POSTPONED ARTICLES OF THE TURKISH CODE OF OBLIGATIONS CONCERNING WORKPLACES HAVE ENTERED INTO FORCE

Although the Turkish Code of Obligations No. 6098 ("**TCO**") entered into force on 1 July 2012; with Article 53 of the Law on Amendment of Certain Laws and Decree Laws dated July 4, 2012 and numbered 6353, enforcement of Articles 323, 325, 331, 340, 342, 343, 344, 346 and 354 of the TCO ("**Postponed Articles**") has been postponed for 8 years as of 1 July 2012 for workplace lease agreements where the lessee is a merchant in the scope of the Turkish Commercial Code ("**TCC**") or a private law or public law legal entity (hereinafter referred to as "**Workplace Lease Agreements for Merchants**").

The reason behind the postponement of the enforcement of these provisions regarding workplace lease agreements is stated as the lobbying activities carried out by shopping malls and real estate investors.[1]

The 8-year postponement period has expired as of July 1, 2020, and said provisions have now entered into force in terms of workplace lease agreements, where the lessee is deemed a merchant in the scope of the TCC or a private law or public law legal entity.

In this article, the effects of these provisions, which entered into force as of 1 July 2020, will be examined.

- **Assignment of the lease relationship**

Article 323 of the TCO regulates the assignment of lease relationships in general and it brings several differences compared to the previous period in terms of assignment of workplace leases. According to Article 12 of abrogated Law on Real-Estate Leases No.6570 ("**Law No. 6570**") it was not possible for the lessee to assign the lease to a third party unless there was a contrary provision in the contract or the lessor consented so. However, this non-assignability principle has been reversed by Article 323 of the TCO in terms of workplace leases and the principle of assignability has been adopted.[2]
According to Article 323 of the TCO, in principle, the lessee cannot assign the lease relationship to a third party without obtaining the written consent of the lessor. On the other hand, the lessor will not be able to avoid giving his consent for workplace leases unless there is a valid reason. The valid reason for not giving consent by the lessor would be determined by the judge on the basis of concrete case considering the conditions such as the properties of the leased place and the new lessee, within the

[1] **İnceoğlu, Mehmet Murat,** "Kira Sözleşmelerine İlişkin Başlıca Değişiklik ve Yenilikler", Yeni Türk Borçlar Kanunu ve Yeni Türk Ticaret Kanunu Sempozyumu (Makaleler, Tebliğler), İstanbul, 2013, p. 210; **Türkmen, Ahmet,** "6098 Sayılı Türk Borçlar Kanununun Kira Sözleşmesine İlişkin Yürürlüğü Ertelenen Hükümlerinin Değerlendirilmesi", Ankara Barosu Dergisi, No. 2015/1, p. 341.
[2] İnceoğlu, p. 177.

framework of good faith.[3] Insolvency of the assigned party, having a bad reputation and not having required permissions to perform the occupation can be set as examples for the valid reason.[4]

Under Article 323 of the TCO, the lessee has been given the right to force the lessor to assign the contract or to have the assigned person accepted, if the legal conditions are met. As mentioned provision obliges one of the parties to give consent to the assignment of the contract, there will be a legal assignment of the contract.[5] In return, according to Article 323/3 of the TCO, the lessee who assigns the lease agreement will be jointly and severally liable with the assignee until the end of the lease agreement and for a maximum period of two years.[6]

- **Returning the leased property before the end of the lease agreement**

In practice, if the lessee wants to return the leased property before the end of the lease agreement, substantial penalties or compensation are foreseen which leave lessee in a difficult position. The purpose of Article 325 of the TCO is to determine the limits of lessee's liability, if the leased property is returned before the end of the agreement.

According to Article 325 of the TCO, if the lessee returns the leased property without complying with the term of agreement or termination period, his obligations arising from the lease agreement continue for a reasonable period during which the property can be leased under similar conditions.

Article 325 of the TCO is a new provision and there was no provision regulating this issue in the abrogated Code of Obligations No. 818 ("**Old CO**") or the Law No. 6570. On the other hand, during the period before Article 325 had adopted, the liability of the lessee in case of early eviction of the leased property was regulated by the precedents of Court of Cassation. According to precedents of Court of Cassation, it was ruled that the compensation to be paid by the lessee in case of early eviction of the leased place would be limited to the reasonable time during which the leased property could be re-leased under the same conditions.[7] Although Article 325 of the TCO has been substantially prepared in parallel with the precedents of Court of Cassation, according to Article 325, the compensation to be paid by the lessee in case of early eviction will be limited to a reasonable period of time during which the leased property can be re-leased on similar terms, not on the same terms.[8]

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[3] **Yavuz, Cevdet**, Borçlar Hukuku Dersleri Özel Hükümler, İstanbul, 2014, p. 265; **İnceoğlu**, p. 177.
[4] **Aral, Fahrettin / Ayrancı, Hasan**, Borçlar Hukuku Özel Borç İlişkileri, Ankara, 2015, p. 318.
[5] **Aral/Ayrancı**, p. 317.
[6] **Aral/Ayrancı**, p. 318.
[7] **Türkmen**, p. 353; For precedents of the Court of Cassation, please see: Y 6 HD, E. 2011/166, K. 2011/4444, T. 07.04.2011; Y 6 HD, E. 2011/14591, K. 2012/3725, T. 8.3.2012; Y 6 HD, E. 2012/5538, K. 2012/10456, T. 11.7.2012; Y 6 HD, E. 2012/17192, K. 2012/16833, T. 18.12.2012.
[8] **Koç, Nevzat**, "6098 Sayılı Türk Borçlar Kanununda Kira Sözleşmesine İlişkin Olarak Yapılan Yeni Düzenlemelerin Genel Değerlendirmesi", İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi No. 1, 2014; p. 18; **Türkmen**, p. 353.

Besides, according to Article 325 of the TCO, if the lessee finds a new lessee who can be expected from the lessor to accept, has the solvency and is ready to take over the lease relationship, the contractual obligations of the lessee arising from the lease agreement will be ended. On the other it should be noted that unlike Article 323 we explained above, the lessor is not obliged to accept the new lessee found by the lessee; but if he does not accept it, he will be deprived of the compensation he could request due to early eviction.[9]

- **Termination of lease relationship based on important reasons**

According to Article 331 of the TCO, each of the parties may terminate the agreement at any time by complying with the legal termination notice period in the presence of important reasons that make the continuation of the lease relationship unbearable for itself.

Although termination of the lease agreement based on important reasons was also regulated under the Old CO, there are certain differences between the Old CO and Article 331 of the TCO. First of all, Article 264 of the Old CO used to regulate the termination of the lease agreement based on important reasons only for fixed-term immovable leases. On the other hand, Article 331 of the TCO has removed this distinction and allowed both fixed-term and indefinite-term lease agreements to be terminated based on an important reason.[10]

In addition, there is a difference in terms of compensation to be paid by the party terminating the agreement in case of termination. According to the Old CO, the terminating party is under the obligation to pay a full compensation to the other party, and if the lease term is one year or longer, it was regulated that the compensation amount to be paid cannot be less than six months' lease value. On the other hand, with the new provision introduced by Article 331 of the TCO, the judge is given a discretionary power to determine the amount of compensation to be paid and the judge will determine the amount to be paid by taking into account the conditions and circumstances.[11]

- **Prohibition of Linked Contracts**

According to Article 340 of the TCO, if establishment or maintenance of the agreement for residential and roofed workplace leases is linked to an obligation that is not directly related to the use of the leased property without the benefit of the lessee, the linked contract is deemed invalid.

There was no provision corresponding to Article 340 of the TCO under the Old CO or the Law No. 6570. The purpose of Article 340 is to prevent the lessor from abusing the lessee's need to make a

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[9] **İnceoğlu**, p. 200.
[10] **Dönmez**, Zeynep, "Kira Sözleşmesinin Önemli Sebeple Feshi", İstanbul Barosu Dergisi, J. 93, No. 2019/2, March-April 2019, p. 161.
[11] **Türkmen**, p. 354.

lease contract, and from putting the lessee under some obligations that are not related to the lease agreement.[12]

Article 340 of the TCO does not include any explanation about the definition of linked contracts; however provisions that oblige the purchase of cleaning services, communication services such as fax or internet from the lessor in addition to the lease agreement in the workplace leases in shopping malls can be given as examples to linked contracts.[13]

The linked contract meeting the conditions set out in Article 340 will be deemed invalid. Therefore, in the case of linked contracts, the lease agreement will be valid, while the said provisions or if it is made as a separate agreement, the related agreement will be invalid. [14]

In addition, it must be noted that there is no difference between the situation where the lessee incurs debts which are not linked to the lease agreement against the lessor or against the third party; in both cases the outcome will be absolute nullity according to Article 27 of the TCO.[15]

With the entry into force of the provision in terms of Workplace Lease Agreements for Merchants as of July 1, 2020, an important financial comfort will be provided especially for lessees in shopping malls.

- **Security Given by the Lessee**

Article 342 of the TCO which regulates the security deposit given by the lessee had no equivalent in the Old CO or the Law No. 6570; however in practice, lessors used to take certain amount of money called as deposit from the lessees as a security against any non-payment of lease amount or ancillary expenses and possible damages to the leased place and at the end of the lease agreement deductions were made from the relevant amount for the incurred losses.[16] Therefore, from time to time, there had been cases where the lessees were not able to get this deposit back from the lessor, partially or at all. To resolve these problems and to prevent the loss of value of the money or valuable paper that the lessees have set aside for the performance of the security deposit,[17] some regulations have been introduced by Article 342 regarding the security to be taken from the lessee.

First of all, with Article 342, an upper limit has been provided in terms of the security deposit to be received from the lessee and it is regulated that the security deposit cannot exceed the three-month rental fee.

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[12] **Yavuz**, p. 303-304
[13] **İnceoğlu**, p. 183-184.
[14] **İnceoğlu**, p. 185.
[15] **Koç**, p. 22.
[16] **İnceoğlu**, p. 185.
[17] **Koç**, p. 24.

Although Article 342 does not regulate what is to be provided as security deposit, it is stipulated that if the parties decide on money or valuable papers as security deposit, the lessee must deposit the money in a savings account and deposit the valuable papers in a bank and the lessee cannot withdraw the subject amount/valuable papers without the lessor's consent. Accordingly, the bank can return the security deposits only with the consent of the both parties or upon a final execution order or a final court decision.

In addition, if the lessor does not notify the bank in writing that he has filed a lawsuit or initiated execution or bankruptcy proceedings against the lessee concerning the lease agreement within three months following the end of the lease agreement, the bank is obliged to return the security upon the lessee's request.

With the entry into force of the provision in terms of Workplace Lease Agreements for Merchants as of 1 July 2020, payment of high amount of security deposits by lessees can be avoided and lessors can be prevented from unfairly refraining from giving this security amount back.

- **Prohibition of Making Changes to The Detriment of The Lessee**

Pursuant to Article 343 of the TCO, no changes can be made in the lease agreements to the detriment of the lessee, except for the determination of the rental fee.

Since there was a provision in the abrogated Law No.6570 that fully corresponds to this provision, it is not possible to mention that Article 343 has brought a novelty in terms of lease relations. Therefore, the entry into force of this provision, which has been postponed in terms of workplace leases, as of 1 July 2020 will not make any changes in terms of workplace leases.

- **Determination of The Rental Fee**

Article 344 of the TCO regulates determination of the rental fee.

There was no provision under the old CO and the Law No. 6570 corresponding to Article 344 of the TCO. On the other hand, before the TCO, determination of the rental fee was regulated by the precedents of the Court of Cassation. Although Article 344 includes provisions parallel to the mentioned precedents of the Court of Cassation, there are also a number of differences.

According to Article 344/1 of the TCO, the agreement of the parties regarding the rental fee to be applied in the renewed lease periods are valid provided that the increase rate does not exceed the increase rate in the consumer price index according to twelve-month averages in the previous lease year. Accordingly, this provision deems the agreement of the parties regarding the determination of the rental fee be valid indefinitely. On the other hand, according to the precedents of the Court of Cassation in the previous period, renewal agreements were considered valid only in the first renewal

year.[18] Article 344/1 of the TCO has also regulated that the increase rate in the consumer price index according to twelve-month averages will be considered as an upper limit in terms of the rental fee to be determined. Therefore, the portion exceeding this upper limit in the agreement of the parties will be invalid for the relevant renewal period,[19] and the increase will take place over the specified upper limit. In addition, Article 344/1 regulates that this rule will also be applied to lease agreements that are longer than one year. According to the scholars, this provision aims to regulate that it is not possible for the parties to decide on an increase rate exceeding the specified rate even within the contract period for contracts with a duration of more than one year.[20]

Article 344/2 regulates the situation where the parties of the lease agreement do not determine the increase rate and states that, in this case, the rental fee will be determined by the judge on an equitable basis, taking into account the condition of the leased property, provided that the increase rate does not exceed the increase rate in the consumer price index according to twelve-month averages in the previous lease year.

Article 344/3 foresees that, regardless of whether or not an agreement has been made by the parties on this matter, the judge will determine the rental fee to be applied in the new lease year in cases exceeding five years, on an equitable basis and by taking into account the increase rate in the consumer price index according to twelve-month averages, the condition of the leased property and the equivalent rental prices. Based on this provision, it will be possible to request determination of the current rental value in every five years.[21]

Article 344/4 regulates the situations where the rental fee is decided as foreign currency, and it is stated that it is not possible to change the rental fee before five years, regardless of the term of the rental agreement. As an exception to this rule, only the TCO's provisions regarding "Hardship" are reserved. On the other hand, after the five-year period, determination of the rental fee may be requested pursuant to Article 344/3 explained above. During the application of the abrogated Law No. 6570, in cases where the rental fee was decided as foreign currency, it was possible to freely decide on the increase rates during the contract period; there were only restrictions regarding to renewal periods.[22] Therefore, Article 344/4 of the TCO differs from the former practice in this respect.

Other important point concerning Article 344 is the amendments made to this provision with the Law on Amendments to Tax Laws and Certain Laws and Decree Laws No. 7161 published on 18.01.2019 ("**Law No. 7161**"). The expressions of "the rate of increase in the producer price index in the previous

[18] **İnceoğlu**, p. 194; **Türkmen** p. 357.
[19] **İnceoğlu**, p. 194.
[20] **İnceoğlu**, p. 195.
[21] **İnceoğlu**, p. 196.
[22] **Türkmen**, p. 357; Y 3 HD, E. 2009/425, K. 2009/2656, T. 24.2.2009.

lease year", which are stipulated as the upper limit in determining the increase rate in the first, second and third paragraphs of the first version of Article 344 have been changed as the “increase rate in the consumer price index according to twelve-month averages " by the Law No. 7161. Also, with the Law No. 7161, a link was established between the two legislations by adding the expression "on the condition that the provisions of the Law No. 1567 on the Protection of the Value of Turkish Currency are reserved" to Article 344/4.

Furthermore, the Law No. 7161 stated that the provision added to Article 344 stipulating that the increase rate will be based on the consumer price index according to twelve-month averages will also be applied to the workplace lease agreements where the lessee is considered as a merchant and private and public law legal entity and it has been stipulated that Article 344 will enter into force as of 1 January 2019. Therefore, with this amendment made in Article 344 of the TCO, it is accepted that this provision has entered into force as of 1 January 2019 in terms of Workplace Lease Agreements for Merchants as well.

- **Prohibition of Regulation to the Detriment of the Lessee (Invalidity of Penalty and Acceleration Clauses)**

According to Article 346 of the TCO, no payment obligation other than the rental fee and ancillary expenses can be imposed on the lessee. In particular, agreements stating that if the rental fee is overdue, a penalty will arise or the following rental fees will become due, are deemed invalid.

Although Article 346 consists of a single paragraph, it actually regulates two different issues.

First sentence of Article 346 aims to prohibit the amounts that the lessor demands from the lessee without any reason, which is known as key money in practice.[23] Before Article 346 of the TCO was adopted, imprisonment and heavy fines were foreseen by Article 16 of the Law No. 6570 as a sanction for receiving more money than the rental fee, as a key money or under any other name. Article 346 specifies invalidity as a sanction instead of imprisonment.[24] Therefore it can be said that the first part of Article 346 has an equivalent in the Law No.6570 and this provision will not bring a novelty in terms of workplace leases with the entry into force of the provision.[25]

With the second sentence of Article 346, it is aimed to protect the lessee against heavy liabilities such as payment of penalties or payment of all remaining rental fees in case of rental fee is not paid on time. As there was no regulation on this subject under the Old CO or the Law No: 6570, Article 346 may have significant effects in practice.

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[23] **İnceoğlu**, p.190.
[24] **İnceoğlu**, p.190.
[25] **İnceoğlu**, p.190; **Türkmen**, p. 365.

With the entry into force of the aforementioned provision as of July 1, 2020 in terms of workplace lease agreements, where the lessee is deemed a merchant in the scope of the TCC or a private law or public law legal entity, it will no longer be possible to include such acceleration and penalty clauses in the lease agreement for lessees of this nature. In addition, the acceleration and penalty clauses that had already regulated in the lease agreements before 1 July 2020 have automatically became invalid with the entry into force of the provision as of 1 July 2020.[26]

Another important issue concerning Article 346 is that only penalty clauses related to non-payment are prohibited with this provision; therefore, other penalty clauses foreseen for breach of contract will continue to be valid.[27]

- **Provisions regarding Termination through Litigation**

Pursuant to Article 354 of the TCO, the provisions regarding the termination of the lease agreement through litigation cannot be changed to detriment of the lessee.

In the period before the TCO was adopted, the reasons of termination of the lease agreement through litigation were limited pursuant to the Law No.6570 and it was also stipulated that evacuation lawsuits to be filed for reasons other than those indicated in the Law No.6570 and old CO would not be heard even if there is a contrary provision in the lease agreement. Thus, it is considered that the entry into force of Article 354 as of 1 July 2020 will not cause any change in practice.

Application of the Postponed Articles to Lease Agreements Established Before 1 July 2020

The Law No. 6101 on the Enforcement and Implementation Method of the Turkish Code of Obligations ("**Enforcement Law**") should be taken into consideration while deciding as to whether the Postponed Articles will be applied to the lease agreements established before 1 July 2020.

Pursuant to the Enforcement Law, in principle Postponed Articles shall only be applicable for the lease agreements that will be established after 1 July 2020. In other words, these provisions shall not be applied retrospectively. However, there are exceptions to this rule.

Pursuant to the Enforcement Law, if a provision of the TCO is related to default, termination and liquidation, the provisions of the TCO, not the provisions of the old CO or the Law No.6570, will be applied to these issues. The second of the exceptions is that the TCO provisions concerning public order and public morality will be applied to all acts and transactions, regardless of the date they took place.

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[26] **Türkmen**, p. 365.
[27] **İnceoğlu**, p. 192.

Therefore, if the Postponed Articles regulate the issues related to default, termination and liquidation, or if they are related to public order and public morality, the Postponed Articles will also be applied in terms of agreements established before 1 July 2020. The provisions that do not fall in this scope will only be applied to agreements concluded after 1 July 2020. A separate analysis must be made for each of the Postponed Articles to determine whether such provisions regulate the issues related to default, termination and liquidation and / or related to public order and public morality.

Conclusion

The postponed provisions of the TCO regarding workplace lease agreements, where the lessee is deemed a merchant in the scope of the TCC or a private law or public law legal entity, have entered into force as of 1 July 2020. These provisions bring vital novelties and advantageous regulations for lessees compared to the period before the TCO. It is believed that the entry into force of these provisions will have consequences that will relieve lessees, especially in terms of lease relationships where the lessors are in a strong position, such as shopping malls. Finally, it should be noted that how the Postponed Articles will affect the existing lease relationships should be evaluated separately in terms of each postponed provision.