Comparative Remarks on Residential Tenancy Law in Latvia and Estonia

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Latvia and Estonia share a common history and common inheritance of Soviet legal regime from 1940 to 1991. The period after regaining independence in 1991 signifies a radical turning point in the housing policies in all three Baltic States. More particularly, over the last 25 years, the availability of residential housing in Baltics has been influenced by general liberalization of housing market. As a result, the housing market in Baltics is commonly characterized by a high rate of private ownership of housing stock and a high rate of owner-occupancy in comparison to the rental housing, which, by estimations in Estonia and Latvia, is not higher than 15%.[1] However, increasing migration and urbanization will lead to a greater need for rental apartments. The authors examine some aspects of the regulation of tenancy relationships where the balanced and reasonable protection of interests of both parties – tenants and landlords – seems to be missing. There are not very many studies about differences in development of Estonian and Latvian legal systems, and this analysis will contribute to filling the gaps in comparative studies of these two countries.

Keywords: tenancy law, rental contract, protection of weaker party, housing policy.

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[1] As there is no need for registration, consequently, there is no official, reliable data on private renting available. Without exact data characterising the number of people living in rented dwellings, we have to rely on information from reports based on surveys and/or evidence from other sources.

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Abbreviations

Art.	Article
BGB	*Bundesgezetsbuch* [German Civil Code]
cf.	confer, compare
CL	*Civillikums* [Latvian Civil Code]
LOA	Law of Obligations Act (Estonia)
LPA	Law of Property Act (Estonia)
LRT	*Likums "Par dzīvojamo telpu īri"* [The Latvian Law on Residential Tenancy]
No.	Number
Report	National Report for Estonia

Introduction

Tenancy helps to satisfy the basic need for a shelter, when a person has no access to the property market or does not wish to acquire dwelling into ownership due to different reasons. Tenancy also contributes to achieving other important aims, for example, to contribute to privacy and family life.

After the era of socialism and transition to the market economy, the housing sector was significantly affected by reforms and legislative enactments in the Baltic States in course of wide-range **privatization[2] and restitution**.[3] When the Baltic States regained independence, the most significant changes[4] were connected with

2 In Estonia, privatization of public housing stock was launched by the Privatization of Dwellings Act and Privatization Act adopted in 1993. All adult residents had a right to a specific amount of National Capital Bonds (*rahvakapitali obligatsioonid, RKO*) based on their years of active employment and service to the economy. Public tenants, except tenants of dwellings subject to restitution, were entitled to privatize their dwellings at a calculated price using RKOs as privatization vouchers until Dec. 1st 1994. Cf. *Purju, A.* The Political Economy of Privatisation in Estonia. Centre for Economic Reform and Transformation, 32. Available at http://www2.hw.ac.uk/sml/downloads/cert/wpa/1996/dp9602.pdf [last viewed 30.06.2015].

3 E.g. in Latvia (as also in other Baltic States) tenants of the denationalized houses could not privatize the apartments, therefore the restriction of rental payments was one of the mechanisms, which ensured balance between the interests of the tenants and landlords, and reached a socially fair aim. The restrictions were planned as a short-term measure, but only in the year 2007 the Constitutional Court declared the said lease restrictions as unconformable with the Constitution and invalid. See: Judgment of the Constitutional Court of the Republic of Latvia of 8 March 2006, Case No. 2005-16-01. Available at www.satv.tiesa.gov.lv [last viewed 30.06.2015].

4 The individuals could have only one house in their private ownership, with a floorspace not exceeding 130 m^2 area. See more: *Smith, M. B.* Property of Communists: The Urban Housing Program from Stalin to Khrushchev. DeKalb Illinois: Northern Illinois University Press, 2010. Under Soviet regime, only dwellings that did not exceed certain limits of living space were left as a private property. Rented

denationalisation and restitution of property to former owners or their heirs. Today, as a natural consequence of migration and urbanisation, the legislator has to find a proper balance between the interests of both parties – landlords and tenants.

This article focuses on the Latvian tenancy law and compares particular questions of the Latvian law to the Estonian provisions to start a discussion on possible amendments of the valid Latvian laws. There are not very many studies about Baltic countries providing systematic studies of the differences in development of legal system and regulation of specific civil law concepts. This article is based on a study of Tenancy Law and Housing Policy in Multi-level Europe,[5] which filled the gap at least in some legal areas.[6]

1. Regulatory Framework

The main legal sources of the Latvian tenancy law are the Civil Law[7]and the Law on Residential Tenancy.[8] General rules of the CL are applied insofar as they are not restricted by the special legal norms of the LRT (Art.1. 2 of the LRT). The interaction of the general and special statutes is not always as distinct as it would be preferable for the purposes of legal certainty, hence parties to the rental contract are not always capable to determine and foresee the extent of their rights and duties. We will see some discrepancies while speaking about different issues below.

In Estonia, residential tenancy contracts are regulated by the Law of Obligations Act,[9] the specific rules on lease are to be found in the Chapter 15 (Lease Contracts, Arts. 271–338). The relationship between general and special rules in Estonia is unproblematic, partly because the Estonian LOA is quite new,[10] although there

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dwellings belonging to enterprises, the state or other public entities became the dominant tenure types in the urban centres. Once the dwelling was allotted to a given tenant, public housing tenants enjoyed almost unlimited occupancy rights for their dwellings comparable to "owning" the dwelling: open-term leases, the right to inherit or transfer to relatives, the right to carry out maintenance work, etc. In fact, such "personal use" became an institution separate from that of rental tenure. See more: *Kährik, A., Kõre, J.* Estonia: Residualization of Social Housing and the New Programs. In: *Hegedüs, J., Teller, N., Lux, M.* (eds.). *Social Housing in Transition Countries*. New York, NY: Routledge, 2013, p. 163; *Lux, M., Kährik, A., Sunega, P.* Housing Restitution and Privatisation: Both Catalysts and Obstacles to the Formation of Private Rental Housing in the Czech Republic and Estonia. *International Journal of Housing Policy*, 2012, No. 2, p. 143.

[5] TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, Grant Agreement No.: 290694.

[6] National reports, used in this article are: *Kolomijceva, J.* National Report for Latvia. Available at http://www.tenlaw.uni-bremen.de/reports/LatviaReport_09052014.pdf; *Hussar, A.* National Report for Estonia (hereinafter 'Report'). Available at http://www.tenlaw.uni-bremen.de/reports/EstoniaReport_18062014.pdf [last viewed 30.06.2015]. About tenancy law in Lithuania see: *Mikelėnaitė, A.* National Report for Lithuania. Available at http://www.tenlaw.uni-bremen.de/reports/LithuaniaReport_09052014.pdf [last viewed 30.06.2015]. All country reports can be found at: http://www.tenlaw.uni-bremen.de/reports.html [last viewed 30.06.2015].

[7] 28.01.1937. *Civillikums* [Civil Law, hereinafter – 'the CL']. The Latvian civil law draws a distinction between the rental and lease contract, the criteria is the fact whether the property is a fruit – bearing or not (Art. 2112 of the CL), in spite of that we will use the both notions as synonyms in this text. Available at http://likumi.lv/doc.php?id=225418 [last viewed 30.06.2015].

[8] 16.02.1993. *Likums "Par dzīvojamo telpu īri"* [The Law on Residential Tenancy, hereinafter – 'the LRT']. Available at http://likumi.lv/doc.php?id=56863 [last viewed 30.06.2015].

[9] *Võlaõigusseadus* [Law of Obligations Act, hereinafter – 'the LOA'], passed 26.09.2001, entry into force 01.07.2002. RT I 2001, 81, 487. Available (in English) at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516092014001/consolide [last viewed 30.06.2015].

[10] Estonian Law of Obligations Act was passed on 26.09.2001 and entered into force on 01.07.2002. See more in: Report, pp. 78, 125; *Kull, I., Varul, P.* Part II. Specific Contracts. Ch. 6, Lease. In: *Jacques H.* (volume ed.), *Blanpain, R.* (gen. ed.), *Colucci, M.* (ass. gen. ed.). Estonia, International Encyclopaedia

still are particular arguable issues. For instance, there is a legal dispute, whether Art. 196. 2 of the LOA as a general rule supplements the special norm applicable to lease contracts (Art. 316 of the LOA). The problem lies in granting an additional term for performance to the tenant in accordance with Art. 196. 2 of the LOA before the extraordinary[11] termination of a lease contract.[12]

Under the Latvian law it is disputable whether the tenant is actually a socially weaker party,[13] if the tenant is not simultaneously a consumer. The approach that the position of the landlord can actually be stronger than that of the tenant, could influence interpretation of legal norms and possible outcomes of tenancy disputes. In other comparable areas of the Latvian law – consumer or labour law – the principle is established that a contract, as well as law provisions ought to be interpreted and applied in favour of a weaker party, i.e., the consumer and, respectively, employee. For example, K. Balodis is rightly arguing that a tenant is usually more interested in finding and keeping a proper residence because he needs accommodation,[14] therefore, additionally to the already provided protection by the mandatory norms of the LRT, it could be necessary, at least in some cases, to restrict the freedom of contract so that a landlord cannot unilaterally dictate his will to the tenant.

In conclusion, the Latvian legal doctrine does not unanimously regard the tenant as a weaker party to the contract, but the Latvian courts can consider this idea in the course of the teleological interpretation of law, when the matter concerns dispositive rules of the LRT and the CL. To compare, the Estonian law considers the tenant to be a weaker party and the parties cannot agree on terms less favourable to the tenant than provided by the LOA, unless explicitly permitted by law.[15]

In order to find a reasonable balance between legally protected interests of parties to the lease contract, the principle of good faith (Art. 1 of the CL) is of an

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for Contracts. The Netherlands: Kluwer Law International, 2015. *Pärna, P.* Development of Apartment Ownership Legislation in Estonia in 1994–2009 and Reform Plans in the Context of European Judicial Practice. *Juridica International*, No. 16, 2009, p. 103; *Siimets-Gross, H.* Social and Economic Fundamental Rights in Estonian Constitutions between World Wars I and II: A Vanguard or Rearguard of Europe? *Juridica International*, 2005, No. 10, p. 135; *Varul, P.* Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. *Juridica International*, 2000, No. 5, p. 104; *Kull, I.* Codification of Private Law in Estonia. In: *Rivera, J. C.* (ed.). The Scope and Structure of Civil Codes. Munich: Springer, 2014, p. 133; *Kull, I.* Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law. *Juridica International*, 2008, No. 14, 122. lpp.; *Luts, M.* Private Law of the Baltic Provinces as a Patriotic Act. *Juridica International*, 2000, No. 5, p. 157.

[11] Estonian law distinguishes ordinary *vs.* extraordinary notice. Tenant (as well as landlord) may terminate a lease contract entered into for an unspecified term by giving at least three months' advance notice (Art. 311 and 312. 1 of the LOA) (ordinary notice). Advance notice of extraordinary termination is not generally required (Art. 313. 3 of the LOA). (Report, p. 146). See: *Varul, P., et al. Võlaõigusseadus I. Kommenteeritud väljaanne* [Law of Obligations Act I. Commented Edition]. Tallinn: Juura, 2006 (in Estonian). Provisions on lease contract are commented in *Varul, P., et al. Võlaõigusseadus II. Kommenteeritud väljaanne* [Law of Obligations Act II. Commented Edition]. Tallinn: Juura, 2007 (in Estonian).

[12] Report, p. 93.

[13] Likumprojekta "Dzīvojamo telpu īres likums" sākotnējas ietekmes novērtējuma ziņojums (anotācija). Available at *http://www.mk.gov.lv/doc/2005/EMAnot_201113.2127.doc* [last viewed 30.06.2015]; *Balodis, K.* Ievads civiltiesībās. Rīga: Zvaigzne ABC, 42., 48. lpp.; *Torgāns, K.* Līgumu un deliktu tiesību problēmas. Rīga: Tiesu namu aģentūra, 2013, 62. lpp.

[14] *Balodis, K.* Ievads civiltiesībās. Rīga: Zvaigzne ABC, 42., 48. lpp.

[15] Article 275 of the LOA.

importance.[16] Along with other general principles of law (Art. 5 of the CL), this principle is relevant while determining the rights and duties of parties, supplementing the contract, as well as interpreting the LRT and the CL. The principle of good faith in the legal doctrine of Latvia is considered to stipulate that parties exercise their rights and fulfil duties in good faith. A party must take into account legal interests and rights of another party arising from the rental contract, otherwise the court may not permit to exercise subjective rights or fulfil obligations in exceptional cases, if interests of another party are more significant under particular circumstances.[17]

The principle of good faith is also relevant in tenancy disputes in Estonia, firstly, as one of general principles of law (Art. 6 of the LOA) and secondly, as a part of specific provisions. For example, tenant may contest the (otherwise valid) notice of termination before a lease committee or in court, if the termination is contrary to the principle of good faith (Art. 326 of the LOA). Extraordinary termination of a contract by the landlord is also contrary to the principle of good faith if, above all, the lessor terminates the contract due to one of the following reasons: (1) the tenant in good faith files a claim arising from the lease contract against the landlord, (2) the landlord wishes to amend the lease contract to the detriment of the tenant, and the latter does not consent thereto, (3) the landlord wishes to induce the tenant to purchase the leased dwelling, or (4) the marital status of the tenant changes, although this does not result in any significantly harmful consequences to the landlord.[18]

2. Conclusion of the Rental Contract

Pursuant to the lease contract, the tenant gains the right to use a leased residential dwelling for a charge ('*par maksu*') (Art. 2112 of the CL, Art. 2 of the LRT). The notion of the lease contract set out by the Estonian LOA is very similar to the Latvian definition, and the lease contract is a contract under which a dwelling (a residential building or an apartment) is granted for use for a charge ('*tasu eest*').[19]

Latvian law distinguishes between the so-called consensual and real contract. In the second case, the transfer of the subject matter is an additional mandatory requirement of validity.[20]Art. 2112 of the CL states, *inter alia*, that the landlord grants or promises the property to the lessee, and the conclusion derived from the wording of this provision is that parties may choose to conclude the lease contract in the form of a consensual or real contract.[21] There is also another point of view that the lease contract shall be qualified as a consensual contract in accordance with

[16] *Krauze, R.* Latvijas Republikas likums par dzīvojamo telpu īri. Likums ar komentāriem. 4. papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2008, 15. lpp.

[17] *Krauze, R.* Latvijas Republikas likums par dzīvojamo telpu īri. Likums ar komentāriem. 4.papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2008, 15. lpp.; *Balodis, K.* Ievads civiltiesībās. Rīga: Zvaigzne ABC, 142. lpp.; *Slicāne*, *E.* Labas ticības princips un tā piemērošana Latvijas civiltiesībās. *Jurista Vārds.* Available at www.juristavards.lv [last viewed 30.06.2015].

[18] Report, pp. 78–149.

[19] Ibid.

[20] The real contract will have no legal effect, if transfer has not taken place, even though the consensus on essential and other contractual parts has been reached by the parties. The concept of real contract is somewhat archaic and parties can achieve the very same result of the real contract by means of the suspensive condition or including a term when the contract enters into force (Art. 1551, 1579 of the CL). See: Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā. Rīga: Mans īpašums, 1998, 476.–478. lpp.

[21] *Torgāns*, *K.* Saistību tiesības. II daļa: Mācību grāmata. Rīga: Tiesu namu aģentūra, 2008, 98. lpp.

Art. 2124 of the CL.[22] Both opinions are possible under the LRT and CL. Practically, in order to avoid disputes concerning true intent of parties, whether they wished to conclude a consensual or real lease contract, it would be more expedient to consider the residential lease contract to be a consensual contract.

In Estonia, a mutual consensus on the essential conditions of the agreement is sufficient for conclusion of lease,[23] in other words, the lease contract is consensual.

Art. 5. 1 of the LRT states that the residential rental contract is to be concluded in writing. In accordance with Art. s 1475, 1483 and 1484 of the CL, a transaction is not valid when the parties have not observed the written form. At the same time, the court jurisprudence recognizes so-called "*actual (legal) rental relations*",[24] which are *per se* oral residential lease contracts. The latest research shows that approximately 25% of parties do not have a written contract on rent of residential premises.[25] The Latvian courts apply Art. 1488 of the CL when lessor and tenant have not prepared a written deed, but have started to fulfil duties resulting from an oral contract on residential rent.

Art. 1488 of the CL states: if a written deed has not been prepared when law makes a claim based on a contract, in particular, the claim about its enforcement, dependent on the written form, the following rules apply: (1) the contract performed by both parties have the same consequences as if the contract was concluded in writing and reclamation of performance is not possible; (2) the contract voluntarily performed by one party ,if the second party is ready to perform, has the consequences described in the Subsection 1, but if the second party evades performance, the contract is not valid, although the first party may reclaim performance in kind or its value; (3) until parties have performed, the contract is not valid and each party may resign from it.

Art. 5 of the LRT cannot not be directed to deprive tenants from the protection granted by the LRT, and landlords may not take advantage of the fact that the contract has not been concluded in writing. The purpose of the form requirement is to provide evidence about the contract's existence, to protect parties against rash decisions and inform them of possible consequences of a rental contract.[26] Art. 1488 of the CL is a tool to avoid situations when a landlord can take advantage of the fact that a lease contract has not been concluded in writing, although the landlord has voluntarily transferred a residential space to the tenant for living and accepted payments thereof.

Also in this respect, Estonian law is more liberal and clear, since the LOA does not require the written form as the essential contractual term, on which would depend the validity of lease. However, when the contract of residential lease with a term exceeding one year is not entered into in writing (Art. 274 of the LOA), the contract is deemed to have been entered into for an unspecified term (with the limitation that the contract shall not be terminated earlier than one year after the

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22 16.04.2008. Latvijas Republikas Augstākās Senāta Civillietu departamenta spriedums lietā nr. SKC-151; *Erdmann, C.* System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. 4. Band. Obligationsrecht. Riga, 1894, p. 345.

23 Report, p. 88.

24 See, for example, 16.04.2008. Latvijas Republikas Augstākās Senāta Civillietu departamenta spriedums lietā nr. SKC-151.

25 Latvijas notāru un SKDS pētījums. Available at http://www.notary.lv/lv/actual/posts/ [last viewed 30.06.2015].

26 *Balodis, K.* Ievads civiltiesībās. Rīga: Zvaigzne ABC, 42., 48. lpp.; *Torgāns, K.* Līgumu un deliktu tiesību problēmas. Rīga: Tiesu namu aģentūra, 2013, 191. lpp.

transfer of the dwelling to the lessee).[27] To interpret the rule of formalities, the purpose of the rule (form requirement) and the fact whether or not it expressly prescribes invalidity in case of infringement can be of importance.[28] The purpose of the Art. 274 of the LOA is to inform parties about the content of long lasting contracts and not to invalidate lease contracts, which have not been concluded in writing.

Since the proportion of Latvian tenants who do not have a written rental contract is rather high (25%), it would be advisable to adapt the rule similar to Art. 41 of the Labour Law that the lessee has a right to request that the lease contract is expressed in writing and, if at least one of the parties has started to perform the duties contracted for, an oral lease contract should have the same legal consequences as a lease contract expressed in writing.[29] In conformity with the existing practise, the second possibility would be to amend the law, allowing conclusion of lease contracts in any form. It can be also suggested to rethink the scope of application of Art. 1475, 1483 and 1484 of the CL, and on basis of teleological reduction and analogy restrict the consequences of invalidity in case of residential lease.

As said above, the lease contract is concluded, when parties have agreed upon essential or fundamental terms – a habitual dwelling and lease payment – with one exception. In Estonia, a lease contract without the agreement on the amount of rent is valid, if it can be presumed that the contract would have been entered into even without an agreement upon rent or other payments. Circumstances of the lease contract's conclusion, actual intent of the parties and the principle of good faith help to set an amount of lease payments through court. If no information about the market price can be obtained, the lease payment will be a reasonable price under present circumstances[30] (Art. 27 of the LOA). In Latvia, Art. 1418, 2017 and 2122 of the CL could be interpreted in the same way as in Estonia, when parties to a rental contract have not agreed on lease payments. To note, Art. 11 of the LRT states that a rental payment shall be agreed by parties in writing, therefore it is not quite clear, whether Art. 11 of the LRT exclude the application Art. 1418, 2017 and 2122 of the CL or the special statutes shall apply. Most likely, the second alternative is more appropriate. However, in some cases, a contract without agreed payments could also be qualified as *gratis* use (Art. 1947 of the CL), a result will depend on the circumstances of a case.

3. Position of the Tenant in Case of Change of the Landlord

In Latvia and Estonia,[31] the lease contract is a source of obligatory (personal) rights despite the fact that the tenant to the residential contract is protected against a new acquirer, as if he had real right in the specific situations. The LRT and LOA both comprise the principle "sale does not break hire", although in a slightly differing manner.

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[27] Report, p. 107.

[28] Compare: *Bar, C. von, Clive, E., Schulte-Nölke, H.* (eds.). Principles, Definitions and Model Rules of European Private Law – *Draft Common Frame of Reference (DCFR)*. Munich: Sellier, 2009, pp. 214–215.

[29] *Torgāns, K.* Zinātnisks pētījums. Civillikuma Saistību tiesību daļas modernizācijas nepieciešamība un aktuālo privāttiesiska regulējuma tendenču (UNIDROIT, ELTP) iespējama ietekme uz Civillikuma Saistību tiesību daļas modernizāciju. Rīga, 2007. g. aprīlis – decembris. Available at www.at.gov.lv [last viewed 30.06.2015].

[30] Report, p. 109.

[31] Report, p. 91.

Firstly, in Latvia there is some vagueness concerning the legal nature of residential tenancy contracts in cases of landlord change. Namely, Art. 8 of the LRT specifies that the rental contract about dwellings is binding to a new acquirer in all cases of alienation, except for the public auction (Art. 601 of the Civil Procedure Law[32]), therefore it is not practically necessary to register such a contract. If the rented dwelling has been alienated, a new owner becomes a successor of the former owner (landlord) to the rental contract without any public registration or other publicity measures. Lack of publicity of tenancy relationship brought up a discussion about conformity of Art. 8 of the LRT to the right to property as a fundamental right, i.e., about the scope and conditions of applying the principle "sale does not break hire". The problem is that in practice there is always a possibility that the new owner is not aware of the contract concluded by the previous owner, but still is bound by it. It may produce a legal uncertainty. In 2014, the Constitutional Court of Latvia held that the Art. 8 of the LRT is compatible with the Constitution.[33]

Secondly, although the obligatory rights arise from the rental contract, Art. 2126 of the Civil Law simultaneously states that, after the rental contract has been registered in the Land Register, the tenant acquires *property rights*, which are valid to third persons, including a new acquirer of immovable property. The concurrent reference to the property rights and to the contractual relationship with a previous owner, which has become binding to the new owner is confusing. The jurisprudence of the Supreme Court of Latvia confirms that a limited number of obligatory contracts can be entered into the Land Register, nevertheless, if they are entered therein, they become a basis for real rights.[34]

Thirdly, under Latvian law, after transferring the ownership of the subject matter to the tenant, the tenant is the holder of the immovable property (Art. 2130. 2 of the CL) and the possessor of contractual right to use it (Art. 877 of the CL). The difference between holder and possessor of the immovable property appears in a subjective element: the possessor acts with a thing as if he was an owner, but the holder acknowledges another person to be an owner thereof (Art. 876 of the CL). In other respects, the holder and possessor are in comparable positions, i.e., have actual control over the property.

Possession of the right considerably intersects with holding of immovable property with regard to protection, because the tenant is protected as if he were a possessor (Art. 876, 2130 of the CL). Remarkably, the lessee may also ask to protect the possession of the right, which equates to protection of possession (Art. 921 of the CL). The lessee is expected to be entitled to choose between the protection of holding the immovable property and possession of right with the intention to recover the possession or refrain from the interferences with possession. which are not connected with deprivation. Additionally, the tenant is entitled to claim damages that arise from deprivation of or interference with holding or possession (Art. 915, 923 of the CL). In practice, claimants almost never resort to the rules regulating possession,

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32 14.10.1998. Civilprocesa likums [Civil Procedure Law]. *Latvijas Vēstnesis*, 326/330 (1387/1391), 03.11.1998., *Ziņotājs*, 23, 03.12.1998.

33 Judgment of the Constitutional Court of the Republic of Latvia of 7 July 2014, Case No. 2013-17-01. Available at www.satv.tiesa.gov.lv [last viewed 30.06.2015].

34 20.12.2012. Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta Lēmums lietā Nr. SKC-2456/2012. Available at www.at.gov.lv [last viewed 30.06.2015].

because the norms of the CL are ambiguous and a simplified court procedure for these purposes does not exist. Further clarifications are also required here.

As mentioned above, also Estonian law recognizes the principle "sale does not break hire," i.e., also in the events outside of the compulsory execution or bankruptcy proceedings (Art. 291. 1 of the LOA). However, the new owner does not have the right to terminate the lease contract, if an entry regarding the lease contract has been made in the land register (Art. 324 of the LOA).[35] The new lessor may terminate the lease contract within three months by giving notice at least three months in advance. For the new landlord in the residential lease relationship, however, this right is limited, as the acquirer may terminate a residential lease contract only on the specific ground that the new owner "urgently needs the leased premises" (Art. 323. 1). The tenant may demand that a notation regarding the lease contract be made in the land register (*kinnistusraamat*) (Art. 324 of the LOA). This requirement ensures that the actual owner of immovable property, or a person for whose benefit the dwelling is encumbered with a limited real right, shall permit the lessee to use the immovable property pursuant to the lease contract and that a new owner does not have a right to terminate the lease contract unless the acquirer urgently needs the leased premises (Art. 323 of the LOA). It has to be noted that in Estonian law the new landlord is protected against 'surprise lease contract' by the condition provided for in the law that the lease contract will be transferred to the acquirer of the property only if the transfer has taken place after the lessor transfers an immovable property into the possession of a lessee (Art. 291. 1 of the LOA). Possession as an additional condition offers adequate protection against the ignorance of the new owner.

The Estonian Law of Property Act[36] stipulates that the tenant becomes a direct possessor while the lessor is an indirect possessor after transfer of the leased subject matter (Art. 33 of the LPA) and the lessee's right of possession is protected as an absolute right.[37] The Latvian concept of "holder" intrinsically reminds the Estonian concept of "direct possessor". The Estonian PLA grants the right to the tenant to assert claims arising from violation or deprivation of possession (Arts. 44–45 of the PLA) or the claim for compensation of damage.[38]

To sum up, the Estonian law implements the principle of the "sale does not break hire" in a more flexible manner. The Latvian law does not allow the landlord to unilaterally terminate the contract in any circumstances, regardless of the mode or reason of acquisition.

As to the protection of possession, it could be a convenient instrument to be used by the tenant, when third persons disturb and deprive the tenant of possession without any legal ground. A possible model thereof could be the rules of Latvian Civil Procedure Code, which were in force in 1918–1940. These rules granted the right to claim protection of possession, when the judge only considered the fact of interference or deprivation of possession within a simplified court procedure.[39]

[35] Report, p. 92.

[36] *Asjaõigusseadus* [Law of Property Act, hereinafter – 'the LPA'].

[37] Ibid.

[38] Ibid.

[39] *Konradi, F., Zvejnieks, T.* Civilprocesa likums ar paskaidrojumiem – izvilkumiem no Latvijas Senāta un Tiesu palātas spriedumiem un no attiecīgās zinātniskās literatūras, kā arī dažādiem aizrādījumiem uz likumdošanas motīviem. Rīga: Valsts tipogrāfijas izdevums, 1939, 51. lpp.

4. Securities for the Landlord

4.1. Deposit

This chapter is dedicated to the review of specific securities provided for the residential lease contracts.

The Estonian and Latvian laws allow agreeing on the security deposit in order to secure claims of the landlord (Art. 308 of the LOA,[40] Art. 12.1. 1 of the LRT). In regulatory level, the Latvian law on security deposit is more dispositive, but the Estonian law, in turn, is more detailed and restrictive. For example, the LOA prescribes that the maximum amount of the security deposit may not exceed the amount of rent for three months (Art. 308. 1 of the LOA), the LRT does not limit a possible amount of the security deposit, when private parties conclude a contract (Art. 12.1. 1 of the LRT).

The LOA also addresses the problem, how to distinguish the security deposit and advance payments. Art. 308 of the LOA creates the presumption that if a lessee transfers money to the landlord in order to guarantee possible future claims, it is a security deposit and not a prepayment of rent.[41] In Latvia, if it is impossible to establish the actual intent of parties interpreting a clause about a payment, which has to be performed by the lessee, an interpretation at a disadvantage of the party who is a creditor in the particular case, i.e., at a disadvantage of the landlord, ought to be chosen (Art. 1509 of the CL). Given that the deposit constitutes an additional payment, the interpretation is in favour of advance payment or earnest money, that is, the conclusion will be quite the opposite to the regime of the Estonian LOA.

Unfortunately, the Latvian LRT does not specify, how the landlord must manage the deposit until the deposit is used for its direct purposes or is repaid, except if the parties have regulated the issue in their mutual agreement. The LOA, on the other hand, states that the deposit shall be kept by the lessor in a credit institution separately from the assets of the lessor, and at least at the local average interest rate, and the interest belongs to the lessee and increases the deposit (Art. 308 of the LOA).[42] In theory, answering the question whether the landlord may use the deposit or not, if the parties have not agreed on the matter, similar results can be achieved applying the rules regulating loan or custody of the CL by analogy. If the landlord has used the deposit for his own benefit, he pays interest (Art. 1759 of the CL). In this connection, it would be recommendable to supplement the LRT with respective provisions on management of the deposit and possibility of the landlord to use the deposit until returning it in its entirety or a remaining part of it.

As to the allowed uses of the security deposit, the Estonian law closely resembles the Latvian counterpart. Under the Art. 308 of the LOA, the deposit secures any claim arising from the contract. The landlord has to inform the lessee about using the deposit and the lessee may demand repayment of a deposit if the lessor does

[40] Estonian regulation of deposit resembles the one in German BGB § 551, entitling the landlord to ask for the security deposit in the amount not exceeding three months' rent. In practice, a deposit of an amount of 1–2 months' rent is usually demanded. Report, p. 130.

[41] Estonian regulation of deposit resembles the one in German BGB § 551, entitling the landlord to ask for the security deposit in the amount not exceeding three months' rent. In practice, a deposit of an amount of 1–2 months' rent is usually demanded. Report, p. 130.

[42] Ibid. In practice, private landlords often do not keep the deposit separately from their own assets and calculation of interest could be based on the interest rates referred in Art. 94. 1 of LOA, i.e., the last interest rate applicable to the main refinancing operations of the European Central Bank on a semi-annual basis.

not inform the lessee of a claim of the lessor against the lessee within two months after expiry of the lease contract.[43] Art. 12.1 of the LRT stipulates that the deposit may be used for securing different claims: rental payments, payments for utilities and damages. The Latvian regulation states that the security deposit in full or in part ought to be returned at the day when the lessee clears out residential premises, unless parties have agreed otherwise.

4.2. Pledge

Under LOA, the landlord has the pledge right on possessions of the tenant which the latter has brought into the leased dwellings (Arts. 305–307 of the LOA[44]). The LOA's pledge resembles to the right to retain the possessions of the tenant and keep them until the claims of the lessor are satisfied regulated in Art. 1734 – 1740 of the CL. Respectively, if the tenant is in position to claim compensation of expenses from the landlord, he may exercise the retention rights on property owned by the landlord, too (Art. 2150 of the CL). Historically, the retention rights have developed from the legal concept of pledge,[45] but the retention rights are not a security and the retained property cannot be alienated (Art. 1734–1740 of the CL).

It is reported that in Estonia most of the tenant's possessions are exempt from attachment and the performance of security interest is relatively complicated and often not productive.[46]

The retention rights also fail to be an effective tool in Latvia, since the retention rights, *inter alia*, cease, when a party exercising these rights looses the actual control of the thing (Art. 1740 of the CL), but the CL does not comprise any sanctions in the event of removing the retained things without consent and notifying the entitled party thereof.

5. Subject Matter and its Maintenance

5.1. Compliance and Remedies

There is no notion of "defects of the dwelling" in the CL, but scholars and practitioners believe that the rules on alienation of defective things are applicable regarding lease by analogy.[47] Similarly the Estonian LOA does not comprise the general notion of defects of rented dwelling, but it can be concluded that the lease subject matter shall comply with a contract and law (Art. 77 and 276 of the LOA)[48] and, if not stated otherwise, should be habitable and conform to average quality.

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[43] Report, p. 130.

[44] Estonian law recognizes a right of security (pledge) of the lessor comparable to *Vermieterpfandrecht* as set out in § 562 BGB: the claims of rentpayment for the current year and the previous year and claims for compensation are secured by a pledge over movables located in the leased property and, upon the lease of a room, over movables, which are part of furnishings, or are used together with the room.

[45] *Biema van Dr., H.* Īres nodrošināšanas tiesības ar īrnieku ienestajām lietām. *Jurists*, Nr. 6/7, 1935, 159. lpp.

[46] Report, p. 128.

[47] Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā. Rīga: Mans īpašums, 1998, 481. lpp.; *Torgāns, K.* Saistību tiesības. II daļa: Mācību grāmata. Rīga: Tiesu namu aģentūra, 2008, 107. lpp.; *Bukovskij, V. I.* Svod grazhdanskih uzakonenij gubernij pribaltijskih s prodolzheniem 1912–1914 gg. i raz"jasnenijami v 2 tomah. Tom II, Riga: G. Gempel' i Ko, 1914, s. 1752–1753; 15.11.2006. Latvijas Republikas Augstākās Senāta Civillietu departamenta spriedums lietā Nr. 635.

[48] Report, pp. 135–136.

Under the Latvian and Estonian law, the defects of the rented dwelling can be legal or material, as well as minor or essential. The defect is legal, if real, personal or other right of a third person with regard to the property deprives the tenant of using the residential space. The defect is material, when the habitual dwelling does not have average qualities or all the necessary belongings, and, as a result, the use of the rented premises is impossible.[49] In general, the lessor is liable for essential defects, which hinder the use of the entire property or a considerable part thereof (Art. 1613, Art. 2172 Subsection 2–3 of the CL; Art. 277 of the LOA). Minor defects should routinely be eliminated by the tenant himself by light cleaning or maintenance (Art. 1613 of the CL; Art. 280 of the LOA). Transient and short-term disturbances of use (Art. 2136 of the CL) are also considered to be minor or insignificant defects,[50]

The lessor is liable for essential defects existent at the time when parties have entered into the lease contract, including hidden defects, which have become apparent after the contract has been concluded (Art. 1614 subsection 1 of the CL,[51] Art. 277 of the LOA). Moreover, the landlord is also liable for the defects that occur due to his culpable actions or inaction during the validity period of lease contract.

Although the wording of Art. 2135 of the CL indicates that the landlord also bears responsibility for defects, which should have been noticed by the landlord through careful examination, even if the lessee has known or ought to have known of such defect, the academics and court jurisprudence are of the opposite opinion.[52] The LOA, in its turn, explicitly states that the lessee may not use legal remedies against the landlord, if the tenant knows or ought to have known that the object does not conform to the contract, but accepts the object regardless of that (Art. 277. 2 of the LOA).

In contrast to the LOA, the Latvian CL does not explicitly provide that the tenant must promptly notify the lessor of the discovered defects, and the landlord is entitled to claim losses, when the tenant infringes this rule (Art. 278 of the LOA). Besides, Art. 278 of the LOA stipulates that in the latter case the tenant may not exercise his rights because of defects and terminate the contract without providing the landlord the opportunity to resolve the defects within a reasonable time.[53] In Latvia, the lessee's duty to inform the landlord about the defects may be derived from Art. 1 of the CL, i.e., the principle of good faith, at the same time, such remedy as the right to demand removal of a defect within a reasonable time does not exist under the Latvian law at all.

Other remedies available to the tenant partly differ in Latvia and Estonia.

Art. 41 of the LRT provides the tenant with a right to ask for reduction of rent when the landlord has not ensured the use of dwellings according to a contract and

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[49] Report, p. 136.

[50] *Bukovskij, V. I.* Svod grazhdanskih uzakonenij gubernij pribaltijskih s prodolzheniem 1912–1914 gg. i raz"jasnenijami v 2 tomah. Tom II, Riga: G. Gempel' i Ko, 1914, s. 1278.

[51] Art. 1614 of the CL applies by analogy in cases of lease. The *argumentum a contrario* would mean that the landlord is actually not liable for hidden defects or those faults that the lessee could not objectively have discovered while previously examining the residential premises. Such opinion would be against the principle of good faith (Art. 1 of the CL) and justice (Art. 5 of the CL). Since there is no explicit rule for rental contracts, this legal gap ought to be filled by the analogical application of Art. 1614 of the CL.

[52] Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā. Rīga: Mans īpašums, 1998, 481. lpp.; 15.11.2006. Latvijas Republikas Augstākās Senāta Civillietu departamenta spriedums lietā Nr. 635.

[53] Report, p. 137.

law. The opinion is expressed that Art. 41 of the LRT is also connected with Art. 2136, 2147, 2148 of the CL.[54] The previously described norms provide the remedies in the cases when the tenant cannot use the dwelling because of *force majeure* circumstances.[55] These remedies are, as follows: withholding of future rent; reclamation of already paid rent for the time period when the use has been impossible; termination of the contract. All these rights can be exercised simultaneously, if necessary. When a defect was caused by *force majeure* circumstances, the tenant may not claim damages from the lessor (Art. 2136 of the CL).

When the landlord is liable for an essential defect, under Art. 1620 subsection 2 of the CL[56] the legal remedies of the lessee are either reduction of rent or termination of the contract. Rent reduction presumably means withholding or reclamation of rent for the time period when the use of the subject matter was not secured considering the similar wording of Art. 2136 and Art. 2147 of the CL. If the landlord is liable for an essential defect and in addition has acted with malicious intent, he must also compensate the losses of the tenant (Art. 1620 subsection 1 of the CL).

Art. 2133 of the CL mentions an in-kind replacement in cases of legal defects, and if it is executed, the tenant is not entitled to ask for further compensation of damages. This remedy could be relevant when the defect is also material, as well as the right of the landlord to replace the subject matter, insofar as the landlord can actually manage it, would be logically prior to other remedies.

In the light of the given arguments, Art. 41 of the LRT can refer to the situations when the tenant is entitled to partially withhold lease payments when the defect, for which the landlord is responsible, is neither essential, nor minor.

Furthermore, if the landlord delays the capital repairs required to eliminate the defects, the tenant is entitled to make capital repairs thereof and then to exercise the right to set off.[57]

According to Art. 278 of the LOA, the Estonian lessee is entitled to demand that the landlord removes the defect or takes over a legal dispute with a third party. If the landlord delays resolution of the defect, the tenant may remedy the defect and claim the payment of the incurred expenses from the landlord. Until the defect

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[54] *Krauze, R.* Latvijas Republikas likums par dzīvojamo telpu īri. Likums ar komentāriem. Ceturtais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2008, 190. lpp.; Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā. Rīga: Mans īpašums, 1998, 482. lpp.

[55] Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā. Rīga: Mans īpašums, 1998, 486. lpp.

[56] The LRT or CL do not state what legal remedies are at the disposal of tenant, if a defect does not completely prevent, but considerably reduces the possibility to use the subject matter in accordance with the contract or law. In other words, the issue concerns defects, which are nether essential, nor minor. On the other hand, Art. 40. 1 of the LRT stipulates that the lessor is obliged to ensure the use of dwellings in accordance with the contract. For example, parties have contracted that the total area of the rental subject matter amounts to 20 m^2, but in fact it is only 15 m^2, – as a result the subject matter does not have the agreed quality, still, the defect is usually not essential. If the application of Art. 1620 of the CL by analogy is denied, the tenant may tolerate the defect or unilaterally cancel the contract in accordance with Art. 27 of the LRT, when the parties cannot compromise. However, it seems to be unfair to leave the tenant without any legal remedies, when he might have agreed to continue using the subject matter on different terms, i.e., paying smaller rent. On the other hand, if the agreed quality is subjectively significant for the tenant and, moreover, the landlord has promised its presence in the contract, it will be reasonable and just to grant the right to ask for termination of the contract.

[57] *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri: Lietas; Valdījums; Tiesības uz svešu lietu. Rīga: Mans īpašums, 1998, 26.–27. lpp.

has not been removed, the lessee may claim a proportional rent reduction. When the habitual dwellings cannot be used at all, the lessee is fully dispensed from the obligation to pay rent and related payments.[58] In addition to the rights described before, the tenant may demand a compensation for the damages sustained from the lessor. Alternatively, the tenant may deposit the rent with a notary after having given a notice to the landlord to remove defects by a certain deadline in a format, which can be reproduced in writing and warned the landlord that, if the defects are not removed, the lessee will deposit the rent which falls due after expiry of the term. If the tenant does not file a claim against the lessor within thirty days as of the time when the first rent deposited is due, the landlord may then demand payment of the deposited amount.[59]

To sum up, the rules regarding defects are similar in both countries, however, with respect to legal remedies the Estonian tenancy law takes into account a wider range of circumstances. The Latvian law is rather casuistic from time to time, for example, the CL states that replacement in kind is possible in case of the legal essential defect, although the consequences of material and legal defects are identical, i.e., the tenant cannot use the leased dwellings. Finally, it would be advisable to generalize the existent remedies for specific defects and apply them in other cases too,[60] for example, the right of the tenant to remove a defect instead of the landlord and ask for compensation of expenditures, which at the moment is provided in case of capital repairs.

5.2. Maintenance and Repairs

The tenant is not responsible for natural tear and wear of the immovable property, if he properly uses and manages it in accordance with the agreement and law in Estonia and Latvia (Art. 2150 of the CL; Art. 276. 1 of the LOA[61]). Both the Estonian and Latvian landlords have to perform capital repairs. However, as to regular repairs, in Estonia, it is clear that the landlord has the duty to carry out the routine repairs and also cover the expenses incurred thereof (mandatory regulation), while in Latvia, the answer to the question who – the landlord or the tenant – covers the costs of ordinary repairs, is debatable.

According to Art. 40 and 42 of the LRT, the landlord must perform capital repairs, but the tenant shall be responsible for regular repairs.

Pursuant to the CL, the tenant may claim compensation of necessary expenses incurred to prevent the object from total destruction, collapse or devastation, and useful expenses, which improve the leased subject matter (Art. 2140 of the CL). Expenditures, which are intended to make the dwelling more convenient, pleasing or attractive, are not reimbursable (Art. 868 of the CL).

There are several following issues, which the CL could define more precisely:

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[58] *Paal, K.* Contracts for use. Commentaries to Art. 296, 3.3. In: *Varul, P., et al.* (eds.). *Võlaõigusseadus* II. *Kommenteeritud väljaanne* [Law of Obligations Act II. Commented Edition]. Tallinn: Juura, 2007 (in Estonian).

[59] Report, pp. 137–138.

[60] *Torgāns, K.* Saistību tiesības. I daļa: Mācību grāmata. Rīga: Tiesu namu aģentūra, 2006, 213.–217. lpp.

[61] Under the Estonian law, the lessee is not required to repair the premises or to preserve the condition that existed at the time when the premises were handed over to the lessee, and the lessor has the duty to maintain the usability of the premises (Art. 276. 1 of the LOA). The lessee must only eliminate minor defects that can be eliminated by minor cleaning or maintenance, which is required for the normal preservation of the object (Art. 280 of the LOA). Agreements deviating from the aforementioned to the detriment of the lessee are void (Art. 275 and Art. 279. 4 of the LOA).

Firstly, it is questionable whether the tenant's expenditures connected with the ordinary repairs can be necessary or useful expenses at the same time to claim their reimbursement from the landlord. This question is answered on a case by case basis,[62] assessing works or improvements made by the tenant and their extent in each case. Usually, capital repairs will be closely related to the necessary expenses,[63] but ordinary repairs can result into necessary or useful expenses.

Secondly, the two different opinions about compensation of the necessary expenses and capital repairs have been expressed: anyone, except the possessor in bad faith, is entitled to claim a compensation of necessary expenses (Art. 866 of the CL), even though no agreement with the landlord has been reached;[64] capital repairs are only compensated by the landlord, if the consent of the lessor has been received by the tenant[65] (Art. 40 of the LRT). The very same issues occur, when ordinary repairs according to Art. 42 of the LRT cause necessary expenses in the meaning of Art. 866 of the CL.

Thirdly, it can be disputable, whether the tenants should bear costs, when regular repairs constitute the useful expenses. One point of view holds that the tenant bears these costs, since he must perform ordinary repairs (Art. 42 of the LRT). On the other hand, Art. 42 of the LRT can be viewed in connection with Art. 2140 of the CL, which clearly states that the tenant is entitled to receive a compensation of useful expenditures.

Fourthly, if the latter opinion holds, that the tenant may demand to compensate useful costs connected with ordinary repairs, the problem at issue is whether the consent of the landlord[66] or Art. 42 of the LRT area constitute a legal ground for compensation.

There are no cogent arguments, why the tenant would not be allowed to refer to Art. 866, 867 and 2140 of the CL to receive a compensation for capital repairs and/or ordinary repairs, unless the parties have agreed otherwise. The necessary expenses shall be reimbursed to everyone except the possessor in bad faith (Art. 866 of the CL), useful expenses are compensated only if the tenant has coordinated ordinary repairs, which cause useful expenses, with the landlord (Art. 42 of the LRT; Art. 867 of the CL).

Conclusions

Informality of the rental relations is a common problem in Latvia and Estonia. This leads to a relatively high level of distrust and uncertainty regarding the conditions of the relationship. Unfortunately, in case of Latvia, the level of legal certainty is quite low, as the provisions of the Law on Residential Tenancy do not always remedy the drawbacks and inaccuracies of the Civil Law, and the rules of the Civil Law are sometimes too casuistic. Estonian law is generally too restrictive, i.e., the parties may not agree on terms and conditions that work to the detriment of the tenant, unless specifically provided by law. A greater flexibility could facilitate

[62] *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri: Lietas; Valdījums; Tiesības uz svešu lietu. Rīga: Mans īpašums, 1998, 26. lpp.

[63] *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri: Lietas; Valdījums; Tiesības uz svešu lietu. Rīga: Mans īpašums, 1998, 26.–27. lpp.

[64] *Grūtups, A., Kalniņš, E.* Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. 2. izdevums. Rīga: Tiesu namu aģentūra, 2002, 12.–88. lpp.; *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri: Lietas; Valdījums; Tiesības uz svešu lietu. Rīga: Mans īpašums, 1998, 26.–27. lpp.

[65] *Krauze, R.* Latvijas Republikas likums par dzīvojamo telpu īri. Likums ar komentāriem. 4. papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2008, 189. lpp.

[66] *Grūtups, A., Kalniņš, E.* Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. 2. izdevums. Rīga: Tiesu namu aģentūra, 2002, 12.–88. lpp.

the functioning of heterogeneous rental market. To sum up, the rules regarding defects are similar in the both countries, however, with respect to legal remedies, the Estonian tenancy law takes into account a wider range of circumstances. In Latvian law, the special rules of LRT shall be more detailed and it would be advisable to generalize remedies for specific defects provided for in the law.

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