

New obligations

Ilknur Yilmaz and Serhan Koçaklı of Kolcuoğlu Demirkan Attorneys at Law show describe how a new Turkish law will affect both residential and workplace rentals

After an eight-year debate among the members of the Turkish Law Commission, which is comprised of scholars and practitioners, the draft Turkish Code of Obligations was submitted to the parliament on January 22 2008. The new Turkish Code of Obligations No 6098 (TCO) was finally published in the official gazette on February 4 2011. Pursuant to the Law Regarding the Enforcement and Implementation of the Turkish Code of Obligations (No 6101), the TCO will become effective as of July 1 2012.

Lease agreements were previously governed under two main pieces of legislation depending on the location and qualification of the immovable property to be leased. In the event that the immovable property was a roofed property and was located within the boundaries of a municipality, then the lease of such immovable property would have been subject to the provisions of Law No 6570 on Immovable Leases. The relevant provisions of the former Code of Obligations (No 818) dated April 22 1926 would also have been applicable where a certain matter was not regulated under Law No 6570.

However, the new TCO also contains provisions regarding the lease of residential and roofed workplaces, regardless of their location. Therefore, in accordance with

Law No 6101, after 57 years of service, Law No 6570 will be annulled as of July 1 2012 together with the former TCO.

The main components to a lease agreement bearing significant importance are: (i) parties; (ii) term; (iii) rental and its payment; and (iv) termination conditions.

Parties

In addition to individual and legal entities, all lease agreements entered into by governmental institutions and organisations will be subject to the new TCO, without any exception with respect to their own principles and procedure, as once had been regulated under Law No 6570.

Like the former TCO, the new Code does not impose any restrictions on foreign legal or real persons leasing a property in Turkey. Accordingly, foreign legal or real persons may freely lease properties in the country.

Term

Similar to the Law No 6570, there are no restrictions regarding the term of a lease agreement pursuant to the new TCO. Parties may freely determine the term of their lease by mutual agreement. However, certain time limitations are applicable for lease agreements to be executed with governmental and administrative bodies (eg; the Treasury, municipalities, etc).

If the lessee does not notify the lessor of its intention to not renew the agreement in writing at least 15 days before the end of the lease agreement with a definite term, such agreement is deemed to be renewed for a period of one year with the same conditions. As was regulated under Law No 6570, the lessor still does not have the option to terminate the lease agreement at the end of its expiration date, based on the fact that the term of the agreement has expired.

However, upon the end of 10 years of renewals, the lessor may terminate the lease agreement for any reason provided that the lessor has notified the lessee in

writing at least three months before the end of any renewal year after the tenth year. According to Law No 6101, this termination provision of the new TCO will be effective (i) within five years upon the enforcement date of the new TCO if the remaining lease term is shorter than five years provided that the 10-year renewal period has not expired; (ii) within two years upon the enforcement date of the new TCO if the 10-year renewal period has expired.

Unlike Law No 6570, leases of immovable properties allocated for temporary usage for a term of six months or less are not subject to the provisions of this section of the new TCO.

Rent

In accordance with the principle of freedom of contract, the parties may freely determine the amount of daily, weekly, monthly or yearly rent. The rent can also be determined in a foreign currency.

However, the new Code restricts the rate at which the rent is to increase in every rent year. In the time of Law No 6570, the parties were free to use any local or international indices or even determine their own percentage of increase. The new TCO stipulates that where the term of a lease agreement is more than one year, the rate of increase of the rent amount for the following rental years (either renewed or within the determined term) cannot exceed the Producer Price Index (PPI).

If the lease period is more than five years or the lease agreement is renewed in every fifth year after the first five years, regardless of whether there is an agreement between the lessee and the lessor, a judge will determine the new amount of rent equally fairly for both parties taking into account the PPI, the condition of the leased property and comparable rentals of other properties in the neighbourhood. Therefore, every five years, the rent will be adjusted not only according to PPI, but also with the comparable market prices. As per rental fees in a foreign currency, the rent amount cannot be changed before five years. After five years, the new rent will be determined by a judge in line with the aforementioned considerations, together with the fluctuations in the foreign currency when compared to the Turkish lira.

In the author's view, a judge's intervention in the rent price, without involving the parties and regardless of whether or not the parties actually agree on a new rent, is against the fundamentals of the freedom of contract.

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A lawsuit regarding determination of rent may be filed at any time. However, the new rent determined by the court will be binding as of the beginning of the new lease term if the lawsuit is filed at least 30 days before the new lease term or if the lawsuit is filed until the end of the new lease term provided that the lessor has notified the lessee regarding such increase in rent in writing within the 30-day period. If there is a provision in the lease agreement regarding the rent increase for the new lease term, the rent determined by the court in a lawsuit filed before the end of the new lease term will be valid as of the beginning of such new lease term.

The new TCO aims to prevent the collection of monies from lessees other than payments in the sense of rent. One exception is to request a guarantee from the lessee to compensate any possible damages (other than ordinary wear and

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tear) to the leased property at the time of vacating the leased property. Such guarantee is commonly referred to as a deposit. The new TCO also provides for a limit to such deposit amounts to be received from the lessee: the deposit amount should not exceed three months’ rent. Furthermore, in case the guarantee is provided in cash, the lessee is obliged to deposit such amount into a long-term savings account. If the guarantee is given as a negotiable instrument, the lessee must deposit such instruments in a bank. In both cases, the bank will not return the deposited cash or the negotiable

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instruments without approvals of both lessee and lessor, an execution proceeding, or a final and binding court decision. The bank is obliged to return the guarantee upon the lessee’s request, if the lessor has not informed the bank in writing that he has initiated a lawsuit or an execution proceeding regarding any due payments under the lease agreement within three months following the termination of the lease agreement.

The new TCO also restricts any penalty payments put into contracts due to the lessee’s default in timely payment of the rent. Accordingly, a common provision found in lease agreements regarding penalty or acceleration clauses in the event of a failure to promptly pay the rent on time will be void under the new Code.

The lessee will be responsible for the payment of common expenses and utilisation fees (water, electricity and heating, for example).

Termination

A termination notice for the lease of a residential property or roofed workplace is valid only if it is made in writing.

In addition to termination rights at the expiration date of the lease agreement as explained above, lease agreements with indefinite terms may be terminated by the lessee at any time and by the lessor upon the expiry of 10 years following the execution of the lease agreement in accordance with the general terms regarding termination. Law No 6570 did not grant the lessor such a termination right.

The lessor may also terminate the lease agreement: (i) in the event of necessity for usage with respect to the requirement of him/herself, his/her spouse, lineal kin or other persons that s/he is obliged to look after; and (ii) in the event of habitation within the leased property is impossible due to reconstruction and development works to be carried out by the lessor.

While agreements with definite terms can be terminated by the lessor upon expiration of the term and in the presence of the foregoing conditions, such termination procedure for the agreements with indefinite terms should be initiated by filing a lawsuit within one month starting from the date of termination notice that can be served on the lessee in accordance with the time limits provided under the general conditions.

Similarly, if the leased property is sold, and the new owner of the leased property is in need of the leased property as explained in point (i) above, he/she can file an eviction lawsuit within six months of the purchase provided that a written notification is sent to the lessee within one month of the purchase date.

Other than the abovementioned termination rights, there are some other termination causes based on which the lessor will have the right to evict the lessee. These are: (i) lessee's written commitment to evict the leased property; (ii) lessee's failure to promptly pay the rent twice within a lease year; and (iii) lessee or his or her spouse owns another residence within the same municipal borders suitable for habitation.

If the lessor evicts the lessee based on reconstruction and development of the leased property, the leased property may not be leased to a third person within three years as is (in other words, the leased property is never put under reconstruction). If the lessor breaches this prohibition, compensation not less than one-year's rent to be calculated in accordance with the lessee's lease agreement will have to be paid to the lessee.

Law No 6570 had prescribed both penal and pecuniary sanctions (imprisonment for between six and 12 months and a monetary fine equal to three-times the amount of rent). Partners or successors having similar professions or the persons living in the same residence with the decedent lessee may continue to be party to the lease agreement provided that they comply with the law and the agreement.

On a final note, lease agreements executed before July 1 2012 will continue to be subject to the former TCO and Law No 6570 and therefore any provisions thereof contradicting the new TCO will not be affected. However, events of default, termination and liquidation of such lease agreements will be subject to the new Code.

Lessees were granted a higher level of protection under Law No 6570 than landlords. This was partly because of their (theoretically) disadvantaged position in economic terms and partly because of the shortage of affordable real estate available to them. As a consequence, leases have been strictly regulated and subject to specific separate legislation action.

However, as of today, Turkey's economic environment is very different than it was 50 years ago. The new TCO therefore appears less than satisfactory and contains very significant provisions falling far away from the principle of freedom of contract.

Moreover, it is believed that the term "commercial lease" must be introduced to Turkish law immediately. As the laws stand, a university student's lease of a single bedroom and the lease of a hypermarket store by a retail giant are subject to the same laws and regulations.

Although most of the lease-related provisions of the new TCO noticeably contain traces of the market practice and court precedent formed to date, it is still a lessee-favouring law. Chaotic days are almost inevitable until lessees, lessors, lawyers and courts digest the new rules and the market comes to peace.

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