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Tenancy Law Project – Swiss Report

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General Introduction

a) Origins and Basic Lines of Development of Swiss Tenancy Law:

Swiss tenancy law was introduced by the Swiss Code of Obligations (SCO) in 1882. Between 1914-1925 and 1936-1965, however, Switzerland enacted emergency decrees to control rents and restrain the circumstances in which tenancy agreements could be terminated. Thus, full freedom of contract only existed between 1925-1936 and 1970-1972. In 1972, the Federal Act on Measures against Abuses in the Tenancy Market was enacted. Tenants' rights have been integrated into the Constitution (Article 109 Swiss Federal Constitution).

In 1990, driven by an acute housing shortage, Swiss tenancy law was entirely revised. In essence, the revision formally integrated the provisional emergency law of 1972 into the SCO.¹ The tenancy law currently in force reflects the development of the modern welfare state; with 'conservative' political forces criticising the law for its interventionist approach, and for its failure, faced with the housing shortage, in creating incentives for the construction of additional housing.² This mirrors the general dispute between 'progressives', aiming at social justice and stability through regulation, and 'conservatives', seeing the market mechanism and incentives as the basis for social provision.

After the adoption of Article 109 Swiss Federal Constitution in 1972, the Constitution served as the legal base for the adoption of the provisional rules and, after 1990, today's final rules on tenancy agreements.

In brief, Swiss tenancy law reflects the broader political debate on the form of the modern welfare state. Accordingly, the main influence on tenancy law has originated from political groups which have shaped the current state of the law. Unsurprisingly, tenancy law has overwhelmingly taken the form of statutory law (*see* below), whilst judicial influence has been restrained to more specific, pragmatic and less controversial, questions.

b) Basic Structure and Content of Current National Law

aa) Private Tenancy Law

Current tenancy law is essentially defined by the SCO and an ordinance specifying the provisions on tenancy. Local customs, governing such matters as the time at which the rent

The authors wish to thank Dr. Mel Kenny for his proof-reading of the text.

¹ HEINRICH HONSELL, *Schweizerisches Obligationenrecht Besonderer Teil*, Berne 2001, p. 207.

² HONSELL, p. 207.

is due and the dates at which tenancy agreements may be terminated, play an important role, whilst framework tenancy agreements, as negotiated by tenants' and of landlords' associations (defining, *inter alia*, criteria for determining abusive rents), are also influential. The Cantons also have a role to play, e.g. by providing that tenancy agreements require the use of specific cantonal forms in case of a housing shortage, and by issuing the forms required to terminate tenancy agreements and to raise the rent. Finally, litigation in this area is largely defined by the respective cantonal codes of civil procedure.

To a significant extent, the parties are free to agree on terms and conditions differing from the statutory provisions (concerning the periods of notice, the amount of the rent, the dates at which the agreement may be terminated). Other issues are governed by rules which allow for contractual modification in favor of the tenant, such as the duty of the tenant to tolerate modernization and maintenance, or the duty of the tenant to bear the costs for minor repairs.³ Finally, some issues such as the minimum notice period are mandatory with respect to both parties.⁴ A tenancy agreement need not be concluded in any particular form, and may be concluded orally or by implication. It is however common practice to enter into an agreement in writing.

The amount of the rent as well as the terms of payment is defined by the tenancy agreement. The landlord may raise the rent periodically; at the next date for giving notice. The tenant may challenge the increase within thirty days after notification with the competent conciliation authorities, on the grounds that the increase is abusive, that is, that it results in an *excessive* return from the rental object.

The conditions under which tenancy agreements may be terminated are found within the agreement itself. Usually, tenancy agreements provide for termination on three months notice from a date defined by custom, such as March 31, June 31, September 31, and December 31 of each year. The tenant may challenge the termination within 30 days of notification if the termination violates the principle of good faith. Where the landlord can establish either an urgent need to use the accommodation on his part or that of a close relative, or if the tenant has defaulted on payments, then the tenant is precluded from challenging the termination.

If the termination is effective, an extension of the tenancy of not more than four years may, nevertheless, be obtained by the tenant, if the termination results in a hardship which is not countervailed by the interests of the landlord in personal use of the property.

Lawful possession of a property for housing purposes will, in the majority of the cases, be based on a tenancy agreement. It is, however, possible that possession is based on a gratuitous loan, which may, precisely because it is gratuitous, not be deemed a tenancy.

³ See BaK-WEBER ad art. 257a, 257h, 259, 260 SCO.

⁴ BaK-WEBER, N 3 ad art. 266a SCO.

The tenancy does not confer any real property right on the tenant. However, an exception exists where the tenancy is registered in the Real Estate Register, which is possible if the parties have agreed to such a registration in writing (Article 71 par 1 Ordinance on the Real Estate Register; Article 261b SCO), in that event, any new landlord automatically becomes party to the tenancy agreement.⁵

A right of occupancy may also be based on real rights, i.e. a usufructuary right (Article 745 Swiss Civil Code (SCC)) as well as on a right of abode (Article 776 SCC). Both may be agreed on for an unlimited duration,⁶ in which case they end upon the death of the beneficiary (Article 748(2) SCC).

European consumer protection legislation does not play any role in Swiss tenancy law.

bb) Social regulation affecting private tenancy contracts

Swiss public welfare regulations affect private tenancy law by granting allowances to indigent persons whose income falls below the specified level of the “existence minimum” (*Existenzminimum*). The level of the “existence minimum” is defined by cantonal guidelines for the various categories of single persons, married couples, and couples with/without children, and is calculated by adding to a basic allowance, supplements for specific spending such as housing costs.⁷ The state supports such persons, according to the principle of Subsidiarity, to the extent that neither close relatives nor spouses are in a position to support them financially (Article 328 SCC).

In order to encourage the construction of new housing, the Swiss Confederation enacted the Federal Act on the Support of the Construction and Housing Property (ASCHP).⁸ According to Article 12 et seq. of that Act, the Confederation may procure and grant loans to public and private organizations, and take other necessary steps in order to encourage the construction of housing (i.e. assisting in providing the necessary water and electricity connections). Additionally, the Confederation seeks to specifically encourage the construction of low-cost apartments (*see* Article 36 et seq. ASCHP) by procuring, securing and granting loans of up to 90% of the total construction costs.

In March 21, 2003, the Federal Act on Supporting Affordable Housing (ASAH)⁹ entered into force, replacing the ASCHP. Under the new act, from September 2001 onwards,

⁵ Commentary of the Swiss Federation of Real Property Managers, N 8 ad art. 261b SCO (quoted “Commentary SVIT”).

⁶ Cf. JÖRG SCHMID, *Sachenrecht*, Zurich 1997, pp. 1337 et seq.

⁷ In the Canton of Zurich, the minimum of existence for singles with no children is a base sum of CHF 1100.00 plus housing costs and other costs (circular letter of the administrative committee of the High Court of the Canton of Zurich dated May 23, 2001).

⁸ SR 843.

⁹ SR 842.

federal assistance, provided for by the ASCHP, was abolished¹⁰). Instead, under the ASAH, the Confederation is now entitled to grant loans, with low or even no interest, to owners of affordable housing (Article 12 ASAH) so long as a stipulated occupancy level is met, and the owner undertakes to reduce the rent (Article 12(2) and 14 ASAH). From 1976 to 2001, approximately 107'000 apartments have been granted federal assistance under the terms of the ASCHP and the ASAH.¹¹

c) Summary Account on "Tenancy Law in Action"

aa) Swiss Accommodation Market

Switzerland has a very large leasehold property market. According to the last census in 2000, only 35% of households own their house or apartment. The average housing area per person is 44m².

The housing market is deemed to be functioning at an optimal level if freely available accommodation constitutes between 0.5 and 2 percent of the total accommodation pool.¹² As per June 1, 2003, only 0.91 percent of the total accommodation pool was freely available, the peaks being the Canton of Geneva (lowest housing availability) with a percentage of 0.17 and Canton of Glarus (highest housing availability) with 2.71. Between 2002 and 2003 the housing market deteriorated; whereas 35'400 apartments were freely available in 2002, only 31'100 were free for rental in 2003. The total expenditure on private-sector construction also decreased during this period: from 17 billion CHF in 2002, to 16.5 billion CHF in 2003.¹³

bb) Associations

The Swiss tenants' association (*Schweizerischer Mieterverband*, (STA)) actively engages in the Swiss housing debate and has exerted considerable political influence on tenancy issues. In the past, several initiatives have been presented by the STA.¹⁴ The STA has also edited a commentary on Swiss tenancy law.

¹⁰ See the website of the Federal Housing Office, <http://www.bwo.admin.ch/wohnraum/statistik/00091/index.html?lang=de>

¹¹ See the website of the Federal Housing Office, <http://www.bwo.admin.ch/wohnraum/statistik/00091/index.html?lang=de>

¹² Analysis 5/2002 by the Statistical Office of the City of Zurich, p. 1.

¹³ See press release of the Federal Office for Statistics of September 29, 2003, p. 3.

¹⁴ The most recent initiative („Yes to Fair Rents“) has been submitted on March 14, 1997 (see BBl. 1999 9823), On May 18, 2003, Switzerland has however dismissed the initiative.

The Swiss Association of Landlords (*Schweizerischer Hauseigentümerverband*, (SAL)) also has significant influence in the Swiss parliament.¹⁵ Its most important aims are related to tax issues and a general reduction of regulations concerning real property and tenancy.¹⁶ In addition to the SAL, the Swiss Association of Real Property Fiduciaries has edited a commentary on Swiss tenancy law.

cc) Dispute Resolution

In general, dispute resolution in tenancy matters follows the cantonal and federal rules of civil procedure. Tenants and landlords are not allowed to agree on a place of jurisdiction other than that which the Federal Code on the Place of Jurisdiction in Civil Law Matters¹⁷ provides for, i.e. the place where the object of the tenancy is located (Articles 21 and 23 Code on the Place of Jurisdiction).

Most civil litigation must be initiated before a Justice of the Peace (*Friedensrichter*) who seeks to achieve an amicable settlement. In tenancy matters, there is a special Conciliation Authority (Article 274a SCO) which seeks and often manages to settle the dispute non-litigiously. The procedure before the Conciliation Authority is free of charges and costs. The Conciliation Authority also provides free legal advice to tenants and landlords and, should the parties so decide, may act as an arbitration authority.

Most rules on civil procedure, including tenancy law matters, are specified in cantonal law. In case that, under cantonal law, different authorities are competent for the eviction procedure, and for deciding the admissibility of the termination of agreement, the authority competent to order the eviction may also consider the legitimacy of the termination. Clearly, the eviction may depend on the admissibility of the termination.¹⁸

The general rules on legal assistance apply to tenancy matters. Free legal assistance is available to any individual (but not to legal entities) who do not have the means to bear the costs of legal advice and court costs.

¹⁵ Five members of its executive board are members of the Swiss parliament, *see* <http://www.shev.ch>.

¹⁶ *See* its mission statement on www.shev.ch.

¹⁷ SR 272.

¹⁸ Art. 274g SCO.

dd) Execution of Tenancy Law Judgements

The Cantons are competent to regulate the execution of tenancy law judgments and orders, such as evictions.¹⁹ The Cantons may provide special rules for fast-track proceedings, or subject the eviction process to the regular civil procedure.²⁰

The judicial authority which renders the eviction order does not execute that order, but mandates the competent authority, as defined by the relevant cantonal code of procedure, to do so. The eviction order may be executed by the police if the application of force is necessary. The costs of the eviction, including any storage costs for goods seized, must be advanced to the competent authority by the landlord.²¹

¹⁹ BGE 122 III 92 cons. 2.b. The Cantons must however observe certain federal rules such as art. 274g SCO.- Debt enforcement – including the enforcement of debts based on tenancy agreements – is however subject to the Swiss Debt Enforcement and Bankruptcy Law.

²⁰ BGE 122 III 92 cons. 2.b. In the canton of Zurich, the judge sitting alone in summary proceedings is the competent authority. *See e.g.* § 222(2) of the Zurich Code of Civil Procedure and BGE 119 II 141.

²¹ MARTIN USTERI ET AL., in: Schweizerisches Mietrecht Kommentar, 2nd ed., Zürich 1998, N 23 ad art. 274g SCO.

Set 1: Conclusion of the Contract

General Introduction

In general, an agreement is concluded by corresponding declarations of the parties' intent (Article 1 SCO). In such cases, agreements are deemed factual agreements, that is, agreements based on the coincidence of the parties' intent, mutually declared in an appropriate way.

However, where the declaration of one or both of the parties is flawed and does not express their real intent, that declaration takes precedence over the real, but not appropriately declared, intent. Additionally, the exact content of such a flawed declaration is defined by the meaning given to its recipient, but only to the extent that a reasonable person would share such an understanding (*Vertrauensprinzip*). Such agreement is deemed a normative agreement.

Furthermore, a tenancy agreement is only deemed to have been concluded if the understanding of the parties, whether actual or normative, covers the essential issues regarding that type of agreement. The essential issues of a tenancy agreement being: (i) the object of the tenancy (i.e. the house or apartment), (ii) the use of this object in return for payment., (iii) the amount of the rent must be defined or definable.²²

Question 1: Choice of the Tenant

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

- a) *has a husband and three children; does T have a claim against L?*

Swiss tenancy law adheres to the principle of freedom of contract. Accordingly, a landlord may freely choose with whom to conclude a tenancy agreement. This freedom, however, is limited by: (i) general contract law; and (ii) specific rules governing tenancy agreements.²³ Since the specific rules do not contain any restriction as to the choice of the tenant, the general rules of contract apply. The Swiss Federal Court has held in a recent judgment²⁴ that refusing to enter into an agreement may be illegal under the following conditions: (i) the party refusing to enter into the agreement offered the requested good or service to the public (ii) the agreement concerns an essential or commonly available good; (iii) the requesting party, given the market power of the refusing party, has no reasonable

²² BaK-WEBER, N 1 ff. ad art. 253 SCO.

²³ PETER HIGI IN: Kommentar zum Schweizerischen Zivilgesetzbuch, vol. V2b, 3rd ed. 1994, N 43 et seq. ad art. 253 SCO.

²⁴ BGE 129 III 35, cons. 6.3.

substitute, and (iv) the refusing party has no objective reason for refusing to enter into the agreement. This jurisprudence is based on the protection of the person (Article 28 SCO) as well as on considerations of public morality.²⁵

However, whilst the courts have not directly addressed the question of whether these conditions apply where a person is not accepted as a tenant, it does not seem likely that a landlord could possess such market power that the rejected tenant could not find reasonable alternative accommodation.

As the first condition will not be met, it is entirely at the landlord's discretion to decide whether or not to accept *any* given person as a tenant, that that person is married with three children is irrelevant. T does not have a claim against L.

b) is a Muslim, and L is afraid of terrorism

Article 261^{bis} of the Swiss Penal Code prohibits denying publicly offered services to an individual on grounds of race, ethnicity or religion. According to prevailing legal opinion, this applies to any market participant and therefore by extension to any offer of housing made to the public.²⁶

Article 261 of the Swiss Penal Code only applies to the forms of discrimination which it specifies; rejecting a tenant on these grounds is a criminal offence. The Article does not apply where L rejects T on grounds of a fear of terrorism, which is not specified in the Penal Code. It will be difficult for T to obtain sufficient evidence that L refused to accept him as a tenant because of his religion. Moreover, even if L is convicted of racial discrimination under Article 261 Swiss Penal Code, this does not confer upon T a claim to the tenancy. In such circumstances T would only be entitled to sue L for compensation, and only to the extent of the financial damage he has suffered – calculated on the basis of the difference between of the rent due for the desired apartment and the alternative T had to take. Such a claim for compensation will also be subject to a review of whether T acted to mitigate his loss, for example by applying for other apartments, and to the extent that the loss resulted from an illegal practice. This last criterion is crucial, because damage is caused illegally in two cases: (i) if the infringed good is protected in an absolute way – i.e. life, health, or property; or (ii) if a rule exists whose very purpose is to prevent the action that caused the damage, to protect persons such as the injured person, and to protect the good which has been violated.²⁷ The question whether Article 261^{bis}, Swiss Penal Code is, such a legal rule, and therefore, in the present case, would allow a claim for damages on T's part, has not yet been answered by the Swiss courts. For the time being, however, it is

²⁵ BGE 129 III 35, cons. 6.5.

²⁶ BaK-SCHLEIMINGER, N 71 et seq. ad art. 261^{bis} Penal Code.

²⁷ VITO ROBERTO, *Schadensrecht*, Basle 1997, p. 84.

only with reluctance that a Swiss Court will find that a legal rule, such as that contained in Article 216 Swiss Penal Code, will be considered a rule rendering the damage suffered by T unlawful and therefore subject to compensation.²⁸ (A more generous approach seems to exist in tort law).²⁹

c) has a small dog or d) is a hobby piano player and wants to play about 1 hour every evening from 8-9 pm. or e) does not have full capacity and is under custody

By virtue of the freedom of contract, it is entirely within L's discretion to decide whether or not to enter into a tenancy agreement. Whilst the Swiss Federal Constitution proscribes discrimination on grounds of race, sex, age, and disabilities; this does not, prevent a landlord from refusing to enter into a tenancy agreement with a given person due to the referred to criteria, as long as the conditions outlined by the Swiss Federal Court (*see a)* above) are not met. Furthermore, the Federal Constitution does not apply directly to the relations between individuals (a so-called horizontal effect does not take place between individuals directly but indirectly, as a principle of interpretation and based on corresponding governmental decrees, *see* Article 35(3), Swiss Federal Constitution. A direct horizontal effect is rejected by the majority of the Swiss legal opinion³⁰).

Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards *access* to employment, vocational training and promotion, and working conditions has not been – and probably never will be – implemented in Switzerland.

Variant 1

In order not to lose any chances to get the apartment, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages?

L may challenge the agreement and, if successful, may rescind the contract if he agreed to it on the basis of a on a substantial error or fraud (Article 24(1) SCO). However, *any* error is sufficient to challenge and rescind the contract if T obtained the tenancy through willful deceit (Article 28 SCO).

A substantial error is any error that constitutes, subjectively (to T), and objectively, an essential basis of the agreement; only such errors will justify the rescission of the agreement. Therefore, T may refuse to answer any non-essential question on the tenancy,

²⁸ See ROLAND BREHM, Berner Kommentar Vol. IV/1/3/1, Die Entstehung durch unerlaubte Handlungen (quoted BK-BREHM), N 36 et seq. ad art. 41 SCO; BaK-SCHNYDER, N 34 et seq. ad art. 41 SCO.

²⁹ HEINZ REY, Ausservertragliches Haftpflichtrecht, Zurich 2003, N 710 et seq.

³⁰ See BV-SCHWEIZER, N 19 et seq. ad art. 35 Swiss Federal Constitution.

and may lie about such questions, so long as he is not fraudulent,³¹ since such questions are, *per definitionem*, not an essential basis of the agreement and may therefore not cause an error that is substantial in the aforesaid sense.

Question 2: Sharing with Third Persons

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

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

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

The tenant's use of the apartment may be restricted by the tenancy agreement itself. Otherwise, the tenant may use the apartment as he sees fit, subject to the caveats that he must take due care of the apartment, and show consideration towards the neighbours (Article 257f SCO). Generally, the tenant may take other persons into the apartment, regardless of their relationship to him, or other factors such as the sexual preference of such persons. However, sharing a very small apartment with other persons may exceed what is considered taking due care of the apartment. In such a case, L may advise T, in writing, to observe the required level of care. Should T default on this duty, L may terminate the tenancy upon a thirty days' notice (Article 257f(3), SCO).³²

Persons who the tenant takes into his apartment are not *ipso iure* parties to the tenancy agreement. The landlord may, of course, accept such persons as new tenants by agreeing to amend the agreement.

The sublease, which may be relevant in this respect, is addressed below.

Variant 1:

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

Assuming that the persons listed under a) – c) never entered into an agreement with L, they cannot enter into the tenancy agreement, unless they are heirs to a deceased tenant (Article 560(2) SCC).³³ In such an event, the heirs may terminate the agreement upon thirty days notice (Article 266i SCO). Invariably, children and spouses are heirs (Articles 457 and 462

³¹ Cf. MANFRED REHBINDER, *Schweizerisches Arbeitsrecht*, 15th ed., Berne 2002, pp. 68 et seq.

³² Commentary SVIT, N 59 ad art. 257f SCO.

³³ Cf. ZK-HIGI, N 45 ad art. 253 SCO.

SCC), whereas the parents are heirs only if the deceased does not have children (Article 458(1) SCC). The homosexual partner is an heir only if the deceased by his last will explicitly so decided (art. 483 Civil Code).

The landlord does not have a corresponding right to terminate the agreement upon the tenant's death.³⁴

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?

Presuming that A contributes to the rent, he would enter into a sublease with T. Such an agreement requires the approval of L (Article 262(1) SCO). L may, however, not withhold this approval, unless: (i) T refuses to disclose the terms and conditions of the sub-letting; and/or (ii) these terms and conditions are abusive, as compared to the terms and conditions of the principal tenancy agreement; and/or (iii) L is put at a substantial disadvantage by the sublease agreement (Article 262(2) SCO).

The landlord is not obliged to accept other students as tenants by entering into tenancy agreements with them, neither are the students *ipso iure* parties to the contract.

Therefore, the students are not liable to ensure that the rent is the paid. Though it is possible that the students through their shared goal (i.e. inhabiting L's apartment, rented by T), form a simple partnership (Article 530 et seq. SCO). If this is the case they are obliged to contribute equally to the rent payments. Externally, for the Landlord and third parties, only T is responsible for the agreement.

The agreement cannot be construed as containing an implied clause according to which the landlord must accept students as successors, based on his knowledge that the students can only afford to pay the rent if their number remains the same. The interpretation of the agreement follows the principle of good faith (*Vertrauensprinzip*; see above, general introduction, set 1), meaning that its content is deemed to be what an average and reasonable person in the same circumstances would understand it to be. According to such an interpretation, it cannot be presumed that the landlord has to accept any new student as a replacement for a parting student, because, even if the number of students must be maintained, the question which (of the) student/s should become tenant/s and which students shall contribute to the rent without being parties to the agreement would not be answered.

³⁴ BaK-WEBER, N 1 ad art. 266i SCO.

Question 3: Sub-renting

Does, and if yes under what conditions, T possesses 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)?

In the above conditions, T has a right to sub-rent a room in the apartment. T may also raise the rent under the general conditions set for raising a rent mentioned above. If L opposes a sub-lease under Article 262 SCO, and T rents the room without L's consent, L may terminate the tenancy because of a breach of contract.³⁵

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?*

A tenancy agreement may be concluded in any form, including orally, unless the parties agree to a specific form (Articles 11(1), 16(1) SCO). In the event of a housing shortage, the Cantons may provide that a tenancy agreement requires a specified form (Article 270(2) SCO) which includes information on how to contest the rent, where the landlord seeks to profit from the shortage and the position of the tenant. In such a situation the tenant must be informed of his rights.³⁶ However, the tenancy agreement remains enforceable even if the parties disregard the required form.³⁷

A tenancy agreement does not require registration in a public register. The parties may however agree that it shall be registered in the *cadastral register (Grundbuch)*. In such event, every subsequent owner of the real estate is bound and must allow the continued use of the apartment under the terms of the registered agreement as concluded by the tenant and the previous landlord (Article 261b SCO).

³⁵ ZK-GAUCH/HIGI, N 58 para. 2 *in fine* ad art. 262 SCO.

³⁶ ZK-HIGI, N 104 ad art. 270 SCO.

³⁷ ZK-HIGI, N 109 and 110 ad art. 270 SCO.

Question 5: Extra Payments and Commission of Estate Agents

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

Yes. Article 269d SCO stipulates that the conditions which apply to rent increases do not apply to pre-contractual negotiations, i.e. the relations between the landlord and the tenant before the conclusion of the contract.³⁸ Therefore, the general rules on contracts apply, in particular, the principle of freedom of contract: the freedom to enter, or not to enter, into an agreement, and the right to claim extra payments (i.e. in respect of drafting documents) as a condition for the conclusion of the contract.

Among the restrictions to freedom of contract is the ruling of the Swiss Federal Court, discussed above, that, under certain circumstances, refusing to enter into an agreement may be illegal.³⁹ On this authority an agreement made dependent upon excessive conditions might be seen as being equally illegal. Such conditions are not present in the instant case.

Variant 1

The sum of 500 € is requested from T by F who is the current tenant of 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.*

This is possible in Switzerland: freedom of contract allows the parties to enter into such agreements.

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 € 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 for A's services. Is this claim lawful?

Yes. Generally speaking, tenancy law provisions aimed at protecting the tenant do not apply to the period preceding the conclusion of the agreement, with certain exceptions that are not relevant to the case at hand. As a rule, the parties to an agency agreement may agree on any given commission. Whilst statutory law (Article 417 SCO) provides for a

³⁸ See ZK-GAUCH/HIGI, N. 24 ad art. 269d SCO.

³⁹ BGE 129 III 35, cons. 6; cf. question 6 above.

reduction of excessive commissions for real estate transactions and labour agreements, it is unclear whether this may be extended to other types of agreements such as tenancies.⁴⁰ No specific judgments address this question as yet.

Set 2: Duration and Termination of the Contract

General Introduction

A tenancy is considered a contract of indefinite duration, unless otherwise agreed at the formation of the contract. If a specific duration is set, the contract expires upon the conclusion of that period without any notice of termination. If the parties continue the contract beyond expiry, the tenancy becomes one of indefinite duration (Article 255 SCO). Perennial tenancy agreements are not allowed and are automatically converted into agreements of indefinite duration (Article 20(2) SCO).

Indefinite tenancies can be terminated without explanation so long as proper notification of termination is given in accordance with the time periods and dates provided for by law (cf. question 6). Tenancy contracts may also be terminated if the terms of the contract become unbearable (Article 266g SCO). Swiss law sets out objective reasons for extraordinary termination (such as death, divorce, or bankruptcy of the tenant, Article. 266h et seq. SCO). Such circumstances must neither have existed, nor have been foreseeable at the time of the conclusion of the agreement. Specific statutory provisions cover termination issues in the event of non-payment of rent, or the non-performance of the landlord's duties (Article 257d(2) and 107 SCO).

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?

L is allowed to give notice according to the dates established by local custom and subject to three months' notice. In the absence of local custom, ordinary notice as per the end of a three month period may be given (Article 266c SCO). For valid reasons rendering performance of the contract intolerable, L may terminate the agreement at any time after observing the three months period provided for by law (Article 266g SCO). The fact that L wishes to renovate the house, regardless of whether she has been granted building permission to do so, does not entitle her to terminate the agreement; she has to comply with the statutory and/or contractual requirements for ordinary termination.⁴¹

⁴⁰ HUGUENIN, p. 111.

⁴¹ Commentary SVIT, N 13 ad art. 266g SCO.

As a rule, L may terminate the agreement for any reasons and without specific justification. However, a termination in contravention of good faith is invalid (Article 271 SCO). According to Article 271, SCO, termination offends this principle if it is notified in order to counter a claim made by T under the tenancy, or if L exerts pressure on T through giving notice to further her own interests – such as the purchase of the apartment by T, or a unilateral amendment of the agreement. For these reasons, L must provide justification of the termination upon T's request.

If the tenant goes bankrupt subsequent to the conclusion of an agreement, the landlord may ask for security for future rent. If the landlord does not receive this within a stipulated time limit, he may give notice with immediate effect (Article 266h SCO).

Notice of termination must be given in writing on a form approved by the Canton, indicating that the termination may be either challenged, and that the tenant may request an extension of the tenancy (Article 266l SCO).

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

(See above and general introduction, c)dd). The judicial authority which ordered eviction does not execute that order, but mandates the competent authority, in accordance with the relevant cantonal code of procedure. The eviction may be executed by the police if the application of force is necessary. The costs of the eviction, including the costs of storing goods seized, must be advanced by the landlord.⁴²

Certain cantonal codes of procedure (such as that of Geneva) provide for a postponement of eviction where this is deemed necessary on humanitarian grounds (i.e. to allow a tenant to find a new apartment). The Swiss Federal Court has found such provisions compatible with federal law, so long as the period of postponement is short.⁴³ In the absence of such provisions, a tenant may not invoke legitimate interests to stay the eviction. According to the Federal Court, the postponement could only be justified by the tenant's legitimate interests if the circumstances have considerably changed after the eviction order acquired *res iudicata* effect (e.g. the tenant falls ill after the date of the eviction order).⁴⁴

Question 7: Contract Limited in Time

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

⁴² MARTIN USTERI ET AL., in: Schweizerisches Mietrecht Kommentar, 2nd ed., Zürich 1998, N 23 ad art. 274g SCO.

⁴³ BGE 117 Ia 336 et seq.

⁴⁴ BGE 117 V 178 et seq.

Pursuant to Article 266 SCO, tenancy agreements expire *eo ipso*, if the parties have expressly or tacitly agreed to limit the agreement in time. As this is possible for the tenancy of chattels and immovable assets, it is, by extension, possible for accommodation, too.⁴⁵ Article 266(2) SCO provides that if the parties tacitly maintain the tenancy agreement, they are deemed to have entered into a new tenancy agreement unlimited in time.

Whilst it is not illegal to repeatedly renew expired tenancies, such a chain of agreements may be interpreted as one agreement unlimited in time, depending of the characteristics of the individual case.⁴⁶

Question 8: Justification for Time Limit

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

This contract will be interpreted as a tenancy without a specified duration. The parties have agreed to specific notice periods and dates on which notice may be given, which is possible under Swiss law.⁴⁷ The parties to a tenancy agreement without a specified duration may generally terminate such an agreement without stating reasons. L is thus not obliged to state her reasons upon the termination of the tenancy agreement.⁴⁸

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

Yes, it does; the terms and conditions of the termination apply to both of the parties equally, in the absence of a contrary contractual provision.

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 notice to T?

⁴⁵ MARTIN USTERI ET AL., N 4 ad art. 266.

⁴⁶ BaK-WEBER, N 6 ad art. 255 SCO.

⁴⁷ ZK-HIGI, N 21 and 29 ad art. 266a SCO.

⁴⁸ ZK-HIGI, N 9 et seq., 17 ad art. 266a.

Should L die the contract passes to her heirs (Article 560(2) SCC), and so does the system of protection against termination. Hence, the heirs must comply with the same requirements as L.⁴⁹

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

If the landlord sells the house, the tenancy follows the ownership. The new owner and landlord may, however, give notice according to the requirements provided for by law – in addition to the contractual termination rights,⁵⁰ which will often coincide –, i.e. three months from a date set by local custom, or, in the absence of custom, at the end of a three-month period, if the landlord invokes an urgent need for the use of the house by himself, his close relatives or in-laws (Article 261(1) SCO). If the new owner gives notice of termination earlier than provided for by the tenancy agreement, the previous landlord is liable to the tenant for all damage thereby suffered (Article 261(2) SCO).

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?

The above applies.

Question 10: Tenancy “For Life”

L rents an apartment to T "for life". Can, and if so under what circumstances may L give notice before T's death?

A tenancy "for life" is not allowed by Swiss law. A perennial agreement will be considered as having definite duration; the duration of the tenancy will be modified to an acceptable degree (Article 20(2) SCO).⁵¹ Therefore, upon the expiry of such duration, L may give notice according to the legal requirements (i.e. upon three months notice from a date set by local custom, or, in the absence of such a custom, at the end of a three-month period)⁵².

A right of occupancy, however, may be based on real rights, i.e. a usufructuary right or a right of abode (*see* above, basic structure and content of current national law). Both may be agreed on for an unlimited duration,⁵³ in which case they end upon the death of the beneficiary (Article 748(2) SCC).

⁴⁹ THEO GUHL/ALFRED KOLLER: Das Schweizerische Obligationenrecht, 9th ed., Zurich 2000, § 44 N 67.

⁵⁰ BaK-WEBER, N 6 ad art. 261 SCO.

⁵¹ MARTIN USTERI ET AL., in: Schweizerisches Mietrecht Kommentar, 2nd ed., Zurich 1998, N 19 ad art. 255.

⁵² ZK-HIGI, N 19 and 52 et seq. ad art. 266a.

⁵³ Cf. JÖRG SCHMID, Sachenrecht, Zurich 1997, pp. 1337 et seq.

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?

No. Where T has not paid the rent for the last two months, L may set a time limit for payment which must be at least thirty days. L may terminate the agreement if T fails to pay the rents within the said time period, upon thirty days notice (Article 257d SCO). However, if T continually pays the rent only after an additional thirty days period, L may, terminate the tenancy agreement, notwithstanding the fact that T finally does pay the rent.⁵⁴

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

The party wishing to terminate the agreement must establish (Article 8 SCC) the existence of “important reasons” which objectively render the agreement “unbearable”. However, as discussed, only circumstances which neither existed, nor were foreseeable at the time the agreement was concluded allow for such an exceptional termination. Such reasons may be of an objective nature (i.e. war or commercial crisis), or of a subjective nature (i.e. a substantial change of either parties’ financial situation, a divorce or separation of the common law spouse, personal misunderstandings between the parties to the agreement).⁵⁵ Therefore, if T repeatedly disturbs the peace in the house, L may terminate the agreement since, from an objective point of view, he must not tolerate such behaviour.⁵⁶

However, Article 266g SCO provides that such extraordinary termination must observe the statutory notice period of three months (Article 266c SCO), but not the date at which the termination takes effect (i.e. termination is possible with three months). Thus, in Swiss tenancy law, there is no general provision of a right to immediate termination.

Hence, Article 266g, SCO enables the parties to terminate the tenancy agreement upon a three months period.

However, Article 266g SCO does not apply to the non-performance of the landlord’s duties (See: Article 258(2) in conjunction with Article 259b lit a SCO). The Article also doesn’t apply to the tenant’s duties: the duty of care in using the apartment; the duty to show

⁵⁴ BaK-WEBER, N 15 ad art. 257d SCO; HUGUENIN, p. 54; BGE 119 II 232 cons. 3.

⁵⁵ HONSELL, p. 224 et seq.

⁵⁶ See Commentary SVIT, N 15 ad art. 266g SCO.

consideration towards the neighbours (Article 257f SCO); the tenant's duty to pay the rent, since these occurrences are regulated by specific provisions of the SCO.⁵⁷

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?

This question addresses the issue of conditions subsequent. In general, Swiss legal opinion affirms the admissibility of conditions subsequent.⁵⁸ As tenancies do not end at a predetermined point of time, they are considered tenancies unlimited in time.

The Swiss Federal Court has held that conditions subsequent in tenancy agreements are to be upheld.⁵⁹ In cases in which such conditions are invoked, the Court has excluded the application of the protective rules on termination (Article 271 et seq. SCO).⁶⁰ However, and contrary to the general rules of contract, as tenancy agreements are "unlimited in time" they must be terminated by serving notice, i.e. the tenancy does not end *ipso iure*. According to the Swiss approach, the tenant may therefore challenge termination where he can show that the condition has been brought about by the landlord *mala fide*. As the challenge is subject to Article 271 et seq. SCO, the exclusion of the said rules by the Swiss Federal Court is, in effect, rejected in the tenancy context, because, in such circumstances, it is manifest that a regular termination should take place, thus the special rules on conditions subsequent are abandoned.⁶¹

Based on the above, a "clause résolutoire" is admissible, but, in Court, its destiny and, more precisely, the method by which the tenancy can be terminated is uncertain.

A different view has been advanced where the landlord seeks to exercise his right to terminate the tenancy for important reasons. According to at least a part of legal opinion, the parties may, to a certain extent, define such "important reasons", so as to include the tenant's non- or irregular payment.⁶² This opinion, however, has been disputed.⁶³

⁵⁷ HONSELL, p. 224.

⁵⁸ BaK-WEBER, N 3 et seq. ad art. 255 SCO.

⁵⁹ BGE 56 II 190 et seq.

⁶⁰ BGE 121 III 260 cons. 5.a.

⁶¹ BaK-WEBER, N 4b ad art. 255 SCO.

⁶² ZK-HIGI, N 7 ad art. 266g SCO.

⁶³ BaK-WEBER, N 2 ad art. 266g SCO.

Set 3: Rent and Rent Increase

General Introduction

According to Article 257 SCO, the rent is the remuneration for the use of the apartment. Whilst it is usually paid in cash, the tenancy agreement may also provide for payment, either in whole or in part, in the form of a non-cash benefit such as caretaker services. As opposed to the rent, accessory charges are borne by the landlord, unless otherwise agreed (Article 257a(2) SCO).

The amount of the rent as well as the terms of payment is defined by the tenancy agreement. The landlord may raise the rent at the next possible date for giving notice, and must notify and justify the increase at least ten days before the period of notice commences on a form approved by the Canton (Article 269d(1) SCO).

The tenant may challenge the increase, on the grounds that it is abusive, within thirty days of notification with the competent local conciliation authorities⁶⁴ (Article 270b SCO). A rent is abusive, and subject to review, if it results in excessive returns from the rental object (Article 269 SCO).⁶⁵

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?

According to Article 257c SCO, the rent is due by the end of each calendar month. The parties may agree on a different date.

The payment may be in cash, but may – where a clause in the tenancy so provides – also be made in a different form. However, according to Article 254 SCO, agreements that are linked to the tenancy agreement (coupled transactions, *Koppelungsgeschäfte*) are null and void when: (i) the tenancy is made dependent on the coupled transaction, and (ii) the coupled transaction contains obligations which are not directly linked to the use of the apartment on the tenant's part, and (iii) the coupling is abusive.⁶⁶ Thus, coupled agreements are null and void if the tenancy agreement is used as a means of enforcement.

The landlord has a right of distraint only in respect of arrears under a lease of business premises (Article 268 SCO), for both an expired one-year rent and the ongoing half-year-rent on movable property within the premises.

⁶⁴ Each Canton is divided into one or several districts, and each district has a local conciliation authority.

⁶⁵ See ad question 13.

⁶⁶ Commentary SVIT, N 14 ad art. 254 SCO.

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

The rent may be increased as of the next date at which notice can be served (i.e. as defined by local custom) (Article 269d(1) SCO). L must, however, notify T of the increase using a form approved by the Canton at least ten days before the commencement of the three month notice period (Article 269d(1) SCO).

A rent increase is not possible for tenancy agreements limited in time, because such agreements cannot be terminated by ordinary notice.⁶⁷ Should L wish to raise the rent, in such a case, he has to seek to amend the agreement, which T is most likely to refuse.

The increase is null and void if L does not use the cantonal form and/or does not state a reason for the increase and/or simultaneously threatens to terminate the tenancy agreement or actually terminates the agreement (Article 269d(2) SCO).

T may challenge the increase as abusive at the conciliation authority within 30 days of notification (Article 270b(1) SCO). The increase is abusive where it leads to excessive returns from the property (Article 269 SCO). As a rule, however, rents are not abusive if: (i) they are within the range of the rents customary in the specific neighbourhood or place in which the property is located; and/or if (ii) they are based on either an increase of L's costs, or the costs of additional services rendered by L; and/or if (iii) they are, for newer buildings, within the scope of the cost-covering gross revenues, and/or if (iv) they solely aim at the compensation of former abatements of the rent which had been granted based on a restructuring of the costs of financing customary in the particular market and are in a financial schedule which had been known to T in advance, and/or if (v) they are solely based on an increase in the costs of the capital invested (as determined by the current mortgage rates); and/or if (vi) they do not exceed the amount recommended by associations of landlords, or tenants, or similar organizations (Article 269a SCO). Finally, since the rent increase must observe the three months period provided for by Article 266c SCO, it cannot take place more often than four times per year.

Question 14: "Index-clause"

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

⁶⁷ BaK-WEBER, N 1 ad art. 269d SCO; BGE 128 III 419, cons. 2.4.1.

This is possible. The increase, however, must be linked to the national index of consumer prices. In addition, this linkage is only available in respect of tenancy agreements concluded for a fixed duration of at least five years (Article 269b SCO).⁶⁸

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

This is lawful under the following conditions: (i) the tenancy is concluded for a fixed duration of at least three years; (ii) the rent is increased no more than once a year; (iii) the rent increase is fixed in Swiss currency (Article 269c SCO).

Question 15: Rent Increase by Contractual Amendment

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

The parties may mutually agree to a rent increase at any time. Where a unilateral increase by the landlord is concerned, Article 269d SCO applies. Here, the landlord must allow a period of 10 days before the next termination period begins for the tenant to consider challenging the increase. Consequentially, according to legal opinion and jurisprudence, the tenant waives the right to challenge the increase by paying the increased rent, tacitly accepting the increased rent and modifying the tenancy agreement in doing so.⁶⁹

Question 16: Deposits

What are the general rules on deposits?

The landlord may, and usually does, require the tenant to provide a deposit of, at the most, of three months' rent (Article 257e(2) SCO) (this does not apply to business premises).

In the event that the deposit is furnished in cash or securities, the landlord must lodge the deposit with a bank in the tenant's name (Article 257e(1) SCO). The bank may release the deposit only with the landlord's and tenant's approval, or where a summons has been made. Where the landlord raises no claim within a year of termination, the tenant may seek a refund of the deposit from the bank.

⁶⁸ An initiative, supported by the Swiss Tenants' Association, proposed to link the rents to a levelled mortgage rate on a five-year basis. This initiative has however been dismissed by the Swiss people.

⁶⁹ BaK-WEBER, N 1 ad art. 269d SCO, BGE 106 II 356 cons. 3.c.

Question 17: Utilities

What are the general rules on utilities? Which utilities may the landlord make the tenant pay by contractual stipulation? Is it legal to establish in the contract a monthly lump sum to cover certain or all utilities?

The tenant must pay ancillary costs (*Nebenkosten*) (Article 275a and 275b, SCO), i.e. the costs for heating, hot water and similar utilities, where both tenant and landlord have agreed on such a payment. Alternatively, the landlord may agree to bear such costs himself by not including such a clause in the agreement. In most cases, however, it is the tenant who bears such costs.

In general, the tenant pays a monthly sum on account (Article 257c, SCO) to cover ancillary costs. Each year or half year, the landlord must render a statement showing the amount of actual costs, either reimbursing or claiming payment for the difference.

The parties may agree to a lump sum payment. The lump sum is calculated on the basis of the average yearly costs for the last three years (Article 4(2) Swiss Ordinance on Tenancy of Accommodation⁷⁰). The tenant is not liable for a discrepancy between the lump sum and the actual costs in his favour. However, he is entitled to repayment when the difference is in the landlord's favour, due to the mandatory nature of Article 257b(1) SCO, which prohibits payments for ancillary costs in excess of the actual costs.⁷¹

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

General Introduction

Swiss law has not adopted Directive 93/13/EC (OJ 1993, L 95/29) on Unfair Terms in Consumer Contracts, and provides only limited protection with regard to standard contract terms.⁷² According to Article 8, of the Unfair Competition Act⁷³, contract terms are unfair if they substantially differ from statutory provisions or provide for rights and duties which are unexpected, misleading or substantially divergent given the nature of the contract.

⁷⁰ SR 221.213.11.

⁷¹ BaK-Weber, N 9 ad art. 257b SCO.

⁷² See ANDREAS FURRER, AGB als Stolpersteine in der Vertragsgestaltung – Die KMU-Problematik, in: Rechtsfragen rund um die KMU, Schulthess 2003.

⁷³ SR 241.

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)

Because of the low level of protection provided by the Swiss rules on unfair terms and general conditions, these rules have hardly any impact on tenancy law. EC directives, as they are not directly applicable in Switzerland, provide no relief. Moreover, neither Swiss legal opinion nor Swiss case law refers to EC law in the area of tenancy law.

Question 19: Frequent Standard Terms

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

- a) The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorised by a judge.*
- b) The cost of small reparations, up to 100E per annum, have 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?

Clause a) is unlawful. Article 259g SCO allows the tenant to off-set instalments if L has not corrected a defect, on the expiry of a deadline set by the tenant in writing.

Clause b) is lawful, but unnecessary; statute imposes the duty on the tenant to fix minor defects up to an amount of CHF 100 (Article 259 SCO).⁷⁴

Clause c) is unlawful. At the end of the tenancy, the tenant must clean and hand over the apartment in the condition it is in, having used it in accordance with the tenancy. According to the Federal Court, the tenant is not under a duty to repaint the apartment.⁷⁵

Clause d) is, from a Swiss perspective, clearly abusive and immoral, and therefore null and void. The Constitution guarantees freedom of association (Article 23 Swiss Federal Constitution), though this does not prevent the tenant from entering into an agreement which prohibits him from joining a tenants' association. Therefore, it is not so much the

⁷⁴ HONSELL, p. 214.

⁷⁵ BGE 105 II 35, cons. 4.b.

Constitution that prohibits such clauses, but, rather, considerations relating to public morality (Article 19 and 20 SCO) and the protection of personal rights (Article 27 SCC).

As to the directive, see question 18: as Switzerland is not a member state, it is not bound by the directive.

Question 20: Changes to the Building by the Tenant

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

As long the installation of a parabolic antenna is compatible with Swiss public law, and as long as the parties have not agreed that T must seek L's permission in the tenancy agreement, L cannot oppose the installation.

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 local language well?

There is no Swiss jurisprudence dealing with this question. The Turkish immigrant is protected by Article 10 ECHR, which would not, however, have any direct effect (*see* question 1.b; the abovementioned on the direct effect of the Constitution applies).

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?

The tenant must use the apartment with due care and consideration (Article 257f SCO); the landlord and the neighbours do not have to put up with behaviour in contravention of these duties. However, such behaviour is only evidenced if it is either a criminal offence or against public morality.⁷⁶ Exhibiting a poster with the said slogan is therefore admissible (and, in fact, is quite common).

⁷⁶ Commentary SVIT, N 21 ad art. 257f SCO.

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?

As T rents the apartment he is free to decide on whether a given person, including L, may enter the apartment. According to the Swiss Association of Real Property Owners, L may only keep a set of keys with T's consent.⁷⁷ In our opinion however, L may keep a set of keys since he may have a right to enter the apartment (in emergencies), though he may not use the keys without T's consent. If the landlord enters the apartment without the tenant's consent he commits a criminal offence (breach of domestic peace, under Article 186 Swiss Penal Code).

T must accept L's entry where this is necessary for maintenance, the sale or re-letting of the apartment, provided that L gives reasonable notice.⁷⁸

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?

The landlord incurs a double contractual and tortuous liability. As far as the contractual liability is concerned, L is contractually bound to maintain the apartment in "a suitable condition for its predetermined use" (Article 256(1) SCO) which includes the maintenance of the stairs.

However, where T is the only tenant, L is not obliged to carry out all maintenance and repair work: the tenant must bear responsibility for "minor maintenance", i.e. repair and maintenance for which the costs are marginal (*kleiner Unterhalt*).⁷⁹ Therefore, to the extent that "minor maintenance" is involved, the sole tenant must maintain the stairs.

If, however, several tenants occupy the house and the stairs are used by all, it is the landlord who is responsible for the maintenance work. The "suitable condition for the property's predetermined use" is difficult to define, but requires, in any event, that the property does not endanger the life and health of the tenant.⁸⁰ In the event that the condition of the stairs cause injury to the T's child, the landlord is in breach of contract and is liable for the injury and damage as they arise, such as the costs for the child's medical treatment (Article 97(1) in conjunction with Article 256(1) SCO). The tenant must

⁷⁷ Monatsschrift HEV 2/2003, p. 105.

⁷⁸ Commentary SVIT, N 18 ad art. 257h SCO; BaK-WEBER, N 4 ad art. 257h SCO.

⁷⁹ Commentary SVIT, N 13 et seq. ad art. 257 SCO.

⁸⁰ Commentary SVIT, N 4 ad art. 256 SCO.

establish that L is in breach of contract, and that the breach caused the damage incurred by T (L bears the costs incurred by T's child, Article 276 SCC⁸¹), whereas the fault required on L's part is statutorily assumed (Article 97(1) SCO) yet may be rebutted). Any degree of fault on L's part – i.e. intention or negligence – is sufficient (Article 99(1) SCO). The fact that the child has no (direct) contractual relationship with L does not matter, since it is T who incurs the damage as the party responsible for the child.

Furthermore, L is also liable in tort (Article 41 et seq. SCO). T may invoke the double basis of contractual and tortious liability for his claim for damages. L is liable, according to Art 41 et seq. SCO, for personal injury, but generally not for financial losses, except if a particular rule forbids the specific act that caused the damage. The child, represented by T, may therefore bring a claim for damages.

Set 5: Breach of Contract

The generic term “breach of contract” covers non- or late performance, defective performance and impossibility.

In case of *non- or late performance*, the promisee, after admonishing the promisor and setting him a time limit for performance: (i) may, on the passing of the time limit, waive his claim for performance and claim damages instead. Such a party may (ii) choose whether: (ii.a) to claim full damages (i.e. the amount which is commensurate to the worth of full and timely performance); or (ii.b) to claim only those damages which restore the situation to that as if no contract had been entered into at all (including loss of profit), (Article 107 SCO).

Defective performance is governed by Article 97(1) SCO. The party in breach of contract is liable for damages resulting from defective performance (Article 97 SCO), if: (i) financial loss resulted from the breach of contract; and (ii) the party is actually in breach of contract; and (iii) the breach is *de facto* and *de iure* the cause of the damage; and (iv) the contract was wrongfully breached (i.e. intentionally or negligently).

According to the majority of legal opinion and jurisprudence, only financial damage may be compensated (a lost opportunity - i.e. a foregone profit - does not count as damage in this sense).⁸² The damage must result from the breach, that is, the breach must be a *conditio sine qua non* of the result, i.e. the damage (causality *de facto*), and the breach must, in the ordinary course of events cause such damage (causality *de iure*). The Swiss Federal Court is rather generous in affirming such causality, excluding only particularly exceptional consequences.

⁸¹ See PETER TUOR/BERNHARD SCHNYDER/JÖRG SCHMID, *Das schweizerische Zivilgesetzbuch*, Zurich 1995, p. 319.

⁸² See BaK-WIEGAND, N 38 ad art. 97 SCO, but see CHRISTOPH MÜLLER, *Die ärztliche Haftpflicht für die Geburt eines unerwünschten Kindes*, AJP 2003, 522 pp.

To understand the concept of *Impossibility*, two distinctions must be made. First, subjective impossibility is where it is only the debtor/promisor for whom performance is impossible (e.g. because he is obliged to deliver a painting which he does not possess), while objective impossibility means that performance is generally impossible (e.g. because the painting has been destroyed). Second, initial impossibility means that performance was impossible from the beginning, while subsequent impossibility means that, whilst performance was possible at the time of the conclusion of the contract, it subsequently became impossible to perform.

An agreement whose performance is objectively impossible is (in case of initial impossibility) or becomes (in case of subsequent impossibility) null and void (Articles 20 and 119 SCO).

Subjective impossibility, whether initial or subsequent, results in the liability of the non-performing party, if that party wrongfully caused its own subjective impossibility (Article 97(1) SCO).⁸³

A party may be simultaneously liable in both contract and tort (Article 41 et seq. SCO). This party may in such a case invoke both foundations in support of its claim.

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.

The performance of the contract, or, to be precise, primarily the performance of L's duty is thus rendered impossible; consequently, by virtue of Article 119(2) SCO, T's duty to L is terminated.

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

In this case the agreement is also terminated, as contractual performance has become impossible (Article 119 SCO). However, for the part of the month before the apartment was destroyed the rent is due *pro rata temporis*.

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?

Yes. This renders the case one of initial objective impossibility. T's claim for performance is excluded under Article 20 SCO (*see above, general introduction*).

⁸³ This is the opinion of the majority of the doctrine, while others support that subjective impossibility equals late performance, *see* BaK-WIEGAND, N 11 et seq. ad art. 97 SCO; GAUCH/SCHLUEP/SCHMID/REY, N 3140.

Question 24: “Double Contracts”

L rents the same apartment to T1, who takes possession of it, and shortly after also to T2. What are the legal consequences for both contracts?

Both contracts are valid: L performs his duty towards T1 and therefore fulfils the contract. The second contract, however, cannot be performed by L, as he is unable to provide the apartment to T2 as required by the agreement, that is, in a condition suitable for its designated use by T2. T2 may first request performance and, upon L’s failure, terminate the agreement and claim damages (Article 102 et seq. SCO).⁸⁴

No real property law issues are involved in this case, unless T2 seeks to occupy the apartment against T1’s will. In such a case, T1 may invoke the simple fact of his previous occupation to oppose T2’s claim; this serves as a basis of the assumption that T1 is legally entitled to continued occupancy. If T2 fails to prove that he has a better claim to occupation, his claim will be overruled (Articles 926, 928 SCC). The Cantons provide for a special fast-track procedure for such cases.⁸⁵

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 1/17/2003 without any special arrangements in the case of delay. However, as the neighbour N challenges, though unsuccessfully in the end, the building permit granted by the competent authority to B in an administrative law procedure, the apartment is not available until 1/1/2004. Has T any claims against L? Has L claims against N?

In general, L has no claim against N, as there is no contractual relationship between the two. A claim for damages may arise only in the event of circumstances described above (introduction, section 5, breach of contract). Such a claim cannot consist solely of increased expenses, less income than anticipated or a foregone profit, since losses can only be compensated where they are caused by an act or omission which is prohibited by a legal rule. Therefore, compensation is not due in cases such as the present, except in the event that the damage violates public morality (Article 41(2) SCO). Such may be the case if the construction is challenged without any reason at all, and therefore clearly in violation of the principle of good faith.⁸⁶

⁸⁴ HONSELL, p. 207; Commentary SVIT, N 28 ad art. 256 SCO.

⁸⁵ For the Canton of Zurich, *see* § 222(2) Code of Civil Procedure.

⁸⁶ BGE 93 II 183, cons. 9 ; ATTILIO GADOLA, Die unbegründete Drittbeschwerde im öffentlichrechtlichen Bauprozess, ZBL 1994, p. 101 et seq.

Due to his late performance, L is in breach of contract, and T has a claim against him (Articles 97 et seq. 259e SCO), L being liable to T in respect of such items as deposits paid on furniture, and intervening hotel expenditure etc. (as regards other losses, *see* general introduction). T is, however, under a duty, as described, to mitigate his losses; i.e. a duty to rent an apartment before completion, where this is less expensive than a hotel. As long as the apartment is not ready and accessible, T is not obliged to pay the rent (Article 82 SCO). Alternatively, T is entitled to terminate the agreement (Article 107, 259b(a) SCO).

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.

As a rule, the rent may be reduced on the grounds of defective performance. The existence of mildew may or may not be defective performance: local custom will address the question of whether T must remove such stains by defining the scope of maintenance which is incumbent upon him (Article 259 SCO). If, however, the stains result from T's lack of maintenance or hygiene, T is liable to L; and the rent cannot be reduced. If the mildew results neither from T's act or omission, it constitutes defective performance on L's part, and T may claim a rent reduction (Article 259d SCO). The period during which the rent can be reduced runs from the time of L's cognisance of the stains to the time of their removal (Article 259d SCO). The rent can only be reduced after L has been notified.

Variant 1

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

This is possible (Article 259b lit b SCO). The two weeks period may, however, be too short from a Swiss perspective.

Variant 2

T did not discover the mildew stains when inspecting the house before entering into the contract, even though these had already been present.

T may proceed as above and claim a reduction of the rent until such time as the stains are removed (Article 258(2) SCO). Since the stains pre-existed, T does not have to remove them himself, notwithstanding local custom (cf. above question 26, a)).⁸⁷ As they are

⁸⁷ BaK-WEBER, N 8 ad art. 259 SCO.

deemed minor defects, such stains do not allow T to terminate the agreement under the terms of Article 107 SCO (late performance; cf. above, general introduction).

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

T may claim a rent reduction for defective performance; L, obliged to maintain the apartment in a state suitable for the defined use (i.e. housing), cannot comply with this obligation because of the noise pollution. L on his part may claim compensation from the city administration for his loss of rental income.

b) The tenants of the neighbouring apartment in the house have repeatedly organised loud nightly parties from 11 p.m. to 5 am.

T may of course directly request the neighbours to comply with their duty to show due consideration towards him. In the event that the neighbours continue their parties, T may ask L to advise the neighbours to refrain from further partying and, in case they default, to take steps to terminate their tenancy (Article 257f(3) SCO). As mentioned above, L has an obligation towards T to maintain the apartment in a state suitable for its defined use, and therefore has a duty in contract to take the required steps to end the noise that emanates from the neighbours' parties. However, if the owner/landlord of the neighbouring apartment is not T's landlord but a second landlord (L2), L2 has no contractual obligation towards T; T cannot ask L2 to proceed against his tenants.

Furthermore and independently from contract, T may – based on real property law, and, more precisely, the law relating to good neighbourly relations – request the court to prohibit the neighbours from producing excessive noise emissions. Art. 684 SCC, prohibits such emissions, and applies, not only to real property owners, but also to persons with a legal title for possession, such as tenants.

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?

No, the rules that form the basis of L's liability are mandatory (Article 256(2) SCO).

One could argue that, by contractually limiting the use of the apartment to such as are compatible with noise emissions' regulations, the landlord may indirectly exclude his liability: since L is no longer in breach of contract, no claim for damages could arise. Precisely this argument, however, explains why for residential, as opposed to commercial, tenancies, such restrictions are not possible (Article 256(2) SCO).⁸⁸

⁸⁸ BaK-WEBER, N 5 ad art. 256 SCO.

Question 27: House to be used for Specific Purpose

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

T could terminate the tenancy on the grounds of a substantial error (Article 23 et seq. SCO), under the following conditions: (i) T was in error concerning a fact fundamental to the agreement, and (ii) T was objectively entitled to consider this fact fundamental. In the event that both parties were aware of T's plan, the fact that permission for the surgery was not granted by the local authorities may constitute a substantial error. Where the erroneous assumption concerns a "future fact", such as the granting of permission, the Swiss Federal Court has ruled, that such a mistake may constitute an error within the meaning of Article 23 et seq. SCO.⁸⁹ The Swiss Federal Court has also held – in similar cases – that an error made at the time of the conclusion of the contract concerning the likelihood that a particular site will or will not be the subject of further development may constitute a substantial error.⁹⁰ A substantial error was, however, denied by the Swiss Federal Court where the future likelihood of development could simply not be determined.⁹¹ In the present case, it will therefore be crucial to establish the degree to which T was certain that permission would be granted, and whether L made any corresponding guarantees (generally speaking, he should not have been too certain since a permission to use some rooms for work, in particular for a surgery, cannot be taken for granted).

The question may also be analyzed from the perspective of whether the parties entered into a conditional agreement; for where the condition precedent fails, the agreement lapses (Article 151 SCO). However, such an analysis is based on the assumption that it was the parties' common intention that the agreement should not be binding if the intended use proved impossible. Assuming that the tenancy was set down in writing, if a common intention on the apartment's use was not included, this would indicate that this aspect was not considered a part of the agreement, and is therefore to be treated as irrelevant.

Set 6: The Relationship among the Tenant and Third Persons

General Introduction

In respect of the tenant's legal relationship to third parties his rights are limited to those arising from his relationship with the landlord. These rights are set out in the SCO and impose duties on the landlord such as maintaining a reasonable living environment. The

⁸⁹ Cf. the analysis made by the Swiss Federal Court in BGE 109 II 105, cons. 4.a.

⁹⁰ BGE 98 II 15, cons. 1 (the vendor however had expressly confirmed that the site is suitable for construction). Reverse proposition: BGE 109 II 105, cons. 4.b.bb.

⁹¹ BGE 95 II 407, cons. 1.b. (the vendor has not made any confirmations).

landlord is the one who owns the property, wherefrom the rights and duties extend. Therefore, he is the only one in a position to deal officially or directly with third parties. As a result, the tenant's relationship to third parties is indirect, he has an obligation to work with and through the landlord, rather than dealing with third parties directly where the use of the property is concerned. Similarly, the landlord has the duty to deal with third parties hindering the use of the dwelling on the tenant's behalf, when validly requested.

Question 28: Neighbour Relations

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

See above, question 26 (T may advise the neighbours to refrain from producing such emissions. He may request the landlord to take the necessary steps to stop the emissions and, if necessary, terminate the tenancy agreement with N). If T and N are tenants of different landlords (L1 and L2 respectively), T cannot request L1 to take measures against N, as T has no contractual link to L2. He may however submit a claim against N, requesting the court to prohibit N from continuing producing emissions (Article 684 SCC).

This applies equally to the situation in which T is not a tenant but the owner of the adjacent apartment.

Question 29: Damages caused by Third Parties

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

T, not being the property owner, cannot claim tort damages (because a tort claim requires the action causing the damage to be unlawful, that is, involving the violation of a good protected in an absolute way or in violation of a rule prohibiting such actions; in the present case, no absolutely protected good belonging to T has been violated. *See above question 1.b).*

However, T may assert a claim based on his lawful possession, which is impaired by the damage caused to the property (Article 928(2) SCC). Such a claim requires the damage to be proven; the restriction of the possession – i.e. the residential use – does not necessarily constitute such damage, but entitles T to reduce the rent based on Article 259d SCO until the house has been repaired. L must repair the house in order to fulfil his duties under the tenancy agreement (i.e. maintain the use of the house for the purpose of the tenancy, under the terms of Article 256 SCO).

Therefore, only L has a claim for damages against the building company in tort (Article 41 SCO). The building company is vicariously liable for its employee who, in performance of contractual duties, caused the damage (Article 55 SCO).

L may not assert any claim against N, either in tort or in contract: N, with whom L does not have a contractual relationship, is not responsible for the building company's actions.

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?

Based on the smells, N has a claim against T since T, by omitting to empty the garbage bin, breaches his duty to use the apartment with due consideration towards his neighbours (*see* question above). The smells are an emission that N does not have to put up with. N has a right to both the cessation of emissions, and the restraint of future emissions. Since N does not incur any (financial) damage by the smell alone, he cannot claim damages. N's claim is dealt with in a fast-track procedure⁹² which may take place in T's absence, at least in the event that T does not respond to a summons.

On the other hand, T may have a claim against N where N's intervention is deemed an "improper and unauthorised agency" (*unechte Geschäftsführung ohne Auftrag*). Such an improper and unauthorised agency exists if N does not intend to act in T's interests, and only considers his own.⁹³ However, assuming that N sought to prevent both his own and T's apartment from incurring damage by a gas explosion, this would be a case in which the agency is not "improper and unauthorised", but a real and necessary agency.

Furthermore, N's intervention, were it to be held as being objectively necessary, is authorised under the terms of Article 419 SCO. According to Article 420(1) SCO, N is therefore only liable for damage caused by his intervention if he has acted negligently. Negligence in this context is defined as the ignorance of the required standard of care. In the present case, T could not have acted in a different way, assuming that the police would not have been able to enter the apartment without causing equal damage, or have arrived within a reasonable time, given the threat of explosion. In such circumstances, N could not be held to have acted negligently, and T would not have a claim against him.

⁹² See e.g. § 222(2) Zurich Code of Civil Procedure.

⁹³ See BaK-WEBER, N 2 ad art. 419 SCO.

Based on his lawful and necessary intervention, N may claim compensation for the damage caused to his chisel (Article 422 (1) SCO). It is entirely within the court's discretion to award such compensation.