

CEE LEGAL NEWSLETTER



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COMMERCIAL LEASES

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In cooperation with



FRANCE

After setting forth (for the particular benefit of our foreign readers) the main features of the special legal rules which apply to commercial leases in France (I), we will discuss the recent amendments to the legislation which have been introduced in order to mitigate the effects of Covid-19 on the performance of leases (II and III).

THE GENERAL RULES ON COMMERCIAL LEASES

A commercial lease is a contract concerning commercial, industrial or trade premises. The lessee (or lessee) is obliged to pay a rent, whilst the lessor, who owns the premises, is obliged to ensure the delivery and quiet enjoyment of the premises. A commercial lease is necessarily entered into for a minimum term of nine years (Article L.145-4 of the French Commercial Code). If, however, the lease is for a longer term than the statutory period, it has to be published in the mortgage registry in order to be binding on third parties. In order to benefit from the special status of a commercial lease, which falls outside the general provisions of ordinary French law, the lessee and lessor must satisfy a certain number of requirements.

The lessee must notably:

- (i) Have the status of a merchant or tradesperson or a commercial company. It must also be registered at the trade and company registry or listed in the trade directory;
- (ii) Run a business concern which it owns from within the premises

In principle, a commercial lease expires on service of notice at the end of the agreed term, but it may expire earlier if terminated. The legislator has notably intervened in this regard, in connection with the public health state of emergency.

MODIFICATION OF LESSEE'S OBLIGATIONS DURING THE PUBLIC HEALTH STATE OF EMERGENCY

The provisions of law n° 2020-1379 of 14 November 2020 modify certain of the lessee's obligations, such as:

- (i) A prohibition on any action, sanction or means of compulsory enforcement for late payment of rent or service charges or a failure to pay the same.
Lessors can, accordingly, no longer rely on the cancellation clause contained in their lease in the event of a failure to pay the rent.
- (ii) A prohibition on the enforcement of real and personal security which guarantees the payment of the rents and service charges.
- (iii) A suspension of the enforcement procedures commenced by lessors (lessees who have a workforce of less than 250 employees and who have lost at least 50% of their

revenue in respect of the period between 1 November 2020 and 30 November 2020 may enjoy the benefit of these measures).

It follows that the provisions of the law of 14 November 2020 go further than those contained in the ordinance of 15 March 2020, which were previously adopted in this regard, since a lessor can no longer commence proceedings for interim relief in respect of rents which are covered by the legal protection period afforded by the public health state of emergency.

Since this type of attachment procedure can be commenced without the consent of a judge (Article L. 511-2 of the French Code of Civil Enforcement Procedures), lessors continued to have effective procedural weapons at their disposal to protect themselves in the event of payment defaults.

The rules have also been consolidated compared to March 2020 with a complete blocking of all the default remedies. Accordingly, a lessor can no longer claim compensation for the consequences of the lessee's failure to pay rent.

Moreover, a lessee who has not paid its rent on the due date may still apply to the judge for an extension of time for payment or for a grace period, the effect of which will be to suspend in full the payment of the rent.

The lessee may still avail itself of the provisions of ordinary law and it is of particular interest, in this regard, to highlight recent case law referring to Article 1722 of the French Civil Code which provides that if the object leased is destroyed in whole or in part, the lease may be terminated or the price may be reduced.

On 20 January 2021, the Paris Court of Justice held that this article applied to a situation where it was impossible to use the leased premises as a result of a decision by the state authorities to close certain establishments.

Accordingly, the judge releases the lessee from its obligation to pay rent for so long as it cannot enjoy the object leased within the meaning of Article 1722 of the French Civil Code (TJ Paris, 20 January 2021, n° 20/8092).

MODIFICATIONS OF LESSOR'S OBLIGATIONS DURING THE PUBLIC HEALTH STATE OF EMERGENCY

In the current public health state of emergency, judges seek to control the manner in which lessors perform their obligations under the lease.

In order to be considered to be acting in good faith, within the meaning of Article 1104 of the French Civil Code, a lessor must no longer require that the provisions contained in the lease are strictly enforced. It must agree to make certain concessions and, at the very least, offer to defer the rent payment dates. Consequently, a lessor who demands payment of the rent on the terms set forth in the contract, without making any offer to adjust such terms, will be deemed to have acted in bad faith.

In a decision rendered on 21 January 2021 (TJ Paris, ref., 21 Jan. 2021, n° 20/55750), pronouncing upon a plea of non-performance raised by the lessee, the interlocutory judge noted that contracts must be performed in good faith and, accordingly, the parties are obliged, in the event of exceptional circumstances, to check whether such circumstances do not require an adjustment to the terms of performance of their respective obligations.

In other words, a claim based on a plea of non-performance must be examined, not in light of the lessor's compliance with its obligation to deliver, since, in this instance, the restaurant was open to the general public, but in light of the obligation for the parties to negotiate in good faith the terms of performance of their contract.

The public health crisis and the repercussions which it has caused concerning the lessee's business operations and failed negotiations can be classified as "exceptional circumstances" which require an adjustment of the rents payable during the period in question.

Moreover, in order to encourage solidarity between lessors and lessees, the second modifying finance act for 2020 provides special tax measures for lessors who decide to waive part of the rent due for the benefit of businesses impacted by the public health crisis.

Accordingly, if a lessor waives its right to claim rent receivables between 15 April and 31 December 2020, the amount of the rent which it has waived will be deducted from its taxable income for the year 2020.

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HUNGARY

Hungarian law does not distinguish between regular leases and commercial leases. Commercial leases may be entered into in respect of retail, industrial or even residential properties, and the ordinary provisions governing regular leases will apply.

MATERIAL CONDITIONS OF COMMERCIAL LEASES

The terms and conditions of the lease agreement are to be negotiated between the parties, who benefit from a relatively broad discretion to determine most of the contents of the agreement. Apart from instances where exceptions are not permitted, commercial leases can be adapted to the specific circumstances of the project and the leased property. Parties to such agreements can be either natural persons or legal entities, whether Hungarian or foreign; the leased property can be residential, commercial, retail or industrial and the term of the agreement can be definite or indefinite, as the parties deem fit.

FORM AND FORMALITIES

In order to be valid under Hungarian law, the lease agreement must be entered into in writing. Any amendments, including the termination of the lease, also have to be in writing in order to be valid. As a matter of standard practice, particularly when one party to the lease agreement is a foreigner or a foreign legal entity, the parties' signatures are notarized. While this serves as an additional guarantee of the signatories' identity and of the date of the agreement, such certification is not a prerequisite for the validity of the lease agreement.

Leases cannot be registered in the Hungarian Land Registry.

TITLE OF OWNERSHIP AND LIENS ON THE LEASED PROPERTY

The lessor is not required to own the leased property, provided that the lessor has the right to use it and is entitled to transfer possession and use of the property to a lessee. A lessee may, in turn, sublet the property with the lessor's written consent. Commercial lease agreements usually provide that the lessor's consent may not be unreasonably withheld and set a deadline for the lessor's response.

Liens may be created over the leased property without the lessee's consent, unless provided otherwise in the lease agreements. The lessor has a statutory lien over any movable property belonging to the lessee which is located in the leased property. This means that the lessor may retain any such movable property in lieu of unpaid rent or costs until the outstanding amounts are settled. If the lessee removes such movable property without the lessor's permission and does not provide adequate security in lieu, the lessor is entitled to demand the return of such movable property at the lessee's expense.

DEFAULT AND LIABILITY

If the lessee continues to use the leased property after the expiry of a fixed-term lease and the lessor fails to object within a period of 15 days from such expiry, the fixed-term lease will be transformed, by operation of law, into a lease for an indefinite term. The remaining terms and conditions of the lease will continue to apply.

It is standard practice for commercial leases to provide specific rules for the vacation of the leased property, in order to facilitate this process. The lessor may also require that the lessee sign a declaration of eviction (in the form of a notarised deed), which entitles the lessor to evict the lessee from the leased premises without the need for litigation. If the lessee has not signed any such declaration of eviction and fails to vacate the premises, the lessor is entitled, within a period of 60 days, to commence expedited eviction proceedings before the court. In this *ex parte* procedure the court will reach a decision within 5 business days and notify the bailiff who will then enforce the eviction within 3 business days of the court's order.

The parties have a broad discretion, concerning any default or liability, to stipulate provisions in the lease agreement which they deem appropriate for their specific circumstances except for a few imperative legal provisions which cannot be derogated by the parties (e.g. when the subject of the lease is residential property, if the latter becomes unfit for residential use since it poses a health threat, the lessee is entitled to terminate the agreement and any waiver of this right by the lessee shall be considered null and void).

Under Hungarian law, a distinction is drawn between an "ordinary" termination and an "extraordinary" termination.

Regarding an **ordinary termination**, the parties may terminate a lease agreement for an indefinite term without providing reasons and at any time (on service of notice). Conversely, fixed-term lease agreements will terminate either on the agreed termination date, if such a date is provided in the agreement, or on the date when a certain event stipulated in the lease agreement, in lieu of a specific termination date, occurs. A fixed-term lease cannot, therefore, be terminated prior to the expiry of its term by either party, unless provided otherwise by law (e.g. termination by the lessee's heirs, a sale of the property or termination by the new lessor, if he was misled by the lessee regarding the existence of a lease or material lease conditions) or as agreed in the lease agreement (e.g. a contractual breach). According to current court practice, the parties may regulate the terms and conditions of the right of termination when that right does not relate to the other party's breach of contract; the parties can also limit the period during which the right of termination may be exercised. For example, they may agree that the right to ordinary termination may be exercised only if a certain period has elapsed following the execution of the lease. Leases for an indefinite term are typically considered to be permanent, in which case the exclusion of a right to terminate is void and unlawful.

In addition, the right to terminate the lease agreement with immediate effect and without reasonable justification may also be agreed as a contractual term in the lease. However, should the advantages and disadvantages of termination of the lease become significantly disproportionate, this will result in a breach of the principle of good faith and fairness. However, the breach of this principle alone may not serve as a legal ground for invalidity and a breach of other specific rules will also be required in order to claim invalidity.

An ***extraordinary termination***, unlike ordinary termination, is akin to a sanction. It therefore applies in the event of a breach by one of the parties. The causes for extraordinary termination may be agreed upon by the parties in the lease agreement. For the lessor, such a cause could, for example, include a payment default or damage caused by the lessee to the property. For the lessee, it could be a failure by the lessor to ensure that the property can be used in a normal manner. According to current court practice, the parties may provide that the failure to pay the rent when due for a certain period of time or that other forms of unlawful behaviour will trigger a right to enforce extraordinary termination. The parties may also extend the scope of the grounds for extraordinary termination provided for by law by, for example, declaring that the conduct of certain activities which would not otherwise affect the intended, contractual use of the property, will constitute a breach of contract, and will trigger a right to enforce extraordinary termination. Furthermore, the parties may opt out of the statutory requirement to serve prior notice as a prerequisite for termination.

In the event that the lessee sublets the property, certain rules will apply concerning the lessee's liability. If the lessee sublets or assigns the use of the property with the lessor's consent, the lessee will be liable for the conduct of the sub-lessee and the user in the same way as for the lessee's own use. If the lessee sublets or assigns the use of the property without the lessor's consent, the lessee will be liable for any damage that would not otherwise have occurred.

On termination of the lease, if the lessee has any outstanding claims against the lessor, it is entitled to remain in possession of the leased property, but without using it as if the lease continues to apply, until its claims against the lessor under the lease are settled.

The Civil Code provides for statutory interest to be paid on late payments under ordinary contractual rules. As a general rule, the interest for late payment will be calculated as follows: the Hungarian National Bank base rate (for payments made in foreign currency, the base rate determined by the central bank issuing that foreign currency; failing which, the money market rate) which is in effect on the first day of the half-year to which the late payment pertains, will apply to the said half-year.

In the event of contracts entered into between business entities, the following specific rules will apply: (i) late payment interest which applies to any given half-year shall be equal to the Hungarian National Bank base rate (for payments made in foreign currency, the base rate determined by the central bank issuing that foreign currency; failing which, the money market rate) which is in effect on the first day of the half-year to which the late payment pertains plus 8 percentage points; (ii) an obligee may challenge any contractual terms which unilaterally and unreasonably depart from the provisions of the Civil Code to the detriment of such obligee by breaching the requirement of good faith and fair dealing; (iii) any contractual term excluding late payment interest shall be null and void, unless the obligor is liable to pay contractual penalties in the event of a delay.

TAX-RELATED INCENTIVES DURING THE PANDEMIC

Commercial leases have not been subject to any specific tax-related COVID-19 regulations. In general, some tax incentives were introduced in order to mitigate the negative impacts of the pandemic (e.g. pursuant to Act LVIII of 2020 on transitional rules and epidemiological preparedness relating to the cessation of an emergency), the payment of certain taxes (i.e. corporate income tax, small business tax, local business tax, income tax on energy suppliers and the innovation contribution) and reporting obligations were suspended for a limited period of time in 2020. The issue of whether to update or adapt the terms and conditions of commercial leases, if it should prove necessary in order to avoid a default caused by COVID-19 related challenges, is a matter of discretion for the parties.

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BULGARIA

Commercial leases are regulated under Bulgarian law with the aim of providing contracting parties with sufficient flexibility to adapt the terms and conditions of the agreement to their specific circumstances, whilst at the same time ensuring certain minimum safeguards. In general, statutory provisions will apply regarding the term, termination and liability, unless expressly agreed otherwise. Also, for certain types of property or lessors, such as municipalities or the state, there are special mandatory rules that cannot be waived by the parties. In light of the innovations in the field of commercial leases, such as build-to-lease, the practice of the administrative authorities and the courts has significantly evolved in recent times, in order to accommodate such agreements and promote dispute resolution.

MATERIAL TERMS AND CONDITIONS OF COMMERCIAL LEASES

- **Parties:**

Parties to commercial leases are usually legal entities registered as commercial companies in the Bulgarian Trade Register or an equivalent company register abroad. For the transaction to qualify as commercial and thus be regulated as such, at least one of the parties to the agreement needs to be a merchant, i.e. either a commercial company or a sole proprietor. This is an important distinction. The rules governing commercial transactions are much more flexible, since the contracting parties are deemed to be skilled professionals who thus require less statutory protection when estimating the risks involved. While the law does not prevent natural persons, either Bulgarian citizens or foreigners, from being party to a commercial lease, the standard practice is to register a commercial legal entity whenever a private individual wishes to lease out a commercial property, since this status affords certain advantages in terms of tax and liability.

- **Leased Property:**

The leased property should be described in sufficient detail, including the surface area, boundaries, description and the equipment included, so that the leased premises can be clearly identified. In certain cases, this might pose a challenge, particularly if the subject of the lease is still under construction or is to be carved out from a larger open space within a building (e.g. an open office space). An inadequate description might prevent the registration of the lease agreement with the Real Estate Register or trigger disputes regarding the exact amount of the rent due, if the latter is calculated on the basis of the surface area of the leased premises. In most ordinary cases, the property can be adequately defined by using its cadaster registry reference, which is available for most regions in Bulgaria. If the leased premises are part of a cadaster registry unit, i.e. do not have an individual cadaster registry reference, the registration authorities will accept a plan of the property based on the cadaster registry unit, where the leased part is clearly marked and separated (e.g. by partitions).

The law does not restrict the type of property that can be the object of a commercial lease, provided that it is private property. In particular, when the property is private municipal or state property (as opposed to public property for which special concession requirements apply), the lease will usually be the subject of a public tender and certain requirements concerning the material terms and conditions of the agreement cannot be waived by the parties.

- **Term:**

The term of a commercial lease can be freely negotiated by the parties (unlike a standard lease or a lease where one of the parties is a municipality or state body which is responsible for the leased property, in which case the term cannot exceed 10 years – pursuant to Bulgarian law a commitment for more than 10 years is deemed to be a disposal of property rather than an act of property management and, accordingly, stricter rules apply). If the lease term is not defined in the agreement, the lease cannot be registered in the Real Estate Register and can generally be terminated on one month's notice.

FORM AND FORMALITIES

A lease agreement is usually entered into in written form for practical reasons (e.g. tax deductions), although this is not a prerequisite in order for it to be valid. The parties might also choose to have their signatures notarized and to record the lease agreement in the Real Estate Register. If the agreement is notarized, as mentioned above, this provides the lessee with certain advantages. One such advantage is that, in the event of a transfer of the leased property, the lease agreement will remain valid and binding on the new owner for a period of one year (or for the remaining term of the agreement, if less). The notary's fee is based on the total amount of the rent for the term of the agreement.

The lessee might also benefit from a registration of the lease in the Real Estate Register, since this guarantees that the lease in its entirety (all terms and conditions) will remain binding on the new owner in the event of a property transfer. The requirements for registration include a lease term of at least one year, notarized signatures and the identification of the owner and the leased property. A set of documents for the property must be filed, together with payment of a registration fee. On termination of the lease, the registration will have to be removed at the specific request of either party; otherwise, it will continue to be registered as an encumbrance on the property in the Real Estate Register.

TITLE OF OWNERSHIP AND LIENS ON THE LEASED PROPERTY

It is not mandatory for a lessor to have beneficial or legal title to the leased property. The lessee's right to use the property is a contractual right (i.e. based on the lease agreement) and not a right in rem. Hence, the lease agreement will be valid, even if the owner of the property is not aware of its existence.

The lessor is, however, required to ensure that the lessee can enjoy possession of the leased property, as agreed, without being disturbed by claims from third parties. It is, however, standard practice to require proper authorization from the owner before entering into the lease, when the lessor does not have title of ownership to the leased property.

Liens on the leased property, such as mortgages, easements or injunctions can be registered and established without the lessee's consent. In such an event, the lease agreement will be binding on the new owner or creditor only if it has been duly registered in the Real Estate Register. In the event of a public sale of the leased property, in particular, the registered lease agreement will remain as an encumbrance on the property, even though all prior mortgages and other property encumbrances will be automatically released after the public sale.

DEFAULT AND LIABILITY

The lessee is required to vacate the leased property on termination of the lease agreement, failing which the lessor is entitled to bring eviction proceedings pursuant to a summary procedure. In certain cases, however, it might be in the interests of both parties to continue the lease even after the expiry of its term. If the lessee does not vacate the leased premises and the lessor does not object then, absent any specific provision in the agreement, the lease will be transformed into a lease for an indefinite term, which can be terminated on one month's notice by either party, while the rest of the terms and conditions remain unchanged.

Besides the statutory penalty interest for late payment, the law affords the parties to a commercial lease significant freedom to stipulate the penalties in the event of a default, on the assumption that they are informed professionals who are able to assess the risks involved. Nonetheless, the courts have established a rule that certain types of penalties are to be deemed excessive, in particular if the amount is such that the penalty clearly surpasses the potential loss suffered by the injured party and can thus be considered to be punitive damages which go beyond the acceptable standard for reasonable merchants.

COVID-19 RELATED TERMS AND CONDITIONS

Besides the variety of measures introduced to mitigate the negative impact of the COVID-19 related restrictions in general, the legislator has chosen not to interfere with the regulations governing commercial leases, with the exception of an option for the state and for municipal bodies to waive the rent on municipal or state properties during the state of emergency. The municipality of the capital Sofia took advantage of this opportunity to assist lessees of municipal property for a limited period of time in 2020, thus avoiding a wave of defaults and/or disputes as to whether or not force majeure clauses applied.

D'ORNANO

PARTNERS

February 2021

For private lessors and lessees seeking to enter into a commercial lease after the outbreak of COVID-19, the main concern is to provide for the potential negative impact of future restrictions relating to the public health crisis. Since it is evident that business activity will continue to be adversely affected for the foreseeable future, any related events that might trigger a default under the lease agreement, cannot be deemed to constitute force majeure. They would, accordingly, have to be specifically provided for in the lease agreement.



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IN COOPERATION WITH D'ORNANO PARTNERS

CROATIA

Commercial leases in the Republic of Croatia, including their creation and termination, as well as the mutual rights and obligations of the parties thereto, are regulated by the Lease and Sale of Business Premises Act ("**Lease and Sale Act**").

MATERIAL TERMS AND CONDITIONS OF THE COMMERCIAL LEASES

- **Parties:**

The Lease and Sale Act does not impose any specific requirements regarding the parties to the lease agreement. It is therefore irrelevant whether the party is domestic or foreign, or a natural or legal person, as long as the subject of that agreement is the lease of business premises.

- **Leased Property:**

The leased premises can be any business premises, such as office buildings or premises, garages, and parking spaces, since any facilities designated for conducting business activities fall within the scope of the definition of business premises within the meaning of the Lease and Sale Act.

- **Term:**

The lease agreement can be executed for either a definite period stipulated specifically in the agreement by the parties or for an indefinite period of time (the Lease and Sale Act does not impose any minimum or maximum term).

FORM AND FORMALITIES

The lease agreement must be drawn up in writing; otherwise, it will be null and void. Although not mandatory, it is common in practice for the parties to draw up a lease agreement in the form of a notarial deed containing a so-called "enforcement clause", which gives the lessor the right to evict the lessee and collect any unpaid claims faster and more efficiently. If the signatures of the parties or the lease agreement itself are not notarised by a public notary, the lessor is obliged to submit a copy of the lease agreement with the appropriate tax authority. If the lease is notarised, the public notary will automatically file a copy of the lease agreement with the tax authority. It is not compulsory to register the lease agreement with the Land Books Register; however, the lessee could benefit from such a registration, especially in the event of enforcement, i.e. a forced public sale of the leased business premises. An application for the registration of the lease agreement in the Land Books Register may be filed by either party provided that a fee of approximately EUR 30 is paid and that the lease agreement, containing permission for such registration, is also submitted.

TITLE OF OWNERSHIP AND LIENS ON THE LEASED PROPERTY

The lessor must own the leased business premises. The lessee is not entitled to sublet the business premises or part of the business premises (unless otherwise stipulated by the lease agreement).

Liens may be attached to the leased premises without the lessee's consent (the most common being a mortgage). If the liens are implemented, i.e. the enforcement and public sale of the leased business premises is initiated, the lessee's future status will depend on whether the lease agreement was executed prior to the acquisition of the lien and was registered in the Land Books Register.

Lease agreements that were executed and registered in the Land Books Register prior to the acquisition of the lien are not terminated with the sale of the leased business premises. The buyer takes over the lessor's rights and obligations with effect from the acquisition of ownership of the business premises. Lease agreements that were not registered in the Land Books Register, whether at all or prior to the acquisition of the lien, shall be terminated as a result of the sale of the leased business premises.

DEFAULT AND LIABILITY

When the lease agreement is for an indefinite period of time, either party can terminate it by serving written notice on the other party. It is sufficient to deliver the notice by registered mail, unless the lease agreement is certified (notarised) by a public notary – in which case, the termination notice should be served via a public notary. Unless otherwise specified in the lease agreement, the termination notice may be given only on the first or fifteenth day of the month, while the notice period amounts to 30 days.

If the lease agreement has a definite term, it terminates upon the expiration of the said term. The fact that the lessee still continues to use the leased premises afterwards would therefore not automatically extend the agreed lease term. If it is necessary to evict the lessee, the procedure will differ depending on whether or not the lease agreement contains an enforcement clause, as mentioned above. Such a clause would enable the lessor to initiate enforcement proceedings directly for the eviction/repossession of the leased business premises and the collection of any overdue and unpaid claims arising from the lease. In the absence of an enforcement clause, these actions would take considerably more time and effort. Namely, instead of directly initiating enforcement proceedings, the lessor would first have to procure a judgment for the eviction of the lessee through court proceedings. Although the Lease and Sale Act stipulates that such court proceedings are urgent, practice to date would suggest otherwise (e.g. it is not uncommon for proceedings before a court of first and second instance to last up to 5 years).

The Lease and Sale Act does not provide for any predetermined penalties for either party in the event of a breach of their obligations. If either party suffers damages as a result of the termination of the lease related to a default by the other party, the Croatian general damage compensation rules would apply. In particular, a lessee who is late in paying the rent will also be liable to pay statutory interest. From 1 January 2021 to 30 June 2021, the said statutory interest for commercial agreements amounts to 7.75% per year.

COVID-19 RELATED TERMS AND CONDITIONS

The coronavirus epidemic opened the possibility for the activation of a statutory remedy from the Croatian Obligations Act which would allow parties to change or terminate the agreement due to changed circumstances. In particular, if the fulfilment of an obligation would become excessively difficult for one party or would cause it excessive loss due to exceptional circumstances arising after the execution of the agreement, which could not have been foreseen at the time of the execution of the agreement, that party may request that the agreement be amended or even terminated. Therefore, if the coronavirus epidemic affected regular business activities of the lessee so that it makes it difficult to fulfil obligations under a specific lease, or causes the lessee excessive loss, the lessee would not be obliged to bear all the negative consequences of the situation and under certain circumstances has the right to seek an amendment of certain contractual provisions or even seek termination of the agreement.

Furthermore, the Croatian government has adopted certain administrative measures regarding the lease of business premises in 2020, but they apply solely to lessees where the lessor is the Republic of Croatia. Some of the measures adopted for lessees of business premises owned by the Republic of Croatia include the deferral of rental payments for a period of 3 months, starting from 1 March 2020; waiver of the statutory interest for overdue receivables in the specified moratorium period, and the suspension of proceedings for the rescission/termination of the lease agreement or for debt collection and eviction.

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ROMANIA

All types of lease agreements are governed by the Romanian Civil Code which generally provides for rules and regulations that can be contractually excluded or amended by the parties.

MATERIAL TERMS AND CONDITIONS OF THE COMMERCIAL LEASES

The lessor in a lease agreement may be the legal or beneficial owner of the leased property or a lessee who has been granted express authorisation by the property's owner to sublet the relevant leased property. The subject matter of a lease agreement may be immovables that are either registered in a land registry or unregistered, entire buildings, or parts of them, irrespective of their surface areas. Lease agreements may be entered into in respect of immovable property which is jointly owned by multiple parties, subject to the approval of the majority of the co-owners. However, should the lease contract have a duration in excess of three years, the approval of all the co-owners will be required.

Lease agreements may be contracted for a fixed or indefinite period of time. In practice, lease agreements are usually entered into for a period of between 1 and 5 years. The maximum duration of a lease agreement stipulated by the Civil Code is 49 years. If the parties to a lease agreement decide upon a longer duration, it will be automatically reduced to 49 years.

In the case of agreements entered into for an indefinite period of time, the duration can be determined either by common practice or by the Civil Code, which stipulates a term of one year for commercial lease agreements (i.e. those entered into between legal entities).

If the term expires and the lessee continues to occupy the property without any specific objection from the lessor, then, provided that the lessee continues to comply with its obligations, it is presumed that a new lease agreement was entered into by the parties on the same conditions as the initial lease agreement, including any warranties, except for the duration of the lease which shall be deemed to be for an indefinite period of time.

FORM AND FORMALITIES

A lease contract is considered as being in force following the mutual agreement of the parties regarding the leased property and the rent, and no other formalities are required. Nevertheless, in practice, lease agreements are entered into in writing for the purpose of allowing the parties to prove the negotiated and enforceable rights and obligations. If lease agreements are entered into in writing, a notarised certification of the parties' signature is not required. However, lease agreements entered into in writing, which are registered with the fiscal authorities, as well as notarized lease agreements, qualify as enforceable titles in respect of the payment of rent on the dates and on the conditions stipulated in the lease agreement.

Lease agreements entered into in the form of a notarised deed or private deed which is registered with the proper tax authority, will constitute a writ of execution for the eviction of the lessee once the lease term has expired. Registering a lease agreement in the relevant land registry is not mandatory, but it would make the lease contract enforceable with regard to future owners of the property in question. An application for registration is sent to the land registry where the immovable property is located, and the lessor will have to prove that it holds the relevant rights in order to be able to lease the property to the lessee, such as legal or beneficial title or a right of use pursuant to another lease agreement. The fees for registration in a land registry amount to 60 Ron/registration (approximately 12 EUR).

TITLE OF OWNERSHIP AND LIENS ON THE LEASED PROPERTY

In order to be able to lease the property to the lessee, the lessor will have to hold the relevant rights over the leased property, such as legal or beneficial title or a right of use under another lease agreement. If the rented property is sold, the lessee's right is enforceable as against the new owner, provided that the lease agreement was registered in the land registry. Moreover, in the event of a forced sale, any lease agreements previously registered with the land registry are binding on the new owner. Nevertheless, the new owner is not obliged to comply with the terms of the lease agreement, if the agreed rent is one-third below the market price or less than the rents agreed in earlier lease agreements executed in respect of the same property. The lessee's consent is not required, if the property is mortgaged by the owner of the leased premises.

DEFAULT AND LIABILITY

The lessee is obliged to inform the lessor immediately about the need to undertake certain repairs in respect of the rented property, and failure to do so will entitle the lessor to ask for damages and any related costs. If a third party brings legal proceedings asserting a right over the rented property, the lessee may join the lessor as a party to such claim provided there is a risk of the lessee losing its right to use the property, whether in whole or in part. Should the lessee fail to inform the lessor about any such claim, the lessor will be entitled to be indemnified for any loss incurred.

The lessor may ask for damages or for the termination of the lease agreement if the lessee makes changes to the rented property/changes its initial intended use/or uses the property in a manner that causes prejudice to the lessor. If the lessee suffers loss as a result of defects to the rented property, the lessor may be liable to pay damages, unless it is proven that he was not aware of such defects and was not obliged to know of their existence, given the circumstances.

The lessee is also entitled to damages if a third party makes a legal or factual claim which prevents the lessee from using the rented property, whether in whole or in part, unless the lessee is deemed by law to have knowledge of the claim when it entered into the lease agreement.

- **Penalties:**

If the lessee performs repairs which come within the lessor's responsibility, as a result of the lessor postponing such repairs, the lessee shall be entitled to be compensated with both the amount paid for such repairs and also interest from the actual date of payment of that amount. On termination of the lease agreement, the lessor shall be entitled to be indemnified for any damage caused to the rented property by the lessee.

- **Statutory interest:**

Failure to pay the rent in time will trigger an obligation for the lessee to pay, in addition to the outstanding amount, the penalties provided by the Romanian legislation, according to the reference interest rate established by the National Bank of Romania.

- **Termination:**

Lease agreements entered into for an indefinite period may be terminated at any time by either party after serving reasonable prior notice (e.g. one month).

The lessee has the right to terminate the lease agreement, if the rented property has latent defects which it was not informed of and which would have prevented it from renting the property, if it had been aware of them. Also, the lessee has the right to terminate the lease agreement, if a third party makes any legal or factual claims in respect of the rented property and if the lessee would not have rented the property, if it had been aware of such claims.

The lease agreement may be terminated if, during its term, repairs are required which render the property unfit for its agreed use. If the rented property is sold by the lessor during the term of the lease agreement, the agreement will be terminated only if the parties have so provided, and only after a period which is twice that of the applicable notice period in the agreement. If the rented property is destroyed or cannot be used as initially envisaged, the lease agreement will cease to have effect and the lessee will be entitled to damages, provided that the event in question could have been foreseen.

The lease agreement will be terminated if the lessor's title of ownership is revoked; however the lease agreement will continue to have effect for a maximum period of one year, provided that the lessee entered into the lease agreement in good faith.

COVID-19 RELATED TERMS AND CONDITIONS

In 2020, in the context of the Covid-19 pandemic, the Romanian state adopted certain measures allowing small and medium-sized companies, as well as certain categories of professionals (public notaries, lawyers, enforcement officers) to postpone the payments of rent for properties leased as headquarters or secondary places of business, provided that they met certain conditions (total or partial cessation of their activity, together with a force majeure certificate issued by the proper authorities).

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IN COOPERATION WITH D'ORNANO PARTNERS

SERBIA

Commercial leases are regulated by the general rules on contractual leases of both movable and immovable privately owned property (the Serbian Obligations Law). Leases of publicly owned properties, on the other hand, are regulated by a special Law on Public Property, and are subject to specific legal provisions.

MATERIAL TERMS AND CONDITIONS OF COMMERCIAL LEASES

Parties to commercial lease agreements can be either natural or legal persons, whether or not foreign. Since both natural and legal persons can be contracting parties, this may affect some of the tax issues regarding payment of the rent and also regarding which courts have jurisdiction in the event of a dispute regarding the lease. The subject of the lease can be the entire building, business premises, shops, warehouses, apartments or garages, etc. According to the positive regulations of the Republic of Serbia, the lease agreement can be concluded for a definite or indefinite period of time. Therefore, the parties are generally not limited and are free to determine the duration of the lease, in accordance with their mutual agreement and understanding.

FORM AND FORMALITIES

As a general rule, a lease agreement does not have to be in writing in order to be legally binding and valid. However, in practice, the parties almost always choose the written form for their own security, bearing in mind that the subject of the lease is often real property of great value. There are only some exceptions to this rule, when a written form is required (e.g. a long-term lease by foreigners or foreign companies of tourist properties and amenities must be agreed in written form). Additionally, there is no obligation to have the parties' signatures certified by a notary, even if the parties opt for a written agreement. It is also possible in Serbia to register a lessee's right to the lease. The lessee is allowed to commence the registration process in person or through a proxy (the costs are approximately 50 euros). In practice, only long-term leases tend to be registered, whereas short-term leases are rarely registered.

TITLE OF OWNERSHIP AND LIENS ON THE LEASED PROPERTY

Under Serbian law, the lessor does not need to be the owner of the leased property. Thus, for example, unless the lessor and lessee have expressly agreed otherwise, the lessee may lease the subject of the lease to another person, i.e. sublet it (if this does not cause damage to the lessor). The lessor may, in order to collect his receivables arising from the lease, request direct payment of the amount owed by the sub-lessee to the lessee pursuant to the sublease.

Also, the lessor may terminate the lease agreement, if the subject of the lease is sublet without his permission, if such permission is required by law or under the agreement.

On the other hand, the Law on Public Property provides that publicly owned properties should be leased through the public bidding procedure or by collecting written offers. They can also be leased by direct agreement, if no other solution is possible in a specific situation. The law expressly prohibits subleases of publicly owned properties.

The fact that the premises are leased does not affect the lessor's right to dispose of the leased property i.e. the real estate. However, in the event of such a disposal, the buyer, i.e. the new owner of the leased property will be subrogated into the lessor's rights and obligations and cannot require the lessee to vacate the leased property before the expiry of the term defined in the lease agreement (if the lease agreement is for an indefinite term, whether by express provision or by operation of law, the new owner will have to serve notice before taking action to remove the lessee from the leased premises pursuant to the relevant enforcement procedure).

DEFAULT AND LIABILITY

A lease agreement which is entered into for a fixed term will expire at the end of that period.

If the lessee continues nonetheless to occupy the leased property then, in the absence of specific provisions in the lease agreement, the consequences are governed by law. Notably, when the commercial lease agreement is entered into for a definite period of time and the parties continue to act as lessor and lessee after its expiry, i.e. the lessee continues to use the business premises and the lessor does not object, the duration of the lease is deemed to have been amended and to have become an indefinite period of time. In such event, the other terms and conditions will continue to be binding on the parties, except for those relating to security provided by third parties for the initial lease agreement (e.g. pledge, guarantee). On the other hand, if the lessee continues to use the business premises despite the lessor's express objections, the lessor may bring court proceedings for the eviction of the lessee.

Generally, the terms and conditions for termination of the lease and possible compensation for any loss are to be agreed upon by the parties. In addition to statutory default interest on late payment which will apply to outstanding rent at the rate determined by the Law on Default Interest, the law allows the parties fairly broad discretion to negotiate the lease agreement as they see fit. As a matter of standard practice, most commercial leases provide that the lessee's failure to pay the rent or any other amount due (e.g. service or utility charges) will entitle the lessor to terminate the agreement unilaterally. If a late payment dispute is brought before the court, in the absence of specific enforceable penalty provisions in the lease agreement, statutory default interest on any unpaid rent generally accrues from the date when the lessor's lawsuit is filed, rather than the alleged due date of the rent payment.

COVID-19 RELATED TERMS AND CONDITIONS

Since commercial leases for private property remain subject to the same legal rules which applied prior to COVID-19, the adjustment of the terms and conditions of pre-existing leases to mitigate the negative impact of restrictions related to the health crisis must be negotiated by the respective parties on an ad hoc basis. Hence, since the start of the pandemic in 2020, many lessors have agreed significant concessions, such as a temporary rent reduction of up to 50% in order to avoid payment defaults and the early termination of the lease agreement.

In line with this trend in the private sector, municipal commercial property leases in the City of Belgrade were revised by the authorities to allow, subject to certain terms and conditions, for the suspension of rent payments during the state of emergency declared by the Serbian government in 2020. In particular, although the municipality only invoiced 50% of the rent due during that period, the lessee had to commit to settle the entire amount of the rent due before the end of 2020.



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About D'ORNANO PARTNERS

D'ORNANO PARTNERS is an international law firm with offices in Paris, Bucharest and Budapest.

Deeply rooted in Central and South-East Europe and in France, our lawyers offer in-depth knowledge of local markets combined with unparalleled international experience.

We promote an integrated multi-disciplinary, cross-border approach, based on our strong capabilities and synergy between our European offices which work in close collaboration. We provide tailored legal assistance in the following main sectors.

Expertise

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One impressed client says that he is “always available and he produces high-quality work”, before adding: “We trust his judgement and opinions on matters, he has a very good knowledge of the local laws and situations”. (Chambers and Partners 2020)

