



CLOSURE OF THE ACTIVITIES DUE TO COVID-19 AND PAYMENT OF THE RENT RELATED TO THE LEASE OF REAL ESTATES FOR COMMERCIAL USE



1) THE FACTS

We have been asked for advice by many of our clients (hereinafter, “LANDLORDS”), that have leased their properties to tenants (hereinafter, “TENANTS”) which use the same for the purpose of carrying out commercial activities, including the management of a restaurant, a gym and an artisan laboratory.

Due to the COVID-19 emergency and to the measures consequently adopted by the state and regional authorities (hereinafter, “EMERGENCY MEASURES”), the TENANTS have informed the respective LANDLORDS of their intention to refuse, suspend or reduce the payment of the rent.

2) OUR CLIENTS’ QUESTION

The LANDLORDS have asked us for a legal opinion on whether the TENANTS’ requests are lawful or not, in order to set their conduct.

3) OUR LEGAL OPINION

Following the analysis we carried out on the matter, we have provided our legal opinion stating to the LANDLORDS that the TENANTS are not entitled to refuse, suspend or reduce the payment of the rent on the basis of the applicable laws and regulations, including the EMERGENCY MEASURES, without prejudice to the faculty of the TENANTS to withdraw from - or terminate - the lease agreement.

4) THE LEGAL REASONS IN SUPPORT OF OUR LEGAL OPINION AND OUR CONCLUSIONS

From a specific analysis of all the laws and regulations applicable to the lease relationship concerning a real estate for use other than housing, including the EMERGENCY MEASURES, no rule is found that allows TENANTS to refuse, suspend or reduce the payment of the rent. The results of this analysis are summarised below with reference to the specific and applicable law provisions.



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4.1) Articles 65 and 91 of Decree-Law No. 18 of 2020 (“Cura Italia Decree”)

The Decree-Law No. 18 of 2020 (hereinafter “Cura Italia Decree”), with reference to leases, provides under Article 65: *“In order to contain the negative effects deriving from the prevention and containment measures connected to the COVID-19 epidemiological emergency, subjects carrying out business activities, for the year 2020, are awarded a tax credit equal to 60% of the amount of the rent, relating to the month of March 2020, for properties falling within the C/1 cadastral category.*

The tax credit does not apply to the activities referred to in annexes 1 and 2 of the decree of the President of the Council of Ministers of 11 March 2020 and can only be offset pursuant to article 17 of Legislative Decree No. 241 of 9 July 1997”.

The analysis of this law provision shows that the Cura Italia Decree, like other EMERGENCY MEASURES, does not contain any provision that allows TENANTS to refuse, suspend or reduce the payment of the rent. The only facilitation for TENANTS consists of a tax credit, moreover limited to those properties falling within the C/1 cadastral category.

Article 65 of the Cura Italia Decree, therefore, confirms that the TENANTS are required to pay the rent.

Not even the provision contained in Article 91 of the Cura Italia Decree can be used by the TENANTS in order to lawfully refuse, suspend or reduce the payment of the rent.

This provision states that: *“Compliance with the containment measures referred to in this decree is always assessed for the purposes of excluding, pursuant to and for the effects of Articles 1218 and 1223 of the Italian Civil Code, the debtor’s liability, also in relation to the implementation of any possible forfeiture or penalties connected to delayed performance or non-performance”.*

First of all, the provision of Article 91 of the Cura Italia Decree, introduced with reference to public contracts, must in any case be interpreted and applied jointly with Article 1218 of the Italian Civil Code, according to which the debtor is exempt from contractual liability if he proves *“that the non-performance or the delay was due to impossibility of the performance deriving from a cause not attributable to the same”.*

In addition, since the provision of Article 1218 of the Italian Civil Code contains a general provision of exemption from contractual liability, which is then developed in Articles 1256, 1464, 1467 of the Italian Civil Code, it derives that - in accordance with the analysis carried out below - Article 91 of the Cura Italia Decree cannot be invoked by the TENANTS in order to refuse, suspend or reduce the payment of the rent.

4.2) Article 27, last paragraph, of Law no. 392 of 1978 (hereinafter “Fair Rent Law”)

The last paragraph of Article 27 of Law No. 392 of 1978 (hereinafter, “Fair Rent Law”) provides that *“Irrespective of the contractual provisions, the tenant, if serious reasons occur, can withdraw at any time from the contract with at least six months’ notice to be given by registered letter”.*

In this regard, the Italian Supreme Court, most recently with judgment no. 23639 of 24 September 2019, clarified that the aforementioned “serious reasons” must be (i) determined by events which are unforeseeable at the time of the execution of the lease agreement, as well as beyond the sphere of control of the tenant; and (ii) such as to make the continuation of the relationship objectively and extremely burdensome for the tenant himself.

In the case under reference, the suspension of the commercial activities, implemented in accordance with the EMERGENCY MEASURES, is probably suitable to represent the aforementioned “serious reasons”, if it has a stable impact on the continuation of the lease relationship.

However, from the analysis of Article 27, it can be inferred that, against the adoption of the EMERGENCY MEASURES and/or future emergency measures, the Fair Rent Law entitles the TENANTS to withdraw from the lease agreement, but does not entitle them to refuse, suspend or reduce the payment of the rent, which the TENANTS will, however, be required to pay for the entire duration of the notice period.

4.3) Article 1256 of the Italian Civil Code - Definitive impossibility and temporary impossibility

Article 1256 of the Italian Civil Code provides that *“The obligation is extinguished when, for a cause not attributable to the debtor, the performance becomes impossible.*

If the impossibility is only temporary, the debtor is not responsible for the delay in the performance for so long as such impossibility persists. However, the obligation is extinguished if the impossibility continues until, in relation to the kind of the obligation or to the nature of its object, the debtor can no longer be considered liable to perform or the creditor no longer has an interest in its performance”.



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If the requirements described in the provision occur, the debtor is entitled to request and obtain the termination of the contract.

However, despite the COVID-19 emergency situation and the suspension of commercial activities imposed by the EMERGENCY MEASURES adopted accordingly, the TENANTS' performance consisting in the payment of the rent cannot be considered impossible to fulfil. In fact, based on the general principles of law and on the consolidated case-law, a performance consisting in the payment of a sum of money is, probably and generally, always possible, since money is a fungible good.

4.4) Article 1464 of the Italian Civil Code - Partial impossibility

Article 1464 of the Italian Civil Code provides that *"When the performance of one party has become only partially impossible, the other party has the right to a corresponding reduction of the performance due by the same, and may also terminate the contract if he has no appreciable interest"*.

By applying the provision in question to the lease relationship, we could come to the conclusion that the TENANTS could be entitled to request a reduction in the rent, should the performance of the LANDLORDS become partially impossible to fulfil.

But, in this regard, considering that the landlord's obligation consists in making the leased asset available to the tenant and in guaranteeing the "peaceful enjoyment" of the same (in the case under reference, for the purpose of carrying out a business) pursuant to Article 1575 of the Italian Civil Code, the performance of the LANDLORDS cannot be considered impossible.

In fact, the EMERGENCY MEASURES do not prevent the LANDLORDS from making their properties available to the respective TENANTS, which maintain the possession and custody of the leased properties.

Moreover, even if we were to consider the performance of the LANDLORDS as having become impossible, it is also true that the impossibility of the performance of the LANDLORDS is purely temporary, as determined by provisional measures adopted by means of EMERGENCY MEASURES.

Therefore, we believe that the provision in question cannot be used by the TENANTS in order to lawfully refuse, suspend or reduce the payment of the rent.

4.5) Article 1467 of the Italian Civil Code - Supervening excessive burdensomeness

Article 1467 of the Italian Civil Code provides that *"In contracts with continuous or periodical performance, or deferred performance, if the performance of one of the parties has become excessively burdensome due to the occurrence of extraordinary and unforeseeable events, the party who owes such performance can demand the termination of the contract, with the effects set forth in Article 1458."*

The termination cannot be invoked if the supervening burdensomeness falls within the normal risk of the contract.

The party against whom the termination is demanded can avoid it by offering to equitably change the conditions of the contract".

In the case under reference, there is no doubt that the TENANTS' performance to pay the rent has become more economically burdensome, given the suspension of the commercial activity the purpose of which the lease was serving.

However, in order to invoke the termination of the lease agreement due to excessive supervening burdensomeness, the TENANTS cannot state a mere greater burdensomeness, but will have to demonstrate that the suspension of the commercial activity continued for a period such as to result in a significant and stable alteration of the initial conditions under which the lease has been entered into by the parties (above the normal risk of predictability) and not a mere economic difficulty of the same to pay the rent; and, consequently, they will have to demonstrate the actual disproportion between the performance of the LANDLORDS and that of the TENANTS, which in any case must also be assessed in light of the tax and welfare benefits recognized to the latter by means of the EMERGENCY MEASURES, where applicable.

If the conditions for the excessive supervening burdensomeness occur, the TENANTS may request the termination of the contract, even if it is true that, against the notified termination of the contract, the LANDLORDS will have the faculty to offer the TENANTS an equitable renegotiation of the contractual terms and conditions in order to avoid termination. But even the provision of Article 1467 of the Italian Civil Code cannot be invoked by the TENANTS in order to lawfully refuse, suspend or reduce the payment of the rent.



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5) A NOTE ON THE PARAMETER FOR ASSESSING THE IMPOSSIBILITY AND/OR EXCESSIVE BURDENSOMENESS OF THE PAYMENT OF THE RENT

In assessing the existence of the impossibility and/or excessive supervening burdensomeness of the payment of the rent, so as to satisfy the requirements of the regulatory provisions analysed above, it is necessary, in our opinion, to consider mainly that the party required to pay the rent is an entrepreneur. Therefore, the impossibility and/or excessive burdensomeness of the performance must be assessed not with reference to the financial resources of the closure period, but with reference to the economic result of the current financial year, or of the entire 2020 financial year. We explain this with an example: if that restaurant in 2019 made (total revenues - total costs) € 100,000.00 of net profits and in 2020, due to the closure for covid-19, it will make € 50,000.00 of net profits, can it be argued that an inability to pay the rent has occurred or that the rent has become excessively burdensome?!

6) FINAL CONSIDERATIONS

The analysis carried out shows that there is no rule under which the TENANTS can, merely and unilaterally, refuse, suspend or reduce the payment of the rent.

In fact, the aforementioned analysis leads us to believe that the only possibility, for the TENANTS, to cease the payment of the rent is to withdraw from the contract pursuant to article 27 of the Fair Rent Law, or to terminate the contract pursuant to Articles 1256, 1464 and 1467 of the Italian Civil Code, if the relevant requirements actually occur.

In conclusion, we believe that the most fruitful and coherent solution with reference to the factual situation, having regard to the provisions of law, consists, for the TENANTS, in the joint and voluntary renegotiation of the terms and conditions of the lease, recalling, if applicable, the obligations of good faith and contractual correctness, according to which, if an imbalance of the contractual synallagma occurs, the parties are required to renegotiate the terms and conditions of the relationship in order to restore the equity of their respective performance.

This analysis does not constitute a legal opinion to be used freely in similar circumstances, as each case needs to be analysed accurately and specifically. Bacciardi and Partners law firm remains at your disposal to address and resolve the critical issues and problems resulting from the Covid-19 pandemic.