

UNCERTAIN ISSUES ON RESIDENCE AND WORKPLACE LEASES

In this first part of a series of articles on disputed lease provisions of the Turkish Code of Obligations (the “TCO”) with respect to residences and roofed workplaces, we address whether the parties are free to determine the rental fee after the end of each five-year period.

The TCO allows the parties to determine the rent increase rate in residence and roofed workplace leases subject to limitations. Article 344 of the TCO explicitly sets forth the annual rent increase rules that apply within each five-year period, both for the Turkish lira and for foreign currency leases. However, when it comes to rent increase rates or the rental fee to apply after the end of each five-year period, are the parties free to so determine as they wish?

If the Rental Fee is Denominated in Turkish Lira

According to Article 344/1 of the TCO, the annual rent increase rate applicable to Turkish lira rental fees cannot exceed the average of the change in the consumer price index (the “CPI”) in the last twelve months. As for lease agreements that have a term longer than five years, or renew after five years, Article 344/3 of the TCO regulates that a judge will determine the rental fee to be applied in the new lease year starting after each five-year period, regardless of whether the parties have made an agreement on this matter. As opposed to the annual increases, a judge will not consider the CPI as the only criterion when determining the market rent value after the five-year period. The judge will determine the market rent value in accordance with the (i) average of the change in the CPI in the last twelve months; (ii) leased premises’ condition; (iii) sample rental fees and (iv) fairness principle. The judge may conclude that the increase in the rental fee is to be higher than the average of the change in the CPI in the last twelve months. That said, could the parties benefit from the same opportunity that is afforded to the judge? In other words, is it possible for the parties to determine the increase rate, which will apply after the fifth lease year, through an agreement in advance?

KOLCUOĞLU DEMİRKAN KOÇAKLI

As it is stated above, the annual increase in the rental fee cannot exceed the average of the change in the CPI in the last twelve months. If the annual increase rate requested by the landlord exceeds the CPI, and the tenant accepts to pay the increased rental fee, it may seem as though an implicit agreement has been made between the parties regarding the increase of the rental fee; however, such agreement will be void. If the tenant makes a payment after the fifth lease year, the tenant could request the return of the amount exceeding the CPI as per the unjust enrichment clauses or set it off against the future rental fees.

As per Article 344/3 of the TCO, although the value determined by the judge is the market rent value, the parties are not obliged to apply to the judge after each five-year period to adjust the rental fee to its market value. On the other hand, even if the parties make an agreement regarding the increase rate that will apply after each five-year period, such agreement will not prevent the parties from applying to the judge. The respective Article explicitly states that the judge will disregard whether or not the parties agreed on the increase rate when determining the new rental fee. It is unclear whether the tenant could reclaim the amount that exceeds the rental fee increased by the CPI, if the parties agreed on an increase rate higher than the CPI. The reasoning of the relevant Article does not settle this dispute either. The questions highlighting this issue are expected to be resolved, once there are more court precedents concerning the respective Article.

If the Rental Fee is Denominated in Foreign Currency

Article 344/4 of the TCO regulates that if the rental fee is denominated in foreign currency under the lease agreement, the parties are not allowed to change it until the end of the fifth year. The Article further states that in determining the rental fee at the end of the fifth year, Article 344/3 of the TCO will be applied and the change in the value of the foreign currency will also be considered. Similar to the foregoing dispute regarding Turkish lira leases, the scholars debate whether or not the parties are allowed to freely determine the rental fee to be applied at the end of each five-year period in foreign currency leases. One view argues that the parties cannot agree on any increase rate under the agreement since the reason for restricting the prohibition on an increase after five years is to allow the parties to apply to the court after the fifth year in order to adjust the rental fee to its market value. However, another doctrine argues that the parties could agree on a new rental fee or an increase rate that will apply after the fifth year. This doctrine bases its argument on the reasoning of the respective Article and honors the parties' agreement. The Article reasons that if the parties cannot agree on the rental fee at the end of the fifth year, the rental fee will be determined pursuant to Article 344/3 by also taking into account the changes in the value of the foreign currency. The scholars defending this view also argue that to be valid, the increased rate agreed by the parties must be on an arm's length basis and follow the fairness principle.

Although the TCO entered into force in 2012, the implementation of certain provisions concerning roofed workplace leases was postponed to 2020. Accordingly, both for Turkish lira and foreign currency lease agreements, it is still unclear whether the parties are free to determine the rental fee that will apply after the end of each fifth-year period. It is expected

KOLCUOĐLU DEMİRKAN KOĐAKLI

that the hesitations around the matter will be eliminated once precedents are formed by the courts and such precedents are established over time.

CONTACT



Büşra Özden

bozden@kolcuoglu.av.tr



Merve Tüzmen

mtuzmen@kolcuoglu.av.tr