

Spanish law of residential leases:

Historical developments and current regulation and trends

Derecho de arrendamientos de vivienda en España: evolución histórica, normativa vigente y tendencias

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ABSTRACT: The housing rental market in Spain has been regulated for decades through special rules on urban leases. This special regulation is aimed to protect tenants, who are considered the weak part of the contract, while the general provisions for leases in the Spanish Civil Code are only subsidiarily applicable. The purpose of this article is to provide a broad view of the Spanish legal framework for tenancies, taking into account the historical development of special rules on urban leases, including rights and obligation of the parties and mandatory provisions for this kind of contract. Since 2013, the liberalization of this regime is jeopardizing tenants' stability, affordability and flexibility, which had lead to a proposal for new rules in Catalonia.

KEY WORDS: tenancy law; housing; rental market; tenures; stability; affordability; flexibility.

RESUMEN: El mercado de alquiler de vivienda en España ha sido regulado durante décadas por la normativa especial de arrendamientos urbanos. La normativa especial tiene por objeto proteger a los inquilinos, que se consideran la parte débil del contrato, mientras que las disposiciones generales para los arrendamientos en el Código Civil español solo son aplicables de forma subsidiaria. El objetivo de este artículo es proporcionar una visión general del marco jurídico español para los arrendamientos de vivienda, teniendo en cuenta el desarrollo histórico de esta normativa especial, los derechos y obligaciones de las partes y las disposiciones imperativas para este tipo de contrato. Desde 2013, la liberalización de este régimen está poniendo en peligro la estabilidad, la asequibilidad y la flexibilidad de los arrendatarios, lo que ha conllevado que la Comunidad Autónoma de Cataluña proponga unos principios para regular una futura Ley de arrendamientos de vivienda en este territorio.

PALABRAS CLAVE: derecho de arrendamientos de vivienda; mercado de alquiler; tenencias; estabilidad; asequibilidad; flexibilidad.

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** **Abbreviations**

Art.	Article
BGB	German Civil Code
CC	Spanish Civil Code
DF	Final provision
INE	<i>Instituto Nacional de Estadística</i>
IPC	<i>Índice de Precios al Consumidor</i>
LAU	Act 29/1994, on urban leases. Amended by Act 4/2013
LAU 1994	Act 29/1994, on urban leases
LAU 1964	Decree no. 4104/1964, on urban leases
LH	Mortgage Law (Decree of 8.2.1946)
ROJ	Database for judgments CENDOJ
JUR	Database for judgments Aranzadi
RD	Royal Decree
RDL	Royal Decree-law
SAP	Judgment of the Court of Appeal
STS	Judgment of the Supreme Court
TOL	Database for judgments Tirant lo Blanch

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1. Historical development of Law on urban leases in Spain

1.1. The need for special rules on urban leases

Since the middle of the 20th Century, residential tenancy contracts in Spain and across Europe have been regulated by special rules aimed to protect the weak party in this contract¹: the tenant. For such reason, regardless of the fact that the Spanish Civil Code (from now on, CC²) has some provisions on leases (in fact, it considers as a “lease” the one of a thing, of a work and of a service), they are not directly applicable to urban tenancy agreements. Basically, the CC is only applied to tenancy agreements when: first, the contract does not fall within the scope of Law on urban leases (LAU) (eg. *locatio operis*, *locatio operarum*, *leases of chattles*, leases expressly excluded by LAU, etc.); and, second, and despite it is governed by LAU, when there is a lack of regulation for a particular matter, since the CC is subsidiarily applicable to urban leases as well.

Some of the liberal provisions of the CC, which do not provide tenants a special protection are, for example, that the contract does not bind third parties unless it is registered into the land register (art. 1571 and 1549 CC, *emptio tollit locatum* principle), that there is no possibility to agree on an open-ended lease, that there is no minimum duration to ensure the stability of the tenant (art. 1543 CC) and a lack of pre-emption rights in case of selling the property. While many of these provisions have been historically substituted by special rules (LAU), since Act 4/2013, however, Spanish special rules on urban leases are more similar to the CC provisions, which has had a negative impact on tenants’ stability, affordability and flexibility, while landlords’ position has been reinforced³. A need for rebalance of parties’ rights and duties had lead Catalonia to draft in 2017 a range of new principles for a new urban leases framework in this Autonomous Region of Spain.

1.2. Former Act 1964

During the 20th century, there have been several pieces of legislation on urban leases, and some of them are in force at the same time because a tenancy agreement is regulated by the piece of legislation that was in force when concluding the contract. Some of them are RD

¹ CHRISTOPH SCHMID, “Los arrendamientos de vivienda en Europa”, Working Paper no. 4/2014. UNESCO Chair on Housing of the Rovira i Virgili University. Available at: <http://housing.urv.cat/wp-content/uploads/2014/06/Working-Paper-4-Prof.-Dr.-Christoph-U.-Schmid.pdf> (visited: 23 August 2017).

² Royal Decree of 24.7.1889, Spanish Civil Code. Official Gazette of 25.7.1889.

³ See SERGIO NASARRE AZNAR / ELGA MOLINA ROIG, “A legal perspective of the current challenges of the Spanish residential rental market”, in *International Journal of Law in the Built Environment*, Vol. 9, Iss. 2, 2017, pp. 108-122.

of 21.12.1925⁴, Decree of 29.12.1931⁵, Urban Leases Act of 31.12.1946⁶ or Decree of 13.4.1956⁷. But one of the pieces of legislation that lasted the most and had an important impact on the rental market was the Urban Leases Act of 1964⁸.

In general terms, LAU 1964 regulated a forced and unlimited extension of the residential tenancies' contract (the tenant could unilaterally extend the contract for an unlimited period of time according to art. 57 LAU 1964) and there were rent controls, in such a way that the parties could not freely increase rent. According to art. 100 LAU 1964, the landlord could only update the rent, during the forced extension, every two years depending on an increase passed by the Council of Ministers. However, the latter never passed any legal provision on the increase of rents, so the price of the contracts governed by LAU 1964 was frozen during those unlimited extensions. As a consequence, for decades tenancy agreements for long periods of time were agreed (for example, 30 years because of the forced extension) but with the same rent during the whole period. In addition, a waiver of these rights was void (art. 6 LAU 1964⁹) and the tenant's relatives had a wide right of subrogation when the former died, so the same conditions of the contract were maintained even after the tenant's death (arts. 58 and 59 LAU 1964).

This phenomenon, which led to a low profitability of the rental market, discouraged housing owners from renting their properties, since selling them was more profitable than to rent¹⁰. This, combined with tax deductions for homeownership and the promotion of publicly protected housing under homeownership schemes, led to low rates of people living in rented dwellings. Even today, Spain is the Western-European country with the smallest rental sector (13.8% of the total population, according to Eurostat¹¹, or 15.6% according to INE¹²) while this factor has been rendered to be one of the main causes of the housing bubble and subsequent housing crisis in 2007, in combination with a lack of alternative housing tenures¹³.

A constant decrease of the Spanish rental sector may be seen in the following table. In 1960, 42.5% of the population was living in rented dwellings, while in 2006 they represented only a 13.5%:

⁴ Official Gazette no. 356, of 22.12.1925. In this case, the RD established a forced extension of the contract for tenancy agreements in towns of more than 6.000 inhabitants.

⁵ Official Gazette no. 364, of 30.12.1931. This RD regulated the forced extension in the whole Spain, without having regard to the inhabitants.

⁶ Official Gazette no. 1, of 1.1.1947.

⁷ Official Gazette no. 112, of 21.4.1956.

⁸ Decree 4104/1964, on Urban Leases. Official Gazette no. 312, of 29.12.1964.

⁹ See also Judgment of the Supreme Court (from now on, STS) of 14.05.1982 (TOL1.739.437), which foresees that it is void a waiver of rights provided in LAU 1964 in advance, but it is possible to do so when the tenant has received this right (for example, when they want to terminate the unlimited extension once it started).

¹⁰ See MONTSERRAT PAREJA-EASTAWAY / M. TERESA SÁNCHEZ MARTÍNEZ, "El alquiler: una asignatura pendiente de la Política de Vivienda en España", in *Ciudad y Territorio*, XLIII, 167, 2011, pp. 53-70.

¹¹ Eurostat (2015). *Distribution of population by tenure status, type of household and income group*. Available at: http://ec.europa.eu/eurostat/en/web/products-datasets/-/ILC_LVHO02 (visited: 3.7.2017).

¹² Instituto Nacional de Estadística. *Encuesta de las Condiciones de Vida*. 2015.

¹³ SERGIO NASARRE AZNAR, "A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain", in PADRAIC KENNA (ed.), *Contemporary Housing Issues in a Globalized World*, Ashgate Publishing, 2014, pp. 37-72. For new alternative housing tenures introduced in Catalonia, see HÉCTOR SIMÓN MORENO / NÚRIA LAMBEEA LLOP / ROSA MARIA GARCIA TERUEL, "Shared ownership and temporal ownership in Catalan Law", in *International Journal of Law in the Built Environment*, vol. 9, iss. 1, 2017, pp. 63-78.

%	1950	1960	1970	1981	1991	2004	2006	2008	2010	2012	2013	2014	2015
Ownership	46,9	50,6	63,4	73,1	78,1	79,5	79,5	79,6	79,4	79,2	77,7	78	77,3
Tenancy	51,4	42,5	30	20,8	15	13,9	13,5	14,2	14,5	14,5	15,4	14,9	15,6
Other uses	2,6	6,9	6,5	6,1	7,7	6,7	7	6,1	6,1	6,3	6,9	7	7,1

Table 1. Evolution of tenure's percentage in Spain (1950-2015). Source: Instituto Nacional de Estadística. Encuesta de las Condiciones de Vida.

1.3. RDL 2/1985

Due to the harmful effects of LAU 1964 on the economy and the rental market, Royal Decree-law 2/1985¹⁴ (from now on, RDL 2/1985) abrogated some of LAU 1964's provisions and allowed the parties to freely fix and update the rent and to establish the duration of the contract. As a consequence, since 9th May 1985 (and until 1995), no tenancy contract could have neither an unlimited extension nor a minimum duration, while the rent could be agreed and freely updated, placing tenants in a precarious situation, as the new regime was very close to the aforementioned liberal regulation of the Spanish Civil Code.

The extreme differences between those two regimes (while tenants under LAU 1964 were over-protected and those under RDL 2/1985 were left without any special protection) led even to a case before the Constitutional Court raising an issue about whether those different regulations contravened the right to equality of tenants protected in the Spanish Constitution 1978. However, the Court, on judgment of 17 March 1994¹⁵, concluded that LAU 1964 does not contravene the Spanish Constitution because the right to equality in art. 14 Spanish Constitution does not prevent, through legal amendments, unequal treatment between different situations, resulting from the difference of dates in which they were originated¹⁶.

¹⁴ Royal Decree-law 2/1985, of 30 April. Official Gazette of 9.5.1985 (from now on, RDL 2/1985).

¹⁵ Judgment no. 89/1994. Published in the Official Gazette on 14.4.1994. Available at: <https://www.boe.es/buscar/doc.php?id=BOE-T-1994-8338> (visited: 3.7.2017).

¹⁶ See also DOMINGO BELLO JANEIRO, "La función social de la propiedad y la Ley de Arrendamientos Urbanos (A propósito de la sentencia del Tribunal Constitucional de 17 de marzo de 1994)", in *Dereito*, vol. III, no. 1, 1994, pp. 229-255.

1.4. Act 29/1994

After thirty years of the implementation of LAU 1964 and only nine years after RDL 2/1985, they were finally abrogated and Act 29/1994 (LAU 1994) entered into force. This Act is still into force today, but with important amendments most of them occurred in 2013.

Unlike RDL 2/1985, LAU 1994 aimed to protect the stability of tenants. This may be seen in the explanatory statement of LAU, where the effects of previous pieces of legislation are also explained. The law-maker admitted that RDL 2/1985 led to instability of tenants and LAU 1994, trying to address this issue, regulated, as an example, the following provisions:

1. A minimum duration of the contract of five years. This worked as a forced extension as a unilateral right for tenants, but not perpetual, unlike the one from LAU 1964. In this case, parties could agree on the duration of the contract they wanted but, if it were less than five years, the tenant had the unilateral right to extend it until five (former art. 9 LAU 1994).
2. An additional voluntary extension, after the fifth year, of three years. That is to say, once the term of five years had elapsed, the contract could be extended a maximum of three more years, provided any of the parties did not object to it (former art. 10 LAU 1994).
3. Priority of the tenancy contract before third parties (principle *emptio non tollit locatum*): if the landlord sells the property, the buyer is compelled to respect the tenancy agreement at least during the first five years of the lease, regardless whether the contract had been recorded into the Land register or not (former arts. 13 and 14 LAU 1994). The recording into the Land register was only relevant to continue the tenancy agreement for all the agreed term: for example, if parties agreed on a 10-year contract, the buyer could not terminate the contract until the 10-year term had elapsed. The same happened in a proceeding of mortgage enforcement or other situations where the landlord could have lost his right over the property: in any case, the tenancy contract had to be maintained until the fifth year.
4. Pre-emption rights: when the landlord wanted to sell the property, the tenant had the right to purchase it in preference to a third party. This right could only be excluded in contracts concluded for more than five years (former art. 25 LAU 1994).
5. Rent updates: the rent, during the first five years, could only be updated according to the Consumer Prices Index (former art. 18 LAU 1994).
6. Termination of the contract by the landlord because of housing needs: parties could agree that, if the landlord would need the property for housing purposes, they could terminate the contract for such reason (former art. 9.3 LAU 1994).

1.5. Latest amendments of Act 29/1994 in 2013 and 2015

After five years of the beginning of 2007 financial and housing crisis, LAU 1994 was amended through Act 4/2013¹⁷. Some key provisions of LAU 1994 were altered, which entailed a

¹⁷ Act 4/2013, of 4 June, on measures to make more flexible and to promote the housing rental market. Official Gazette no. 134, 5.6.2013.

reduction of the tenant's stability¹⁸. For example, the minimum duration of the contract was reduced from five to three years, a possibility to exclude pre-emption rights was added and it introduced the need to record the contract into the Land register in order to bind third parties. Note that Act 4/2013 is applicable in tenancy contracts agreed since the 6th June 2013 (DF 4th Act 4/2013).

Nevertheless, after reducing tenants' rights with these amendments, Act 2/2015, on the Discontinuance of Indexation of the Spanish economy¹⁹, establishes that, when nothing is agreed between the parties, the rent of the tenancy contract will not be updated.

As we have seen previously in Table 1, the share of the Spanish rental sector is increasing in recent years. However, this increase is not considered²⁰ to be because tenancies are really appealing to households thanks to the new dispositions of LAU 2013, but due to the negative effects of the financial crisis such as the lack of liquidity of households, restrictions in being granted a mortgage to buy a property, rise of unemployment rate, labor precariousness, etc. In fact, in 2017 to buy a property is more affordable than to rent it in 47 out of 50 Spanish provinces²¹, but many households simply cannot access to homeownership, which remains to be the most desired type of housing tenure in Spain²².

2. Main features of current Act 29/1994, on urban leases (LAU), amended through Act 4/2013

2.1. Scope of application

Current version of LAU (LAU 1994 amended by Act 4/2013) provides special rules both for tenancies for residential purposes (regulated by Title II LAU) and for other uses (regulated by Title III LAU), such as tenancies for commercial premises or for a temporal housing need, for example, for students. When the contract is for residential purposes, parties cannot contravene some mandatory provisions whereas in contracts for other purposes the freedom of contract prevails (art. 4 LAU).

In both cases, the property must be "urban", in contrast with "rural" (art. 1 LAU). The concept of "urban" or "rural" does not depend on an administrative qualification or the

¹⁸ SERGIO NASARRE AZNAR / MARIA OLINDA GARCIA / KURT XERRI, "¿Puede ser el alquiler una alternativa real al dominio como forma de acceso a la vivienda? Una comparativa Portugal-España-Malta", in *Teoría y Derecho*, no. 16, 2014, pp. 188-217.

¹⁹ Act 2/2015. Official Gazette no. 77, 31.3.2015.

²⁰ According to NASARRE and MOLINA, "Therefore, it can be concluded that the slight increase in the rental sector since 2007 is mainly due to a forced option for many families because of the bad economic situation, the lack of alternative attractive housing and the rental black market (which represented 41.4 per cent of the total in 2015)". SERGIO NASARRE AZNAR / ELGA MOLINA ROIG, "A legal perspective of the current challenges of the Spanish residential rental market", cit., pp. 108-122.

²¹ See: https://www.elconfidencial.com/vivienda/2017-01-29/si-pagases-lo-mismo-de-alquiler-que-de-hipoteca-comprarias-casa_1315309/ (visited: 14.8.2017).

²² FOTOCASA. *Los españoles y su relación con la vivienda en 2015*. Available at: <https://www.fotocasa.es/blog/wp-content/uploads/2016/06/informe-fotocasa-2015.pdf> (visited: 23 August 2017).

location (for example, urban or rural land), but on the purpose that the tenant is going to use the property (to cultivate it or to dwell)²³. Thus, contracts agreed for agricultural, livestock or forestry purposes are specifically excluded from LAU (art. 5 LAU) and governed by Act on Rural Leases (LAR)²⁴; but when someone rents a property to live in the countryside, the contract should be considered "urban" and, therefore, governed by LAU.

A tenancy agreement for housing purposes should meet some requirements in order to be governed by LAU (art. 2 LAU):

1. They need to cover a permanent housing purpose. If the tenant uses the property for a variety of purposes (for example, when they live and have their office in the same flat), the tenancy agreement will be considered for housing purposes when the main activity is to live there²⁵. For this reason, temporal housing purposes are excluded from the scope of application for housing tenancies and considered as a tenancy for other uses. There is not an objective rule to define whether the tenant needs the dwelling for permanent housing purposes or not. Case law²⁶ establishes that it does not depend on the agreed term, but on the temporal need: for example, a student who needs a dwelling for the academic year is a temporal housing need, as well as a tourist dwelling.
2. The property should have enough habitability conditions (art. 2.1 LAU): it is neither defined nor clear what "habitability" means. Some courts²⁷ relate this concept with the administrative document that certifies the minimum standards of the dwelling (regulated, for example, in Catalonia by Decree 141/2012²⁸), but most of them establish that a property has the habitability conditions when it is suitable for using it for housing purposes²⁹, regardless of meeting the public rules related to minimum habitability conditions. However, although administrative requirements are not directly enforceable through art. 2.1 LAU, in case the dwelling lacks the certificate of habitability; the Autonomous Community administration could fine the landlord for concluding a lease without that document³⁰. The certificate of energy efficiency shall also be delivered, according to art. 1 Act 235/2013³¹, but no minimum standards are required.

²³ ETELVINA VALLADARES RASCÓN / MARTA ORDÁS ALONSO, "Art. 1. Ámbito de aplicación", in ROGRIGO BERCOVITZ RODRÍGUEZ-CANO, *Comentarios a la Ley de Arrendamientos Urbanos*. 6th ed. Cizur Menor, Thomson Reuters Aranzadi, 2013.

²⁴ Act 49/2003. BOE no. 284, of 27.11.2003.

²⁵ Judgment of the Court of Appeal (from now on, SAP) of Granada of 9.9.2000 (AC 2000, 2133).

²⁶ SAP Cádiz of 18.7.2006 (JUR 2007, 63427) and SAP Huesca of 1.7.2005 (JUR 2005, 175202).

²⁷ SAP Valencia 5.5.2008 (AC 2008, 1433) and SAP Islas Baleares 7.5.2013 (JUR 2013, 237240).

²⁸ Official Gazette of Catalonia (DOGC) no. 6245. 2.11.2012.

²⁹ SAP Barcelona 7.6.2012 (JUR 2012, 282178), SAP Barcelona 18.5.2005 (JUR 2005, 169610), SAP Córdoba 5.4.2000 (AC 2000, 1087), SAP A Coruña 4.11.2005 (JUR 2007, 119361).

³⁰ ETELVINA VALLADARES RASCÓN / MARTA ORDÁS ALONSO, "Art. 1. Ámbito de aplicación", in ROGRIGO BERCOVITZ RODRÍGUEZ-CANO, *cit.*, p. 28.

³¹ Royal Decree 235/2013, 5 April, which approves the basic procedure for the certification of energy efficiency of buildings. Official gazette no. 89, 12.4.2013.

2.2. Mandatory provisions

According to art. 6 LAU, it is not possible to abrogate the mandatory rights for the tenant, except when LAU itself allows it. This restriction only works regarding tenancies for housing purposes, and they may be excluded for other uses (such as commercial ones).

Art. 6 LAU does not establish which of the rights are mandatory, but all the rights awarded to tenants for housing purposes should be included³². For example:

- The right of a minimum duration of 3 years (art. 9.1 LAU).
- The unilateral right of withdrawal of the tenant (art. 11 LAU).
- The subrogation of tenant's relatives in case of tenant's death (art. 16 LAU).
- The right of the tenant to be refunded for performing urgent repair works (art. 21 LAU).
- The right to terminate the contract for lack of habitability of the dwelling (art. 26 LAU).

In any case, LAU provisions are only mandatory if they harm tenants' rights. In consequence, it is possible to agree, for example, a waiver of the landlord's rights, such as the right to terminate the contract for their own need (art. 9.3 LAU).

2.3. Duration of the contract

2.3.1. Mandatory duration

LAU establishes the possibility to agree on the duration of the contract, provided it is fixed-term. Thus, it is not allowed to agree on open-ended leases under Spanish tenancy law according to art. 1543 CC, and unlike some other European countries (§ 1113 Austrian Civil Code³³, §542.2 German Civil Code (BGB)³⁴, art. 255 of the Swiss Code of Obligations³⁵, art. 1100 Portuguese Civil Code³⁶ and in art. 609 Greek Civil Code³⁷).

Although parties may agree on the contractual term they want, they should regard two special provisions. If no duration was agreed, the term by default is one year (art. 9.2 LAU). In addition, in any case, the tenant has the right to live, at least, three years in the rented property. In consequence, being the agreed term lower than three years, the tenant may opt for living there for this minimum duration. An agreement against this right is void (art. 6 LAU).

Once the three-year-term lapses, if neither of the parties terminates the contract, it will be renewed for one more year (art. 10 LAU). After this period, when parties do not agree on a new tenancy contract, a tacit renewal should be applied (art. 1566 and 1581 CC) depending

³² About the waiver of rights in Spanish tenancy law, see STS 24.6.2015 (ROJ: STS 2735, 2015).

³³ *Österreich Allgemeines Bürgerliches Gesetzbuch*, no. 946/1811

³⁴ *Bürgerliches Gesetzbuch*. Published in the Reich Gazette on 24 August 1896.

³⁵ Act on 30 March 1911 which completes the Swiss Civil Code, book five: law of obligations (RS 220).

³⁶ Decree-law n. 47344/66, 25.11.1966, on the Portuguese Civil Code. D.G. n. 274, I Serie.

³⁷ Greek Civil Code of 23 February 1946.

on the frequency of the rent: if the rent is payable every month, the contract will be extended every month; if the rent is payable every year, the contract will be extended every year, and subsequently.

2.3.2. Right to terminate the contract for the landlord's need for housing

There is only one situation when the landlord may deny the extension of the contract for three years: when they need the dwelling for their own housing purpose or for the one of a relative (art. 9.3 LAU). This right is subjected to the following requirements:

1. At least one year of the contract shall be passed. Thus, in any case the tenant will be able to live in the rented property for at least one year.
2. The right is only applicable when the tenant extends the contract, i.e., from the first year to the third one, thanks to his right to extend the contract for three years. Therefore, the landlord cannot terminate the contract when the initial agreed term is, for example, three years, because the mandatory extension will not be applicable.
3. The need of the landlord shall be for housing, not for other purposes³⁸. Landlord's relatives' need may be also covered, but only for those ones with a first-degree of relationship with him (parents, children and the spouse or partner). Some examples for a housing need of the landlord or their relatives are: a landlord's daughter who wants to live on her own and needs the rented dwelling (SAP Barcelona 8.6.2016³⁹), or when the landlord, who was working abroad, retires and wants to return to Spain where the rented property is located (SAP Salamanca 2.11.2012)⁴⁰.
4. If the landlord or their relatives do not enter into the property three months after the early-termination of the tenancy contract, the former tenant may claim for a compensation or ask to be relocated. The amount of the compensation is limited to the value of a monthly rent for each remaining year of the contract.

It is not necessary to previously agree on this right. However, since this is a right for the landlord, it is possible to exclude it by agreement (art. 4 LAU).

2.3.3. Ordinary notice of the tenant

Since 2013, the tenant's right to give ordinary notice (withdrawal right) has been widespread in art. 11 LAU. Thanks to this right, it is possible for the tenant to terminate the tenancy agreement without any justified ground, only for their own convenience. However, one

³⁸ For example, having the landlord another available property, this right cannot be admitted (SAP Asturias 1.7.2014, JUR 2014, 222221).

³⁹ JUR 2012, 215300.

⁴⁰ JUR 2012, 398860.

should distinguish the applicable law to the contract in order to solve whether the tenant has this right or not. Depending on the date of the conclusion of the contract, the tenant will have or will not have a withdrawal right:

— For contracts concluded until 6th June 2013 (Act 4/2013 had not entered into force), art. 11 stated that the tenant was only allowed to withdraw from the contract once the minimum duration of five years had been reached. He had to give notice to the landlord with two months in advance in order to leave the dwelling⁴¹. For contracts with a term below five years, they could only withdraw from it at the end of each year of extension, with a notice period of thirty days (art. 9.1 LAU)⁴².

— For contracts concluded from 6th June 2013, the tenant may withdraw at any time, provided that a minimum duration of six months has elapsed since the conclusion of the contract, giving notice at least thirty days in advance (art. 11 LAU). Additionally, parties may agree on compensation to the landlord with an amount equivalent to a monthly rent payment for each remaining year of the contract. Parties may not agree on a higher compensation.

Note that, although this right has been recently introduced, terminating the contract is still burdensome for the tenant in comparison to other legal systems⁴³: according to arts. 12 and 15 of the French *Loi rapports locatifs*⁴⁴, it is possible to withdraw with a notice period of three months, which may be reduced to one month in some cases (unemployment, illness of the tenant, etc.) or in Germany (§573), with a three-month-period for open ended leases and in Austria (art. 29 Austrian *Mietrechtgesetz*⁴⁵), with a one-month-period.

In addition, it is not possible for the tenant to sublet or to assign the contract to a third party without the landlord's consent (art. 8 LAU) under Spanish tenancy law. In fact, the regulation of the Spanish Civil Code is more favorable to non-urban tenants in this point since, according to art. 1550 CC, the tenant may sublet the whole property provided that the landlord does not oppose to it.

⁴¹ According to STS of 4 March 2009 (RJ 2009, 2383), which considers it a contractual breach, unless the parties agree on the unilateral withdrawal of the tenant.

⁴² In this situation, the main problem was to establish the effects of the withdrawal before the end of any extension. Four doctrinal positions exist regarding this circumstance. ÁNGEL LUÍS REBOLLEDO VARELA, *Cuestiones prácticas actuales de arrendamientos urbanos: últimas tendencias jurisprudenciales*, Aranzadi, Cizur Menor, 2010, pp 5 to 7.

⁴³ According to the current art. 11 LAU, if a tenant wants to terminate the contract, for example, at the second month, he would be required to pay the four months remaining up to the minimum period of six months. In addition, he will have to pay as compensation a monthly rent payment for each remaining year of the contract, if agreed in the contract. Consequently, in a three-year contract, the tenant shall compensate the landlord paying two monthly rents, plus the half-month that corresponds to the proportion of the current year. This means that, if the agreed monthly rent is 500€, the tenant will have to pay 3,250€ for terminating the contract, which involves paying more than half of the annual cost of the tenancy. In addition to this, the cost of renting a new dwelling has to be added to his expenses, which includes the deposit amount, equivalent to one monthly rent. People with scarce resources will not be able to bear the withdrawal costs.

⁴⁴ Act no. 86-1290, of 23.12.1986.

⁴⁵ BGBl. n. 520/1981.

2.4. The rent

2.4.1. General features

According to art. 1543 CC, a certain price is required to conclude a tenancy contract. The price in tenancy law is regulated in art. 17 LAU, which makes reference to the rent of the contract. In this case, the rent is freely agreed by the parties, so there is no control of it.

Normally the rent is paid every month and in cash, but parties may agree other methods of payment as well as different periods (for example, an annual rent). The landlord is obliged to deliver a receipt to the tenant (art. 17.4 LAU).

In addition to the rent, the tenant is obliged to pay the costs of consumptions (electricity, water, heating, etc.), which are not included in the rent amount, according to art. 20 LAU. In addition, parties may agree on the obligation of the tenant to pay other costs, such as taxes (but, in this case, the total amount assigned to the tenant shall be stated in the contract).

2.4.2. Repairs in lieu of rent

Act 4/2013 has introduced a new art. 17.5 LAU, allowing parties to agree on “repairs in lieu of rent”, that is to say, the possibility to replace the rent for improvement works, paying the rent in kind while ameliorating the value of the property. This type of tenancy agreement may make housing available for those tenants without enough liquidity but with some skills on construction, and it may help homeowners with empty dwellings in disrepair to put them on the rental market. Repairs in lieu of rent are intended to facilitate access to affordable housing for less affluent households, to increase the size of the rental market and to improve housing conditions⁴⁶.

Art. 17.5 LAU states the following: “parties may agree to wholly or partly replace the obligation to pay the rent with a commitment from the tenant to rehabilitate or reform the property on the agreed terms and conditions, establishing the landlord’s right to terminate the contract if the tenant fails to perform such obligation. The tenant may not claim, in any case, compensation for works performed”.

Accordingly, the main features of a tenancy contract in which the tenant pay carrying out a renovation work are the following:

1. The main obligation is to perform some works, as the article allows parties to “wholly” replace the rent. There may exist, as a consequence, tenancy contracts in which no rent is required, although it should be determined. Note that repairs in lieu of rent is not a claim for

⁴⁶ In fact, 2 million of properties need to be repaired in Spain, according to the report of IDEA (2015). In addition, the housing need for the next 30 years in Tarragona could be covered only renovating the current empty housing stock, according to: UNESCO CHAIR ON HOUSING URV. *Necesidades habitacionales de Tarragona ciudad (a medio y largo plazo)*. Tarragona, 2016

reimbursement of expenses, as the latter is used when the works are optional for the tenant and the former when the works are the main obligation of the contract⁴⁷.

2. Other payments in kind are not allowed, such as personal services. In principle, the price of a tenancy contract under Urban Leases Act shall be a rent or repair works. Urban Leases Act says nothing about other types of payment (such as services) but, in fact, when renting the property is the result of a labor contract, it is not governed by Urban Leases Act (art. 5.a LAU, for example, a janitor's house).
3. The tenant may not claim a reimbursement of the expenses, since they are the price of the contract.
4. Although the tenant is obliged to carry out a work, the landlord is still obliged to keep the property in the agreed conditions. According to art. 21 LAU, the landlord shall perform the repair works in the rented dwelling. This duty is inherent to the lease agreement, since the landlord shall provide the tenant with the agreed use of the dwelling.
5. Breach of the contract: a breach of the obligation to carry out the agreed works is considered a breach of the contract, and the landlord may terminate it for this reason (art. 17.5 and 27 LAU).

2.4.3. Rent update

Neither the establishment of the initial rent nor its updating are limited by law. One should differentiate between the rent update and the rent review at the end of the contract: (1) the rent update is the increase or decrease of the rent during the contractual term, according to an index (for example, the Consumers' Price Index); whereas (2) the rent review takes place at the end of the contract, if parties want to conclude a new tenancy contract.

Regarding the rent update, since 2013 parties may agree to link the rent increase to any index, even if it is more harmful to the tenant (art. 18 LAU). Depending on what it is established in the contract, the update of the rent will be regulated as follows:

1. Parties may agree on any index to update the rent.
2. When parties establish in the contract that the rent will be updated, but without mentioning the way to do it, the General National Index of the System of Consumer Price Index (IPC) will be used.
3. When parties establish that they do not want to update the rent, it will not be updated (since Act 2/2015).

Regarding the rent review at the end of the contract, parties may agree on any new amount of rent (unlike the new German *Mietpreisbremse* of § 555d BGB, applicable to some cities), since it is considered a new tenancy agreement. This, combined with the shorter duration of

⁴⁷ For this reason, this type of contract has been considered as a "mixed contract", a so-called *ad meliorandum* lease, which combines a rental agreement and a work contract. See, JOSÉ ANTONIO MARTÍN PÉREZ, "Comentario al artículo 17 de la Ley de Arrendamientos Urbanos", in EUGENIO LLAMAS POMBO (coord.), *Ley de Arrendamientos Urbanos. Comentarios y jurisprudencia doce años después*. Madrid, La Ley, 2007, p. 441.

tenancy contracts (which entails that every three years a new rent may be fixed), has been rendered to involve an increase of the rental prices in key cities⁴⁸.

2.5. Works in the rented dwelling

LAU foresees different types of works: repairs (art. 21 LAU), "small repairs" (the wear of the dwelling, art. 21.4 LAU), improvements by the landlord (art. 22 LAU) and improvements by the tenant (arts. 23 and 24 LAU). The general difference between repairs and improvements depend on the agreed use of the property: whereas repairs aim to maintain the agreed conditions of it, improvements increase the value of the property⁴⁹.

According to art. 21 LAU, the landlord is obliged to make repair works in the rented dwelling. This duty is inherent to the lease agreement, since the landlord shall provide the tenant with the agreed use of the dwelling. The obligation to repair has some limitations: when the tenant is responsible for the damage or when the property is destroyed (in this case, the contract would be finished). Some examples of repairs that are obligation of the landlord are leaks and dump (STS 29.2.2012⁵⁰) and repair of walls and of the power system (STS 18.5.2006⁵¹). Apart from the general obligation to repair, the tenant is responsible to bear the costs of "small repairs" for the wear of the dwelling. LAU neither defines this concept, nor establish the type of works included. Case law has included some works within this concept, such as surface cracks in the wall (SAP Lleida 3.2.2005⁵²), changing pieces of the washing machine (SAP Madrid 25.10.2010⁵³) or clearing the toilet tank (SAP Lleida 23.4.1999⁵⁴). As one may see, it is difficult to distinguish between repairs and small repairs, which is why it is one of the most discussed questions in Spanish Tenancy Law.

Apart from that, improvements are also regulated depending on the right of the parties to perform them. The landlord may only carry out urgent improvements in the rented dwelling. The concept of "urgent improvements" is also undefined, likewise repairs. Courts have included within this concept those works imposed by an authority. For example, works imposed by the municipality, by a Court or even by the Board of the Condominium⁵⁵. But the landlord may not perform other improvement works without the consent of the tenant.

Regarding improvement works performed by the tenant, they may perform them, without the consent of the landlord, provided that they do not change the distribution (*configuración*) of the property. Some of the works that change the distribution and, in consequence, the

⁴⁸ SERGIO NASARRE AZNAR / ELGA MOLINA ROIG, "A legal perspective of the current challenges of the Spanish residential rental market", cit. p. 116.

⁴⁹ AD STRAUB, "Maintenance and Repair", in *International Encyclopaedia of Housing and Home*, Vol. 4, 2012, Amsterdam, Elsevier.

⁵⁰ RJ 2012, 4994.

⁵¹ RJ 2006, 2368.

⁵² AC 2005, 376.

⁵³ JUR 2011, 16468.

⁵⁴ AC 1999, 4415.

⁵⁵ See SAP León 15.11.2003 (JUR 2003, 63384) and SAP Madrid 17.5.2001 (JUR 2001, 251915).

consent of the landlord is needed, are the covering of windows (STS 19.4.2013⁵⁶) or creating new rooms (SAP Toledo 23.10.2015⁵⁷). The landlord's consent is not required when the works are necessary for elder or disabled tenants, as well as for their relatives (art. 24 LAU), but at the end of the contract, the landlord may request the tenant to take out the improvements. Other works that harm the stability or security of the building are not allowed (art. 23.2 LAU), even with the landlord's consent (such as the demolition of a load-bearing wall⁵⁸).

Considering that there is not a legal definition of the abovementioned works, the possibility to carry out them as well as the obligation to bear their costs have to be decided on a case-by-case basis.

2.6. Termination of the contract

2.6.1. Due to a breach of the contract

The landlord and the tenant may terminate the contract under certain circumstances when there is a breach of the contract. Some of the grounds are the following:

— For the tenant: they may terminate the contract when the landlord does not carry out the repair works in the rented dwelling (art. 21 LAU) and when the landlord disturbs the pacific use of the tenant (for example, if they cut the supply of water or electricity, which may be also considered as a coercion crime⁵⁹).

— For the landlord: the landlord has several grounds to terminate the tenancy contract. For example, for a non-payment of the rent, for a non-payment of the deposit, for damages in the property, when the tenant or their relatives make unhealthy, harmful, dangerous or illicit activities in the property⁶⁰, for subletting or assigning the contract to a third party without landlord's consent or when the tenant does not use the property for housing purposes (which implies the obligation of the tenant to live in the rented property, see arts. 7.2 and 27.2 LAU).

Once there is a breach of the contract, it may be terminated before a Court (the eviction procedure may be started from the first rent default⁶¹) or through Alternative Dispute Resolution mechanisms, taking into account that since 2013, Act 4/2013 expressly allows the submission to mediation or arbitration of any disputes that, by their nature, can be solved by such means (art. 4 LAU).

⁵⁶ RJ 2013, 4601.

⁵⁷ Roj: SAP TO 834, 2015.

⁵⁸ SAP Badajoz 21.12.2015 (JUR 2016, 31534).

⁵⁹ See the judgment of the criminal court of Barcelona 19.6.2012 (TOL2.580.234).

⁶⁰ Some examples of these harmful activities are: drug dealing into the rented property (SAP Albacete 21.12.2015, JUR 2016, 31529), to gather garbage into the rented property (SAP Las Palmas de Gran Canaria 4.6.2009, Roj: SAP GC 2030, 2009) or to keep dozens of cats in deficient conditions (SAP Pontevedra 28.3.2012, Roj: SAP PO 706, 2012).

⁶¹ STS 20.10.2009 (TOL1.639.034). Once the eviction proceeding for the non-payment of the rent has been started, if the tenant does not pay or fails to appear to file a defense, the Court Clerk shall issue an order terminating the trial and processing the eviction (art. 440.3 Act 1/2000, on the Civil Procedure).

Apart from that, a registry on tenants who defaulted on paying the rent was expected to be created (art. 3 Act 4/2013, but not regulated so far). Landlords who wish to arrange a tenancy contract will have access to the registry, once they provide a contract proposal, and this will allow them to access only data related to tenants appearing in the proposal. This official system is currently under development, but there already exist some private registries with the same aim⁶².

2.6.2. Due to the sale of the property or any other loss of the landlord's right over the property

After Act 4/2013, a tenancy contract that has not been recorded into the land registry will not bind third parties (art. 7 and 14 LAU), adopting the principle *emptio tollit locatum*. Thus:

- If the contract has not been recorded into the Land registry, the property's acquirer is entitled to immediately terminate the tenancy agreement, unless otherwise agreed in the sale contract (art. 14.2 LAU)⁶³. As a consequence, the tenant will have the obligation to leave the property after the sale, even if the term agreed in the contract foresaw a longer contractual term, which affects their stability. Note that LAU 1994, before its amendment in 2013, foresaw the right of the tenant to remain at least five years living in the property even when the property was sold and when the contract was not recorded into the Land Register.
- The same happens in the exercise of a conventional redemption, the opening of a *fideicommissum* substitution, the compulsory sale of the rented property derived from a mortgage enforcement, a judicial decision, or the right of an option to purchase the rented dwelling (art. 13 LAU). When the landlord loses his position as such because one of the abovementioned situations, the tenancy contract will not bind third parties, unless the contract was recorded into the land registry before that right. As an example, the tenancy agreement will not bind a third party if the contract was recorded after the mortgage, whose default involved the loss of the landlord's ownership.

However, the same art. 14, which establishes the termination of a non-recorded tenancy agreement in case of selling the property, admits that the new acquirer has to be considered to be in "good faith", according to art. 34 Mortgage law (*Ley Hipotecaria*, hereinafter "LH"⁶⁴). This "good faith" means that they could not know about the existence of the contract if it is not recorded into the Land registry⁶⁵. In this vein, the Supreme Court⁶⁶ decided that: "there is no good faith when something that with due diligence should have been known is not known. And it is hard to understand that a buyer who has not seen the property to verify its

⁶² EL ECONOMISTA. *Por solo ocho euros puede saber si un inquilino es moroso.* <http://www.eleconomista.es/vivienda/noticias/8358274/05/17/Por-solo-ocho-euros-puede-saber-si-un-inquilino-es-moroso.html> (visited: 18 august 2017).

⁶³ According to article 34 LH, the new acquirer shall act in good faith, so he should not know the existence of the contract. If not, the tenancy contract will remain in force until the end of the agreed term.

⁶⁴ Decree of 8.2.1946, establishing a new official version of the Mortgage Act. Official Gazette no. 58, 27.2.1946.

⁶⁵ Art. 34.2 LH establishes that the good faith of third parties is always taken for granted, while it is not proven that third parties are aware of Registry inaccuracies.

⁶⁶ STS 27 December 2004 and 25 May 2006 (RJ 2006, 3340).

conditions has acted with due diligence to be considered in good faith⁶⁷. In conclusion, although Act 4/2013 goes against art. 34.2 LH when it is said that in any case the acquirer will not be bound by the tenancy contract if it was not recorded into the land registry, when the acquirer knows the existence of the contract, it should bind him.

2.7. Deposit

There is a minimum compulsory deposit to be paid by the tenant at the beginning of the contract. According to art. 36 LAU, the tenant shall make a deposit equivalent, at least, to a monthly-rent-payment (tenancies for housing purposes) or to two rents (other uses). Since it is a minimum amount, parties may agree on a higher deposit. Moreover, parties may agree on other guarantees, such as personal guarantees from a bank or from the tenant's relatives and insurances.

3. New principles on urban leases in Catalonia 2017

As we have seen so far, the current urban leases regime reduces the stability of tenants in comparison to LAU 1994. In fact, some of the provisions that traditionally were used to protect the tenant are now similar to the liberal approach of the Spanish Civil Code, such as readopting the principle *emptio tollit locatum*.

The Autonomous Community of Catalonia drafted in January 2017, thanks to the proposals of the UNESCO Chair on Housing of the Rovira i Virgili University and as a results of its participation in the TENLAW project⁶⁸, a range of principles for implementing a new legal framework for tenancies⁶⁹, with the aim to make them more affordable, stable and flexible for tenants while keeping profitability and security for landlords, based on European systems such as the German, Swiss and Austrian ones⁷⁰. These principles are intended to be the guide to draft a future piece of legislation on urban leases in Catalonia, but there is no formal proposal so far (September 2017). Note that Autonomous Communities in Spain may have competences in housing (art. 148.3 CE) and in the conservation, modification and development of its own civil law (art. 149.1.8 CE).

Some of the shortcomings of the current tenancy framework that needed to be addressed under these principles are the lack of stability of the tenant (since the Spanish law only

⁶⁷ In practice, this exception was reduced to cases of comprehensive sales of real estate in which the purchaser is not required to check the possessory status of all houses. JUAN PÉREZ HEREZA, "Arrendamientos, hipotecas y registro de la propiedad", in *El notario del siglo XXI*, núm. 51/2013, 62-65.

⁶⁸ <http://www.tenlaw.uni-bremen.de/> (visited: 16 August 2017).

⁶⁹ http://www.ara.cat/economia/Generalitat-creara-index-referencia-lloguers_0_1725427612.html (visited: 16 August 2017).

⁷⁰ SERGIO NASARRE AZNAR / ELGA MOLINA ROIG, "A legal perspective of the current challenges of the Spanish residential rental market", cit. p. 117.

ensures three years of the contract), the lack of flexibility (due to restrictions on terminating the contract and difficulties in subletting the dwelling), to increase the affordability and to improve, at the same time, the profitability of the landlord. In fact, the legal regimes of urban leases of those European countries with more share of rental market have rules to protect the stability, affordability and flexibility of tenants as well as the landlords' rights. With this aim, the Catalan principles establish the following:

- The field of application of a future law on tenancies in Catalonia would be widened to room rental agreements (which today are mainly governed through Civil Code provisions, thus rendering these tenants unprotected), social rented housing and payments of the rent in kind (such as works and services), provided that they cover a permanent housing need.
- The stability of tenants is promoted through the proposal for regulating open-ended leases, which, as seen, are currently not allowed in the Spanish Urban Leases Act, but also with fixed-term tenancies with a minimum duration of five years, while providing the landlord with mechanisms to terminate the contract for their own need.
- The Catalan proposal returns to the principle *emptio non tollit locatum*, thus maintaining the tenancy agreement in case of selling the property.
- Regarding the tenant's flexibility, the principles promote the possibility of the tenant to terminate the contract, without any ground, with a three-month-notice period. In addition, they may sublet the contract to a third party provided that the landlord gives his consent, which can be only denied under certain circumstances (such as overcrowding or lack of economical resources of the new tenant).
- In order to avoid the problems concerning the obligation to carry out the repairs in the rented dwelling, the Catalan principles propose a distribution of the cost of repairs (the tenant has to pay a maximum of the 10% of the costs of the ordinary maintenance).
- Finally, regarding the affordability, the Catalan government proposes the establishment of a range of tables to launch a rent-reference system⁷¹, in such a way that parties will be able to consider them when establishing the rental price as well as its updating (similar to the German system of § 557 and 558d BGB, regarding the *Mietspiegel*).

4. Conclusions

Spanish tenancy law has been continually changing over the last years, promoting in some cases a strong protection of tenants and in others leaving them without enough stability, affordability and flexibility. In fact, last amendments in Urban Leases Act 2013 have led to a decrease on tenants' rights and have been rendered to increase the rental prices in key cities. For example, a limited minimum duration of three years is granted (art. 9.1 LAU, whereas under LAU 1994 it was of five years), the landlord may terminate the contract for

⁷¹ Right now, tables were passed through Order GAH/142/2017, 5.7.2017, on the reference index of rental prices, and are only for informative purposes. They may be seen at the following website, launched on July 2017: <http://agenciahabitatge.gencat.cat/indexdelloquer/> (visited: 16 August 2017).

their own need or a relative's need (art. 9.3 LAU), if the landlord sells the property, the buyer is not obliged to respect the tenancy contract unless it is recorded in the Land Registry (art. 14 LAU), parties may exclude pre-emption rights, there are no rent controls, there exist a minimum duration of six month to let the tenant leave the rented property (art. 11 LAU), etc. Apart from that, the amendments on tenancy law have not solved other traditional problems, such as the distribution of costs for maintenance works (art. 21 LAU) or the lack of incentives to carry out improvements in the rented dwelling, neither for the landlord nor for the tenant.

To promote the rental market (only a 14% of the Spanish population live in a rented dwelling) as well as tenants' and landlord's rights, Catalonia has just drafted some principles for a new legal framework of residential tenancies, promoting the flexibility, stability and security of tenants while respecting the aspirations of landlords.

In any case, all these are indicators of the inefficiency of the current tenancy law in Spain to grant the right to an adequate housing of those people who cannot afford buying a dwelling and that, at the same time, are not eligible for social housing.

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