if the defects render the use for the agreed purpose impossible. The right to rescind a contract is also limited by two more stipulations according to which the defect either has to occur at the time of delivery, or, if the defect occurred later, the landlord, even though notified of the fact, has failed to rectify the problem in due time. T will also have the right to rescind the contract if it is not possible to remove the defect. In all cases T is entitled to compensation for damages.

#### **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?*

As stated above, if during the tenancy there is a need to carry out repairs, for which the landlord is responsible the tenant must notify him of this fact and give him a deadline. If the deadline is ineffective, i.e. the landlord has not performed the repairs within the given time-limit, the tenant retains the right to undertake the repairs at the landlord's expense.

Such a solution is in accordance with the Supreme Court's resolution of 19 March 1975<sup>187</sup>, which has settled that, on the basis of article 663 of the Civil Code, the tenant will have the right to off-set the costs of reparations, for which the landlord is responsible.

#### **Variant 2:**

*a) 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?*

Paragraph 3 of article 664 of the Civil Code states that a tenant will be unable to claim a rent reduction on the basis of defects in the rented property, if he was aware of these defects when the contract was concluded. He will also be unable to rescind the contract. It is for the tenant to prove that he was unaware of the defect at the moment of formation of the contract. Nonetheless, with the intention of improving the situation of the tenants of residential premises, the Civil Code provides in article 682 for this category of tenants right to rescind the contract without notice, even if he

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<sup>187</sup> The Supreme Court Resolution of 19 March 1975 III CZP 13/75 glosa: Radwanski Zbigniew OSP 1975/12/265

knew of the defects when the contract was concluded, in a case where the defects are of such nature as to endanger the health of the tenant and others living with him or employed by him in the apartment.

It is highly questionable whether the fact that a noisy building site for a major road opened by the city administration next to the apartment could be considered as a defect in the premises. We should consider that the road must comply with legal norms for an admissible level of noise in a populated area, and it is these norms that should be taken into account and not the opinion of the tenant. Also this is not a defect that the landlord is able to repair, and in such a case the only claim that the tenant could have would be to terminate the contract with immediate notice. However, nothing prevents the tenant from trying to re-negotiate his contract with the landlord, who considering the imminent termination, may be willing to lower the rent.

As was elegantly stated in the Supreme Court's Judgement of 25 April 1980<sup>188</sup>: the principles of social coexistence should be obliged with at any time. Indeed one cannot be relieved from this duty neither by age, nor social status. These principles are particularly important for landlord and tenant relations, as even a small deviation will influence the local community. Accordingly article 683 of the Civil Code requires the tenant to obey the "order of the house" and to take into account the needs of other tenants and neighbours and article 685 of the Civil Code stipulates the landlord's right to give immediate notice if the tenant infringes his obligations with respect to these rules. Nevertheless the UOL, as *lex specialis*, provides for the termination of the contract only if the landlord firstly instructs the tenant in writing not to act against "the order of the house". If, after receiving this written instruction<sup>189</sup> calling the tenant to improve his behaviour he continues to abuse, he will be able to terminate the contract by serving one month's notice.

As the provision of the UOL is more favourable to the tenant, this will be applied before the provisions of Civil Code.

The landlord will not be liable to the tenant for the actions of other tenants. Interestingly enough, the UOL in article 13, section 1 gives the tenant a right to apply to the court for the dissolution of the other tenants' contract if they obstinately act against the "order of the house" and negatively impact upon other's enjoyment of the premises. This is a far-reaching and powerful claim, which reinforces the proprietary nature of the tenancy right.

### **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?*

It is for the landlord to decide about the purpose for which he wants his property to be used. His decision should be reflected in the contract<sup>190</sup>. It is assumed that in a tenancy contract the

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<sup>188</sup> the Supreme Court's Judgement of 25 April 1980 III CRN 41/90

<sup>189</sup> General rules of the Civil Code will apply to assessing whether the instruction has reached the Tenant, see to that effect : M. Pecyna "Podmiotowe i przedmiotowe przesłanki skuteczności wygasnięcia stosunku najmu lokalu na tle regulacji ustawy z dnia 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie kodeksu cywilnego.", *Transformacje Prawa Prywatnego* 2002/1-2/45

<sup>190</sup> A. Maczynski "Dawne i nowe instytucje polskiego prawa mieszkaniowego.", *Kwartalnik Prawa Prywatnego* 2002/1/65

landlord is obliged to provide premises that are fit for the agreed purpose of renting<sup>191</sup>. Still the parties are free to agree in the contract that the tenant will renovate premises so as to render them fit for the purpose of the contract<sup>192</sup>.

The Act on the Protection of Resident's rights (UOL) reveals that the term "premises" encompass all types of estates, even if technically not suited for habitation. This is due to the fact that the legislator seeks to protect tenant's rights in any location, even if the premises are deemed unsuitable. The only condition that must be met is that the property is rented for residential purposes and it suffices to raise the issue of protecting tenant rights - regardless of the characteristics of the house. This does not mean however that the tenant will be granted any additional claims as to the standard of premises he is renting, apart from basic sanitary requirements.

As was mentioned previously, the tenant's protection is not extendable to the lease for other purposes. This means that the tenant in our case will not have any claims on the basis of the UOL, since his rights as a tenant of residential premises are not infringed in any manner. It has to be stressed that the UOL is applicable to the tenancy of residential premises, which are let for the purpose of satisfying the housing needs of the party. The provisions of this act are not applicable in a case where the purpose of the tenancy is carrying out an economic activity (apart from artistic activities - explicitly mentioned in the act - as it is traditionally the case that artists work from home)<sup>193</sup>.

Even if the assumption that the use of shared premises - though not stipulated in the contract - is valid and enforceable, it would be questionable whether the tenant could claim damages for non-performance according to the general rules of the Civil Code, as it would firstly have to be decided whose obligation it was to adapt the premises.

If the landlord was obliged to adapt the premises then, according to article 493 of the Civil Code, the tenant could rescind the contract on the grounds that performance on the part of the landlord is partially impossible (as he is not able to provide premises fit for the planned surgery). Such a termination is possible in such circumstances, only if the other party must have been aware of this reality. However, if it was the tenant who undertook to adapt the premises, he cannot rescind the contract or claim damages. If the landlord was fully aware that the premises were not adaptable and it is not possible to receive the necessary permits it will be deemed that he has commenced and conducted the contract negotiations contrary to good customs and will therefore be liable for damages caused to the tenant who was expecting to conclude the given contract (the legitimate expectation principle already mentioned in answer to question 1).

## **Set 6: Relationship between the Tenant and Third Persons**

As we have previously described in the introduction, tenancy is principally an obligatory right with some proprietary features. One of the real property traits is the enhanced protection of tenure based on the assumption that the special role played by tenancy law for satisfying housing needs alongside full ownership necessitates the former to be strengthened along the lines of the latter. This rationale led legal protection of tenure to be modelled on that of full ownership. The

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<sup>191</sup> Article 662 par 1 of the Civil Code

<sup>192</sup> K. Zagrobelny Comment to the Judgment of the Supreme Administrative Court of 11 April 1994 SA/WR1861/93, "Glosa" 1996/10/14

<sup>193</sup> M. Pecyna "Podmiotowe i przedmiotowe przesłanki skuteczności wygasnięcia stosunku najmu lokalu na tle regulacji ustawy z dnia 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie kodeksu cywilnego.", Transformacje Prawa Prywatnego 2002/1-2/45

tenant is, thus, entitled to take advantage of all instruments effective *erga omnes*, which are enjoyed by the owner, to protect his tenure against third parties' transgressions. Aside from the ownership-like protection of tenure, the tenant enjoys also a second set of rights effective *erga omnes* stemming from possession. The tenant is the actual possessor of an apartment and, as such, he may resort to separate instruments of protection of possession that usually play a complementary role. Finally, one should mention that the UOL affords the tenant some particular rights against third persons with a view to further improving the tenant's status.

### **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?*

A tenant has the right to demand that a neighbour cease behaving in a manner that infringes upon his tenure. As the playing of excessively loud music or the constant production of bad smells would infringe upon his enjoyment of the property, the tenant would be entitled to demand that his neighbour cease this nuisance by invoking his rights flowing from either possession or ownership of the property.<sup>194</sup> Such a claim would be similar to the Roman *actio negatoria*.

In extreme cases, where "the tenant glaringly or obstinately transgresses the accepted house rules thereby making the use of other premises in the building difficult", the UOL provides other tenants and the landlord with the right to bring court proceedings to dissolve the tenancy relationship and evict the troublesome tenant.<sup>195</sup> Since there is a very similar ground for termination of the contract by notice, it is of little value for the landlord. However, this is a provision of fundamental importance for other tenants as it enables them to dissolve the tenancy relationship between an annoying neighbour and the landlord, even against the will of both. Thus, it provides them a degree of control over the circle of neighbours. This measure is regarded by the courts, however, as an *ultima ratio* and, as such, is rather reluctantly and rarely invoked.

All rules on eviction described above apply.

### **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 two weeks. The lorry has been driven by E, an employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?*

On the assumption that the lorry caused damage to the tenant's belongings, he would be entitled to claim damages under the tort regime, regardless of steps undertaken by the landlord. The complete resolution of this case would depend upon a number of variables connected to the constructor and the neighbour, particularly the relationship between them, their actual role in the construction of the house, and the status of the constructor.

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<sup>194</sup> Art. 222 & Art. 344 of the Civil Code

<sup>195</sup> Art. 13 UOL

Assuming that the building company carries out the construction work on its own following the mandate given to it by the neighbour, it would be the latter who would assume the responsibility, as the neighbour is the mandator of the construction. However, he would not be liable if he proves that he committed no fault in the choice of the person who caused the damage or entrusted the construction to an enterprise or an establishment, which performs such acts within the scope of its professional activities.<sup>196</sup> Assuming that it is a professional building company that carries out the construction, the neighbour would evade liability. Yet, if he errs in his choice of the construction company he would be liable for the tenant's claims.

Finally, if the building company and the neighbour co-perform the construction work, they will be co-responsible for any damage caused.

### **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 a long-standing institution of the Polish civil law enshrined in the Civil Code, Title XXII, Articles 752-757. Essentially these provisions regulate relations between two parties where one conducts the affairs of the party without a prior mandate. The legal situation depicted in Question 30 fits this description as N undertook an action for the purpose of protecting T's property without the lack of a prior *vinculum iuris* between them. One could thus quite safely conclude that this situation would be governed by the provision on *Negotiorum Gestio* indicated above.

Concerning the question of claims between T and N, the latter would be likely to have the right to demand the entire refund of the chisel's value, as well as to be exempt from the obligation to pay for the destroyed apartment door. N's behaviour appears to satisfy all the requirements of a due conduct under the indicated circumstances. Firstly, N undertook the action for T's good and in line with his probable will (in all likelihood, T would expect N to react to a strong gas-like smell coming from his premises). Secondly, N acted with due diligence (in the circumstances, given the unavailability of other equally effective and rapid means to resolve the problem, N chose a reasonable and value-for-money way to avert the perceived imminent danger). It would, however, be difficult to prejudge the outcome of potential litigation beyond doubt as some details would have to be further clarified, including the availability of other measures that could have been undertaken by N such as making a telephone call to T or addressing the landlord directly.<sup>197</sup>

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<sup>196</sup> Art. 429 of the Civil Code

<sup>197</sup> One should note that there is a special provision in the UOL on the procedures to be applied where the landlord wants to enter T's apartment urgently. Compare with the answer to question 21.