

THE LEGAL EFFECTS OF THE CORONAVIRUS (COVID-19) PANDEMIC ON LEASE AGREEMENTS

The Coronavirus pandemic has brought devastating effects on commercial activities. As part of the measures aiming to prevent the wider spread of Coronavirus, many businesses have temporarily closed down their workplaces and taken measures to adopt methods of remote working. On March 16, 2020, the Ministry of Internal Affairs delivered to the city governorates the Additional Circular on Precautions against Coronavirus (“Circular”) suspending the activities of a wide range of businesses such as performance centers, concert venues, cinemas, cafés, playgrounds, and sports centers. These measures will undoubtedly bring forward legal issues regarding lease agreements.

In line with the principle of freedom of contract, parties’ will should be taken into consideration before analyzing any possible application of relevant provisions in the Code of Obligations. In other words, it should be checked whether the parties have any provision foreseeing the legal effects of a force majeure event in their lease agreement, which is the case for the Coronavirus pandemic. If the lease agreement does not have any force majeure clause, then general provisions will come into play.

Article 136 of the Turkish Code of Obligations (“TCO”) regulates impossibility of performance and provides that the debtor’s obligation will terminate if the performance of the debtor becomes impossible due to reasons for which the debtor cannot be held responsible. The provision further sets forth that the debtor who is discharged from its obligation due to impossibility should return what he already received from the other party as part of the latter’s performance according to the unjust enrichment provisions, and will not be entitled to demand the other party’s performance which has not yet been realized. Article 301 of the TCO describes the landlord’s obligation as “delivering the object of the lease agreement on the agreed date, in a condition convenient to the purpose of the contract and keeping it in this condition for the duration of the contract”. If the subject of the lease contract is one of the business activities forbidden by the Circular, then the obligation of the landlord prescribed in Article 301 may be deemed impossible, which may give rise to the termination of the contract under Article 136. However, if one of the parties does not consent to the termination of contract by arguing that Article 136 only concerns the case of permanent impossibility, whereas the measures against Coronavirus are only taken temporarily, then it should be evaluated whether it can be foreseen when this temporary situation causing the impossibility will come to an end, and to what extent this temporary situation affects the basis of the contract.

Another provision of the TCO which may apply in this context is Article 138 regulating hardship. According to this article, if an extraordinary situation arises, the reason of which cannot be attributed to the debtor and which was unforeseeable and could not be foreseen at the time of conclusion of the contract, by changing the circumstances at the time of conclusion of the contract to the extent that the demand for performance of the debtor would be against the principle of good faith, then the debtor may request from a judge that the contract be adapted to the current circumstances, and may use its right to terminate the contract, if adaptation is not possible. As many businesses had to shut down their workplaces due to Coronavirus, their incapacity to use these workplaces constitutes an extraordinary situation which causes a radical decrease in their incomes.

Therefore, Article 138 may apply for the tenants of workplaces which are closed down within the framework of the measures taken against Coronavirus.

Article 331 of the TCO regulates the cases which may give rise to the extraordinary termination of a lease contract. The article stipulates that either party can terminate the contract any time in compliance with the legal notification periods for termination, if there are important reasons which render the continuation of the contract unbearable for that party. The circumstances created by the Coronavirus epidemic could be considered as “important reasons” within the definition of this provision. However, it is regulated in the TCO that Article 331 will not come into force for eight years starting from July 1, 2012. Therefore, it will only be possible to rely on this provision to terminate a lease contract as of July 1, 2020.

Last but not least, according to Provisional Article 2 of the Law No. 7226 which was enacted by the Turkish Grand National Assembly on March 25, 2020, and came into force on March 26, 2020, by being published in the Official Gazette No. 31080 (Duplicate), failure to pay the workplace rents for the period between March 1, 2020 and June 30, 2020 shall not constitute a reason for termination of the lease agreement and evacuation. Therefore, landlords of workplaces will not be able to rely on Article 316 of the TCO regarding default of the tenant for the rents of the above-mentioned term. As a last note, it should be remembered that this provision is solely about workplaces and does not concern residence lease agreements.

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