Changes in the Turkish Rental Law upon Entry into Force of the Postponed Articles of the Turkish Code of Obligations

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1. Introduction

The entry into force of certain provisions *(i.e. Articles 323, 325, 331, 340, 342, 343, 344, 346 and 354*) of the Turkish Code of Obligations numbered 6098 ("***TCO***") had been postponed for workplace leases of merchants and legal entities until July 1, 2020 with the Provisional Article 2 of the Law No. 6217 on the Amendment of Certain Laws for the Acceleration of Judicial Services ("***Law No. 6217***").

Examination of these articles reveals that postponement of them for 8 years (*as of the entry into force of TCO, i.e. July 1, 2012,*) was in favour of the lessor. In other words, entry into force of the aforesaid 9 articles for workplace leases of merchants and legal entities has brought changes for the benefit of the lessees of such lease relationships[1].

Furthermore, in cases where TCO did not have a provision regarding the issue at hand, relevant provisions of the abrogated Code of Obligations numbered 818 ("***aCO***") and with aCO's reference, Law No. 6570 on Real Estate Leases ("***Law No. 6570***") were applicable. This application has ended with the entry into force of the postponed articles.

2. Explanations and Evaluations regarding the Postponed Articles

2.1. Assignment of the lease relationship (Article 323)

Article 323 of TCO regulates the assignment of the lease agreements to third parties. As per Article 323 of TCO *"The lease agreement cannot be assigned to a third party without the written consent of the lessor. In case the leased property is a workplace, the lessor cannot*

[1] Ahmet Türkmen, "*6098 Sayılı Türk Borçlar Kanununun Kira Sözleşmesine İlişkin Yürürlüğü Ertelenen Hükümlerinin Değerlendirilmesi*", 2015/1 Ankara Barosu Dergisi, p. 348, 349

refrain from providing such consent unless there is a just cause. With the written consent of the lessor, the person whom the lease agreement is transferred replaces the lessee and the lessee transferring the lease agreement shall be relieved from his obligations. The lessee transferring the lease agreement shall be severally liable with the lessee taking over the lease agreement until the end of the lease agreement and yet for a maximum 2 - year - period in any case."

There was no regulation regarding the assignment of the lease agreement in aCO. In another words, except the general mandatory provisions of the law, there was no provision restraining parties from regulating the issue on aCO with coming to mutual terms. Therefore, parties could agree on such a provision preventing transfer of the lease agreement with their free will, and lessor could avoid providing his consent for transfer of lease agreement. As a matter of fact, there was also no article on the general provisions of aCO regarding transfer of agreement burdening the lessor to provide such consent.

As of July 1, 2020, lessors will be bound with Article 323 of TCO, and they will be obligated to provide their consent regarding approval of transfer of the workplace lease agreements unless there is a valid/just cause. Also, as of July 1, 2020, such regulations prohibiting the transfer of the workplace lease agreement will be deemed to be void. However, in case of the transfer of the lease agreement, former lessee transferring the agreement who is deemed to be relieved from his obligations against the lessor, shall be severally liable with the lessee taking over the lease agreement until the end of the lease agreement and yet for maximum 2 year period in any case.

2.2. Return of the leased property before the term of the contract (Article 325)

Return of the leased property before the term of the contract by the lessee and its consequences is regulated under Article 325 of TCO. In accordance with Article 325 of TCO, in case the leased property is returned before the term of the contract, the lease agreement shall, nevertheless, continue for a reasonable time in which the lessor may be leased under similar conditions. However, the Article provides an alternative way of early termination in case the lessee finds a new lessee who is capable of fulfilling the obligations under the lease

agreement and is willing to duly take over the leasing relationship. In such a case, the lessee's obligations under the lease agreement shall be deemed to terminate immediately.

Prior to Article 325 of TCO, there was no clause regarding return of the leased property before the term of the contract in aCO. However, with the precedents of High Court of Appeals, liability of lessee has been limited for a reasonable period of time in which the property may be leased under the same circumstances. That being the case, before Article 325 of TCO came into force, with respect to commercial lease relationships, lessee has been deemed to relive from his obligations after a reasonable period of time in which the property may be leased under the same circumstances.

Per Article 325 of TCO, in case the leased property is returned without conforming the lease term or termination period, the lessee will continue to perform its obligations under the lease agreement for only a reasonable period of time in which the property may be leased under similar circumstances. As per the same article of TCO, if the lessee finds another lessee that has the capacity to pay the rent, is ready to take over the lease and that would reasonably be accepted by the lessor as a lessee, the lessee's obligations would be discontinued.

Following the entry into force of the subject article on July 1, 2020 for workplace leases, in cases where the lessee evicts the property before the lease term or termination period, they may be released from the obligations of the lease agreement if they find another lessee as explained in the foregoing paragraph.

2.3. Extraordinary termination based on substantial grounds (Article 331)

Article 331 of TCO regulates extraordinary termination based on substantial grounds. Even though Article 331 of TCO is postponed until July 1, 2020, since aCO contains a similar clause (Article 264 of aCO), even before Article 331 of TCO came into force, parties could terminate the lease agreement based on probable cause for fixed-term workplace lease agreements. As of July 1, 2020, the workplace leases for indefinite terms may also be terminated based on probable cause making the continuation of the rental relationship unbearable based on Article 331 of TCO, with a slight difference. As per Article 264 of aCO, if the lease period was more than one year, the compensation amount to be paid in case of the

termination by the party terminating the agreement could not be less than the six-month rental price. However, in accordance with Article 331 of TCO, the amount of indemnity will be determined by the judge considering the specifics of the case.

2.4. Prohibition of linked agreement (Article 340)

Article 340 of TCO regulates the prohibition of linked agreements. There is no provision in aCO which corresponds to Article 340 of TCO. In that sense, this article has entered into force as a new provision in favour of the lessee.

Pursuant to this article, if formation or continuation of a lease agreement pertaining to dwelling and workplaces leases is linked to assumption of an obligation that is not related to the use of the leased property and not in the interest of the lessee, such agreement linked to the lease will be deemed invalid.

Prohibition of linked agreement will be applicable, for instance, in case of obliging the lessee to take out a policy from a certain insurance company when such insurance is mandatory within the scope of workplace lease, necessitating the lessee to work with an architect determined by the shopping centre or entailing the lessee to get certain services from the lessor or a third person[2].

Moreover, even though the text of Article 340 only speaks out to the invalidity of the linked agreement itself; it is propounded in the legal doctrine that provisions included in the lease agreement which provides an obligation to enter into a linked agreement should regarded as invalid, as well[3].

Entry into force of Article 340 of TCO does not affect the lease agreements to which concluded before July 1, 2020; it will be applicable to the lease agreements concluded after this date.

2.5. Security deposit by the lessee (Article 342)

[2] M. Murat İnceoğlu, "*Kira Hukuku*", On İki Levha, Istanbul, March 2014 (2 Vol), p. 36-59.
[3] *Ibid*.

Article 323 of TCO, another postponed article, regulates the limits and method of the deposit amount required to be paid by the lessee at the beginning (*i.e. signing phase*) of the lease agreement. As per this article, the deposit amount cannot exceed a "three-month lease amount". Furthermore, the deposit amount shall be deposited to a bank account, not to be withdrawn without the lessor's consent. The bank shall return the deposit only on the grounds of the parties' mutual consent, finalization of enforcement proceedings or a final court decision.

Neither Law No. 6570 nor aCO provides for a limitation regarding the amount of deposit. Therefore, during the postponement period, parties were free to determine the deposit amount and whether or not to put the deposit amount into a bank account, in accordance with the principle of freedom of contract.

With the entry into force of Article 342 for workplace leases of merchants and legal entities, the deposit amount required to be paid by the lessee will be limited to "three-month lease amount" and if deposit amount is determined as money or legal instrument, it will be mandatory to put this amount into a bank account.

Entry into force of Article 342 only effects the lease agreements to be concluded after July 1, 2020. Accordingly, the deposit amounts paid on the basis of valid lease agreements which were signed before July 1, 2020 could exceed "three-month lease amount"; therefore, the lessee cannot request return of the exceeding part after entry into force of this article. Likewise, parties cannot claim that the deposit amount should be deposited to a bank account if the respective lease agreement was concluded before July 1, 2020.

2.6. Prohibition of changes to the detriment of the lessee (Article 343)

Article 343 of TCO is a reflection of the principle of interpretation in favour of the lessee and it provides a momentous protection for the lessee. Article 343 stipulates that the lease agreements shall not be amended to the detriment of the lessee, except for the determination of the lease amount. By way of example, condensation of the payment terms or increase of the lessee's maintenance obligations are prohibited within the scope of Article 343.

Even though this article is listed among the postponed articles for workplace leases of merchants and legal entities, Article 9 of Law No. 6570 corresponds to this provision; therefore, entry into force of this article has not brought any changes in practice.

2.7. Determination of the rent amount (Article 344)

The rent amount is acknowledged as one of the most significant elements of lease agreement and its determination, due to its fundamental role for both parties of the lease agreement, has been regulated under Article 344 of TCO. But the enforcement of this article was postponed with respect to lease agreements of merchants and legal entities subjecting workplaces. Accordingly, the provision got back in force as of July 1, 2020 for lease agreements of merchants and legal persons regarding the workplace leases.

Article 344 of TCO comprises of 4 sub-paragraphs. The first subparagraph of the article regulates an upper limit for the increase rate. Accordingly, it has been stipulated that the increase rate cannot exceed the 12-month average of the consumer price index changes of the previous rental year.

The following sub-paragraph of the article, i.e. the sub-paragraph 2 of Article 344, regulates that if the increase rate has not been determined by the parties within the lease agreement, the court shall determine an equitable increase rate by considering the consumer price index of previous year, the conditions of the leased property; but the court-determined increase rate shall not be exceed the 12-month average of the consumer price index changes of the previous rental year.

It is stipulated in subparagraph 3 that, for the lease agreements longer than 5 years or renewed after the fifth year, the court shall determine the rent considering the 12- month average of the consumer price index changes of the previous rental year, conditions of the leased property and rents of similar properties. It should be highlighted that, unlike the sub-paragraph 2 of this article, the 12-month average of the consumer price index changes of the previous rental year

is not binding for the court in determination of the rent, but only a criteria for such determination. The gist of this legislation is to determine the rent amount, which falls behind the market value, in a reasonable way. The sub-paragraph also clearly states that there is no need to place an article about this in the lease agreement as this article shall still be implemented regardless the agreement including such a regulation. Once the rent amount is determined by the court as per this sub-paragraph, the rent will be increased in following 4 years as per the first and second sub-paragraphs of this article and then a court determination as to the rent can again be requested for the fifth year.

Finally, the last sub-paragraph indicates that in case the rent has been determined in foreign currency, i.e. any currency other than Turkish Lira, then the rent cannot annually increase, unless 5 years pass, preserving the occasions where the adaptation of the agreement is a necessity as per Article 138 of TCO. However, while determining the rent in foreign currency, the Law on the Protection of the Value of Turkish Currency No. 1567 and the Communiqué on the Decree No. 32 on the Protection of the Value of Turkish Currency should be certainly taken into account since it has been prohibited to determine the rent in or indexed to foreign currency subject to specific conditions stipulated in the Decree. It should also be noted that the new rent can be determined pursuant to sub-paragraph 3 of this article yet the newly determined rent should be in Turkish Lira, unless determination in foreign currency is agreed by both parties, as per the settled practice of High Court of Appeals.

2.8. Prohibition of regulation to the detriment of the lessee (Article 346)

As per Article 346 of TCO, the only financial obligation that the lessee undertakes is acknowledged as (i) the rent and (ii) secondary expenses, which is also an embraced practice by Article 16 of Law No. 6570. During this postponement period, Article 16 of Law No. 6570 has been implemented to serve for the same purpose. Therefore, the postponement does not actually affected the lease law practice at all since the said article of Law No. 6570 were also applicable for lease agreements of merchants and legal entities subjecting work places.

The additional issue that Article 346 of TCO brought is that the penalty clauses or clauses of maturity are prohibited, which is regulated under the second sentence of Article 346 of TCO. The implementation of Article 16 of Law No. 6570 was not covering such clauses and the

lease agreements of merchants and legal entities subjecting workplaces were allowed to indicate them. As a result, the penalty clauses or clauses of maturity regarding the failure in paying the rent in due time were legally valid and the practice of High Court of Appeals were also in compliance with this.

In light of the foregoing, the entry in force of Article 346 of TCO has its effects on the penalty clauses and clauses of maturity in the lease agreements of merchants and legal entities subjecting work places; as the prohibition of undertaking no financial burden other than the rent and secondary expenses of lessee were already being implemented with reference to Article 16 of Law No. 6570.

The entry in force of this article will also have an immediate effect and have the penalty clauses and clauses of maturity of the ongoing lease agreements of merchants and legal entities subjecting workplaces invalid as of July 1, 2020.

2.9. Limitedness of the grounds of action (Article 354)

The legal grounds for the lessor for filing a lawsuit against the lessee for the purpose of eviction has been regulated *numerus clausus* under Articles 350 – 352 of TCO. Accordingly, the article 354 regulates that the lessor is not entitled to file a lawsuit against the lessee, claiming the eviction of the leased property, based on any reason other than the ones listed under Articles 350 – 352 of TCO. In other words, the lessors can only file a lawsuit claiming the eviction of the leased property against the lessee based on (i) need, re-construction or public improvements, (ii) the need of the new owner of the property or (iii) the causes stemming from the lessees behavior such as causing two written warning due to not paying the rent within one or more years. Article 354 regulates that there is no other ground for the lessor to file a lawsuit claiming the eviction against the lessee.

Although this article has been postponed until July 1, 2020 to be implemented on lease agreements of merchants and legal entities subjecting work places; Article 8 of Law No. 6570 covers the same principle and considers opposite agreements invalid. Therefore, the entry in force of this article does not change the present practice.

3. Conclusion

This work has sought to give an overview of the 9 postponed articles of TCO in relation to workplace leases of merchants and legal entities. As indicated, these articles regulate pro-lessee provisions and their entry into force is therefore in favour of the lessees. In that sense, entry into force of these articles will have considerable effects on workplace leases of merchants and legal entities. That said, due to application of aCO and Law No. 6570 with the reference of Law No. 6217 and aCO respectively, some of the current practices will continue. Furthermore, while some of the postponed articles will be applicable for ongoing lease agreements concluded before July 1, 2020, some will only concern lease agreements concluded after this date.

Moreover, especially taking into consideration that some of the postponed articles did not have an equivalent in aCO or Law No. 6570, entry into force of these articles will bring along various theoretical and practical questions. The concrete application of these provisions will be determined through the precedents of the High Court of Appeals.

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(First published by Mondaq on July 21, 2020)