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TENLAW: Tenancy Law and Housing Policy in Multi-level Europe

Tenant's Rights Brochure for

GERMANY

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1. Introductory information

- Give a very brief introduction on the national rental market

    - Current supply and demand situation

The German housing market is characterized by a high share of rental dwellings which are mainly owned by private persons. According to the most recent numbers from the *Zensus 2011*, there are ca. 41.3 million dwellings in Germany. About 52% of them are used for rental purposes (EU-average ca. 29%) and 64% of these rental dwellings are owned by private persons. The share of owner-occupied dwellings amounts to about 42% of the whole dwelling stock (EU-average ca. 71%).

Although the total number of the population is expected to decrease (from 80.5 million in 2012 to about 79 million in 2025 and to about 67.5 million in 2060), it is believed that the number of households will still be increasing in the next few years. From 1992 to 2012, the number of households in Germany increased by 14% to 40.66 million, and will account for 41.1 million in 2025. The assumption, that the

number of households will still increase although the population decreases, results basically from the upward tendency to live in one-person households. In 1992, one-person households constituted 33.7% of the overall household number, and this percentage amounted to 40.5% in 2012. For the future, it is estimated that one-person households will even account for 42.5% of all households. In order to be able to supply the current as well as the upcoming demand, 183,000 new dwellings will have to be built annually until 2025. In 2012, about 205,000 new dwellings were constructed. According to estimates, there is currently a shortage in Germany of 250,000 dwellings. The cities with the most massive housing shortage are Munich (-31,000 dwellings), Frankfurt (-17,500 dwellings) and Hamburg (-15,000 dwellings).

With regard to rental dwellings, the average useful floor area amounts to 69.9 square metres, and every tenant has on average a useful floor area of 38.7 square metres, with the result that these dwellings are inhabited by on average 1.8 persons. Concerning the amount paid for rent, the average monthly rent excluding utilities (*Nebenkosten*) is EUR 376.16 or EUR 5.43 per square metre and the average rent including utilities is EUR 522.21 or EUR 7.56 per square metre. The financial burden, which is considered as the proportion of expenses for housing in relation to the household income, amounts to about 22.5% (EU-average ca. 16.9%).

- Main current problems of the national rental market from the perspective of tenants

- Brokerage fee: in the big cities, dwellings are frequently offered by estate agents who are hired by the landlord, but have to be paid by the tenant
- Rental market in the metropolises: finding an affordable rental dwelling is difficult in the metropolises like Munich, Frankfurt or Hamburg
- Shortage of social dwellings: the demand for social dwellings exceeds its supply considerably; currently, there is a small number of newly constructed dwellings

- Significance of different forms of rental tenure

  - Private renting

About 92% of all rental dwellings are rented out on the private rental market, i.e. the landlord is free to determine the amount of rent at the time of concluding the tenancy contract, although this is subject to some limits under criminal law. During the tenancy, however, he is bound to the reference rent customary in the locality (*ortsübliche Vergleichsmiete*) regarding increases in rent.

  - "Housing with a public task" (e.g. dwellings offered by housing associations, public bodies etc)

The remaining 8% are assigned to the rental tenures with a public task. This category can be defined as housing that is on the one hand subject to rent control which the owner has to accept in return for subsidization and on the other hand is subject to access restrictions which limits the prospective tenants. Only tenants who cannot

secure adequate accommodation for themselves because of their low income or other financial circumstances are entitled to this kind of rental housing. However, the commitments of the landlord are limited in time, and after a time limit expires, the rents can be raised to market level and the housing unit can become part of the private rental sector. The subsidization is not restricted to special types of owners so that all kinds of owners can become landlords of housing with a public task.

- Some general recommendations to foreigners on how to find a rental home (including any specificities with respect to the position of foreigners on the national rental market)

In general, it is advisable for a foreigner who does not speak German very well ask a native speaker to come along to the viewing of a dwelling in order to avoid possible communication problems or misunderstandings. In particular, guest students should contact the international office or the student services of the university they will visit. Foreigners who come to Germany for work may ask their employer or colleagues how to find an apartment or whether the company even offers special dwellings for their workers (*Werkswohnung*).

- Main problems and "traps" in tenancy law from the perspective of tenants

- Amount of rent reduction: there are reference points based on comparable court cases, but it depends on the individual case; therefore, no legal certainty regarding the amount of rent the tenant may reduce because of a material or legal defect of the dwelling
- Clauses on cosmetic repairs: the wide case law regarding the effectiveness of clauses on cosmetic repairs creates legal uncertainty (over three quarters of all terms concerning cosmetic repairs are void)
- Operating costs: every second invoice of advance payments for operating costs apportioned to tenants is incorrect
- Parabolic antenna: the right of the tenant to install a parabolic antenna is still controversial
- Use of standard contracts by the landlord or estate agent: the provisions of the contract are often not geared to the particular tenancy; furthermore, the provisions are frequently formulated to the advantage of the landlord; therefore, the tenant needs legal knowledge or legal advice in order to know whether the contractual provisions are effective or not

- "*Important legal terms related to tenancy law*"

German	Translation into English
außerordentliche Kündigung	termination without notice for a compelling reason

Betriebskosten	operating costs
Bruttomiete/Warmmiete	gross rent (including utilities)
Eintrittsrecht	right of succession
Indexmiete	indexed rent
Kauf bricht nicht Miete	purchase is subject to existing leases
Kaution	security deposit
Kleinreparatur	minor maintenance work
Kostenmiete	rent that is required to cover the current expenses
Maklergebühr	brokerage fee
Mieterhöhung	rent increase
Mietspiegel	list of representative rents
Nebenkosten	utilities
Nettomiete/Kaltmiete	net rent (excluding utilities)
ordentliche Kündigung	termination of an open-ended tenancy
ortsübliche Vergleichsmiete	reference rent customary in the locality
Schönheitsreparatur	cosmetic repair
Staffelmiete	stepped rent
Untermiete	sublease/subletting
Vermieterpfandrecht	landlord's right of lien
vertragsgemäßer Gebrauch	use in conformity with the contract
Wohnberechtigungsschein	qualification certificate for social or subsidized housing
Zeitmietvertrag	fixed-term tenancy

(An official English translation of the current German Civil Code (tenancy law: sections 535-580a) is available under http://www.gesetze-im-internet.de/englisch_bgb/).

2. Looking for a place to live

2.1. Rights of the prospective tenant

- What bases for discrimination in the selection of tenants are allowed/prohibited? What about, for example, status as a foreigner, student, unmarried partner, or person with a short-term work contract?

According to the broad non-discrimination rule enshrined in the General Act of Equal Treatment, discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation is prohibited. This rule must be considered by landlords in every phase of the tenancy. However, different treatment in the rental housing sector is exceptionally allowed in order to create or achieve a stable structure of citizens, a balanced settlement structure, and balanced economic, social and cultural circumstances.

- What kinds of questions by the landlord are allowed (e.g. on sexual orientation, intention to have children etc)? If a prohibited question is asked, does the tenant have the right to lie?

Information concerning the personal status or the solvency of the potential tenant can be gathered lawfully if they are essential for the tenancy, meaning that the landlord must prove a legitimate interest. Legitimate questions are for example the identity of the potential tenant, his civil status and the number of children. Questions about the solvency are justified as well, if they concern the profession and income of the potential tenant. In that case, the tenant is obligated to provide information truthfully. Otherwise the landlord has a right to dispute the contract or to avoid his declaration of will.

If the question is however illegitimate, especially because of infringing personal rights, the tenant has a “right to lie”. In that case, the landlord cannot rescind the contract. This applies to detailed questions about civil status, sexual orientation, the intention to have children or the state of health of the potential tenant’s health.

- Is a “reservation fee” usual and legal (i.e. money charged by the landlord to allow the prospective tenant to participate in the selection process)?

Landlords are not allowed to demand a fee for the negotiation of a tenancy contract over their own residential space, and even estate agents are prohibited from demanding such a fee from a prospective tenant before a contract has been entered into. Only after the conclusion of a tenancy agreement as a result of his negotiation, they may claim a brokerage fee.

- What kinds of checks on the personal and financial status of the tenant are usual and legal (e.g. the landlord requiring an independent credit report)?

The following checks on the personal and financial status of the potential tenant are usual:

- interviews either with the potential tenant (especially about his solvency), his last landlord or his employer; the last landlord is not obligated to issue his previous tenant a certificate that there are no rent arrears (*Mietschuldenfreiheitsbescheinigung*), but the tenant may demand receipts for received rent payments,
- demanding submission of a salary statement from the prospective tenant,
- common solvency check of the General Credit Protection Agency (*Schutzgemeinschaft für allgemeine Kreditsicherung*, SCHUFA) with the tenant's consent or a self-disclosure of the tenant,
- inspection of lists of debtors maintained by the local courts or other credit agencies,
- requiring a bank reference is permissible only in the case of commercial tenants.

Data checks on the prospective tenant, particularly those concerning financial status can in any case be gathered lawfully with the consent of the tenant. The consent is necessary because of the fundamental right to informational self-determination and the right to data protection. Tenants are not obligated to give their consent to a solvency check, but it is often demanded and therefore "helpful" for the landlord in the tenant selection process.

- What is the role of estate agents in assisting the tenant in the search for housing? Are there other bodies or institutions assisting the tenant in the search for housing?

In order to find a dwelling, the tenant may hire an estate agent who assists him in the search, especially by proposing and executing viewings of dwellings corresponding to the tenants' needs. If a tenancy contract is entered into as the result of the negotiation of the estate agent, the latter may demand at most the amount of two monthly net rents (*Netto-/Kaltmiete*) excluding utilities plus value added tax.

Apart from estate agents, the tenant can be assisted by municipalities provided that he is searching for social housing, as well as by housing cooperatives (*Wohnungsbaugenossenschaft*) if he wants to rent a cooperative dwelling (*Genossenschaftswohnung*). Regarding the accommodation of students and guest students, most universities have special institutions, like the student services or the international office, which provide assistance in searching a dwelling or room especially in student hostels.

If the tenant wants to find a dwelling on his own, he can search for housing advertisements in newspapers or on the bulletin board of the particular city/town (dwellings are usually offered by the landlord himself) or he may search on the common internet portals:

- www.immobilienscout24.de
- www.immonet.de
- www.immowelt.de

} dwellings are often offered by estate agents

- www.wg-gesucht.de (for flat-shares)

- Are there any accessible "blacklists" (or equivalent mechanisms) of bad landlords/tenants? Is there a system for rating and labelling preferred landlords/tenants?

There are blacklists of "bad tenants" in Germany. These lists or databases are compiled by different companies (e.g. Deutsche Mieter Datenbank KG (DEMDA) www.demda.de; SAF Forderungsmanagement GmbH http://www.immobilienscout24.de/de/anbieten/serviceleistungen/bonitaetspruefung.jsp; Supercheck GmbH www.privatevermieter.de; Vermieterschutzkartei Deutschland-GmbH & Co. KG (VSK) http://www.vermieterschutzkartei.de/; Zentralverband der Deutschen Haus-, Wohnungs- und Grundeigentümer e.V. - Haus & Grund Deutschland http://www.hausundgrund.de/mietersolvenzcheck.html) which are subject to restrictions based on data protection rights. The companies obtain data from the local courts and their lists of debtors as well as from credit institutions, energy utilities, debt collection agencies and landlords. Landlords who want to request information about a tenant must register and pay a fixed rate for each disclosure. Even tenants themselves have the possibility to get a self-disclosure from these companies or the SCHUFA.

For landlords, there are no real "blacklists", but there are similar mechanisms. The tenant may for example obtain information about the landlord from the local tenant association. Apart from that, a website exists on which tenants can rate landlords as well as neighbourhoods (http://www.wowirwohnen.de/leitbild/). The landlord is not in fact named on the website, but the exact address of the dwelling is indicated. If the landlord is represented by an estate agent, tenants should further find out whether or not the estate agent is a member of the German Real Estate Association (*Immobilienverband Deutschland*, IVD), since a membership of the IVD confirms the agent as a professional and qualified service provider.

2.2. The rental agreement

- What are the requirements for a valid conclusion of a rental contract (is written form necessary; is registration necessary and if yes, what kinds of fees apply lawfully)?

The tenancy agreement does not have to be in writing to be valid. However, if the tenancy shall be temporary for a period longer than one year, the contract has to be laid down in written form. The same applies in case of a tenancy unlimited in time, but under exclusion of the right to terminate the tenancy ordinarily for a period of more than one year. Otherwise, the tenancy is deemed to be concluded for an indefinite period of time. Apart from that, the contract is still effective, but it is

advisable to always conclude a tenancy in writing to avoid problems of proof. In order to satisfy the requirement of written form, the essential conditions of the contract must follow from the tenancy agreement, in particular the rent amount, the parties, the period and the rental property.

Ordinary tenancy contracts do not have to be registered at the *Land* register. There is no fee in terms of a public charge for the conclusion of a tenancy contract in Germany, but the landlord is not prohibited from agreeing to charge the tenant a fee for the conclusion of the tenancy contract (*Vertragsausfertigungsgebühr*). The limit of this contract fee constitutes the coverage of costs, since the landlord may not demand commission for his own dwelling. Unreasonable, excessive fees illegally violate principles of good morals and can therefore be reclaimed from the landlord. Courts have held that a fee of about EUR 50 is cost-covering and therefore reasonable. An agreement on a fee for the conclusion of the contract within the frame of standard business terms is however always ineffective.

- What is the mandatory content of a contract?

    - Which data and information must be contained in a contract?

A tenancy contract must at least include and describe the parties, the rental object, the contract duration (and as the case may be a reason for the limitation on duration), the amount of rent and finally the residential purpose, which is especially necessary in case of a mixed-use-tenancy. Apart from these mandatory minimum requirements, the contract should also provide information on the beginning of the tenancy, the size of the dwelling, the scope of use, provisions on keeping of animals, contracts of supply, the allocation of costs for utilities and the duty to carry out cosmetic repairs as well as to bear the costs for minor damages.

    - Duration: open-ended vs. time limited contracts (if legal, under what conditions?)

Tenancy contracts can be concluded either for a definite or an indefinite period of time. In Germany, tenancy contracts are mainly concluded for an indefinite period of time, since, to the protection of tenants, the landlord must prove one of the following three reasons for the fixed-term tenancy: (1) the landlord wishes to use the premises as a dwelling for himself, members of his family or his household; (2) the landlord wishes to eliminate the premises or change or repair them so substantially that the measures would be significantly more difficult as a result of a continuation of the lease; (3) the landlord wishes to rent the premises to a person obliged to perform services, for example an employee of the landlord. The landlord must notify the tenant in writing of the reason for the fixed-term when the agreement is entered into. Otherwise, the tenancy is deemed to be concluded for an indefinite period of time. The same applies if a reason for the fixed-term tenancy is not met. The tenant may also demand an unlimited extension of the tenancy if the reason ceases during the tenancy period. But if the reason for the fixed-term is met and does not cease to apply, the tenant has no claim to contract extension.

Tenancies on holiday homes, dwellings inhabited by the landlord himself or public houses are exempted from this restriction as well as residential space in student or other hostels for young people.

- Which indications regarding the rent payment must be contained in the contract?

Regarding the rent payment, the contract must first distinguish between the net rent as consideration for the use of the dwelling, the utilities which are included in the gross rent (*Brutto-/Warmmiete*) and those for which the tenant himself has to conclude a contract of supply. Furthermore, the tenant must know when and in which intervals he has to pay the rent. Usually, the tenant has to pay the rent in advance on a monthly basis. If the contract does not provide information on the due date, the rent is, according to tenancy law, to be paid at the beginning – but at the latest on the third working day – of each payment period the parties had agreed. Since Saturday is not a bank business day, this day is not considered as a working day in the context of calculating the payment deadline. Finally, the contract must contain information on how the rent is to be paid. Usually, the parties agree that the tenant has to pay the rent via bank transfer, often in form of a standing order.

- Repairs, furnishings, and other usual content of importance to tenant

  - Is it legal for the landlord to shift the costs for certain kinds of repairs (if yes, which?) to the tenant?

According to German tenancy law, it is up to the landlord to maintain the rented property in a suitable condition as well as to bear all the costs resulting from necessary maintenance works and repairs. Nevertheless, it is lawful and usual to shift the costs for minor maintenance works (*Kleinreparaturen*) and for cosmetic repairs (*Schönheitsreparaturen*) to the tenant.

Cosmetic repairs include renovation works such as paperhanging, painting or whitewashing the walls and ceilings, painting the floors, radiators including tubes, inner doors as well as the windows and insides of exterior doors. Usually, kitchens and bath rooms with showers have to be renovated every three years; toilets, corridors, halls, living and sleeping rooms every five years; and ancillary rooms e.g. storage rooms every seven years. Nevertheless, the scope of the duty to renovate depends primarily on the degree of the real wear and tear. Therefore, a fixed schedule in a tenancy agreement is ineffective. But if the tenancy contract provides a flexible schedule using the words “regularly”, “usually” or “in general”, the assignment of cosmetic repairs is effective. The same applies to clauses according to which the tenant is obliged to pay the costs for cosmetic repairs proportionately in case of commenced but not expired renovation periods. If the tenant must however pay these costs on the basis of inflexible periods, such a clause would be void. Clauses committing the tenant to pay the costs for cosmetic repairs according to an estimate of a professional painter are ineffective as well. This applies also to clauses according to which the tenant is obliged to carry out cosmetic repairs at his own expense by craftsmen.

Minor maintenance works include however only those parts of the dwelling which the tenant uses directly and often, for example repairing small damage to the installed hardware for electricity, water and gas, to the equipment for cooking and baking as well as to the locks of doors and windows. An assignment to the tenant is effective, if the clause determines a ceiling for every single repair and also for all minor repairs within a year. The costs the tenant shall bear for a single repair may not exceed an amount of EUR 75 up to EUR 100, while the costs for the whole year may not amount to more than 8% to 10% of the annual rent. Furthermore, the tenant may not be obliged to carry out the maintenance works on his own.

Provided a clause on the assignment of cosmetic repairs or minor maintenance works is ineffective, the contents of the tenancy contract are determined by the statutory provisions with the result that the landlord remains responsible.

- Is the landlord or the tenant expected to provide furnishings and/or major appliances?

According to the building regulations, a dwelling must have at least one habitable room, one toilet, one bathtub or shower and a kitchen or a kitchenette, i.e. the technical requirements for the installation of a kitchen suffice. Apart from that, it depends on the tenancy agreement whether and which furnishings the landlord has to provide. In the case of a tenancy on a furnished apartment, the landlord usually provides the main furnishings, like kitchen furnishings, a bed or bed couch, a wardrobe and a desk.

- Is the tenant advised to have an inventory made so as to avoid future liability for losses and deteriorations (especially in the case of a furnished dwelling)?

As part of the handover of the dwelling, the landlord usually makes a move-in checklist (and in case of a furnished dwelling also an inventory list) which becomes part of the tenancy contract and documents the actual condition of the dwelling as well as existing damage. Based on these documents, the tenant is liable only for future modifications and deteriorations of the dwelling (and its furnishings) provided they exceed the wear and tear on the leased property from use in conformity with the contract.

- Any other usual contractual clauses of relevance to the tenant

Usual contractual clauses of relevance to the tenant are the following:

- clause on the provision of a security deposit
- clause on the apportionment of operating costs
- clause on the assignment of cosmetic repairs or minor maintenance works
- clauses on the prohibition to keep domestic animals or to smoke inside the dwelling
- clause on the right of the landlord to inspect the dwelling

- clause on the exclusion of the tenant's right to give ordinary notice

- Parties to the contract

    - Which persons, though not mentioned in the contract, are allowed to move into the apartment together with the tenant (partner, children etc.)?

Spouses, civil partners, parents and children of the tenant are allowed to move into a dwelling together with the tenant. Permission on behalf of the landlord is not necessary, since taking close family members into the dwelling falls within the scope of appropriate use. The same applies to domestic servants and nursing staff. Nevertheless, the tenant has to inform the landlord that he intends to take family members into the dwelling. Cohabitees and other family members like brothers and sisters of the tenant are however subject to approval.

    - Is the tenant obligated to occupy the dwelling (i.e. to use as tenant's primary home)?

Based on the tenancy contract, the tenant is entitled, but not obligated, to live in the dwelling. As long as he still takes care of the dwelling, the landlord has therefore no legitimate reason to terminate the tenancy contract based on the tenant's failure to occupy the dwelling.

    - Is a change of parties legal in the following cases?

        - divorce (and equivalents such as separation of non-married and same sex couples);

In case of divorce, a former spouse who acquires the matrimonial home as a consequence of divorce becomes party to the tenancy which was entered into by the other spouse or both. The same applies with regard to civil partners. According to family law, the spouse shall get it that is more dependent on using the matrimonial home than the other spouse, especially taking into account the best interests of the children living in the household and of the circumstances of the spouses. However, the landlord has an extraordinary right to terminate the contract provided that there is a compelling reason in the person of the entering spouse.

        - apartments shared among students (in particular: may a student moving out be replaced without permission of the landlord);

If the dwelling is rented as a flat-share, the German courts infer from such a tenancy that the landlord has to accept the change of several members. Consequently, he has to exclude the right to change the members or to include a clause on their succession in the tenancy agreement, in order to avoid possible unfavourable legal consequences regarding the constant exit and entry of tenants.

- death of tenant;

In case of death of the tenant, the tenancy is continued with the surviving tenants provided that the contract has been entered into with more than one tenant. Then, the surviving tenant may terminate the tenancy with the statutory notice period of three months within one month after obtaining knowledge of the death of the tenant. As far as there is no other tenant, specific persons who maintained a joint household together with him at the time of demise, like spouse, civil partner, children or life partner (in this order), have a right of succession. If any of these persons do not object, the landlord is committed to continue the tenancy with this person, provided he is not entitled to an extraordinary right of termination due to a compelling reason in the person of the successor. In case the tenancy is not continued with one of these persons, it has to be continued with the heir, who is as well as the landlord entitled to terminate the lease extraordinarily within one month. The persons with whom the tenancy is continued are liable together with the heir as joint and several debtors for obligations incurred up to the death of the tenant.

In all these cases described, the new tenant enters into the tenancy contract under the same conditions as the former tenant.

- bankruptcy of the landlord;

If the landlord is bankrupt and the dwelling is sold through a compulsory auction, the new owner enters into existing tenancies and takes over all the rights and duties of the former landlord. But unlike in the case of a general sale of residential space, the new owner has a special right to terminate existing tenancy contracts within the statutory notice period of three months.

- Subletting: Under what conditions is subletting allowed? How can an abuse of subletting (when the tenant is offered not an ordinary lease contract but only a sublease contract) be counteracted?

Principally, the tenant is not entitled to permit a third party use of the rented property without the consent of the landlord, particularly not to sublet it. This applies in any case to the subletting of the whole dwelling. If the tenant wants however to sublet just a part of the residential space, for example one room, he may demand permission from the landlord provided that he acquires, after entering into the tenancy, a justified interest in permitting a third party to use part of the dwelling. Personal or economic interests of the tenant can cause such a justified interest, as for instance the need of a financial adjustment due to income reduction or unemployment. The mere wish to admit someone else is however not sufficient.

In case of a legitimate interest, the landlord may refuse approval only if (1) there is a compelling reason in the person of the third party; (2) the residential space would be overcrowded or (3) the landlord cannot for other reasons reasonably be expected to permit third-party use. A compelling reason is assumed if the landlord fears serious disturbance of the domestic peace based on concrete indications or if he has a personal animosity with the subtenant. But the decision whether or not to permit the sublet may especially not be based on the solvency of the subtenant, since it causes

a tenancy just between the subtenant and the main tenant and not with the landlord. Further, the determination of when a dwelling is regarded as overcrowded depends on the circumstances of the individual case. In general, each person needs at least nine square metres and children less than six years of age should have at least six square metres. Provided the landlord can only be expected to permit third-party use with a reasonable increase in rent, especially with regard to utilities, he may then make permission dependent on the tenant agreeing to such a rent increase.

If the third party moves in without the permission of the landlord, the sublease contract is nevertheless effective and the landlord has no claim to the rent which the main tenant charged the subtenant, because the subletting does not affect the landlord's legal position. However, he is entitled to terminate the main tenancy without notice after an unheeded warning notice, but giving notice is unjustified when the landlord has to accept the subtenant.

Since a sublease contract does not cause a contractual relationship between the landlord and the subtenant and is in its existence dependent on the main tenancy, the subtenant does not enjoy legal protection in relation to the landlord. But the latter has to observe the provisions on the protection of tenants nevertheless in relation to the main tenant. Therefore, landlords usually do not offer a sublease contract instead of an ordinary one. If the landlord offers a tenant only a sublease contract although there is no main tenant, the contract is anyhow regarded as an ordinary tenancy contract and consequently subject to the tenant protection rules, because the actual purpose of the contract is crucial and not its title.

- Does the contract bind the new owner in the case of sale of the premises?

If the dwelling is disposed of by the landlord, the acquirer of the residential space enters into existing tenancies and takes over all the rights and duties of a landlord that the seller used to have. Provided the acquirer does not perform his duties, the landlord is liable for damages in the same way as a surety. Therefore, the sale of the dwelling does not change the position of the tenant.

Special protection exists with respect to tenants in the case residential space has been recently converted into condominiums (*Eigentumswohnung*). If apartment ownership has been established after the tenant was permitted to use it and the dwelling is sold to a third party, then the acquirer may invoke a legitimate interest (personal needs or prevention of making appropriate commercial use) only after the end of three years after the disposal. This security of tenure is only applicable to the disposal of apartment ownership that has been established after the handover of the dwelling. Therefore, tenants who have already rented a condominium instead of a rental apartment do not enjoy this special protection.

- Costs and Utility Charges

  - What is the relevant legal regulation of utilities (i.e. the supply of water, heating and electricity)? Must the landlord or the tenant conclude the contracts for provision of utilities?

Under German law, utilities mean primarily operating costs (*Betriebskosten*). They are defined as the costs that are incurred from day to day by the owner as a result of the ownership or of the intended use of the building, the outbuildings, facilities, installations and the land. These running costs include on the one hand basic utilities like the costs for the supply and the consumption of water and heating and on the other hand additional utilities like the real estate tax, the charge for sewage water as well as the costs for the maintenance of the heating system, for street cleaning, waste disposal, house cleaning, disinfestations, garden maintenance, lighting for shared parts of the building, chimney cleaning, lifts, caretaker, insurance and benefits in kind and performances rendered by the owner.

The costs for utilities may be distributed according to the consumption, the size of the dwelling, per capita or per housing unit. If the parties have not agreed on a certain method, operating costs are to be apportioned in proportion to the floor space. However, if the residential building is equipped with a central heating and water supply system, the costs for heating and warm water must always be distributed according to the consumption of the tenant. Other operating costs depending on the reported consumption or causation by the tenant shall be also distributed according to consumption, as far as such technical requirements are available, for example regarding waste disposal.

Whether the landlord or the tenant must conclude the contracts of supply of water, heating and electricity depends on the contractual agreement as well as on the respective supply system, since there is no legal regulation. As a general rule, it is always the tenant who concludes the contract if the costs for the supply and consumption can be distributed according to his consumption (e.g. because the dwelling is supplied by a self-contained heating system and has its own water meter). With regard to the supply of electricity, it is almost always the tenant who concludes the contract with the power company (except for cases in which the owner supplies the dwelling by means of renewable energies like solar power), since most of the dwellings have their own electric meter.

- Which utilities may be charged from the tenant by the landlord? What is the standard practice?

According to German tenancy law, the landlord must bear all costs to which the rented object is subject. However, the parties may agree that the tenant is to bear the operating costs. As already mentioned above, operating costs include the real estate tax, the charge for sewage water, the costs for the supply and the consumption of water and heating (provided the landlord concludes the contracts of supply) as well as the costs for the maintenance of the heating system, for street cleaning, waste disposal, house cleaning, disinfestations, garden maintenance, lighting for shared parts of the building, chimney cleaning, lifts, caretaker, insurances and benefits in kind and performances rendered by the owner. The costs of administration, maintenance and restoration however are not apportionable. Usually, the parties agree that the tenant has to bear the apportionable operating costs. The costs for the supply and consumption of electricity are however not regarded as operating costs. Since almost all dwellings in Germany have their own electric meter with the result that the tenant concludes the contract of supply, there is anyway no need for allocation.

- Is the tenant responsible for taxes levied by local municipalities for the provision of public services (e.g. for waste collection or road repair)?

As already mentioned above, the costs for street cleaning and waste collection are regarded as operating costs and may be therefore apportioned to the tenant. Other public services such as road charges for instance are however not allocatable.

- Is it lawful to shift condominium costs, and if yes, which ones, onto the tenant (e.g. housekeeping costs)?

It is lawful to shift condominium costs, such as costs for house cleaning, disinfestations or for a caretaker, onto the tenant, since these costs are defined as operating costs that may be borne by the tenant. Other costs concerning the administration, maintenance or restoration of the condominium are not apportionable.

- Deposits and additional guarantees

  - What is the usual and lawful amount of a deposit?

In Germany, it is common practice that the parties agree on a security deposit for the performance of the tenant's duties. It may amount at most to three months' rent excluding operating costs. Provided the parties agree on several security deposits, their total amount also may not exceed this limit.

If the deposit is to be provided in the form of a sum of money, the tenant is entitled to pay in three equal monthly instalments. The first instalment is due upon commencement of the tenancy, while the other instalments become due together with the subsequent rent payments. A deviating agreement to the disadvantage of the tenant is ineffective. If the tenant is in default to pay the security deposit in the amount of two months' rents, the landlord may terminate the tenancy with immediate effect.

  - How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant)?

The landlord must invest a security deposit provided in form of a sum of money with a banking institution at the usual rate of interest for savings deposit and with a notice period of three months. Because of this duty to invest the deposit, the landlord often requires the tenant to open a savings account on his own and to put it in pledge for the landlord's benefit. Alternatively, the parties may also agree on another form of investment. In either case, the investment must be made separately from the assets of the landlord, usually in the form of a trust account, and the tenant is entitled to the income. The duty of the landlord to pay interest on the deposit does not however apply to residential space in a student hostel or a hostel for young people.

  - Are additional guarantees or a personal guarantor usual and lawful?

Usually, the parties agree that the tenant must provide the security deposit in the form of a sum of money. Additionally or as an alternative guarantee, it is also lawful to agree on a pledge of claims or movable things as well as on the provision of a reasonable surety (*Bürge*). In either case, the limit of three months' rent must be observed. A surety as a personal guarantor is often required by the landlord if the prospective tenant has only low-income due to education or study. Then, the landlord usually demands the parents of the tenant to stand surety.

- What kinds of expenses are covered by the guarantee/ the guarantor?

The security deposit serves as a guarantee for all claims of the landlord arising from the tenancy. It is precisely not supposed to be an advance rent payment, so that the tenant is not entitled to stop paying the rent before the tenancy ends. In case of social or subsidized housing, an agreement on a security deposit is only valid if it is intended for ensuring claims for damages regarding the dwelling or forborne cosmetic repairs.

3. During the tenancy

3.1. Tenant's rights

- Defects and disturbances

  - Which defects and disturbances are legally relevant (e.g. mould and humidity in the dwelling; exposure to noise e.g. from a building site in front of the dwelling; noisy neighbours; occupation by third parties)?

Under German tenancy law, a defect is defined as every adverse deviation of the actual condition from the contractually agreed condition, which impairs or negates the suitability of the rented dwelling. Such impairment can be based either on a material or on a legal defect. The latter exists in particular if the tenant is fully or partially deprived by a third-party right of use of the rented dwelling. A material defect is especially assumed if a warranted characteristic, as for instance the provision of a kitchen, is lacking or later ceases, as well as if the dwelling is mould-infested or humid in general. Noise from a building site and noisy neighbours are considered as material defects of the dwelling only if the noise exceeds the limits of reasonableness. Thus, a defect is especially assumed in case of noise due to extensive construction works at the neighbouring plot, as well as in case of noisy disputes during the night time in the dwelling next door, but not in the event of general noise caused by children.

  - What are the tenant's remedies against the landlord and/or third parties in such situations (e.g. unilateral rent reduction vs. rent reduction to be allowed by court; damages; "right to cure" = the landlord's right to repair the defect; the tenant first repairs the defect and then claims the

costs from the landlord)

Principally, all claims and rights of the tenant against the landlord due to defects of the dwelling require that the tenant did not know of the defect when entering into the tenancy contract or at the time of acceptance. Provided he remains unaware of the defect due to gross negligence, he has these rights only if the landlord fraudulently concealed the defect. Furthermore, the tenant is obligated to notify the landlord immediately if a defect comes to light during the tenancy period. Otherwise, he is entitled neither to reduce the rent nor to demand damages. Rather, the tenant is liable to the landlord for damages incurred by the failure or delay to report. Finally, the landlord is not subject to any claims due to a defect which is imputed solely to the sphere of the tenant.

Provided these requirements are met, the tenant is entitled to a rent reduction. For the period when suitability of the dwelling is negated, the tenant is exempted from paying the rent, while he has to pay a reasonable part of the rent as far as suitability is merely reduced. Concerning this, only a defect which substantially reduces suitability can cause the legal consequence of rent reduction. A defect is regarded as trivial if it is easy to recognize and to remedy and its removal entails only low costs. The amount of rent reduction is calculated on the basis of the gross rent and usually expressed as a percentage.

Apart from rent reduction, the tenant may also demand damages if (1) a defect exists when the tenancy contract is entered into, regardless of any fault by the landlord; (2) a defect arises later due to a circumstance that the landlord is responsible for or (3) the landlord is in default in remedying a defect. In the latter case as well as if an immediate removal of the defect is necessary to maintain or restore the state of the dwelling, the tenant may remedy the defect himself and demand reimbursement of the necessary expenses (section 536a (II) BGB). In order to place the landlord in default, the tenant has to give a warning notice in addition to the notice of defect. The tenant may demand damages notwithstanding the right to rent reduction. Instead of demanding damages and reimbursement of expenses, the tenant may set off these claims against the landlord's claim for rent. Alternatively, he may also exercise a right of retention in relation to such a claim. In both cases, the tenant has to notify the landlord in text form of his intention at least one month prior to the due date of the rent.

- Repairs of the dwelling

    - Which kinds of repairs is the landlord obliged to carry out?

One of the primary duties of the landlord is to maintain the rented property in a suitable condition for the whole tenancy period. Therefore, the landlord is principally responsible for all kinds of maintenance works and repairs. But as already mentioned above, it is lawful and usual to include clauses in the tenancy contract, according to which the tenant is obligated to bear a portion of costs for minor maintenance works as well as to carry out cosmetic repairs. Provided the contract contains such clauses, the landlord is obliged to carry out repairs which are defined as neither cosmetic repairs nor as minor maintenance works (e.g. which entails costs of more than EUR 100 per single repair).

- Does a tenant have the right to make repairs at his own expense and then deduct the repair costs from the rent payment?

Whether or not the tenant may replace the rent payment by a performance in kind depends primarily on the provisions in the tenancy agreement. Apart from that, the tenant has a statutory right to this effect in so far as he is entitled to set off a claim for reimbursement of expenses against the landlord's claim for rent. A claim for reimbursement requires that the tenant had remedied a defect either because the landlord was in default in remedying the defect or because an immediate remedy was necessary to preserve or restore the state of the rented property. Furthermore, the tenant may also have a claim for reimbursement if he has carried out for instance necessary renovation works or repairs which correspond to the landlord's interests and will, but to which he has not been instructed by the landlord.

- Alterations of the dwelling

  - Is the tenant allowed to make other changes to the dwelling?

    - In particular, adaptations for disability (e.g. building an elevator, ensuring access for wheelchairs etc.)

With regard to changes necessary in order to accommodate a handicapped person, the tenant may demand the approval of the landlord for structural changes or other installations required to make the use of the dwelling or access to it fit for the needs of the disabled. The landlord may only refuse approval if his interest in maintaining the rented dwelling or building unchanged outweighs the tenant's interests. Furthermore, the landlord may make his approval dependent upon payment of a reasonable additional security deposit for restoration of the original condition. Consequently, the tenant must bear not only the costs of the structural alterations, but also the costs of the restorations works.

    - Affixing antennas and dishes

In general, tenants are not entitled to fix a parabolic antenna without the permission of the landlord. However, if a foreign tenant cannot gain access to TV channels in his native language or of his home country even by using cable television, he is, pursuant to his right to inform himself without hindrance from generally accessible sources, allowed to install such an antenna without permission. To this extent, the fundamental freedom of information outweighs the landlord's property right. The interest of a foreign tenant to be informed about the events in his home country is not lessened if he lives in Germany for many years or even if he has German citizenship. Furthermore, the tenant may not be referred to newspapers or the internet in order to inform himself. However, some courts have recently held that the possibility to receive TV channels via internet should be considered within the weighting, since it is nowadays comparable to TV. Therefore, it remains to be seen if foreign tenants will be permitted in the future to install a parabolic antenna as often as in recent years.

The possibility for a German tenant to claim permission for the installation of such an antenna is however *a priori* more limited: He has to prove a higher need for information, for example due to his profession, which cannot be satisfied through other media sources, like the internet, cable or terrestrial television.

Provided the landlord has to tolerate the installation of a parabolic antenna, he has nevertheless still the right (1) to determine the place where the antenna shall be fixed, (2) to be indemnified from all costs and (3) to demand a deposit for the costs of a removal. If the tenant is not however entitled to install such an antenna, the tenant uses the dwelling in breach of contract and the landlord may after an unheeded warning seek a prohibitory injunction.

- Repainting and drilling the walls (to hang pictures etc.)

Without the landlord's permission, the tenant is principally not allowed to carry out physical alterations affecting the structure of the residential building, even if these measures lead to an improvement on the condition of the dwelling. This includes e.g. the refurbishment of bathrooms, the installation of new heating systems as well as the renewal of floors. Only in the case of minimal structural alterations or if refusal of approval on part of the landlord would be due to other reasons contrary to the principle of good faith and trust, would the tenant have a claim to permission. This applies especially to alterations that are reversible with little trouble or that can be restored easily, like repainted walls, dowels or nails.

- Uses of the dwelling

  - Are the following uses allowed or prohibited?

    - keeping domestic animals

It is generally accepted that keeping animals inside the dwelling belongs to the contractual use of the rented dwelling and is also protected by the fundamental right to free development in so far as it concerns non-disturbing pets, which are usually kept in a cage or an aquarium. Therefore, a general prohibition to keep pets of any kind is ineffective. This applies also to a general prohibition of keeping disturbing animals like cats and dogs inside the dwelling. The decision whether to permit the keeping of animals or not must be made instead on a case-by-case basis. It depends especially on the species and number of animals, the size of the dwelling, special needs of the tenant as well as on the conduct of the landlord in comparable cases.

    - producing smells

Producing smells belongs to the ordinary use of residential space. But to the extent that smells cause an unreasonable stench and originate from dirt and uncleanness in the dwelling, other tenants of the residential building are entitled to a rent reduction, and the landlord may terminate the tenancy. Smoking, not in an excessive way, belongs also to the contractual use of residential space. Therefore, it is principally not

possible for the landlord to terminate the tenancy due to the fact that the tenant smokes inside the dwelling. Recently, however, a court has upheld such a termination, since the smoke led to an unreasonable odour nuisance that posed a risk to health of the other tenants of a multiple dwelling. Regarding compensation because of discolorations or other damage due to nicotine, the tenant is only liable if smoking caused a deterioration of the dwelling that cannot be removed by aesthetic repairs.

- receiving guests over-night

As a general rule, tenants may receive guests as often and as much as they want to, also over-night. Only in exceptional cases may the landlord ban a guest of the tenant from the dwelling, for example if this person has disturbed the domestic peace several times. The tenant is even entitled to receive guests for a period of several weeks not needing the permission of the landlord. But in the case that the visit lasts over a period of three months, it is assumed that the accommodation of the guest is permanent. Then, the tenant may demand permission for the subletting from the landlord. However, this does not apply to spouses or children of the tenant.

- fixing pamphlets outside

Whether or not the tenant is entitled to fix a pamphlet in the window or at the house front depends essentially on its content and presentation. Furthermore, the tenant's freedom of expression has to be weighed against the landlord's property right as well as against the rights of the other tenants. Considering this, courts have held that the tenant should be in principle allowed to fix posters outside, even if its content is political. But as far as such a poster causes a disturbance of the domestic peace, it has to be removed.

- small-scale commercial activity

Commercial use of a dwelling rented solely for residential purposes still falls under the term "habitation" as long as the professional activities are exercised in a way that they do not emerge to the outside. Thus, offices or shops with active customer traffic are contrary to contract and do not have to be tolerated by the landlord without any prior agreement. However, if the effects on the rental object and on other tenants are not beyond the scope of usual residential use, the landlord is obligated to permit the commercial activity.

3.2. Landlord's rights

- Is there any form of rent control (restrictions of the rent a landlord may charge)?

Hitherto, a system of rent control has applied only to tenancies concerning housing with a public task. In that case, the landlord may only demand a rent that is required to cover the current expenditures (*Kostenmiete*) and well below the market level.

However, after an average period of about fifteen years, these dwellings pass into the free market, and landlords are then permitted to increase the rent up to the market level.

With regard to the private rental market, the introduction of a rent control system is part of the coalition agreement of the new Federal Government but not yet regulated by law. After the elections for the German Federal Parliament, the *Bundestag*, the new governing parties agreed during the coalition negotiations on a "Package for affordable Building and Housing". Accordingly, the amount of rent in case of new tenancy contracts may not exceed 10% of the reference rent customary in the locality.

Apart from that, a rent control exists under general civil law as well as criminal law. Under criminal law, the landlord commits an administrative offence by demanding a rent that exceeds the customary rent for comparable dwellings by more than 20% in times of a limited supply of housing accommodation. If the landlord however demands a rent in excess of 50% of the rent charged for comparable dwellings, he commits even a criminal offence. If the parties have agreed on such an excessively high rent, this agreement is partially void under general civil law. The tenant may therefore claim restitution regarding paid excessively high rents. Since the rent agreement is only partially invalid, only the excessive amount can be claimed back. Prospectively, the tenant will have to pay a permissible rent instead of the excessive rent, which anyhow still exceeds the level of the customary rent. Apart from the partially void rent agreement, the rest of the tenancy contract remains effective.

- Rent and the implementation of rent increases
    - When is a rent increase legal? In particular:
        - Are there restrictions on how many times the rent may be increased in a certain period?

Regarding increases in rent, the landlord may either include a clause on future changes in the amount of rent in the tenancy agreement or demand a higher rent during the tenancy period.

Future changes in the amount of rent may be agreed only as a stepped rent or as indexed rent. A stepped rent is an automatic increase clause by which the rent is fixed in varying amounts for specific periods of time. Each amount of rent or increase must be indicated as a monetary amount in the written contract. If the clause only indicates the increase per square metre or as a percentage, the agreement on the stepped-rent is void, since the amount of increase is not transparent enough for the tenant. The rent must remain unchanged on each occasion for at least one year and further unilateral increases are excluded during the period of stepped rent. An index oriented increase clause is however a written agreement by which the rent is determined by means of the price index for the cost of living of all private households in Germany. The price index is computed by the Federal Statistical Office (*Statistisches Bundesamt*) and available at: https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Preise/Verbrauch

erpreisindizes/Tabellen_/VerbraucherpreiseKategorien.html. As well as in the case of a stepped rent, the rent must remain unchanged for at least one year while an indexed rent is applicable, except for increases because of modernization or changes in operating costs. An increase in rent up to reference rent customary in the locality is however completely excluded. If the indexed rent changes, the landlord must indicate the change in the price index as well as the rent (or the increase in rent) in the individual case as a monetary amount in a written declaration. The revised rent must be paid at the commencement of the second month beginning after receipt of the declaration.

The ordinary form of rent increase during the tenancy period in order to compensate inflation or to increase profit is the increase in rent up to the reference rent customary in the locality. Such an increase is allowed if the rent has remained unchanged for fifteen months at the time the increase is to occur and can be therefore made at the earliest one year after the most recent rent increase. Then, the rent may not be raised within three years by more than 20% or even 15% in regions which can be determined by the federal states. To date, the capping limit of 15% is applicable in Berlin, Hamburg and many cities in Bavaria. According to the adopted coalition agreement of CDU and SPD, the federal states shall be prospectively legitimated to reduce the capping limit for regions with a tight rental market to 15% within four years instead of three. However, rent increases due to renovation measures or changes in operating costs are not taken into account with regard to the period of fifteen months as well as to the capping limit. In case the capping limit is not observed, the demand to increase the rent is not entirely void but is capped to the admissible extent.

The landlord may also increase the rent if he has carried out modernization measures. Then, the increase of the annual rent may not amount to more than 11% of the costs spent on the modernization. According to the coalition agreement of the new Federal Government, it shall be reduced to 10%. Finally, the rent may be increased due to changes in operating costs. In that case, the landlord must observe the principle of economic efficiency and may demand an adjustment only to a reasonable amount.

- Is there a possible cap or ceiling (fixed by statute or jurisprudence) which determines the maximum rent that may be charged lawfully?

Apart from the ceilings of 20% or 15% for the increase in rent up to the reference rent customary in the locality and the cap of 11% because of modernization measures, the maximum lawful amount of rent is determined by the mentioned criminal provisions, i.e. not more than 20% of the customary rent charged for comparable dwellings in times of a limited supply of housing accommodation or 50% of the rent charged for comparable dwellings.

- What is the procedure to be followed for rent increases? To what extent can the tenant object to a rent increase?

The landlord has to declare and to justify all types of unilateral rent increases to the tenant in text form. With regard to an increase in rent up to the customary level in the locality, the declaration must state one of the possible references for the justification

of the increase. Usually, the landlord justifies such rent increase by referring to the list of representative rents (*Mietspiegel*), to the extent that the city where the dwelling is situated has one (http://www.mietspiegelportal.de/). It is formed from the usual payments that have been agreed or that have been changed in the last four years in the municipality or in a comparable municipality for residential space that is comparable in type, size, furnishings, quality, location, and energy quality and furnishing. If the landlord wants to increase the rent because of modernization measures, the declaration must provide the calculation of the increase based on the incurred costs. Further, an increase in rent because of changes in operating costs requires that the basis of the apportionment is referred to and explained in the declaration.

In general, the tenant owes the unilaterally increased rent from the beginning of the third month after receipt of the demand. However, in the case of an increase in rent up to the customary level in the locality, the tenant has to approve the increase. Nevertheless, if the tenant does not grant his approval by the end of the second month after receiving the declaration although all requirements like the period of fifteen months or the capping limit are met, the landlord may sue for it within three additional months. If, however, the tenant does not approve the rent increase explicitly, but pays the increased rent without any reservation, he grants his approval at least impliedly. The number of unreserved payments that is required to assume such an approval ranges between one or two and five to six times. Apart from that, the tenant has a special right to terminate the tenancy contract within two months after receipt of the declaration of the increase if the landlord asserts a right to a rent increase. Then, the tenancy ends after three months, and the rent increase does not take effect.

- Entering the premises and related issues

    - Under what conditions may the landlord enter the premises?

Considering the constitutional protection of the tenant's right of occupancy as well as of the inviolability of home, tenants have the right to be left alone in their rented dwelling. Therefore, the landlord is only allowed to enter the dwelling if he has (i) a concrete and legitimate reason, (ii) announced his intention beforehand and (iii) obtained the tenant's consent. Otherwise, he commits the criminal offence of trespass.

Reasons which entitle the landlord to enter the dwelling are for example the implementation of maintenance or modernization measures, the reasonable suspicion of a breach of contract by the tenant, the intention to sell the dwelling and to show it to prospective buyers or tenants as well as the inspection in order to avert imminent dangers. The tenant has to be informed at least twenty-four hours in advance and the inspection should take place at an acceptable time (from 10:00 a.m. to 1:00 p.m. and 3:00 p.m. at the latest to 8:00 p.m.).

Whether the landlord above is entitled to inspect the dwelling periodically without any reason is controversial. While some courts concede landlords the right to inspect the dwelling in intervals of one to two years, other courts deny such a general right on the

grounds that periodic inspections are not necessary, since the tenant is obliged anyhow to inform the landlord about defects or dangers.

- Is the landlord allowed to keep a set of keys to the rented apartment?

The landlord is obliged to hand all keys over to the tenant in order to enable him to use the rented dwelling without any disturbance. Especially, he may not withhold a key for no apparent reason. If the landlord enters the dwelling by means of an own key, the tenant can terminate the tenancy without notice.

- Can the landlord legally lock a tenant out of the rented premises, e.g. for not paying rent?

The landlord is not entitled to lock the tenant out of the rented dwelling, even if he could terminate the tenancy due to arrears of rent. In case the landlord nevertheless replaces the lock, the tenant is not obliged to pay the rent for as long as he is not able to use the dwelling. Beyond that, the tenant may require possession to be restored.

- Can the landlord legally take or seize a tenant's personal property in the rented dwelling, in particular in the case of rent arrears?

The landlord has, for his claims arising from the tenancy, a statutory right of lien (*Vermieterpfandrecht*) over the things brought upon the dwelling by the tenant. This right may not be asserted for future compensation claims and for rent for periods subsequent to the following years of the tenancy. Furthermore, it does not extend to the things that are not subject to attachment. Objects exempted from attachment are especially things serving the tenant's personal use or his household as well as food, fuel for heating and cooking, and means of lightning required for four weeks by the tenant and his household members.

The right of lien is extinguished upon the removal of the things, provided that the landlord knows about the removal or has not objected to it. The tenant may also release his things from the right of lien by provision of security. If the landlord wants to enforce his claim to grant possession of the tenant's things, he must go to court or he can make use of his limited right of self-help. Accordingly, the landlord is on the one hand entitled to prevent the removal of the things that are subject to his right of lien. On the other hand he may take possession of these things if the tenant moves out. Since most of the tenant's things are exempted from attachment and the realization of pledges is relatively complicated and often not productive, the landlord's right of lien is of little importance for practice.

4. Ending the tenancy

4.1. Termination by the tenant

- Open ended contract (if existing): under what conditions and in what form may the tenant terminate the tenancy?

If the tenancy is entered into for an indefinite period of time, the tenant can give ordinary notice. The notice period amounts to three months and is allowed at the latest on the third working day of a calendar month to the end of the second month thereafter. Agreements on deviating deadlines and notice periods are excluded, but the parties are free to agree on a shorter notice period for a termination on part of the tenant. As against the termination by the landlord, the tenant does not need a justification for giving notice and the notice period remains constant regardless of the duration of the tenancy. The aim of this regulation is to ensure the mobility of tenants. Nevertheless, it is possible to exclude the tenant's right to give ordinary notice up to four years by a corresponding agreement, provided that the landlord's right to termination is excluded for the same period.

- Under what circumstances may a tenant terminate a tenancy before the end of the rental term (e.g. unbearable neighbours; bad state of dwelling; moving for professional reasons)?

The tenant is able to terminate the contract before the agreed date if he can prove a compelling reason. Then, the tenancy ends with immediate effect. This kind of termination may not be excluded and is subject to both unlimited and limited in time tenancy contracts. In general, a compelling reason is deemed to obtain if the party giving notice cannot be reasonably expected to continue the lease until the end of the notice period or until the lease ends in another way, principally because of a fundamental breach of contractual obligations. Certain examples for compelling reasons that justify a termination without notice are enumerated in the national tenancy law. Accordingly, the tenant can give immediate notice if (1) he is not permitted the use of the rented property in conformity with the contract, in whole or in part, in good time, or is deprived of this use; (2) the dwelling is in such a condition that its use entails a significant endangerment of health or (3) the landlord permanently disturbs the domestic peace. Examples of a significant endangerment of the tenant's health are mildew infestation in the dwelling to a substantial extent. However, in the case that the compelling reason consists in the violation of an obligation under the tenancy, the notice of termination is permitted only after an unheeded warning notice, unless such a warning notice obviously shows no chance of succeeding.

- May the tenant leave before the end of the rental term if he or she finds a suitable replacement tenant?

In case the tenant wants to move out prior to the expiry of the statutory notice period, for example due to a new job in another city, landlords often agree with it on condition that the tenant can propose a suitable and solvent prospective tenant, who is willing to move in soon.

4.2. Termination by the landlord

- Open-ended contract (if existing): under what conditions and in what form may the landlord terminate the tenancy (= eviction) (e.g. the landlord needs the house for himself or wants to renovate and use it differently in the future)?

If the landlord wants to terminate an open-ended tenancy contract, he may give ordinary notice provided he can prove a justified interest. This restriction does not apply to tenancies on holiday homes, dwellings inhabited by the landlord himself, public houses, residential space in student or other hostels for young people, since these types of tenancies are excluded from the security of tenure.

A justified interest exists in particular if (1) the tenant has culpably and non-trivially violated his contractual duties; (2) the landlord needs the premises for himself, members of his family or of his household or (3) the tenancy contract prevents the landlord from making appropriate commercial use of the premises. Notice of termination for the purpose of increasing the rent is however explicitly excluded.

(1) Violations of contractual duties by the tenant are for example use in breach of contract, default in payment in general, payments not on time, unapproved subletting, as well as noise disturbance and defamation of the landlord or other tenants. In any case, the tenant has to violate his duties culpably and non-trivially, which with regard to default in paying the rent would require that the tenant is in arrears with an amount of at least one monthly rent. A prior warning notice by the landlord is not necessary.

(2) Termination due to personal needs requires that the landlord can prove actual need for him or one of his family or household members. For instance, family members in this sense include *inter alia* parents, children, brothers and sisters, grandchildren, parents-in-law as well as sons- or daughters-in-law and even nieces and nephews. It is not necessary that the family member lives in the same household as the landlord, but if the landlord wants to terminate the tenancy in order to allow a person other than a family member to move into the dwelling, this person must necessarily be a member of his household. An effective notice of termination requires further that it is based on a reliable plan for the future of the person who wants to move in. Provided the landlord has another suitable dwelling in the same house or housing complex, which is available for rent, he is furthermore obligated to offer the tenant this dwelling as replacement accommodation. Termination for personal needs is finally regarded as an abuse of rights if the landlord could have foreseen his needs at the time of concluding the tenancy contract. However, this applies only in so far as notice is given within the first three years of the tenancy.

(3) Ordinary notice of termination is furthermore allowed if the tenancy contract prevents the landlord from making appropriate commercial use of the premises. The landlord must have the intention to use the premises differently, for example by selling the house or the dwelling, by demolishing the residential building in order to use the plot of land in another way, by dividing a large dwelling into small ones or by executing fundamental refurbishment measures. The possibility to attain a higher amount of rent by renting the residential space to others may not be taken into account in this context. In any case, the intention to use the premises in another way has to be based on comprehensible and reasonable considerations. Additionally, it is required that the landlord would suffer substantial disadvantages by continuing the tenancy contract.

The ordinary notice of termination is subject to a period of notice of three months. It must be given at the latest on the third working day of a calendar month to the end of the second month thereafter. The notice period is extended for the landlord, by three months in each case, five and eight years after the tenant is permitted to use the residential space. For tenancies on dwellings where the landlord lives in the same building it can be extended up to twelve months. Giving valid reason of notice usually requires that the landlord specifies the reason in a notice of termination, which has to be in writing and shall contain a reference to the tenant's right of objection.

- Must the landlord resort to court?

Provided the tenant accepts the notice of termination and vacates the dwelling at the end of the tenancy period, there is no need for the landlord to resort to court. Only if the tenant does not fulfil his obligation to return the rented property and to deliver it vacated, i.e. clear of contributed things, the landlord must submit an action to vacate the dwelling to the local court which lies within the district where the immovable property is situated.

- Are there any defences available for the tenant against an eviction?

In case notice has been given to terminate an open-ended tenancy for ordinary reasons, the tenant may object to the notice of termination and demand continuation if termination of the tenancy would be a hardship for him or his family that is not justifiable even considering the justified interest of the landlord. In particular, advanced age or serious diseases of the tenant are considered as such a hardship to the extent that they would make removal impossible. Additionally, a hardship is also assumed if appropriate substitute residential space cannot be procured on reasonable terms. The tenant must declare the objection in writing to the landlord at the latest two months prior to the date the tenancy is to be terminated.

Provided all these requirements are met, the tenancy is continued as long as it is appropriate. To the extent that an agreement between landlord and tenant cannot be reached, the duration and the terms under which the tenancy is continued are determined by a judge. The decided duration usually amounts to between six months and a maximum of three years. Upon expiry of this period, the tenant may demand a further continuation of the tenancy only due to unforeseen circumstances. However, if it is uncertain from the beginning when the circumstances causing the hardship are expected to cease, the tenancy may be continued for an indefinite period of time.

In addition to objecting to the notice of termination, the tenant may also request during the court proceeding to be allowed to stay for a reasonable additional period of time. The time limit to vacate the dwelling can be extended, but may not amount to longer than one year in total. Tenancies on holiday homes, on residential space in student or other hostels for young people, dwellings inhabited by the landlord himself or public houses are exempted from this protection from eviction as well as from the possibility of objection. Beyond that, the tenant has another chance to avoid or to delay eviction by filing another request. Accordingly, the court may reserve, prohibit or temporarily stay the measure of compulsory enforcement, provided that eviction would entail a hardship that violates principles of good morals. Regarding this extension, the court is not bound to a legal time limit. Such a hardship is assumed if

the tenant is incapable of moving out because of diseases that pose a risk to his health or life, e.g. committing suicide. In general, impending homelessness does not constitute a hardship in this sense, since the tenant is responsible to find a new dwelling within the period of time set by the court and there exists also public accommodation for homeless persons. The request is to be filed at the latest within two weeks prior to the date set for vacating the dwelling, unless the grounds on which the request is based came about only after this time or the tenant was prevented from filing the request in due time through no fault on his own.

As a last resort, the tenant may finally file an action raising an objection to the claim being enforced. It is targeted at the assessment that the compulsory enforcement is inadmissible. But such an action may be asserted only insofar as the grounds on which it is based arose after the close of the hearing that was the last opportunity for objections to be asserted.

If the court grants protection according to these provisions, it does not result in the continuation of the tenancy contract, but only the court's permission to continue using the dwelling without a contract.

- Under what circumstances may the landlord terminate a tenancy before the end of the rental term?

Provided the landlord wants to terminate the tenancy before the end of the rental term, he needs a compelling reason. The landlord can give such a compelling reason if (1) the tenant disturbs the domestic peace; (2) the tenant is in default of the payment of security deposit in the amount of two months' rent; (3) the landlord cannot be reasonably expected to continue the tenancy until the end of the notice period or until the tenancy ends in another way; (4) the tenant violates the rights of the landlords to a substantial degree by substantially endangering the rented property by neglecting to exercise the care incumbent upon him or by allowing a third party to use it without permission; (5) the tenant is in default, on two successive dates, of payment of the rent or of a portion of the rent that is not insignificant, or (6) in a period of time spanning more than two dates is in default of payment of the rent in an amount that is as much as the amount of rent for two months. In the latter case, termination is excluded if the landlord has by then obtained satisfaction. Furthermore, termination based on delayed payments of rent is ineffective, if at the latest by the end of two months after the eviction claim is pending, the landlord is satisfied or a public authority agrees to satisfy him. However, this will not apply again if a previous termination had already been rendered ineffective under this provision within the last two years.

Also, reasons which are similar to that mentioned above may entitle the landlord to terminate the tenancy without notice. Such similar reasons are for example severe insults against him or his employees as well as criminal acts, threats or false offences willfully reported against him.

Apart from the compelling reason, this kind of termination requires an unheeded warning notice, unless it does not show an obvious chance of succeeding. Afterwards, the landlord may give notice by specifying the reason in a written notice of termination which shall also contain a reference to the tenant's right of objection. Termination must take place within a reasonable period after the landlord obtained

knowledge of the reason for termination (a period of five months is still reasonable; but termination cannot be based on an event that is dated back to more than a half year). Otherwise he will lose his right to terminate. This kind of termination is not subject to a period of notice. Therefore, the tenancy ends with immediate effect, but the tenant has a time period of one to up to two weeks to vacate the dwelling.

- Are there any defences available for the tenant in that case?

In case of termination before the end of the tenancy period, the tenant may object and demand continuation of the tenancy at most only until the contractually specified date of termination. The same applies to the possibility to request extension of the period to vacate the dwelling during the court proceedings. But with regard to the protection from eviction in case of an immoral hardship, the tenant enjoys the same protection as if an open-ended tenancy has been terminated.

- What happens if the tenant does not leave after the regular end of the tenancy or does not hand in (all) the keys of the dwelling?

If the tenant continues to use the dwelling instead of vacating it after the regular end of the tenancy period, it is first possible that the tenancy is extended for an indefinite period of time. This applies only to the extent that neither the tenant nor the landlord has declared his intention to the contrary to the other party within two weeks. The period commences for the tenant upon continuation of use and for the landlord at the point of time when he obtains knowledge of the continuation. However, this prolongation right is dispositive and may be therefore excluded in the tenancy agreement.

In case a prolongation right is not possible, the landlord may for the duration of retention demand as compensation the agreed rent or the rent that is customarily paid for comparable items in the locality, since the tenant is in default of his duty to return the dwelling. In general, the landlord may also assert further damages provided that the tenant is responsible for the late return.

4.3. Return of the deposit

- Within what timeframe and under what conditions does the landlord have to return the tenant's security deposit?

After termination of the tenancy, the landlord has to return the deposit including interest, provided he has no claims against the tenant. To find out whether claims may arise which can be set off against the tenant's claim for reimbursement of the deposit, courts grant the landlord an appropriate period depending on the circumstances of each individual case. Usually, this period should not amount to more than six months.

- What deductions can the landlord make from the security deposit?

- In the case of a furnished dwelling: may the landlord make a deduction for damages due to the ordinary use of furniture?

During the tenancy, the landlord is in general prohibited from making use of the security deposit. Only if he has an undisputed, legally recognized or obviously justified claim arising from the tenancy, is he entitled to use the deposit. In that case, the landlord may demand the tenant to replenish the deposit. After termination of the tenancy, he may make deduction from the security deposit for all outstanding debts that have arisen from the tenancy, in particular arrears with rent payments or with utilities as well as claims for damages.

With regard to furnished dwellings, the landlord may only demand an addition to the rent in return for the furniture, but he is not entitled to make a deduction from the security deposit for damage due to the ordinary use of furniture. Such damage is already satisfied by the rent payment.

4.4. Adjudicating a dispute

- In what forum are tenancy cases typically adjudicated?

  - Are there specialized courts for adjudication of tenancy disputes?

The competency for litigation regarding private tenancy law lies with the ordinary jurisdiction, i.e. it is enforced in civil courts. Within the civil jurisdiction, the local court (*Amtsgericht*) is competent for conflicts arising out of residential tenancies, independent of the amount in dispute. The place of jurisdiction is usually where the immovable property is situated.

  - Is an accelerated form of procedure used for the adjudication of tenancy cases?

If the tenancy case is brought to court, the court of first instance – the local court – shall work towards an out-of-court settlement in every station of the process. For this purpose the court has to hold in particular a conciliatory hearing before the actual hearing, unless the parties have already undertaken a conciliation procedure under the law of the federal states. For the conciliation proceedings the court can refer the parties to a judge appointed therefor, who is not authorized to decide. Nevertheless, this form of procedure does not necessarily lead to an accelerated adjudication.

  - Is conciliation, mediation or some other form of alternative dispute resolution available or even compulsory?

Instead of bringing tenancy cases to courts, there are also possibilities to get an out-of-court settlement between tenant and landlord. On the one hand, tenants and landlords associations have founded conciliation boards. Some of them are acknowledged as conciliation authorities by the Ministry of Justice of the respective

Land. Only decisions and settlements of these conciliation boards can be executed. On the other hand, practitioners offer mediation as a method to settle a dispute amicably by finding an agreeable solution for both parties. The results of these procedures however are not enforceable.

Beyond that, most of the federal states (these are: Baden-Württemberg, Bavaria, Brandenburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine Westphalia, Rhineland-Palatinate, Saarland, Saxony-Anhalt, Schleswig-Holstein) have established a mandatory pre-trial conciliation procedure, which must be undertaken if the amount in dispute is less than EUR 750.

5. Additional information

- How does a prospective tenant proceed in order to get social or subsidized housing (e.g. dwellings offered by housing associations, municipalities, public bodies etc.) or housing allowances?

In order to be entitled to rent a social or subsidized dwelling, the tenant needs a qualification certificate (*Wohnberechtigungsschein*). This certificate is issued by local authorities either for a specific dwelling or for all subsidized dwellings located within the area of a *Land*. It requires that the tenant cannot secure adequate accommodation for himself because of low income or other financial circumstances. In general, the income ceilings amount to EUR 12,000 for a single person household and EUR 18,000 for a two-person household plus EUR 4,000 for every further household member. In addition to German citizens, EU citizens as well as foreigners with a valid long-term residence permit may apply for the qualification certificate. However, despite holding this certificate tenants have no legal claim to get a subsidized dwelling.

This is different with regard to the application for housing allowance. It is granted by local authorities if the tenant can no longer afford the rent. The amount of housing allowance depends on the number of household members, the amount of rent and the total income of the tenant. To this extent, the tenant has a legal claim to receive housing allowance. As well as in case of social or subsidized housing, German citizens, EU citizens and foreigners with a residence permit are entitled to apply for it. Eight of the sixteen federal states (these are: Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine Westphalia, Saarland, Schleswig-Holstein, Thuringia) each have their own calculator which assists tenants to find out whether they would have a claim to housing allowance or not. It is available under: http://wohngeldrechner.nrw.de/WgRechner/wogp/cgi/call-TSO.rexx?d2443.WEBP.exec(wgrbstrt).

- Is any kind of insurance recommendable to a tenant?

First, it is recommendable to a tenant to conclude legal protection insurance (*Rechtsschutzversicherung*), since under German law the costs of litigation, including the legal fees of the winning party and also the court fees, have to be borne by the losing party. Such insurance covers all kinds of legal costs (i.e. court fees, costs for experts and witnesses, lawyer's fee – for the losing party, their own legal costs plus

those of the opposing party). Apart from that, it is also advisable to conclude household insurance (*Hausratsversicherung*). It provides protection for all furnishing of the household in case of damages caused by fire, tap water, lightning, storm, hail, burglary or robbery. Finally, tenants should also conclude private liability insurance (*private Haftpflichtversicherung*).

- Are legal aid services available in the area of tenancy law?

To ensure fair and effective access to justice, personally and economically disadvantaged parties who are unable to pay the costs of litigation can apply for legal aid (*Prozesskostenhilfe*). Legal aid is granted if the prosecution or their defence has sufficient prospects of succeeding and does not seem frivolous. If the legal proceedings require parties to be represented by lawyers, the party shall be assigned a lawyer who is willing to so represent the party and whom the party has selected. The effects of granting legal aid are that (1) the *Bund* or *Land* cash office is able to assert legal fees against the party exclusively in accordance with the provisions made by the court; (2) the party is released from the obligation to provide a security deposit for the costs of the proceedings and (3) the lawyer is prohibited from asserting claims for remuneration against the party. However, this does not affect the obligation to reimburse the opponent for the costs it has incurred, i.e. the party, who receives legal aid and loses the litigation, has nevertheless to pay the costs of the winning party.

- To which organizations, institutions etc. may a tenant turn to have his/her rights protected?

The main organization in Germany advocating the protection of tenant's rights is the German Tenant Association (*Deutscher Mieterbund*, DMB). It is the governing body of over 320 tenant associations. These associations offer comprehensive legal advice and help with tenancy related disputes, provided the tenant is a member of the association. The membership fee currently amounts to between EUR 40 and EUR 90 per year, plus a non-recurring entrance fee of about EUR 15. Usually, legal protection insurance is also included in this fee.

- **DMB Info e.V.** (responsible for the hotline on first advice and for online advice)
  Littenstraße 10
  10179 Berlin
  Tel: 030-223230
  Email: info@mieterbund.de
  Homepage: http://www.mieterbund.de/

  - DMB-Hotline for brief information: 0900-1200012 (does not require membership; costs: EUR 2 per minute)
  - DMB-Online advice: http://www.mieterbund24.de/ (requires registration only, not membership; costs: EUR 25; within 6 hours)
- **Regional associations of the sixteen *Länder* which have listed contact details of the local associations on their website:**

- **Bavaria**
  Sonnenstraße 10/III
  80331 München
  Tel: 089-89057380
  Email: info@mieterbund-landesverband-bayern.de
  Homepage: http://www.mieterbund-landesverband-bayern.de/

- **Baden-Württemberg**
  Olgastraße 77
  70182 Stuttgart
  Tel: 0711-2360600
  Email: info@mieterbund-bw.de
  Homepage: http://www.mieterbund-bw.de/

- **Berlin**
  Spichernstraße 1
  10777 Berlin
  Tel: 030-226260
  Email: bmv@berliner-mieterverein.de
  Homepage: http://www.berliner-mieterverein.de/

- **Brandenburg**
  Am Luftschiffhafen 1
  14471 Potsdam
  Tel: 0331-27976050
  Email: info@mieterbund-brandenburg.de
  Homepage: http://www.mieterbund-brandenburg.de/

- **Hamburg**
  Beim Strohhause 20
  20097 Hamburg
  Tel: 040-879790 (general information also for non-members: 040-867979345)
  Email: info@mieterverein-hamburg.de
  Homepage: http://www.mieterverein-hamburg.de/

- **Hesse**
  Adelheidstraße 70
  65185 Wiesbaden
  Tel: 0611-4114050
  Email: info@mieterbund-hessen.de
  Homepage: http://www.mieterbund-hessen.de/

- **Lower-Saxony and Bremen**
  Herrenstraße 14
  30159 Hannover
  Tel: 0511-121060
  Email: info@dmb-niedersachesen-bremen.de
  Homepage: http://www.dmb-niedersachsen-bremen.de/

- **Mecklenburg-Western Pomerania**
  G.-Hauptmann-Straße 19
  18055 Rostock
  Tel: 0381-3752920
  Email: post@mieterbund-mvp.de
  Homepage: http://www.mieterbund-mvp.de/

- **North Rhine-Westphalia**
  Oststraße 55
  40211 Düsseldorf
  Tel: 0211-5860090
  Email: mieter@dmb-nrw.de
  Homepage: http://www.mieterbund-nrw.de/startseite/

- **Rhineland-Palatinate**
  Löhrstraße 78-80
  56068 Koblenz
  Tel: 0261-17609
  Email: dmb-rhpl@gmx.de
  Homepage: http://www.mieterbund-rhpl.de/home/

- **Saarland**
  Karl-Marx-Straße 1
  66111 Saarbrücken
  Tel: 0681-947670
  Email: info@mieterbund-sb.de; info@miet-immobilienrecht-saar.de
  Homepage: http://www.mietrecht-saar.de/

- **Saxony**
  Fetscherplatz 3
  01307 Dresden
  Tel: 0351-8664566
  Email: landesverband-sachsen@mieterbund.de
  Homepage: http://www.mieterbund-sachsen.de/

- **Saxony-Anhalt**
  Alter Markt 6
  06108 Halle
  Tel: 0345-2021467
  Email: info@mieterbund-sachsen-anhalt.de
  Homepage: http://www.mieterbund-sachsen-anhalt.de/

- **Schleswig-Holstein**
  Eggerstedtstraße 1
  24103 Kiel
  Tel: 0431-979190
  Email: info@mieterbund-schleswig-holstein.de
  Homepage: http://www.mieterbund-schleswig-holstein.de/

- **Thuringia**

Anger 28/Hirschlachufer 83a
99084 Erfurt
Tel: 0361-598050
Email: Info@mieterbund-thueringen.de
Homepage: http://www.mieterbund-thueringen.de/

Useful link for searching for the responsible tenant association in general: http://www.mieterbund.de/suche_plz_v.html

Except for the general tenant associations, there are special associations for tenant's protection which offer their members also legal advice and help with tenancy related disputes. The membership fee currently amounts to between EUR 48 and EUR 80 per year, plus a non-recurring entrance fee of about EUR 12.

- **Mieterschutzbund e.V.** (responsible for advice throughout Germany)
  Office Recklinghausen (Hauptverwaltung)
  Kunibertistr. 34
  45657 Recklinghausen
  Tel.: 02361-406470
  Email: office@mieterschutzbund.de
  Homepage: http://www.mieterschutzbund.de/start.php?nav=11
- **Regional associations for tenant's protection:**

  - **Berlin**
    Konstanzer Straße 61
    10707 Berlin
    Tel: 030-921023010
    Email: zentrale@mieterschutzbund-berlin.de
    Homepage: http://www.mieterschutzbund-berlin.de/

  - **Bremer Mieterschutzbund**
    Am Wall 162
    28195 Bremen
    Tel: 0421-3378455
    Email: mail@bremermieterschutzbund.de
    Homepage: http://www.bremermieterschutzbund.de/

  - **Hamburg**
    Schillerstraße 47-49
    22767 Hamburg (Altona)
    Tel: 040-395315; 040-392829
    Email: info@mieterschutz-hamburg.de
    Homepage: http://www.mieterschutz-hamburg.de/