



## **The High Court of Appeals allows preliminary injunction on rental fees in adaptation cases based on COVID – 19 Circumstances**

**Authors:** Gönenç Gürkaynak, Esq., Tolga Uluay, Neslinur Alptekin and Doruk Altın of ELIG Gürkaynak Attorneys-at Law

It is a fact that, in addition to its serious effects over health concerns, COVID-19 pandemic has been equally overwhelming from an economic point of view due to long-standing lockdowns around the world. Similarly, Turkish government has implemented partial and complete lockdowns during the process and closed social gathering places in order to minimize social interaction. After almost one and half years later from the first-wave precautions causing the closing of several ventures, the High Court of Appeals made a unifying decision to resolve contradictory decisions of different Regional Courts of Appeals and ruled that the severe effects of the COVID-19 pandemic and economic effects of precautions taken against it may be taken into consideration by the courts in preliminary injunction requests in the lawsuits claiming adaptation of lease agreements.

### **I. Introduction**

In Turkey, the Ministry of the Interior decided to close all public gathering places such as cafes, restaurants, gyms, Internet cafés, SPA centers, funfairs and movie theatres as one the first precautions taken against the COVID-19 pandemic. After the long-standing closing of these enterprises, they are gradually allowed to provide services to their customers to mitigate the economic losses. As a result, many lessees of leased properties operating as one of these closed ventures run into serious downswing, especially in paying the rents for their non-operating businesses during the closings.

### **II. Adaption of Contracts under Turkish Law**

Under Turkish contractual law, it is the first priority to keep the contractual relationship between the parties valid and enforceable as the contractual relationship represents and honours the wills of the parties. Accordingly, article 138 of Turkish Code of Obligations

(“*TCO*”) regulates that if circumstances surrounding a contract changes significantly and this substantially alters the equilibrium of the contract in a way that renders the performance of the contract excessively burdensome for one party, such change of circumstances might be considered as a ground for adaption or revocation or termination of the contract<sup>1</sup> (“*clausula rebus sic stantibus*” principle). This principle is based on the general principles of fairness and good faith under Turkish law and explained with the “*collapse of the foundation of the transaction theory*”.<sup>2</sup>

Pursuant to Article 138 of the TCO titled “hardship”, an obligor has the right to request adaptation of the contract to the new conditions from the court; and if adaptation of the contract is not possible, it has the right to revoke the contract, without being liable for compensation.

In order to implement the hardship provision, as specified by Article 138 of the TCO and established in case law<sup>3</sup>, the following conditions must be met:

- (i) An extraordinary event, which is neither foreseen nor expected to be foreseen by the parties at the time of entering into the contract, must occur.
- (ii) This event must not be attributed to the obligor.
- (iii) This event must change the circumstances to the detriment of the obligor in such a way that renders requesting the obligor to perform its obligations contrary to good faith.
- (iv) The obligor must have not be fulfilled its obligations arising from the contract or it must have fulfilled its obligations by reserving its rights arising from the hardship.

---

<sup>1</sup> The applicability of right to revocation and right to termination depends on the nature of contract. The right to termination is applicable for the contracts of continuous performance, while the right to revocation comes into play for the contracts of instantaneous performance.

<sup>2</sup> Oğuzman, Öz (n 2), p. 580, 581.

<sup>3</sup> 13th Civil Chamber of the High Court of Appeals, decision dated 13.06.2014 and numbered 2013/16898 E., 2014/18895 K.; 6th Civil Chamber of the High Court of Appeals, decision dated 22.10.2015 and numbered 2014/11928 E., 2015/8860 K.; 6th Civil Chamber of the High Court of Appeals, decision dated 18.11.2015 and numbered 2014/12999 E., 2015/10017 K.



### **III. The Regional Court of Appeals decision regarding Preliminary Injunction for Reduction of Rental Fees due to COVID-19**

Article 389 of Turkish Code of Procedure (“*TCP*”) provides that “*Only when there is a doubt that a change in current circumstances can make obtaining of a right substantially difficult or completely impossible or that a delay could cause significant damage or inconvenience, a preliminary injunction decision can be rendered.*” Therefore, “possible significant damage” is a *sine qua non* condition for granting a preliminary injunction decision and there must be a *prima facie* case to grant or maintain a preliminary injunction decision.

The Regional Courts of Appeals contradicted interpretation of “*the economic difficulties caused by COVID-19 pandemic*” and “*the economic effects of COVID-related precautions*” as an incident of “possible significant damage”.

*a. 4th Civil Chamber of the Bursa Regional Court of Appeals’ decision numbered 2020/1103 E. 2020/1008 K. and September 28, 2020*

The plaintiff of the lawsuit, who is a restaurant owner and lessee of the subject matter lease agreement, claims adaptation of the lease agreement with respect to the rent amount, considering the demolishing effects of COVID-19 pandemic and precautions taken against it, for a limited period of time while the COVID-19 pandemic is still in effect. In addition, the plaintiff also requested the local court to rule for a preliminary injunction decision with respect to the rent amount. The local court rejected the preliminary injunction request. The rejection decision of the local court was appealed by the plaintiff and the preliminary injunction request was evaluated by the 4th Civil Chamber of Bursa Regional Court of Appeals.

The 4th Civil Chamber of Bursa Regional Court of Appeals firstly explains the legal concepts of adaptation of the contract and the legal mechanism of preliminary injunction along with legal requirements for their implementation. Following that, it has been stated in the decision that, rejection of the preliminary injunction request may cause the lessee to be evicted from the leased property due the lessee, i.e. the plaintiff, lapsing into default while the preliminary



injunction decision has always the option for revision or removal. Also, it has been explained in the decision that even if the adaptation lawsuit is rejected by the local court due to non-presence of the legal requirements for adaptation of the contract, it is still possible to collect the ill-performed part of the rent incurred for the period of preliminary injunction; thus, the preliminary injunction decision would not create any damage on the defendant lessor either.

In conclusion, the 4th Civil Chamber of Bursa Regional Court of Appeals ruled for the acceptance of the preliminary injunction decision provided that the decision shall be re-evaluated every 6 months since the conditions of the COVID-19 pandemic may change in time.

*b. 15th Civil Chamber of the Ankara Regional Court of Appeals' decision numbered 2020/2164 E. 2021/50 K. and dated February 1, 2021*

In this lawsuit filed before the local court in Ankara, the plaintiff who is the lessee of the leased property, which has been in operation as a wedding hall, claims adaptation of the lease agreement due to the dramatic drop in revenue because of the COVID-19 pandemic. The plaintiff also requested for a preliminary injunction decision to be rendered. The local court rejected the preliminary injunction request. The rejection decision of the local court was appealed by the plaintiff and the preliminary injunction request was evaluated by the 15th Civil Chamber of Ankara Regional Court of Appeals.

After the evaluation of the issue in hand, the 15th Civil Chamber of Ankara Regional Court of Appeals decided that the preliminary injunction requires an examination as to the merits of the case and it is not legally possible to hold a preliminary injunction decision that resolves the merits of the case. The appeal of the local court's rejection of the preliminary injunction decision has also been rejected by the Regional Court of Appeals.

#### **IV. Referral of the Matter to the High Court of Appeals**

The decision of Regional Court of Appeals upon the appeal of a decision on preliminary injunction is final as per article 394 of TCP. Accordingly, both the decision of the 4th Civil

Chamber of Bursa Regional Court of Appeals, which accepts the preliminary injunction request, and the 15th Civil Chamber of Ankara Regional Court of Appeals, which rejects the preliminary injunction request, are final. In that sense, in order to ensure legal security and right for a fair trial, the contradiction between these two final decisions must be resolved for future disputes on that front.

As per article 35 the Law numbered 5235, the High Court of Appeals can be requested to resolve a contradiction between final decisions of Regional Courts of Appeals. Accordingly, the contradiction between the decisions of 4th Civil Chamber of Bursa Regional Court of Appeals and the 15th Civil Chamber of Ankara Regional Court of Appeals was brought before the High Court of Appeals.

#### **V. The High Court of Appeals' Decision regarding Preliminary Injunction on Rental Fees due to COVID-19**

The decision of the High Court of Appeals, subject to this article, confirms the accuracy of accepting “*the severe economic effects of COVID-19 pandemic and precautions taken against it*” as a solid reason for accepting preliminary injunction requests in lawsuits claiming adaptation of lease agreements.

In the decision<sup>4</sup> of 3rd Civil Chamber of High Court of Appeals, it has been emphasized that the hardship that the plaintiff suffers regarding the payment of the rent amount due to the drop in the revenue caused by the COVID-19 and administrative precautions against it may lead to the ill-performance of the obligation for rent payment and this may cause eviction of the plaintiff from the leased property, all the while a lawsuit with an adaptation request is still pending and a possible adaptation decision that might come at the end of the lawsuit might remain futile because of the already-executed eviction.

In light of the reasoning summarized above, the High Court of Appeals resolved the contradiction between the decisions of different Regional Courts of Appeals by leaning

---

<sup>4</sup> The decision of 3rd Civil Chamber of High Court of Appeals dated June 4, 2021 numbered 2021/3452 E., 2021/6001 K.



towards the interpretation of Bursa Regional Court of Appeals in this matter, which was for accepting the preliminary injunction request. Accordingly the High Court of Appeals rules that if the legal requirements of article 389 of TCP are met, the preliminary injunction decision as to adaptation of lease agreement, especially as to the rent amount, may be granted in order to maintain the contractual relationship between the parties.

## **VI. Conclusion**

The decision of High Court of Appeals resolved the contradiction as to the accuracy of a preliminary injunction decision for lease agreements of businesses that are affected from the COVID-19 pandemic and precautions taken against it. Accordingly, it is allowed that if the legal requirements for a preliminary injunction decision are met, the preliminary injunction request can be accepted in order to (i) maintain the contractual relationship, (ii) prevent the serious damage to be incurred on the lessee by the way of eviction, and (iii) preserve the functionality of an adaptation lawsuit regarding the lease agreement.

Also, since the decision of the Ankara Regional Court of Appeals is found to be inaccurate; the decision of the High Court of Appeals also created an exception to the principle that “no preliminary injunction decision resolving the merits of the dispute may be granted”. This might be seen as an exception that is granted for the unique COVID circumstances though, but still is a significant development in implementation of the preliminary injunction in adaptation lawsuits and surely has a positive impact on the legal and economic conjunctures of those who have got seriously affected by the COVID-19 pandemic.

Article contact: Gönenç Gürkaynak, Esq.

Email: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)

*(First published by Mondaq on August 24, 2021)*