BIP Belvedere Inzaghi & Partners

24 March 2020

**Subject: lease agreements pursuant to Law no. 392/1978: analysis of landlords' and tenants' legal standing following the regulatory measures issued to deal with the coronavirus emergency**

1. General Framework

Following the publication of national emergency measures addressing the coronavirus emergency, there has been an increase in the locking down of premises open to the public.

In particular, the Decrees dated 8, 9 and 11 March 2020 imposed – throughout Italy and until 3 April 2020 – the suspension of the following activities: gyms, swimming pools, spas, wellness centers, ski resorts, commercial activities, restaurants, personal services, as well as the locking down of theatres, cinemas, museums, archives, libraries and archaeological sites.

The above provisions have had deep impacts in terms of revenues for the relevant parties and, consequently, it seems helpful to analyze – from a legal standpoint – the consequences of these measures with reference to the lease agreements entered into pursuant to Law no. 392/1978 (i.e. the Italian Tenancy Law).

As per the major leases (i.e. agreements of other than residential use premises with a rent exceeding € 250,000.00/year, and entered into after September 12, 2014, date of entry into force of Decree Law 133/2014, the so-called "*Sblocca Italia*"), the mandatory provisions provided for by Law no. 392/1978 may be waived by the parties in the lease.

2. The legal framework

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It should be noted that, in the case at hand, we are dealing with a case of so-called force majeure, since the measures taken by the authorities (so-called *factum principis*) have led to the forced locked down of the above-mentioned activities.

As far as this *memorandum* is concerned, it is of outmost importance to analyze the provisions of Law no. 392/1978 in order to verify whether it contains provisions relating to the so-called *factum principis*.

As a matter of fact, no provision dictates a specific rule to be applied in these cases, there is no general and abstract provision in Italian law dealing with this institution, which, however, has become a standard clause in contractual practice.

In order to apply it, the regulation must be:

- unforeseeable;
- unavoidable; and
- not attributable to one of the parties.

Without *ad hoc* contractual provisions (see below), the general rules on the impossibility of the fulfilment of the relevant obligation (articles 1256, 1463 and 1464 of the Italian Civil Code) or the termination of the agreement when its performance becomes excessively onerous (article 1467 of the Italian Civil Code) should apply.

In particular, as far as commercial lease agreements are concerned, being long term agreements, it should be analyzed the temporary impossibility and not the permanent one (which would result in the legal termination of the contract pursuant to art. 1463 of the Italian Civil Code), unless the relevant agreement is a temporary one like those executed for temporary shops.

Pursuant to art. 1464 of the Italian Civil Code, in case of temporary impossibility the agreement remains valid and in force, but the defaulting party will not be liable for the delay in performance pursuant to art. 1256 of the Italian Civil Code, as its default will be blameless (in this sense, with regard to the emergency situation herein, see art. 91 of Law Decree no. 18 of 17 March 2020, s.c. "Cura Italia" ([1]) which concerns public agreements).

[1] The aforementioned provision, titled "provisions on delays or breach of contract resulting from the implementation of measures to contain and anticipate the price in the context of public agreements" provides that "in Article 3 of the Law Decree no. 6 of 23 February 2020, converted with amendments by Law no. 13 of 5 March 2020, after paragraph 6, the following is added: "6-bis. Compliance with the containment measures

Therefore, the landlord, in accordance with the good faith principle and in compliance with the above mentioned article (art. 1256 of the Italian Civil Code), could come to an agreement with the tenant in order to define a deferred payment of rents (without interest or penalties) or, eventually, a repayment plan of unpaid monthly rents due by tenant during the lockdown period.
In addition, pursuant to art. 1464 of the Italian Civil Code, in case of temporary impossibility of the performance, the tenant could be entitled to a corresponding reduction of the due performance (the rent) with the right to withdraw if the latter does not have an appreciable interest in the partial performance.

However, in the case at hand, it could be stated that the impossibility does not exist because the leased premises remain at the tenant's disposal (unlike the case – for example – in which there is an earthquake or a fire that destroys them or the need for repairs) and, consequently, the legal regime that best fits the current situation appears to be the non-performance of the agreement because it has become excessively onerous.

Therefore, by applying the provision set forth in art. 1467 of the Italian Civil Code, the tenant may request the termination of the agreement only if the *factum principis* will affect the contractual synallagma in such a way as to irreversibly alter the balance between the contracting parties.

The relevant assessment needs to be made on a case-by-case basis in relation to the specific contractual relationship, its duration and the duration of the authoritative measures taken.

The tenant may send a specific request to the landlord in order to reach an agreement to reduce the rent, possibly to be registered with the Italian IRS (even if there is no obligation) with the advantage of exemption both from stamp and registration tax.

The landlord, although not obliged to accept such request, could do so (even if only for a few months) in order to avoid the termination of the agreement by "reestablishing its fairness", in compliance with the principles of good faith and fairness in the execution of the contractual relationship pursuant to art. 1375 of the Italian Civil Code.

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referred to in this decree is always assessed for the purposes of excluding, pursuant to and for the purposes of articles 1218 and 1223 of the Italian Civil Code, the debtor's liability, also with reference to the application of any forfeiture or penalties connected with delayed or omitted performance".

The formal reduction of the rent, if duly registered with the Italian IRS, avoids the landlord's obligation to pay, even in the presence of deferred or delayed payment of the rent, the taxes on the amounts resulting from the agreement and not on those actually collected.

Finally, always from a general and abstract point of view, the withdrawal from the agreement for serious reasons provided for by Article 27, paragraph 8, of Law 392/1978 could also be invoked, if not waived in the so-called major leases pursuant to Article 79 of the same law.

The withdrawal right pursuant to the above-mentioned provision requires a 6 months' notice and determines the impossibility for the tenant to receive the goodwill indemnity.

The Italian Supreme Court (sentences no. 10624 of June 26, 2012 and no. 11772 of May 15, 2013) stated that the serious reasons would exist in cases of events that occurred when the relationship was established, which were beyond the tenant's control and unforeseeable, or such as to make it extremely burdensome for the tenant to continue the lease.

The merit case-law has also highlighted that the burden of proof with reference to the serious reasons lies on tenant' side and the relevant assessment will be carried out on a case-by-case basis, in an objective manner and in such a way that only events beyond the normal contractual risk (bearing in mind that the business risk is borne – *ex se* – by the tenant) can be regarded as serious.

The assessment, which shall be carried out taking into account the duration of the *factum principis* in relation to that of the contractual relationship, shall not be carried out on the entire company structure but only with reference to the activity exercised in the leased premises (in this sense, Italian Supreme Court no. 14365 of 14 July 2016).

The following reasons have not been considered as serious within the meaning of Article 27, paragraph 8:

- the mere convenience of the tenant (Italian Supreme Court no. 12020 of 24 September 2002);
- events that are part of the common business risk (Monza Tribunal, 20 May 2008).

On the other hand, the objectively unforeseeable economic trend, both favorable and unfavorable, which forces – from an objective point of view and not merely for convenience – the tenant to expand or shrink the company structure (i.e. expansion in the premises due to an unforeseeable increase in orders – Italian Supreme Court no. 10624 of 26 June 2012, which refers to Italian Supreme Court no. 9443/2010, no. 3418/2004 and no. 10980/1996) was considered as a serious reason.

## 3. The Contractual Provisions

The foregoing represents the general legal framework that applies without specific contractual arrangements.

Each contractual relationship may contain a clause that regulates cases of force majeure (in international agreements called the "*force majeure clause*") and that generally contains the possibility to suspend the performance and, in cases of prolonged impossibility beyond a certain limit, the termination.

Likewise, the parties may have foreseen the case pursuant to which the performance of a contract becomes excessively onerous (in international agreement called the "*hardship clause*") with the obligation for them to renegotiate the content of the agreement to adapt it to the state of the art, through the intervention of a third party or through negotiations between the parties.

If no agreement is reached, the agreement may be terminated.

## 4. Incentives granted to the companies by the emergency measures

All of the above must necessarily be interpreted in conjunction with the emergency interventions put in place, and capable, to affect the negotiation process.

Reference is made to the incentives for the companies that were initially provided for by the Law Decree no. 9 of 2 March 2020 for those who had their registered office or headquarter in the former red zone, i.e. the municipalities listed in Annex 1 of the D.P.C.M. of 1 March 2020 (Bertonico, Casalpusterlengo, Castelgerundo, Castiglione d'Adda, Codogno, Fombio, Maleo, San Fiorano, Somaglia, Terranova dei Passerini, Vo' Euganeo).

Among them, the most significant were the suspension of tax payments, bills, mortgage payments (those facilitated granted by Invitalia to the companies and those for the purchase of the first house).

With the Law Decree no. 18 of 17 March 2020 (s.c. "Cura Italia"), some incentives were extended to the entire national territory.

Precisely, reference is made to:

- Article 65: tax credit of 60% with reference to the rent for the month of March 2020 for buildings falling under cadastral category C/1[2] to be set-off pursuant to Article 17 of Legislative Decree no. 241 of 9 July 1997 (with the exception of those indicated in annexes 1 and 2 to the D.P.C.M. of 11 March 2020 – e.g. trade in food products, hypermarkets, supermarkets, discount stores, medical and perfumery articles, for personal hygiene, soaps, detergents, laundries, funeral services);

- the financial support for SMEs by the State; and

- Article 89: establishment of a support fund for the entertainment, cinema and audiovisual sectors.

The above reflects the status of the provisions and measures adopted by the Italian Government as of 24 March 2020.

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[2] Usually, shopping centers are identified at a cadastral level as D/8 therefore shopping centers might not benefit from this provision.