

## Law Bulletin

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### **CORONAVIRUS: IMPACT OF OUTBREAK ON LEASE AGREEMENTS**

The Covid-19 disease, derived from the novel coronavirus that first appeared in Wuhan, China in December 2019, has recently spread to 168 countries, including Turkey. On 11 March 2020, Covid-19 was characterized as pandemic by the World Health Organization. It spreads very quickly, and the cure is still unknown. The environment of uncertainty arising from the nature of the disease urged countries to take certain precautions such as closure of country borders, quarantines, curfews and closure of workplaces.

In addition to other measures adopted by the Turkish government, the Ministry of Interior has published a Circular on 16 March 2020 and decided to close nightclubs, bars, gyms, spas, cafes, tea gardens, cinemas, wedding halls, show centers and many other public areas until further notification. To reduce the economic impacts of the Covid-19 pandemic, on 18 March 2020, President Recep Tayyip Erdoğan announced the Economic Stability Shield and urged citizens to stay at home and minimize their physical contact with others. On 19 March 2020, the Shopping Malls and Investors Association adopted a recommendation decision for the closure of shopping malls (SM) and called public authorities to adopt an official decision to that effect. Some SMs announced that they have suspended their operations temporarily.

Measures adopted by the competent official authorities, private institutions and individuals against the Covid-19 pandemic negatively affect the parties' rights and obligations in their commercial relationships and contracts. In this bulletin, we will touch upon the impact of the precautions on lease agreements.

## **I. Regional or Territorial Quarantine Practices, Curfew and Closure of Leased Properties based on a Governmental Decision**

In addition to the education institutions, theaters, cinemas, show centers, concert halls, engagement/wedding halls, restaurants/cafes with live music, clubs, pubs, taverns, coffeehouses, cafes, cafeterias, country gardens, hookah lounges, hookah cafes, internet lounges, internet cafes, all kinds of game halls, all kinds of indoor playgrounds, tea gardens, association clubs, amusement parks, swimming pools, Turkish baths, saunas, hot springs, massage parlors, SPAs and gyms ("**Closed Places**") are closed.

The Cassation Court and the scholars accept that "temporary impossibility of performance" occurs if the performance of the obligation becomes subjectively or objectively impossible for a temporary period, due to the reasons that are not attributable to the debtor. In accordance with the judicial decisions, the contractual obligations are suspended for this temporary period.

The governmental decision regarding temporary closure of the Closed Places, is a mandatory decision taken by the competent official authorities. As a result of this decision, the Closed Places cannot be used by their lessees *-for a temporary period-* for the usage purpose assigned to the leased premises in the relevant lease agreement. Likewise, regional or territorial quarantine or curfew decisions may also hinder the operation of workplaces for a temporary period. Although each case must be evaluated separately, these types of decisions can cause temporary impossibility of performance for the debtors.

As per the precedents of the Cassation Court, in the presence of temporary impossibility of performance, parties' debts and obligations under the lease agreements can be suspended until the circumstances causing the impossibility is eliminated. Accordingly, a party cannot ask the counterparty to perform its debts and obligations such as payment of the rental fee and common expenses or keeping the leased property ready for use.

## **II. Absence of a Governmental Decision regarding Closure of Leased Properties**

If the lessee or lessor prefers closure of leased property in the absence of a governmental closure decision, then the provisions of the lease agreement must be assessed to determine the parties' rights and obligations. In practice, lease agreements *-particularly for lease of stores located in SMS-* usually include provisions regarding force majeure events, whereby the parties' rights and obligations are clearly defined. Some agreements explicitly accept the "pandemic diseases" as force majeure event and set forth the tolerance periods and unilateral termination rights in favor of the parties.

However, before reaching a conclusive opinion, each contract should be evaluated in terms of **(i)** whether the outbreak of Covid-19 causes a force majeure event / impossibility of performance / temporary impossibility of performance / hardship, **(ii)** impact of this situation on parties' obligations and liabilities, and **(iii)** whether the current conditions are sufficient to implement the

mechanisms stipulated under the contract. Moreover, provisions regulated under the Turkish Code of Obligations (TCO) and explained in detail below regarding the hardship can also apply to such cases. Accordingly, the provisions of the agreements should be evaluated as per the circumstances applicable to the parties and within the framework of the law and judicial decisions.

## **1. Lessee's Discretionary Closure of its Workplace**

The lease agreements executed regarding the stores located in the SMs oblige the lessees to keep the workplaces open during the SMs' working hours. On the publication date of this bulletin, there is no mandatory official decision with respect to the closure of the SMs. While each lessee's situation should be evaluated separately, if the lessee of an SM wants to cease its operations in the workplace, in principle, this lessee may not be able to benefit from the protections provided by the "temporary impossibility of performance" concept. On the other hand, existence of Covid-19 can make it very difficult to keep the workplace open.

According to Article 138 of the TCO, if an unforeseen and unforeseeable extraordinary event that is not attributable to the debtor occurs and adversely changes the circumstances that existed at the time of the contract's execution, and so the debtor can no longer be reasonably expected to perform its obligations as designated under the contract, the debtor can request from the competent court adaptation of the contract to such new circumstances. The debtor must exercise this right either before its obligation becomes due or after performing its obligation, by reserving its right to request adaptation. If adaptation is not possible or relieving, then the debtor can terminate the contract.

Due to the Covid-19 measures, many public places are closed, and the state officials announced that citizens should not leave their homes and avoid physical contact unless it is mandatory. As new restrictions on export and import trade are in place due to the Covid-19 measures, it may also become harder for retailers to procure goods. The courts' approach to these new circumstances and the pandemic, is still unknown. However, the lessors' request from lessees to keep their stores open, may contradict with good faith principle, in a social situation where it is essential to protect the public health and ensure the occupational health and safety. In this regard, lessees may consider applying to the courts to ask for the adjustment of the obligations (such as the obligation to keep the workplace open, pay rental fee and common expenses) to the new circumstances during this period.

## **2. Closure of A Workplace Under the Discretion of Lessor**

Although no mandatory decision is adopted regarding the closure of the SMs, the SMs' lessors may also have difficulties in the management and administration of the SMs during the outbreak and may consider closing the SMs. Some SM owners have already adopted decisions to that effect. A closure decision may violate the lessors' obligation to keep the leased property ready for the lessees' use. However, as explained above, "hardship" provisions regulated under Article 138 of the TCO may become applicable for the lessors if the conditions are met. The circumstances may have also changed to the detriment of the lessors, such that the lessors can no longer be expected

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to perform its obligations under the agreement as per the good faith principle. Therefore, if the conditions are met, the lessors may also consider applying to the courts and requesting adjustment of the contractual terms to the new circumstances, including their obligation to keep the leased property ready for lessees' use.

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