Slovenia

Tomaz KERESTES*

1. Introduction

1.1. General

It would be difficult to argue that there has been such a thing as tenancy law - as a special legal field - in Slovenia prior to the country gaining national independence in the year 1991. Prior to this date Slovenia was part of the Federal Socialist Republic of Yugoslavia (hereinafter: SFRJ). Housing relations in SFRJ were based on three different solutions. Certain dwellings were, since 1945 onwards, considered as being privately owned. Although the new socialist government has nationalized a vast majority of such properties, they left smaller apartments for the personal use of former owners. This group of people had partments in their private property throughout the socialist period. Others in society also had private apartments which they purchased already in the socialist era. Under very strict limitations it was already possible to purchase apartments under the socialist system. The great majority of citizens have, however, had apartments for their own use on the basis of a special right called a "housing right"[1]. This right was not a pecuniary right of civil law, but a special right construed in a Socialist Law.[2] All these apartments were in social property[3] and tenants had only a special right to use this social property. This right of use was however permanent and very close to ownership.

In 1991, already in a new State, a process of privatization started in Republic of Slovenia. Privatization in area of housing was based on a concept of purchase under very advantageous conditions. This model was introduced by a Tenancy Act (hereinafter: TA).[4] This was the Act that also introduced a tenancy law in Slovenian legal system. According to TA it was possible to purchase an apartment in use on basis of a housing right at a price that was 10 – 20% of a fair market value. There were only some exceptional cases that it was not possible for users to buy their apartments. These were cases of apartments that were subject of denationalization.[5] However, these users were converted into special protected category of tenants with non-profit rents.

---

* Tomaz Kerestes, LL.D., LL.M., Assistant for Civil Law at the University of Maribor, Faculty of Law, Slovenia.

[1] In Slovenian language: "stanovanjska pravica".

[2] This right was introduced by Zakon o stanovanjskih razmerjih - ZSR [Act on housing relationships]; Ur. l. SRS, No. 18/74 and 10/76. This act was replaced by a new one with the same name (Ur. l. SRS, No. 35/82).

[3] It was a peculiar version of a Yugoslav socialist law that developed a concept of the social property. It was not a real State property but more like public property as, in simple terms, it belonged to everyone but no one in particular. Some groups of population had different "rights" of use at this property, however, there was no single owner.

[4] Stanovanjski zakon – SZ [Tenancy Act – TA]; Ur. l. RS, No. 18/91-I.

[5] Majority of the apartments' users in social property had a special "housing right". This was a sui generis right of a socialist law, quite similar to tenancy right, but inheritable. It was this right that has been used as a basis for the process of privatization after 1991. Anyone with a housing right had an option to buy his apartment at a modest price or become a normal tenant. Due to a very advantageous conditions of sale, almost everybody bought their apartments. However, some apartments that were confiscated or nationalized after 1945 from private owners were subject to denationalization. Users of these apartments had no option of buying this apartments but became tenants with a special regime of protection.

First consequence of this process was that at present there are 88% of all apartments in private property. Second consequence was enormous critic of this model of privatization that has put the same category of citizens in very unequal position.[6] Third consequence was problem with maintenance of apartment houses. As it was possible to buy an apartment almost for everybody, these apartments were also sold to buyers that were not in position to cover all expenses of apartment buildings' maintenance. And fourth consequence of privatization was that there were virtually no tenants in Slovenia, as almost everybody owned her or his own flat or private house. This situation has reflected substantially in development of tenancy law in the last ten years.

1.2. Legislative

The first act regulating tenancy law in Slovenia was TA in 1991. However, tenancy law represented only a small part of this act. The main driving force behind this law was a process of privatization. The great majority of case law developed on basis of this act was related to process of privatization and conversion of former users to new category of specially protected tenants with non-profit rents. However, the basic principles of Slovenian tenancy law were introduced in TA.

It is hard to identify some clear political driving force for enactment of TA. There was in 1991 a broad consensus of all political parties that there is need for privatization and that apartment users on basis of housing right should have privilege in this process. There was, however, a constitutional dimension of this problem as the Constitution of Slovenia (hereinafter: CS)[7] has put on State a responsibility to create conditions for citizens to acquire apartments.[8] As Slovenia at the moment still was not a Member State to ECHR, this convention had no influence to TA. It is also difficult to say that any particular legal system served as inspiration for TA as it was designed to solve a very particular situation present in Slovenia at that time.

In 2003 a new act on tenancy has been introduced. (hereinafter: NTA).[9] The main reason for a new law was a regulation of property relations in multi-apartment houses as result of privatization.

In general we can say that tenancy law in Slovenia is regulated by two statutes. The general rules on contracts and lease are regulated by Code of Obligations (hereinafter: CO).[10] Special provisions on tenancy law can be found in NTA. In Slovenia as a civil law system country, case law does not have any formal binding force. It is therefore possible to say that case law had very little influence on NTA, with exception to Constitutional Court case law in relation to TA. Nevertheless, as already mentioned, the majority of tension points in TA were in relation to process of privatization and not to tenancy law in narrow sense.

---

[6] All users of denationalized apartments were unable to buy their apartments. They are still struggling with State to get some sort of compensation for this disadvantage.

[7] Ustava Republike Slovenije – RS [Constitution of Slovenia – CS]; Ur. l. RS, No. 33/91-I.

[8] Art. 78 CS.

[9] Stanovanjski zakon – SZ-1 [New Tenancy Act – NTA]; Ur. l. RS, No. 69/2003.

[10] Obligacijski zakonik – OZ [Code of Obligations – CO]; Ur. l. RS, No. 83/2001. This code replaced the old Zakon o obligacijskih razmerjih – ZOR [Act on Obligations], Ur. l. SFRJ, No. 29/78, an act from SFRJ. However, the rules of civil law in CO are almost the same as they were in the old statute which was very modern law at the time of its enactment.

1.3. Structure of tenancy law in Slovenia

1.3.1. Private tenancy law

General rules on conclusion of contracts are to be found in the CO. The basic principle is "freedom of contract" and contracts are concluded by exchange of offer and acceptance. Although CO does not require a special form of contracts in general; there is a written form requirement for tenancy contracts in NTA.[11] It is landlord's duty to register a tenancy contract by local and tax authorities. He has also to notify the administrator of multi-apartment building about any new tenants.

The tenancy can be formed for a definite or indefinite period of time. There is however no basic difference for landlord to terminate a contract. He can always terminate a contract if there is tenant's fault as defined by NTA.

However, the landlord cannot just give notice even if these grounds are present. He has to warn the tenant about his fault and give him at least 15 days to eliminate grounds for termination. The termination of a contract is possible only in case that tenant ignores such warning. It is possible that tenant does not agree with such termination. The only way of termination in such situation is that the landlord fills a lawsuit to terminate the contract. Another case of possible termination is, if the tenant of a non-profit apartment or his/her spouse owns a suitable apartment or house. Besides these grounds it is also possible for a landlord to terminate contract on basis of other contractual grounds[12] that are treated the same way as tenant's fault.

There is also a so called non-fault termination of a contract. It is possible for a landlord to terminate a contract on basis of any other ground. However, in this case he has to provide the tenant with another suitable apartment. And there is another limitation. Without a justifiable cause it is possible to terminate a contract to the same tenant only once. In any case are all costs of removal on landlord's account.[13]

The main difference between tenancy contracts for definite and indefinite time is in renewal. If there was a contract for definite time, there is no landlord's obligation to renew the contract. In case that there is no renewal of contract 30 days before contract expiration, the tenant has to vacate the apartment at the day of expiration.[14]

The tenant is always free to terminate a tenancy contract without any special grounds. He has however to take into account a 90 days period specified for giving notice.[15]

The rents for market-base apartments are not limited. Its setting is free. However, such rents must not be usurious, i.e. mote than 50% higher than average rents in the same local municipality.

---

[11] Art. 84(4) NTA.
[12] These grounds do not have to be related to tenants fault. However, such grounds do have to be clearly defined in a contract. Juhart, Stanovanjski zakon [Tenancy Act], (GV 2003), 60.
[13] Art. 106 NTA.
[14] Art. 95 NTA.
[15] Art. 102 NTA.

The competencies in the field of tenancy law are divided between the following bodies:
- Courts (for termination of contracts and other disputes);
- Local municipalities (housing inspection, rent control and optional register of tenancy contracts)
- Administrative units (register of buildings, register of apartments, register of tenancy contracts, tax register).[16]
The main body of tenancy law is regulated in a special act (NTA). Majority of rules in these acts is mandatory. Only secondary it is possible to apply provisions of CO on lease and hire contract. The CO's rules are mainly optional. Especially for special legislation (NTA) it is possible to claim that there are some lacunas creating some legal uncertainty.

As the vast majority of landlords are individual persons, there is almost no influence of consumer protection legislation[17] on tenancy contracts.

As general, the position of the tenant in Slovenian law is considered only as an obligatory (personal) right. However, there are some elements in tenant's legal position that could be considered as a bridge towards real property rights. The first is a right to possession of the tenant and consequently his possessory protection according to the rules of Real Property Code (hereinafter: RPC).[18] The second is a possibility for a tenant to enter his tenancy into a land register[19] that puts the tenancy closer to the real property rights.[20]

1.3.2. Social regulation

According to Art. 78 CS and State's obligation to create possibilities for citizens to acquire suitable apartments, there is some public intervention into tenancy law. However, it is clear that the national policy favor housing property and not rented housing.[21] The main incentive measure by State was creation of a National Saving Scheme for Housing. The aim of this project is to attract citizens to save money for a certain period of time and than to offer them advantageous credits to buy apartments. The second measure was created by a National Housing Fund, that also offers some very advantageous credits for purchase of apartments and simultaneously invest in construction of apartments for renting. Similar housing funds are created at a level of local municipalities as well.

The State, local municipalities and funds are offering non-profit apartments to people in need. These apartments are allocated to such people according to special priority list that is formed by these entities. This non-profit rent is created just to cover the costs of apartment maintenance, financing and depreciation for a period of 60 years.[22] Acquiring of non-profit apartments is also possible with tenant's participation in apartments construction. Such

---

[16] The register at local municipalities is an optional as there is only an option for a local municipality to take over a register of tenancy contracts from administrative units. In case that a local municipality does not decide to do this, such a register is kept at the administrative unit.
[17] Zakon o varstvu potrošnikov – ZVPot-UPB1 [Consumers Protection Act – CPA]; Ur. l. RS, No. 110/2002.
[18] Stvarnopravni zakonik – SPZ [Real Property Code]; Ur. l. RS, No. 87/2002.
[19] Land register in Slovenia is essentially the same as "Grundbuch" in Austria.
[20] Possibility of tenancy entrance into a Land register is introduced by new Zakon o zemljiški knjigi – ZZK-1 [Land Register Act – LRA]; Ur. l. RS, No. 58/2003.
[21] Only recently there is visible some shift to apartments' construction for non-profit renting. See Nacionalni stanovanjski program – NPSta [National Housing Program]; Ur. l. RS, No. 43/2000.
[22] Art. 118 NTA.

participation is then deducted from the rent. Another option for people in need is subsidizing of rents by public funds.[23]

There are no direct subsidies or tax incentives for the landlord. There is some tax relief for tenants according to the rent they pay. There will probably be some effects on private tenancy contracts by introduction of new property tax. On one hand it is possible to predict that some landlords will have a larger interest to rent their apartments now empty.[24]. On the other had, they will probably also try to overturn these costs on tenants.

1.4. Tenancy law in action

In general it is possible to claim that the majority of population own their own home. However, this situation is mainly a consequence of privatization in early 1990s. At the moment it is noticeable a growing need for homes, especially for young generations that were not participating in the privatization process. There are also a lot of market divergences. A need for apartments is especially noticeable in major cities as Ljubljana, Maribor, Celje and Koper. Especially critical is situation in the capitol Ljubljana. Due to rather centralized system of State administration, there are good opportunities for job in government and administration. However, housing market cannot follow this demand. Situation is even worse as Ljubljana is also a university center and there is a great demand for students' apartments. Rents in Ljubljana are disproportional to any other city in Slovenia and the same is true for real property prices. Although the rents in urban centers in Slovenia are quite high[25], there is still not much interest for investment in houses for renting. The majority of investment is still in houses for sale.

At the present moment, the role of associations of landlords and tenants are not particularly important. Both associations are still heavily involved in struggle over the results of privatization, mainly in problem of tenants in denationalized apartments that had no opportunity to buy apartments under favorable terms. These associations have not yet prepared any standard contracts or terms for tenancy contracts.

Tenancy law is almost always enforced before courts as NTA does regulate landlords' termination of contract through a lawsuit.[26] No mechanisms of alternative dispute resolution for this type of disputes are yet developed. There is however a general type of settlement attempt built in Slovenian civil procedure and applicable also to this type of lawsuits. This mandatory intervention of courts is a particular problem in Slovenia as there is an enormous problem of court delays. Although the tenancy disputes do have priority, that still means months of waiting. The same are problems in executions of judgments. There is a special rule that eviction can follow eight days after an order has been handed over to the tenant. This means that opposition to eviction order does not withhold the execution, as it is a general rule

---

[23] Art. 121 NTA.

[24] These are mostly parts of their privately owned houses. Due to advantageous credits it was possible to build a house quite easy in a socialist system. Many people have built up rather big houses with a lot of extra space. This space is currently not put in a profitable use. However, a tax burden on such empty space could change owners' mind.

[25] They consume some up to 30 - 40% of average salary (costs of maintenance and utilities not included), in dependence to local divergence.

[26] Art. 112 NTA.

in execution in Slovenia.[27] However, even handing over an order to the tenant can take weeks or even months in some cases.

There is no special jurisdiction for tenancy law in Slovenia. The ordinary municipal courts are competent at first instance. There is no impediment in access to appeal. However there are some general limitations in access to the extraordinary appeal.[28] Access to justice is improved for people with lower incomes with enactment of Act on Free Legal Assistance.[29] According to this act it is possible to get free legal representation and exemption of all legal fees.

Legal certainty in tenancy law is not at a very high level. Due to the consequences of privatization process there were not many classical tenancy disputes at courts. Therefore, there is no great body of a case law. Courts of Appeal do publish their judgments, but selectively. Supreme court does publish all judgments, but this case law is mostly irrelevant to the tenancy law. As far as the TA is concerned it is possible to say that it was full of contradictions. The NTA has just been enacted and it is still premature to make any judgments. Nevertheless, it does represent an improvement in Slovenian tenancy law. Special problem with tenancy law is that there is almost no secondary literature about tenancy law available. This does to some extent hinder legal certainty in tenancy law.

Basic literature

Tenancy law: Becele, Stanovanjska razmerja po novem [New Tenancy Relationships], Enotnost, Ljubljana 1991; Becele, Stanovanjski zakon s komentarjem [Tenancy Act with a Commentary], Gospodarski vestnik, Ljubljana 1991; Toplak et al., Značilnosti nove stanovanjske zakonodaje in njena uveljavitev v praksi [Characteristics of a New Tenancy Legislation and its Implementation in Practice], IGP, Maribor 1991; Ude, Stanovanjski zakon z uvodnimi pojasnili [Tenancy Act with Introductory Notes], Uradni list, Ljubljana 1994; Ude, Stanovanjski zakon s sodno prakso [Tenancy Act with Cases], Uradni list, Ljubljana 1999, Juhart, Stanovanjski zakon [Tenancy Act], Gospodarski vestnik, Ljubljana 2003, Kopač/Starič Strajnar, Stanovanjski zakon [Tenancy Act], Uradni list, Ljubljana 2003.
Law of Obligations: Cigoj, Komentar obligacijskih razmerij I [Commentary of Obligations I], CZ Uradni list SRS, Ljubljana 1984; Cigoj, Komentar obligacijskih razmerij II [Commentary of Obligations II], CZ Uradni list SRS, Ljubljana 1984; Cigoj, Komentar obligacijskih razmerij III [Commentary of Obligations III], CZ Uradni list SRS, Ljubljana 1985; Cigoj, Institucije obligacij [Institutions of Obligations], CZ Uradni list RS, Ljubljana 1991; Strohsack, Obligacijska razmerja I in II [Obligations I and II], Uradni list RS, Ljubljana 1998, Strohsack, Obligacijska razmerja III [Obligations III], Uradni list RS, Ljubljana 1996; Plavšak et al., Gospodarske pogodbe, prva knjiga [Commercial Contracts - First Part], Gospodarski vestnik, Ljubljana 1993, Plavšak et al., Gospodarske pogodbe, druga knjiga [Commercial Contracts – Second Part], Gospodarski vestnik, Ljubljana 1994; Juhart et al., Novosti na področju obligacijskih in stvarnopravnih razmerij [News in a Field of Obligations and Real Property], Nebra, Portorož 2001, Plavšak et al., Obligacijski zakonik s komentarjem 1 [Code of Obligations with Commentary 1], GV, Ljubljana 2003, Plavšak et al., Obligacijski zakonik s komentarjem 2 [Code of Obligations with Commentary 2], GV, Ljubljana 2003.

[27] Rijavec, Civilno izvršilno pravo [Civil Execution Law], (GV 2003), 317.
[28] There is a limitation for access to Supreme Court of Slovenia that is in proportion to the value of dispute. However, according to the value of tenancy disputes in Act on Judicial Fees there would never be a possibility to have an extraordinary appeal to Supreme Court of Slovenia.
[29] Zakon o brezplačni pravni pomoči – ZBPP [Act on Free Legal Assistance]; Ur. l. RS, No. 48/2001.

2. Questionnaire

Set 1: Conclusion of the Contract

Slovenian law provides that a contract is concluded upon a parties' consent on essential terms of contract.[30] This in general means that there has to be an agreement of wills. Parties can express their will by words, usual signs or other actions that can serve as a sign of existing will. Every expression of contractual will should be serious and free to have any legal relevance.[31] A contract is concluded at a moment when the offeror receives an acceptance by the offeree. As a place of a contract conclusion counts a place where the offeror had his office place or domicile at the moment of stating an offer.[32]

The Code of Obligations defines an offer as a proposition to conclude a contract, given to another party and that includes all the essential terms of a contract as to be able to conclude a contract by sole acceptance of it.[33] A contract is concluded upon an agreement about essential terms of contract even in a case, where parties have left unresolved some unessential terms of contract. These terms could be arranged, if there was no agreement, by the court.[34] It is however not an offer, if such a proposition was addressed to an indefinite circle of people. This situation is considered only as an invitation to an offer.[35] Advertisements in a newspaper are also not regarded as an offer, but merely as an invitation to an offer. However, an advertiser can be held responsible for any damages sustained by the offeror, if he has not accepted the offer without any reasonable ground.[36]

Offer and acceptance have to be declared in a form that is prescribed for a contract as a condition of validity.[37] If an offer was not in such a form, it does not bind an offeror. This rule applies to the acceptance as well.[38]

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?

---

[30] Art. 15 CO.
[31] Art. 18 CO.
[32] Art. 21 CO.
[33] Art. 22(1) CO.
[34] Art. 22(2) CO.
[35] Art. 22(3) CO.
[36] Art. 24 CO.
[37] A tenancy contract has to be concluded in a written form. Art. 84(4) NTA, Art. 39(5) TA.
[38] Art. 27 CO.

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?

This question is in general to be solved by the provisions of the CO. There are no special provisions in the NTA regulating these issues.

L offering an apartment for rent in a newspaper has not declared an offer. According to the Art. 22 and 24 of CO it is only an invitation to an offer. The offer is supposed to be given by T. According to the principle of "freedom to contract", L is not bound to accept T's offer. He can reject it in any case. However, there is a ground for T's damages claim in case that his offer to rent an apartment is not accepted without any reasonable ground.[39] There is no case law on this issue in Slovenia, but we could predict that race or ethnicity could not constitute a reasonable ground. The same is true for T being married and with children. We can derive this assumption from the Art. 14 of CS providing equality of races and ethnicity, as well as Art. 53 declaring special protection of family. Slovenia is also a Member State of ECHR and according to Art. 8 of CS it is directly applicable. Such violations of constitutional or conventional rights should be dealt at the first instance court dealing with civil law disputes. There could however be a reasonable ground to reject T on a ground having a small dog or wanting to play a piano every evening or having no full capacity and being under custody. A person without capacity can not conclude a valid contract according to CO and it is therefore reasonable to allow L to reject T on such basis. This would not be a discrimination.

In case that there is no offer expressed by T, there is a possibility of L and T being involved in negotiations. Negotiations are not binding and any party can interrupt them at any time. However, another party does have a claim for damages, if a party commenced the negotiations without having intention to reach a contract, or if another party had an intention to reach a contract, but have abandoned it without any reasonable ground. Although there is no such case law, we could expect that break of negations solely with intention to discriminate would represent such a case.[40] However, a problematic tenant or person without capacity could be a reasonable ground.
Rejection of T as a tenant on ground of race, religion or ethnicity could also constitute an offence of T's personality rights. This could also result in a claim for damages.[41]

In case that T lied about his status, this would represent a deceit. Art. 49 of CO defines a deceit as a situation when a party causes a misinterpretation (mistake) to another party or does leave it in such position with intention to persuade it to conclude a contract. A deceit gives to deceived party a ground to seek annulment of a contract. There is no need of L's mistake and misinterpretation to be essential.[42] Only a mere fact T's deceit is enough for L to seek an annulment of a contract by the Court. In such a case L has also a right to claim damages.[43]

---

[39] Cigoj, Komentar obligacijskih razmerij I [Commentary of Obligations I], (CZ Uradni list SR Slovenije 1984), 145.
[40] The court would consider as discrimination any prejudice on personal characteristics only, due to the Art. 14 CS.
[41] Art. 179 CO.
[42] A mistake is relevant only in case of being essential. This means that it should be about some essential characteristics of a contract. See Art. 46 CO.
[43] Art. 49(2) CO.

There is no recognized right to lie in Slovenian law. However, a tenant telling a truth does have a constitutional protection anyway, although being rather impracticable. Nevertheless, Slovenia's accession to EU will lead to adoption of a new anti-discrimination legislation that will deal with these obvious problems.
NTA does not contain any provisions implementing the Directive 2000/43/EC on issue of equal access to housing and prevention of racial or ethnical discrimination.[44]

According to the NTA there is a special regime for tenants in the non-profit apartments. These are rented by the state, local municipalities, public housing funds or other non-profit organizations. The choice of tenants is based on a public competition. Every tenant is eligible to compete for such apartments on a basis of a list of candidates, which is created according to special criteria prescribed by the State. Every objection against ranging is resolved in an Administrative proceeding. Hereby the State and other public entities are directly bound by the constitutional provision to treat every man on equal terms.[45] Every person is entitled to enjoy his human rights and fundamental freedoms in Slovenia, without regard to his ethnicity, race, sex, language, religion, political or any other belief, financial situation, birth, education, social status or any other personal circumstance.[46] In case of this special housing regime, T would have possibility of complaint in Administrative proceeding, lawsuit at Administrative Court and complaint at the Constitutional Court of Slovenia because of human rights violations. There is no case law of the Constitutional Court regarding this issue, but we could assume that T would succeed with his complaint.

A comparison with the PECL has likewise to start with the general principle of PECL freedom of contract. This means that parties are free to enter into a contract.[47] However, the parties are limited by the requirements of good faith, fair dealing and the mandatory rules established by the PECL. Parties cannot limit or exclude their duty to act in accordance with good faith and fair dealing.[48] However, there is no rule in PECL as it is not in CO, that a decision not to make a contract on a basis of race or ethnicity or other circumstances, represent unfair dealing.

According to the PECL a proposal amounts to an offer if it was intended to result in a contract if the other accepts it and if it contained sufficiently definite terms to form a contract.[49] Such an offer may be made to one or more specific persons or to the public.[50] There is an exception for a professional supplier making public advertisements, but not for a non-professional supplier.[51] This would lead to a conclusion that there is a serious deviation of Art. 2:201 PECL from the rule contained in Art. 22(3) and 24 CO. However, this difference is only at the first glance. Even the PECL do not imply that an advertisement of a house or apartment for rent at a certain price does amount to an offer. It is generally presumed to be an invitation to make offers.[52] This is also a general approach in Contract law.[53] Hence there is no difference in qualification of L's act between the CO and PECL. L's advertisement to rent an apartment was only an invitation to make offers. It is T who has to make an offer and it is up to L's free will whether will he accept or not. Due to the fact that there is no law prohibiting L to reject T's offer on grounds of racial, ethnical, religious or other discrimination, there would be no way to force L to make a contract with T. However, there

[44] This directive has however been implemented in case of labour law.
[45] Art. 14(2) CS.
[46] Art. 14(1) CS.
[47] Art. 1:102 PECL.
[48] Art. 1:201(2) PECL.
[49] Art. 2:201(1) PECL.
[50] Art. 2:201(2) PECL.
[51] Art. 2:201(3) PECL.
[52] Lando and Beale, Principles of European Law, Parts I and II, (Kluwer 2000), 160.
[53] Kötz, European Contract Law, (Claredon Press 1997), 19.

is a difference between PECL and CO as according to CO a party inviting others to make offers could be liable for damages if not accepted an offer without any essential ground.

If T does not make an offer but starts to negotiate with L, and L interrupts the negotiations on ground of discrimination, there is no substantial difference between PECL and CO. Parties are not liable for failure to reach an agreement.[54] However, if a party broken off negotiations contrary to good faith and fair dealing, it is liable for loses caused to the other party.[55]

In case that T lies to the L about his marital and parental status, religion, piano hobby, dog ownership or capacity, this amounts to incorrect information However, the PECL do make a distinction between the incorrect information and a fraud as the CO does not. On the other hand there is a very different relation between fundamental mistake and fraud in PECL as to the CO. According to the CO a fundamental mistake is solely a wrong perception of facts or law by a party that was not caused by another person. All other cases are treated as fraud (i.e. deceit).

L has concluded a contract relying on incorrect information about facts given by the T. However, there is a difference in lies made by T. If T made a fraudulent representation of any information, which in accordance with good faith and fair dealing it should have disclosed, it is a fraud. Information about marital and parental status are not concerned to L in case that husband and three children do not intent to live in the apartment. Such a misrepresentation would not be in breach of good faith. The same is with religion of T. However, according to the Art. 91(1) of NTA all persons living together with T should be mentioned in the written contract or they do not have right to live in the apartment. L would be obliged to annex the contract if T would get bound by law to support another person.[56]

On the other hand, the misrepresentation about capacity, piano hobby and dog ownership probably does amounts to the fraud and is in breach with good faith. T had intention to deceive. It would give L ground to avoid a contract according to Art. 4:107 PECL and claim damages according to Art. 4:117 PECL. The misrepresentation about private life does on the other hand not amount to fraud and could therefore only represent incorrect information or fundamental mistake as to the facts. The fundamental mistake would also give L a ground to avoid a contract on a basis of mistake that was caused by information given by T as well as claim damages in accordance with Art. 4:117 PECL.[57] Even in case that T's statement does not amount to fundamental mistake, T would still bear liability for damages in accordance to Art. 4:106 and 4:117.[58] As there is no recognized right to lie in Slovenian law, it is not to be expected that PECL would be interpreted in a different way just on a basis of other EU legislation. However, implementation of a "anti-discrimination" directive in a field of housing could make a difference.

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.

---

[54] Art. 2:301(1) PECL.
[55] Art. 2:301(2) PECL.
[56] Art. 91(2) NTA.
[57] Art. 4:103 PECL.
[58] However, it is up to L to prove the existance of damage (e.g. decline in the value of the property), Lando and Beal, cited supra note 52, 282. This would be very difficult in our situation.

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

According to the Art. 91(1) of the NTA all the persons that will use the apartment together with the tenant should be listed in the contract. Landlord has to annex the contract in case that the number of persons being supported according to the law raises. This means that supported family members have to be included into contract, but are not parties to the contract. For other persons is landlord obliged to annex the contract only in case that the apartment still suits such raise of tenants.[59]

If T wants to take into apartment her husband and children, L has to annex the contract and has no way to oppose. T can also take in her parents in case that she has a duty to support them.[60] If T has a relationship with her boyfriend going on for a longer period (extramarital relationship), it is equalized with a marriage.[61] As in case of husband, T has to support L in case of need.[62] L would therefore have to annex the contract. This is however not a case with a homosexual partner. Extramarital relationship is not possible between persons of the same sex (no, as it is not possible – not recognized as an existing legal relationship – any marriage of Slovene citizens does have to be subject to Slovenian law (Private International Law Rule) and hence there is no option to marry according to some foreign law) and there is no duty of one partner to support another. L would have to annex the contract only in case that the apartment he/she rents still suit such a raise of tenants. The same is true for the parents who are able to work or have means to support themselves.

In case that there is no demand by T to annex the contract and T takes in another persons for more then 60 days in a period of three moths, this is a ground for L to terminate a contract. However, L has to give a warning to T that she breaches the contract and gave here a period of time to put off the ground for termination. This period should not be shorter than 15 days.[63]

If T died, L has to conclude a contract with a husband, extramarital partner or one of the nearest family members, in case that they have lived in the apartment in the time of T's death, have had there a registered residence and have been listed in the contract.[64] These persons have to demand conclusion of a new contract in a period of 90 days after T's death. Such demand has to be given in a written form.[65] In case of boyfriend not being an

[59] Art. 91(2) NTA.
[60] Adults are bound to support parents if they are unable to work and have no means to support themselves. Art. 124(1) AMFM.
[61] Art. 12 AMFM.
[62] Art. 50 AMFM.
[63] Art. 103 NTA.
[64] Case II Ips 301/96, Supreme Court of Slovenia from 12th of November, 1997.
[65] Art. 109 NTA.

extramarital partner or T's homosexual partner, there is no obligation for L to conclude a new contract.

There are no public law minimum requirements as regards available space for each inhabitant of an apartment. L has no right to higher rent in relation to possible higher usage of apartment.

The NTA retains harsh rule of written tenancy contract. In case that there are more than one person occupying the apartment, but only T having a contract, T is the only person having a right to occupy the apartment. Under no circumstances T has a right to select a new tenant. L has no obligation to accept such a choice.

Since this issue is entirely regulated by the provisions of special law (NTA), there would be no different solution in case of PECL superseding CO.

Question 3: Sub-renting

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

T has no right to unilaterally sub-rent a room in his apartment to S. He needs L's approving.[66] Sub-rent is only possible for a fixed period of time. A Sub-rent contract requires a written form.[67]

Although there is a requirement of L's approval of sub-rent, there is a rule in CO that landlord cannot reject his approval, unless a well-founded ground exists.[68] It is a L's burden to prove existence of such a ground.[69]

There is no provision concerning the L's conditional permission on an increase of the rent. Therefore a "freedom of contract" rule applies. Nevertheless, such increase is limited by general rules of rent limitation.

In case that T sub-rents a room without permission, has L several options. As S has not been listed in the contract, L could terminate a contract, if S uses the apartment or room for more than 60 days in a period of three months. In this case could L evict both, T and S. Another option for L is to evict only S. As S has no contract, he/she uses an apartment or room without a legal ground. L can therefore in any time fill a lawsuit claiming eviction of S.[70]

L is entitled to damages according to the general regulation in CO. T has breached the contract by sub-renting a room without L's permission. According to the Art. 239 CO is T

[66] Art. 84(3) NTA.
[67] Art. 84(4) NTA.
[68] Art. 606 CO.
[69] Cigoj, Komentar obligacijskih razmerij III [Commentary of Obligations III], (CZ Uradni list SR Slovenije 1985), 1721.
[70] Art. 111 NTA.

liable for damages. L has right to claim future loss that T ought to expect at the time of breach as well.[71] He is also entitled to claim all the money T received from S as unjust enrichment.

There would be no direct influences of PECL on sub-rent as this issue is almost entirely regulated by NTA or provisions of CO that are not included into PECL. It is only the damages that would be regulated by the PECL Art. 9:501. In case of contract termination would L have a claim for damages including future loss, which is reasonably likely to occur. The loss has to be directly caused by T's breach of contract and non-performance of his tenant's duties. For future loss there is no great difference between the CO and PECL as the Art. 9:503 PECL also requires foreseeable damage as does Art. 243 of CO. The major difference is that the time for T to foresee the damage is a time of breach according to CO and time of contract's conclusion according to PECL. There is no indication in Slovenian law that such change of time would be of such importance to form part of *ordre public* or supranational and international mandatory rules as provided in 1:103 (2) PECL.
Moreover, as it is possible even to exclude the liability entirely, it seem that there should be no problem with application of PECL.

Question 4: Formal Requirements and Registration

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

Art. 84(4) of the NTA requires a written form for a contract. The same was situation in Art. 39(5) TA. According to the provision of TA, any contract not in writing was null and void.[72] The same seems to be the rule according to the NTA, although this sanction is not contained in the law anymore. However, there is a rule in CO that any contract, not made in a prescribed form, is null and void, unless something else arises out of a rule rationale.[73] It does not seem that the rationale of this rule has changed with the NTA. An oral contract would not be valid according to NTA as well.

The rationale of this rule is that every contract on lease of apartment has to be registered by the local authorities in 30 days since the conclusion of a contract.[74] The other rationale is also that every contract has to contain strictly prescribed substance. This is only possible in case of written form.

[71] Art. 243 CO.
[72] Ilesic, Urejanje stanovanjskega razmerja z najemno pogodbo [Regulation of tenancy by lease], (IGP 1991), 10; Becele, Stanovanjski zakon s komentarjem [Tenancy Act with Commentary], (GV 1991), 66; Case I Cp 2137/1993 Court of Appeal Ljubljana from 22nd of December, 1993.
[73] Art. 55(1) CO.
[74] Art. 92 NTA.

The contract has to be registered in a register of leases and at the tax authorities. Any landlord that does not register his contract is subject to an administrative fine (€ 300 – 1000 for natural persons and € 300 – 13,000 for legal entities). There are no consequences in private law.

Although the Art. 2:101(2) does not require any special form for a contract this rule would not change the present situation about formality requirements in Slovenian law. According to Art. 4:101 the PECL do not deal with invalidity of contracts arising form illegality. As an oral contract is illegal in Slovenian law, there is no room for PECL to govern this issue.

Question 5: Key Money 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?
Variant 1: The sum of 500 € is requested from T by F who is the current tenant in the house,
a) because F promises to make L accept T as her successor;
b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move in earlier.
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?

The key money is not usual in Slovenia. There is however no rule in Slovenian law explicitly prohibiting such agreement as far as there are no usurious elements present. In case that someone misuse a distress or difficult situation of another person, his insufficient experience, light-mindedness or addiction and provides for himself or another person some advantage that is in evident disproportion with his contribution, is such a contract null and void.[75] Otherwise is there no ground to hold such an agreement as invalid. It is therefore not illegal for L requiring additional "key money" to the monthly rent or to ask for a "fee" to draft a contract. It would be a different situation if L would rent her apartment in scope of her business activities. In such a case would T fall under the protection of CPA (Consumers Protection Act), prohibiting any unfair terms to be included into contract.[76]

In case that T pays F the key money to vacate the apartment and make L to accept T as F's successor is not illegal. F acts in this case as a mandatory and is entitled to a reward from the mandator according to her success.[77]

A acting as an intermediary for T is doing so on the basis of a brokerage contract. A as a broker is entitled to fee even in cases where no contract has been concluded on a basis of his

[75] Art. 119 CO.
[76] Art. 24 CPA.
[77] Art. 766(3) CO. See Cigoj, Kontrakti in reparacije [Contracts and Reprations], (CZ Uradni list RS 1991), 151.

brokerage.[78] It is possible to T to ask court to lower the fee in case of being inappropriate to the broker's effort and service. A acting as a professional broker and estate agent would also fall under the CPA provisions. Any agreement on unusually high fee would be null and void as against good faith and being unfair.[79]

Set 2: Duration and Termination of the Contract

In general does the law of obligations make a difference between contracts for definite and indefinite time. In general can contracts for indefinite time be terminated by notice that has to be handed to the other party. Such notice is possible at any but unsuitable time.[80] On the other hand, it is not possible to terminate contracts for definite time by a unilateral declaration of will. This is possible only in case of substantial change of circumstances when there is no way for a party to achieve its contractual goal. And even then it is possible for the other party to preserve the contract if it offered an accommodation of contract.[81]

This general system does however not apply to tenancy law. Although here also it is possible to conclude tenancy contracts for definite or indefinite time[82], there is no such clear distinction in connection to termination. Tenants can always terminate their contract with a notice to landlord at least 90 days in advance.[83] Landlords can, however, normally terminate contracts only in case of some fault by the tenant. There is a list of grounds provided by NTA and landlords can also add some other grounds that are related to tenant's fault. Nevertheless, no direct termination is allowed. At first it is necessary to warn a tenant about such fault and to give him at least 15 days to set it right.[84] Only after that it is possible to terminate a contract by filling a lawsuit. On the other hand, it is always possible for a landlord to terminate a contract with a tenant, but he should provide a tenant with another suitable apartment.[85]

Question 6: Contract Unlimited in Time

a) *L and T have concluded a tenancy contract, which does not contain any limitation in time. Under which conditions and terms is L allowed to give notice? In particular: Can L give notice if she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?*
b) *Let us assume that in a trial, L wins a title for eviction, which acquires res iudicata effect. How will the execution of the title be normally enforced? Does T have any legal defenses in the execution procedure if she does not find another apartment and risks becoming homeless once the title is executed?*

[78] Art. 846(1) CO.
[79] Art. 23 and 24 CPA.
[80] Art. 333 CO.
[81] Art. 112 CO.
[82] Art. 86 NTA.
[83] Art. 102 NTA.
[84] Art. 103 NTA.
[85] Art. 106 NTA.

If L and T have concluded a tenancy contract, which does not contain any limitation in time, this is a contract for indefinite term. There are two cases in which can L give notice to T. The first case is when there is fault on T's side. T's fault is given in case that T or other persons living with her use apartment contrary to the law or contract. According to Art. 103 NTA such use is given in the following cases:
- If they inflict serious damage to the apartment or house;
- If they perform commercial activities in the apartment without permission;
- If they don't maintain the apartment;
- If they don't pay rent or costs;
- If they violate the house order;
- If they make changes in the apartment without permission of the landlord;
- If there are some persons using apartment together with the tenant for more than 60 days in three months without being listed in a contract or without landlord's consent;
- If the tenant sub-rent apartment without landlord's approval;
- If the tenant does not allow the landlord to make check of the apartment;
- If the tenant does not move in the apartment without any justified cause; and
- If the tenant stops using the apartment for more than 3 moths in continuance.

In all these cases has L to warn T that she violates the contract. Warning has to specify the violation and way to stop the violation. L has to give T additional time to stop with the violation. This time should not be shorter than 15 days. Only after that can L terminate the contract by a lawsuit.

The other option for L to give notice to T is if there is a specific provision in a contract.[86] However, to give notice on other grounds than listed in Art. 103 NTA requires L to procure T another appropriate apartment in which there would be no deterioration of T's position. All costs of moving are at L's burden. Such a termination of contract is possible with or without justifiable ground. However, without a justifiable ground it is possible to terminate contract to the same tenant only once. It is therefore possible for L to give notice to T in desire to renovate house, however, she is liable to procure T another suitable apartment without deterioration of T's position.

In case that L gives notice to T without her fault, there is no need for T to object in the execution proceeding, as there will be no judgment in favor of L, unless she provides T with another appropriate apartment. In case of T's fault, there would be no ground for T to object that she does not find another apartment and risks becoming homeless once the title is executed.[87] There is therefore no defense against the execution of a title. Vacation of an apartment is allowed in 8 days after an order of execution has been served.

Question 7: Contract Limited in Time and Termination

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

[86] Art. 105(1) NTA.
[87] Rijavec, cited supra note 27, 317; Galič, Jan and Jenull, Zakon o izvršbi in zavarovanju, Komentar in uvodna pojasnila [Act on Civil Execution with Commentary and Introductory Notes] (GV 2002), 406.

There is no limitation for concluding a contract limited to one year.[88]

Question 8: Justification for Time Limit

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

It is possible for L and T to agree upon automatic renewal of their tenancy contract. Such a contract is regarded as a contract limited to one year. New contract is then concluded on basis of parties' silence. There is a general provision that offeree's silence does not represent acceptance. However, in case of explicit agreement, even silence can represent acceptance.[89] There is also a rule that automatic renewal of contracts limited by time represents renewal for indefinite time.[90] However, different agreement of parties is possible.[91] There are also no special provisions on this issue in NTA. There is therefore no obstacle in Slovenian law for L and T to conclude such an agreement. Furthermore, there is a rule that by contracts concluded for a definite time, a tenant has to get renewal of contract at least 30 days before end of period, or he/she should vacate the apartment, unless there is a different agreement. There is nothing wrong with a period of three moths (i.e. 90 days). It is lawful for L to give notice to T without reason in a period before deadline agreed. The same rule applies to T as well. It is always possible for a tenant to give notice to a landlord, regardless whether it is a contract concluded for a definite or indefinite time. This notice has to be given 90 days in advance if not agreed otherwise.[92] This provision is of dispositive nature. However, there is no specific rule in NTA or CO that would directly affect such arrangements. There is no case law devoted to this issue either.

Question 9: Termination in Special Cases

L and T have concluded a contract with or without time limit.
a) L dies. Can her heirs give immediate notice to T?
b) The house is sold. Has the buyer a right to give anticipated notice?
c) A bankruptcy procedure is carried out against L at the end of which the house is auctioned off. Can the buyer give anticipated notice?

Death of a landlord does not affect the tenancy according to the Slovenian law.[93] There is a general rule in NTA that any change of ownership does not affect existing tenancy contract

[88] Art. 86 NTA.
[89] Art. 30 CO. See Strohsack, Obligacijska razmerja I in II [Obligations I and II], (CZ Uradni list RS 1998), 86.
[90] Art. 332 CO.
[91] Cigoj, Komentar obligacijskih razmerij II [Commentary of Obligations II], (CZ Uradni list SR Slovenije 1984), 1137.
[92] Art. 102 NTA. See Becele, cited supra note 72, 88.
[93] Cigoj, cited supra note 91, 1139.

either. Every new owner just enters the legal position of a former landlord.[94] Succession is just another way of acquiring property. Heirs become owners at the moment of decedent's death.[95] It is not possible for L's heirs to give immediate notice to T just on basis of L's death. The same rule applies in case of sale of house. The buyer has no right to give anticipated notice. It is not possible for L to become object of bankruptcy procedure, unless she acts in a commercial capacity. In case of bankruptcy procedure it is an option of receiver to give notice every 1st in the month with 30 days period of notice.[96] In case of L not acting in commercial capacity, there is no possibility of having bankruptcy against her. There is however possible to have individual execution proceeding against her house. This would however not affect the tenancy.[97]

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?

There is no specific rule about "for life" contracts in Slovenian law. It would be therefore regarded as a contract for indefinite period of time. L may therefore give notice in any case upon a fault of T.[98] In any other case is L entitled to give notice only if there is a specific agreement in a contract.[99] However, this notice does not necessary terminate the contract. In case of any dispute it has to be terminated by a judicial decision.[100]

According to 6:109 PECL it seems that contracts "for life" would be treated as contracts for an indeterminate period. However, even in case of PECL application, this rule is irrelevant as the entire system of notice and termination is regulated by NTA. PECL would affect Slovenian general contract law (i.e. Code of Obligations), but NTA does represent a special contract law enjoying supremacy to the general contract law.

Question 11: Immediate Termination under Unusual Circumstances

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

a) *Can L give immediate notice if T did not pay the two last monthly rents?*
b) *Can L give immediate notice if T, by repeatedly insulting his neighbors, has endangered peace in the house?*

---

[94] Art. 107 NTA.
[95] Art. 41 RPA.
[96] Art. 122 BC – Zakon o prisilni poravnavi, stečaju in likvidaciji – ZPPSL [Bankruptcy Code – BC]; Ur. l. RS, No. 67/93. This is a *lex specialis* in relationship to any other provision by law or contract. See Plavšak and Prelič, Zakon o prisilni poravnavi, stečaju in likvidaciji s komentarjem [Bankruptcy Code with Commentary], (GV 2000), 459.
[97] Rijavec, cited supra note 27, 312.
[98] Art. 103 NTA.
[99] Art. 105 NTA. And even so the landlord has to provide a suitable apartment to the tenant.
[100] Art. 112(3) NTA.

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?*

Regardless whether there is a contract with or without time limit, the unusual circumstances are not a specific ground for notice. L may give a notice, however all the regular proceeding applies. In case of notice upon T's fault, L has to warn T to stop the violation.[101] In case of regular notice, L has to provide T another suitable apartment. In any case, notice has to be 90 days in advance.[102] In case of any dispute is termination possible only by a lawsuit.[103] Immediate notice is not possible even in case when T repeatedly insults his neighbors. Even in this case L still has to warn T and give him at least 15 days to stop with such practice. However, it suffices to warn T for the same sort of violation only once, unless it has passed more than a year from the last violation.[104] A "clause résolutoire" seems to be valid according to the Slovenian law. Art. 105 NTA allows for L to enter additional grounds for termination of contract into a text of a contract. There is still not clear does this additional grounds have to be based on a fault of a tenant or not. This provision is a new one and there was no similar provision in a TA and consequently no case law as well. However, it is probable that only grounds based on tenant's fault will be allowed as this could be interpreted to be in conformity with a system of NTA. Non-payment of two consecutive rents would represent a fault on a side of a T. However, no automatic termination is possible according to NTA. Any termination should be based on a court decision.

Set 3: Rent and Rent Increase

Rents for apartments are formed at the market. There is no general limitation for rents or rent increase. However, there is a prohibition of usurious rents in the NTA. A usurious rent is a rent that exceeds by more than 50% the average rent for similar apartment in the territory of a local municipality. Every tenant can demand from local authorities to examine his rent. In case that his rent does represent a usurious rent or is in contrast to agreement, the tenant can claim repayment and adjustment of rent.[105] Only rents for people with low incomes that are set by public funds are non-profit and calculated according to the methodology that is prescribed by the state.[106]

Question 12: Settlement Date and Modes of Payment

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

[101] Art. 103(3) NTA.
[102] Art. 112(1) NTA.
[103] Art. 112(3) NTA.
[104] Art. 103(4) NTA.
[105] Art. 120 NTA.
[106] Art. 117 NTA.

There is no provision on issue when is the rent due in Slovenian law. It is up to the parties to agree upon the time limits.[107] Nevertheless, in absence of explicit agreement, it is possible to determine it from the nature of contract. There are also no restrictions on modes of payment as well, but for contracts between residents of Slovenia, according to the monetary law, there is only possible to perform in Slovenian currency.[108] However, there is no possibility for a landlord to distraint T's furniture or other belongings. This would also represent a criminal offence.

According to the Art. 7:102 PECL a party has to effect its performance at the time that is fixed or determinable by contract. It is up to parties' agreement to determine when is the rent due, otherwise it would be a reasonable time. Art. 7:108 PECL is inapplicable for contracts between residents of Slovenia. The only currency of performance is national currency. This is a mandatory rule and probably part of *ordre public*, although there is no case law supporting such claim. Art. 7:107 PECL does regulate that payment of money may be made in ay form used in the ordinary course of business.

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)

There are no special substantive and procedural requirements for an increase in the rent for apartments. The rent is formed according to the agreement of parties.[109] The only exemption represents the non-profit apartments, for which there is a methodology for calculation. This methodology is prescribed by the NTA.[110] Such rent depends upon a valuation of apartment. There are several limitations of rent elements:
- Maintenance cost should represent only 1.11% of apartment value for apartments younger than 60 years and 1.81 for apartments older than 60 years;
- The cost of administration should not represent more than 0.4% of apartment's value per year;
- Depreciation should not be more than 1.67% for apartments younger than 60 years. For older apartments there is no depreciation of apartment, but fixed depreciation of 0.97% is allowed for investment;
- Costs of financing should not represent more than 1.5% of apartments value per year.

A sum of all this rates is the maximum rent, expressed in a % of the apartment's value. There is however still possible to vary up to 30% on account of location.[111]

There is also an upper limit to the rent. Any rent that exceeds the average market rent in a local municipality for a similar or same category of apartments, considering also location and equipment, for more than 50%, is usurious rent.[112] Such a provision in contract is null and void.[113] Such an intentional act could also represent a criminal offence punishable by up to

[107] See Art. 289 CO.
[108] Art. 18(3) Act on Foreign Exchange (Zakon o deviznem poslovanju – ZDP; Ur. l. RS, No. 23/99).
[109] Art. 115(2) NTA.
[110] Art. 115(3) NTA.
[111] Art. 118 NTA.
[112] Art. 119 NTA.
[113] Art. 119 CO.

three years of prison.[114] Every tenant has right to claim from the local authority to check the rent amount. Every impaired tenant has right to claim decrease of rent and payback of overpayments.[115] Such a decrease is to be carried out by local authorities.

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?

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

There is no solution in the NTA regarding to contractual linking of rent increase to index-clause. However, rents are subject to market conditions.[116] Therefore, it is up to CO to decide whether such a clause is valid or not. According to Art. 372 CO it is permissible for parties to agree upon the index-clause.[117] There is also no limitation for annual progressive increase of rents, unless it would lead to usurious contract.

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 reservation. After this time only, she gets doubts and consults a lawyer. Can T get some money back? If yes, can T offset the sum to be repaid against future rent installments on her own motion without judicial intervention?

There is no clear and explicit provision in CO (or NTA) prohibiting the unilateral change of contract's provisions. However, there is a clear position of the Supreme Court of Slovenia that holds such practice as illegal.[118] T's payments of increased rent for three months could be regarded as consent to such increase[119], however, one should note that there is a special provision in NTA prescribing form of contract (in writing). This is a mandatory provision.[120] The parties are therefore not free to change contract content by oral or implicit agreements. It would be possible only in case, that such agreement would decrease duties of one or another party and that is not a case in this situation.[121]

---

[114] Art. 219 CC.
[115] Art. 120 NTA.
[116] Art. 115(2) NTA, unless there are non-profit rents.
[117] Such provision is a novelty introduced by CO in 2001. Before CO there was a provision that any index had to be in direct commercial link with a contract. According to this rule it would not be possible to link rents to the general index of living costs. However, new CO omits this limitation and there is no obstacle for L and T to apply index-clause to their contract. See Kocbek, Monetarni nominalizem in valorizacija [Monetary Nominalism and Valorization], in Novosti na področju obligacijskih in stvarnopravnih razmerij [News in a field of Obligations and Real Property Law, (Nebra 2001), 8.
[118] Case II Ips 673/94, Supreme Court of Slovenia form the 4th of April, 1996. Court made an analogy to the Art. 446, that prohibits unilateral setting of price for contracts of sale.
[119] It is possible for parties to express their contractual will implicitly. See Art. 18(1) CO.
[120] Art. 84(4) NTA.
[121] Art. 51(4) CO. See also Strohsack, cited supra 89, 127.

T has right to demand repayment of money in full amount in case that she had wrong conception about her duty to pay. It is not necessary for such mistake to be fundamental.[122] L has to repay everything that he received without a lawful cause[123], together with interest[124]. In case that T knew that she has no obligation, she would not have a claim for repayment.[125]

L cannot offset this sum against the future rent installments. There is a rule that an offset is possible only for overdue claims.[126] The future rent installments are not yet due and no offset is consequently possible.[127]

Question 16: Deposits

What are the basic rules on deposits?

There are no general rules on deposits in Slovenian law.[128] There is not even a single provision in CO or NTA on deposits as regards tenancy law. There are some views in theory that deposits could be treated as irregular pledge.[129] There is however no general consent about this issue. Nevertheless, deposits are regular content of tenancy contracts.

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?

It is up to tenant and landlord to agree which utilities costs are included into rent and which should be paid separately. It is mandatory to enter such a provision in the tenancy contract. They have to agree upon the amount of such costs and mode of payment.[130] It is therefore free for parties to agree upon the amount of costs paid by tenant. Tenant has obligation to pay all costs according to the agreement.[131] It is however not legal to establish a monthly lump sum to cover certain or all utilities unless in a form of a current account. Cost should be appropriate to real costs as otherwise it would not be costs but a rent[132]

---

[122] Cigoj, cited supra 91, 823.
[123] Art. 190 CO.
[124] Art. 193 CO.
[125] Art. 191 CO.
[126] Art. 311 CO.
[127] Strohsack, Obligacijska razmerja III [Obligations III], (CZ Uradni list RS 1996), 97.
[128] There is no rule such as § 551 BGB in Slovenian law.
[129] Gavella, Stvarno pravo [Real Property Law], (Informator 1998), 752.
[130] Art. 91(1) NTA.
[131] Art. 94 NTA.
[132] This is supported by Art. 91 NTA.

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

There are two sets of rules on standard terms in Slovenian law. In case of landlords acting in commercial capacity the CPA applies. CPA does implement the Directive 93/13/EC. In all other cases the CO is applicable. According to Art. 121 CO all the standard terms in opposition to the intention of a contract (cause or *causa* of a contract) or good business usages are null and void. Nevertheless, even if such terms are not void there is still a possibility for a court to ignore them. This is possible, if they were unjust or too harsh towards the other party.

The obligations of parties to the tenancy contract are regulated by contract. However, some general obligations of the landlord and tenants are detailed in the NTA. The landlord has thus to hand over to the tenant such an apartment that does make it possible to use it in a normal manner. It is landlord's duty to maintain the apartment and building in such a way that a normal use of apartment is possible. The landlord also warrants for any factual or legal defect at apartment.[133] Tenants general obligations are also provided by the NTA. Tenant has to use the apartment in accordance to the tenancy agreement. He warrants for any damage on apartment as a consequence of improper or negligent use of apartment. Tenant has to enable a landlord to make inspections in the apartment up to two times per year. He has to pay rent and all the costs, maintain the apartment and notify the landlord about all defects in the apartment. He must notify every person that is using the same apartment together with him and ask for landlord's permission.[134]

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)

For contracts with landlords not acting in commercial capacity there is no consumers protection for tenants. The legislator has implemented Directive 93/13/EC in the CPA, but has not extended its parts to contracts among other parties. However, there are several provisions on standard contracts control in CO.

All standard terms have to be let known to the tenant. In case of any difference between standard terms and individual agreements, the latter prevail.[135] Any terms that are in breach with the intention of contract or good business practice are null and void.[136] However, even if the terms are not null and void, the court has discretion to refuse application of standard terms that are unjust or too harsh to the tenant.[137]

---

[133] Art. 92 NTA.
[134] Art. 94 NTA.
[135] Art. 120(3) and (4) CO.
[136] Art. 121(1) CO. Tenant has right to fill a lawsuit to get this nullity established by the judicial decision. Art. 92 CO.
[137] Art. 121(2) CO. Such terms are especially those, which dispossess another party of counterclaims or take away contractual rights or impose harsh time limits. See Cigoj, cited supra note 39, 479.

In case that standard terms has not been individually negotiated and contrary to the requirements good faith and fair dealing, it causes significant imbalance, a party may avoid a contract.[138] This rule is more in favor of contracts than CO, where the contracts become void and null by virtue of law. But even standards for avoidance seem to be harsher than we can find in CO. Terms have to represent a grossly unfair advantage and have to create a significant imbalance.[139]

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 offset rent installments against any alleged claims of her own, except if authorized by a judge.*
b) *The cost of small reparations, up to 100E per annum, has to be met by the tenant.*
c) *At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.*
d) *If the tenant becomes a member of a tenants' association, the landlord has the right to give notice.*

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

There is no body of case law or any positions in doctrine, enabling us to give firm answers to this question. However, at least for some questions it is possible to predict the judicial solution. A standard term preventing tenants to use a substantive objection of offset out of court is a term that limits tenants objections.[140] It is therefore possible, but not necessary, for court to reject application of such terms. According to the Art. 92 NTA it is landlord's duty to maintain apartment in such condition that make it possible for tenant's normal use. However, there is no special rule about who bears costs of such maintenance. Art. 589 CO therefore applies. There is a rule that all costs of small repairs that were caused by normal use or object are at tenant's expense.[141] All the costs for maintenance of object that are necessary to enable it for normal use, are at the landlord's expense.[142] It would therefore not be illegal for landlord to demand from tenants to bear costs of small repairs. If repainting of an apartment at the cost of tenant does not represent incomparable high expense comparing it to the rent, it is perfectly legal to demand from tenants to repaint the apartment at the end of tenancy.[143] The general rule is however that tenants do not bear costs of normal usage and this represents costs of the landlord.[144] It is therefore only up to the height of amount do decide whether it is legal for a landlord to demand repainting to be done by a professional painter. A provision preventing tenants to joint tenant's association would be illegal. There is no case law or doctrine to this issue. However, freedom of association is a constitutional guarantee.[145] It is a general rule that contracts or their parts that are contrary to the Constitution[146] are null and void.[147]

---

[138] Art. 4:110 PECL.
[139] Lando and Beale, cited supra note 52, 269.
[140] See Cigoj, cited supra note 91, 1105.
[141] Art. 589(3) CO.
[142] Art. 589(2) CO. See Cigoj, cited supra note 69, 1685.
[143] Cigoj, cited supra note 69, 1715.
[144] Art. 604(3) CO.
[145] Everybody has right to freely associate with others. Art. 42(2) CS.
[146] Art. 86(1) CO.
[147] Šinkovec, Temeljne pravice in svoboščine [Fundamental Rights and Liberties], (Uradni list 1997), 235.

Tenants' associations are not well-formed in Slovenia yet.[148] However, if a tenant amounts to consumer, he falls under protection of CPA which implemented the Directive 98/27/EC. This is possible in cases where landlords act in commercial capacity. They should not use standard terms that are illegal or against good business usages. Otherwise they could be sued to omission of such activity.[149] This action could also be brought by any consumers' protection organization being legal entity and founded already for a period of one year or more.[150] However, such an action is allowed only after consulting the national consumers' protection authority.[151] In case that such illegal practice affects consumers' rights in other EU Member States, such an action could also be brought by similar organizations in these Member States.[152]

Question 20: Changes to the Building by the Tenant

T is a tenant in a building with 4 flours and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses the permission by alleging that otherwise, he would have to give the permission to every tenant, which would ruin the view of the house esthetically. In addition, he argues that 15 TV programs are already accessible via the cable TV connection of the house, which should be more than sufficient to satisfy the tenant's demand.
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?

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?

Tenants are not allowed to change apartments, equipments, installation, or invest in the apartment without the permission of a landlord.[153] However, landlords cannot reject such permission if such changes are in accordance with modern technical demands and in tenant's personal interest, if all costs are sustained by the tenant, if such a change does not endanger interest of a landlord and interests of another apartment owners in the building and that such changes do not damage common parts of a building or its esthetic outlook.[154] It is presumed that such changes are in accordance with modern technical demands, if it concerned the installation of necessary antennas and other equipment for TV reception and there is no possibility to connect to existing installation.[155] It is therefore possible for a landlord according to NTA not to give permission to a tenant to install a parabolic TV antenna on his balcony because of ruining the esthetic view of the building. According to these rules it would also not matter that T is a Turkish immigrant not speaking national language well and that there are no Turkish programs received on cable TV connection. Any such change without landlord's permission would amount to tenant's fault and could give a landlord ground to give

[148] They are mostly concerned about tenants' problems in denationalized apartments. These tenants had no opportunity to purchase their apartments according to privatization provisions of the TA.
[149] Art. 74 CPA.
[150] Art. 75(1) CPA.
[151] Art. 75(4) CPA.
[152] Art. 75(3) CPA.
[153] Art. 96(1) NTA.
[154] Art. 97(1) NTA.
[155] Art. 98(2) NTA.

notice.[156] However, according to the constitutional right to acquire information, it is possible for such an immigrant to claim his right to install an antenna as his constitutional right, although there is no constitutional case law in this direction.

If T exhibits a huge poster with the slogan "Peace in Palestine and Iraq", he does not make any changes in apartment. It is therefore not necessary for a landlord to give permission to such action. The only problem T could have according to NTA, would be a case when other residents would not approve such action and would start arguing with T. Hurting a basic rules of neighborhood's peace does also amount to a tenant's fault giving landlord right to warn him an possibly give him notice.

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?

There is no rule in Slovenian Law preventing L to keep on set of the keys of the rented apartment. This does however not mean that he has right to freely enter apartment without permission of his tenant. According to Art. 94 NTA a tenant has to enable his landlord to enter apartment and check it twice a year. In case that he is preventing him to enter, a ground for a notice is given. However, if a landlord enters a rented apartment without permission, he commits a criminal offence.[157]

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?
Note: This case is supposed to deal with the distinction among contract and tort liability for general "security obligations" (Verkehrssicherungspflichten) of the landlord.

There is no case law indicating such liability of a landlord. However, there are rules of NTA and CO that could serve as a basis for L's liability for a damage sustained at the stairs that are not well maintained. According to Art. 92 NTA it is a landlords duty to maintain a house. Neglecting such care would amount to tort liability according to general rules of obligations.[158] L would be directly responsible for any damage arising thereof.

[156] Art. 103(1) NTA.
[157] Art. 152 CC.
[158] Art. 131 CO.

Set 5: Breach of Contract

Breach of contract in Slovenian law is generally regulated by the CO. There are two situations provided in the CO. If the due performance of contract is an essential term, the contract is avoided by virtue of law.[160] In case that the due performance is not an essential term of a contract, a party has to give the other party some reasonable additional time to perform. In case that there is still no performance , the contract is also avoided by virtue of law, unless the party immediately express its intention to keep a contract valid in force.[161] However, a party can always prevent termination of contract if an immediate declaration is made that he still insists on performance. In any of these situations a party can claim damages – either for delay or non-performance.[162] He can compensate all the damage and loss of profit that was reasonable for another party to foresee at the time of breach.[163]

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?*

This issue is solved by rules on impossibility of performance. If the performance of a contract became impossible because of an event for which neither party is responsible, the obligation ceased to exist. In case that any party performed in part, she has right to claim that back.[164] There is no real difference in consequence if the apartment is destroyed after transfer of possession to the tenant. According to Art. 617 CO tenancy cease to exist if the apartment is destroyed and neither party is responsible.[165] In case that apartment has been destroyed at the time of conclusion of contract without the parties' knowledge, there is a case of impossible subject matter of obligation. In case that an obligation is already impossible at the moment of contract's conclusion, it affects the validity of such contract. It is null and void.[166]

According to Art. 4:102 PECL a contract is not invalid merely because at the time it was concluded performance of the obligation was impossible, or because a party was not entitled to dispose of the assets to which the contract relates. This is a difference to CO solution that would count such a contract as ineffective. However, L can still rely upon Art. 8:108 PECL and prove that due to an impediment beyond its control and expectation it was impossible to perform. This would be rather different solution to CO.

---

[160] Art. 104 CO.
[161] Art. 105 CO.
[162] Art. 103 CO.
[163] Art. 243 CO.
[164] Cigoj, cited supra note 39, 457. Art. 116(1) CO.
[165] See Iglič-Stroligo, Zakup, in Plavšak, Gospodarske pogodbe, druga knjiga [Commercial Contracts – Part 2], (GV 1994), 96.
[166] Art. 35 CO. See Strohsack, cited supra note 89, 102.

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?

Contract with T1 is perfectly legal.[167] At the moment when T1 took possession of the apartment, he assumed his position of a tenant and L performed part of his landlord's obligations towards him.[168] T1 becomes a direct non-proprietary possessor of the apartment and enjoys protection of his possession.[169]

However, contract with T2 is also valid. Nevertheless, he cannot take possession of the apartment as it is already in possession of T1. When T1 discovers that there is a person claiming some rights on apartment, he has to inform L. But there is no possibility for him to terminate the contract on ground of legal defect, as T2 has no right to prevent him in his tenancy.[170]

According to the CO has T2 right to demand from L to fulfill his contractual obligation. He has to give L additional time for such performance. In case that L does not perform his obligation is contract avoided by virtue of law.[171] This gives T2 ground to claim damages in form of negative contractual interest. He can therefore recompenses all costs he had on account of L's breach of contract.[172]

However, T2 has also another option. The contract shall not be avoided by virtue of law, if T2 at the expiration of additional time immediately declare that he stands by the obligation.[173] In this situation is L still obliged to perform his contractual obligation. Although this is not possible for the apartment already taken by T1, some older case law has recognized possibility for L to perform by handing over T2 another similar and suitable apartment. Nevertheless, T2 still retains his right to claim damages.[174] It would seem that this old position is no more suitable. Apartments are no *genus*, but *species*. It would probably be more reasonable to hold performance by L impossible and give T2 only option to claim damages.

It seems that both contracts would be valid under the PECL. L's non-performance towards T2 cannot be excused and T2 can invoke all remedies laid down in Ch. 9 of the PECL, except a claim for performance under Art. 9:102 (1) (a) PECL as it is not possible. L has no possibility to perform to T2. As it was L intention so rent the same apartment twice and to hand it over to T1, it is an intentional fundamental non-performance according to Art. 8:103(c) PECL and gives T2 right to terminate a

---

[167] In legal doctrine it is possible to find a position that tenant has to act in good faith to validly get possession an become tenancy. However, there is no direct provision regulating this issue in CO. See Cigoj, cited supra note 69, 1683.
[168] Art. 588 CO.
[169] Art. 27(2) RPC. See Tratnik in Berden, Tratnik, Vrenčur, Rijavec, Frantar, Keresteš and Juhart, Novo stvarno pravo [The New Real Property Law], (Codex iuris 2002), 47.
[170] Art. 599 CO.
[171] Art. 105 CO.
[172] Art. 103 CO.
[173] Art. 104(2) CO.
[174] See Strohsack, cited supra note 89, 185. Case VSH, Pž 366/82.

contract according to Art. 9:301 PECL and recover any sum paid according to Art. 9:307 PECL as well as claim damages according to Art. 9:501 PECL.

Question 25: Delayed Completion

L is an investor and buys an apartment from a big building company. According to the contract, the apartment should be ready from 1/1/2003. However, the purchase contract contains a (lawful) clause according to which the builder is not responsible for delay unless caused by him. L rents the apartment to T from 17/1/2003 without any special arrangements in the case of delay. However, as the neighbor 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?

A general rule of CO is that damages for breach of contract can be limited or excluded. Such limitation or exclusion is perfectly valid unless it is agreed for intentional acts or gross negligence.[175]

T has a claim against L. If T cannot take possession of apartment on 17/1/2003, that represents L's default.[176] If the date is essential term of contract (as it seems in this case), than such contract is terminated by virtue of law.[177] T has also an option to declare that he stands by the contract and can demand performance.[178] In both cases can T claim damages from L.[179]

There is no case law or even known case in Slovenia that would recognize L's right to sue damages from N. However, new Slovenian Act on Construction (hereinafter: AC)[180] does recognize investors claim for damages against any party who tried to block the issue of building permit by misuse of her rights.[181] According to general principles of tort law, it would be up to this party's burden to prove that she has not misused her rights.[182] So, the presumption of fault is reversed. A party claiming not to be guilty has to prove that it is not. The other party has to prove that he sustained damage and that this damage is caused by N's act.

According to this new legislation we could construct L's claim for damages against N, at least in theory.

T would have claim against L on basis of non-performance. As T intended to move into new apartment and could not, T was substantially deprived of her expectations under the contract (Art. 8:103 PECL). She is therefore entitled to terminate the contract according to Art. 9:301 PECL and claim damages.

---

[175] Art. 242 CO. See Strohsack, cited supra note 127, 35.
[176] Art. 299 CO.
[177] Art. 104(1) CO.
[178] Art. 104(2) CO.
[179] Plavšak, Gospodarske pogodbe, prva knjiga [Commercial Contracts – Part 1], (GV 1993), 68.
[180] Zakon o graditvi objektov (ZGO-1) [Act on Construction - AC]; Ur. l. RS, št. 110/2002.
[181] Art. 74(3) AC.
[182] Art. 131(1) CO.

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

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

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

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

   Variant 2: T did not discover the mildew stains when inspecting the house before entering into the contact, 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 neighboring apartment in the house have repeatedly and despite T's complaints organized 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?

This question is regulated by rule on factual defect. This issue is in general regulated by the CO. Landlord is liable towards tenants for all defects at the object of rent that impede the agreed or usual usage, regardless to the fact whether he knew for such defect. Landlord is also liable for any missing quality or distinction that has been explicitly or implicitly agreed upon. However, such defects must not be minor.[183]

It is possible for landlords to exclude their liability for such defects by a disclaimer clause in the contract. However, such a disclaimer would be null and void, if the landlord knew for defects, but has intentionally kept it secret before tenant or is the nature of defect such that it makes impossible for a tenant to use the object of lease.[184] Landlord would also be liable for such defects, if he made an assertion to the tenant that there is no defect on the object.[185]

General rule of CO is that a tenant can ask his landlord to repair the defect. He has to give him some reasonable period of time to do so. In case that he does not make repairs, is tenant authorized to terminate his contract or demand decrease of rent by a lawsuit. In both cases can he also claim damages.[186] However, there is also a specific regulation in NTA. If an apartment did not provided normal conditions for tenant's use, can a tenant ask the tenancy inspectorate to order L to repair the apartment. If L does not repair the apartment in due time, can perform such repairs T by himself and offset this costs from the monthly rents. He can also demand form L to provide him another suitable apartment.[187]

It is perfectly legal for T to claim reduction of rent on behalf of factual defects in apartment. In case that the factual defects do not allow T's normal use of apartment, he can ask the inspectorate to order L to set it right. In case that he does not, can do so T alone. All costs he had by this action can be offset from monthly rent rates. In case that T inspected the house,

[183] Art. 592 CO.
[184] Art. 595. CO.
[185] Art. 594 CO.
[186] Art. 597 CO. See Cigoj, cited supra note 69, 1699.
[187] Art. 93 NTA.

but she did not discover the mildew stains, there is possible do identify two different situations. If the mildew stains make it impossible for T to have a normal use of apartment, than L has to repair this defect according to the NTA. Otherwise[188] it is up to CO to find a solution. Liability of L is in this case conditioned by the care of T at the moment of inspection. If T had not acted in gross negligence, is L still liable.[189]

It seems that a noisy building plant could mean a change of circumstances and therefore lead to avoidance of a contract.[190] In case of a noisy neighbors, it does not seem that such a fact does represent landlords liability. T has a possibility to deal with noisy neighbors by calling police due to violation of order or can file a claim for possessory protection at court. Only in an extreme situation that noisy neighbors do make an apartment unsuitable for living, such a fact could represent a violation of landlord's obligations.[191]

According to a special legislation it is necessary for a landlord to provide tenant with a suitable apartment that does enable normal use of it. In case that the landlord does not do that, it might amount to fundamental non-performance according to Art. 8:103(b) PECL as the tenant is deprived of what she was entitled to expect under the contract. As a consequence T may terminate the contract (Art. 9:301 PECL) or accept performance that is not conforming to the contract and reduce price (Art. 9:401 PECL). According to Art. 9:501 PECL the aggrieved party can also claim damages.
An Art. 6:111 PECL would substitute the rule on change of circumstances as provided by CO. This rule does make a difference as paragraph 2 requires negotiations to adopt a contract and according to CO a contract is ended by law. However, even according to CO regulation L could offer a just change of contract and keep it in force. Nevertheless, no negotiation is mandatory.

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 explicitl y 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?

If apartment was used for any commercial activity, its owner has to get permission of other owners of the same building, which possess more then one half of building.[192] This rule of NTA would probably hinder any stipulation of this type with a tenant, as no landlord would be in position to assure a tenant to get permission, if there were more than one owner of the same house. The other problem is a formal requirement. A tenancy contract has to be in writing.[193] This form is considered to be a condition for validity of contract. Any contract not being in this form would be null and void.[194] As the intention to use part of apartment would represent an essential term of this contract, it should have been included into contract. However, it is not allowed to make any oral changes to a written agreement with regards to

[188] In case that they do not make it impossible to use the apartment, but they do make it difficult to use it.
[189] Art. 593(2) CO.
[190] Art. 112 CO.
[191] Art. 92 NTA.
[192] Art. 14 NTA.
[193] Art. 84(4) NTA. See Becele, cited supra note 72, 66.
[194] Art. 55 NTA.

essential terms.[195] It would therefore probably be irrelevant if L and T had implicit agreement that some rooms will be used by T as a surgery. However, in case that such an agreement would be recognized as a valid one, there is ground to apply rule on change of circumstances. If there is such a change of circumstances after conclusion of contract, that make it hard for one party to achieve contractual intentions and contract does no more correspond parties' expectations, this party can demand a termination of contract.[196] No one can, however, refer to this rule, if he had to be considering such circumstances.[197] It would probably be possible to predict whether there are any real chances to get permission for surgery according to fire protection and zoning laws. There is also not possible to terminate a contract, if another party agrees to change of contract in equitable manner.[198] L and T could therefore reach an agreement on diminishing of rent or that T rents only one part of such a big apartment. However, in case that it was not predictable that there could be a problem with permission for surgery, T has right to terminate a contract.

According to Art. 6:111 on change of circumstances it is possible to renegotiate a contract. The main difference between solution in CO and PECL is that PECL do give advantage to renegotiation and CO to avoidance. However, in both systems it is possible to renegotiate (CO) or avoid (PECL) contract.

Set 6: The Relationship among the Tenant and Third Persons

In Slovenian law are tenants non-proprietary direct possessors. They do therefore enjoy possessory protection against third persons. However, as in general a tenancy is no real property right, but an obligation between the landlord and tenant, the tenants have no claims against third persons. It is a landlords' duty to provide a tenant with a suitable apartment. In case that due to the acts of a third person such apartment stops being suitable, it is landlord's duty to correct the situation. To some extent a possessory protection can help a tenant to prevent third parties' incursions, but otherwise it is up to the landlord to protect his property, at least as a proprietor.

Question 28: Neighbor Relations

T and N are tenants of neighboring 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?

Solution of this question depends on question, whether both apartments are owned by the same landlord or not? Owner has to offer such an apartment that gives a tenant a normal use. T can demand from his landlord to provide such conditions in his apartment. Otherwise, he can ask inspectorate to order this to a landlord.[199] A landlord that is also an owner of N's apartment could make a written warning to N to stop violating peace in the neighborhood and could eventually give N notice.[200] In case that T's landlord is not an owner of N's apartment, T's landlord could demand such action from N's landlord on basis of his right of ownership.

---

[195] Art. 51 CO. All changes of a formal contract regarding
[196] Art. 112(1) CO.
[197] Art. 112(2) CO.
[198] Art. 112(4) CO.
[199] Art. 93 NTA.
[200] Art. 103 NTA.

Consequently it is possible even to eject (i.e. expropriate) one owner from the house if his property is cause of permanent disturbance to other owners.[201] T's landlord could also demand prevention of further influence form N's landlord on basis of his real property rights and rules of neighbor law.[202] In case that T's landlord does not take care and prevent further influences from N's apartment, such a position could be treated as if an apartment had a factual defect. It does not matter that such a defect might occur only during the tenancy period. It is treated the same way as if it had occurred at the beginning of tenancy period.[203] T would therefore have option to ask his landlord to suppress the defect or can terminate a contract or demand decrease of rent. In any case, T has right to claim damages from his landlord.[204]

In case that T is not a tenant but owner, he would have all the protection deriving out of his property right – rules of a neighbor law, *actio negatorio* and possessory protection. Another option would also be to report N to police or health inspectorate. Playing excessively loud music does represent to a petty criminal offence.

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 neighbor's house, which causes repair costs of 10000 € and entails T being unable to use two rooms for 2 weeks. The lorry has been driven by E, an employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?

In case that a lorry damages house that T rented form L, T has right to terminate contract with L or demand decrease of rent.[205] In case that T suffers any direct damage from lorry accident, T has claims against the building company and/or a lorry driver E. . He has no claim against a neighbor as the building company is independent builder. This would be in case that T terminates contract with L and rents another house for higher price. The ground for such claim would be general rule on tort law – whoever does damage is liable to compensate is.[206] However, T has no claim for damage sustained by house. He can only ask L to make repairs or can make repairs himself and offset cost from his rent.[207]

---

[201] Art. 123 RPA.
[202] Art. 75 NTA.
[203] Art. 598 CO. See Cigoj, cited supra note 69, 1701.
[204] Art. 597 CO. However, landlord's liability for damage is not strict. He can exculpate himself that he has no guilt in relation to a situation amounting to a factual defect. See Cigoj, cited supra note 69, 1699.
[205] Art. 617(2) CO. However, he cannot ask to diminish rent, if it was obvious that such a solution does not meet cause of the contract and does not suit a landlord as well. See Cigoj, cited supra note 69, 1744.
[206] Art. 131 CO.
[207] Art. 597 CO; Art. 93(2) NTA.

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?

In case that N proves that he acted with due care (as a good master), a court would have possibility to release N of all liability for damage of € 200 or only part of it.[208] At the same time it is also possible for N to ask from T restitution for his chisel, according to Art. 202 CO. A court would take into consideration altruism and solidarity of N.[209] In such case, all cost should be borne on T's account. In case that there was some danger to the apartment of N, his action could be qualified as action in necessity. According to the Art. 139 CO any person acting in necessity does not have to pay any damages to a person creating need for such an action. Although there was no real need for action in necessity, N could still refer to the rule on fundamental mistake in his action. If he reasonably believed that there is a threat to his and public safety, he is not held liable for damage. what do these rules say and what would be their result here?.[210]

[208] Art. 201 CO.
[209] Plavšak/Juhart, Obligacijski zakonik s komentarjem 2 [Code of Obligations with Commentary 2], (GV 2003), 64.
[210] Art. 46 CO, see also a case Supreme Court of Slovenia II Ips 319/95.