



Real Estate

Deloitte Legal - Coronavirus Legal Tips

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The measures adopted by the Government and the Regions to contain the Covid-19 epidemic, most recently the Prime Minister Decree of 22 March 2020, provide for the temporary shutdown of most commercial and productive activities, with few exceptions in order to guarantee the production and distribution of necessities.

As is well known, often companies use stores and factories for commercial and production activities under real estate or business lease agreements.

In the light of the above, **operators may wonder if the rent for the buildings or businesses is in any case due even during the forced shutdown period.**

The answer may be found in the terms and conditions of each agreement and, in second instance, in the general rules on contracts set out by the Italian Civil Code.

1. Contractual clauses on force majeure

The most detailed agreements may include specific clauses, which regulate the occurrence of force majeure events. In the absence of a legislative definition of force majeure, each contract may indicate which events could qualify as force majeure event.

In most cases, force majeure events are described as unforeseen and extraordinary events affecting the ability of the parties to meet their obligations. In general, the Covid-19 epidemic and **the measures taken by the authorities** to combat it **could be included in the definition of force majeure** provided in the contracts.

The provisions on force majeure may be more advantageous to the tenant, if they provide for **a suspension of the rent** in case of impossibility to use the property or the business, or more advantageous to the landlord, if they expressly **rule out a reduction of the rent** in such circumstances.

2. The supervening impossibility

In the absence of similar contractual clauses, the general discipline on supervening impossibility of the performance could apply, pursuant to articles 1256 and 1464 of the Italian Civil Code.

The supervening impossibility applies if the performance of one party becomes, in whole or in part, impossible, even temporarily, for reasons not attributable to such party.

In the real estate industry, the measures adopted by the authorities could cause a temporary impossibility of performance, because the use of the assets is prevented for a limited period of time.

In relation to the **business or business unit lease agreements**, the shutdown has a direct impact on the main obligations of the lessor, which is to make the business or business unit available to the lessee to carry out a specific business activity. Therefore, it can be argued that lessor's obligation becomes impossible.

In relation to **lease agreements**, the landlord's obligation, which consists in making the real estate property available to the tenant, does not seem directly affected by the measures that ordered the shutdown.

However, Italian case law has recognized that the supervening impossibility could occur not only when the debtor's obligation has become impossible but also where the creditor is not able to use the services provided by the other party for reason not attributable to the creditor (*Italian Supreme Court, Section III, 10 July 2018, No. 18047*).

It can be argued that the supervening impossibility could apply also in relation to lease agreements, if the tenant is unable to use the property due to public measures suspending the business activity.

In the light of the above, the tenant or the lessee could invoke the supervening impossibility **if their businesses have been suspended by order of the authorities**.

Therefore, **the tenant or lessee could request the landlord or lessor to reduce the rent** for the period of shutdown, pursuant to Article 1464 of the Italian Civil Code.

On the contrary, the supervening impossibility should not apply if the commercial activity has not been suspended or, in any case, it continues but in a different way (e.g. home delivery of products without opening the premises to the public).

In any case, the reduction of the rent should be agreed in writing between the parties or be determined by the competent court. A unilateral reduction of the rent by the tenant could be considered unlawful.

3. Supervening excessive onerousness

A further legal instrument to deal with the consequences of the Covid-19 emergency on the lease and business lease agreements could be the termination for **supervening excessive onerousness**, regulated by art. 1467 of the Italian Civil Code.

The spread of the Corona-virus could have negative consequences on the business, for example by significantly reducing the turnover, even if activity has not been suspended.

In this situation, **the rent provided for by the contract may become too onerous** for the tenant/lessee, who may have an interest in terminating the contract.

However, in order to invoke the supervening excessive onerousness, it is necessary to assess if there is **a significant and long-lasting alteration in the balance** between the values of the reciprocal obligations compared to the situation existing at the time of the entering into of the contract. Furthermore, the onerousness shall not fall within the normal risk relating to the agreement and the parties shall not have excluded the application of this remedy.

The possibility to request the termination due to excessive onerousness may only be assessed in the light of the economic consequences of the current emergency.

If all the conditions provided by the law are met, to be assessed on a case-by-case basis, **the tenant/lessee could ask the court to terminate the contract**. In case of termination of

the agreement, the tenant/lessee shall return the property or the business according to the terms set out in the agreement.

During the legal proceeding, the landlord may prevent the termination by offering to review the economic conditions in favor of the tenant.

The excessive onerousness needs to always be assessed in court. Therefore, **it is not possible to suspend unilaterally the payment of the rent**, except in force of a court order, which may also be requested as a precautionary measure.

4. Withdrawal for serious reasons

The tenant of commercial properties could also consider withdrawing from the lease agreement **for serious reasons**, per article 27 of Law No. 392 of 27 July 1978.

Pursuant to such provision, which may be derogated only for leases with an annual rent higher than Euro 250,000, the tenant may terminate the contract at any time in case of serious reasons, with **at least six months' notice** to be served by registered letter.

The law does not provide a description of the serious reasons, which over time have been identified by the case law. In general, these are **unpredictable and supervened facts that do not depend on the tenant**, occurred during the term of the lease, which make the continuation of the agreement excessively onerous for the tenant.

Notably, the Italian Supreme Court maintained that an economic crisis of the tenant could be considered a serious reason for withdrawal. Moreover, if the company operates more business units, the economic crisis of only one unit could allow the withdrawal from the lease agreement relating to the asset where the activity of such unit is performed, even if the economic difficulties do not affect the company in its entirety (*Italian Supreme Court, Section III, 28/02/2019 No. 5803*).

Upon the effective date of withdrawal, the tenant shall return the property to the landlord according to the terms set out in the lease agreement.

5. Agreement to reduce the rent

The tenant could also use termination of the contract due to excessive onerousness and the withdrawal for serious reasons as negotiating tools to attain a **renegotiation of the contract** by the landlord/lessor.

In the event that the parties reach an agreement on the reduction of the rent, they should **enter into an addendum to the original lease agreement, signed by both parties, to be registered with the Italian Revenue Agency**.

Although **registration** is not mandatory for the validity of the addendum, it is required in order to enforce the new provisions against the tax authorities (Resolution No. 60 of 28 June 2010). In this way, the lessor will be able to **avoid paying taxes on the original rent**.

Pursuant to art. 19 of Decree Law no. 133/2014, **the registration of the addendum** by means of which the parties only regulate the reduction of the rent is **exempt from registration and stamp duties**.

Contacts Real Estate

Giorgio Mariani

Partner | Head of Corporate and M&A Team
giomariani@deloitte.it

Manuel Marangoni

Associate
mmarangoni@deloitte.it



Deloitte Legal

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