

This regional overview provides brief guidelines regarding some of the most often asked questions relating to the influence of business disruption caused by Covid-19 pandemic on commercial lease agreements

Effects of Covid-19 pandemic on lease agreements

A regional perspective

Slovenia / Croatia / Serbia / Bosnia & Herzegovina / North Macedonia / Montenegro

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LEGAL NOTICE:

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JURISDICTIONS COVERED:

1. SLOVENIA
 2. CROATIA
 3. SERBIA
 4. BOSNIA & HERZEGOVINA
 5. NORTH MACEDONIA
 6. MONTENEGRO
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QUESTIONS COVERED FOR EACH JURISDICTION:

1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?
 2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (rebus sic stantibus) caused by the Covid-19 pandemic? If yes, what are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?
 3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?
 4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?
 5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?
 6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?
 7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?
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SLOVENIA:

1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?

As in all European countries, Covid-19 pandemics had severe negative impact on all aspects of life in Slovenia, including economy. The government declared Covid-19 as epidemic on 12 March 2020, and has subsequently introduced numerous measures and restrictions intended for containment of epidemic (most notably, on 15 March 2020 the Slovenian Government issued an ordinance by which general retail activity (sale of goods and services to consumers), save for certain exemptions (e.g., grocery shops, pharmacies, gas stations) is temporarily prohibited; and on 29 March 2020 an ordinance by which all public gatherings in public places are banned, with an exhaustive list of exceptions (work related travel, purchase of essential goods, (limited) recreation, e.g.) and all travel is limited to the municipality of a person's residence (again, with the certain exceptions)).

Certain restrictions were already lifted, and more are expected to be lifted in May, however, the performance of commercial activities (including transportation, retail, certain services) remains to be heavily impacted by measures for preventing of infections with SARS-CoV-2 recommended by the Slovenian National Institute of Public Health ("NIJZ"), which based on decrees adopted by the Slovenian Government have to be abide by on an obligatory basis.

Above measures have caused temporary (partial or full) closure of numerous business premises (most notably, shopping centres, restaurants and hotels), and are heavily impacting the performance of other commercial activities.

According to the Act on Additional Liquidity to the Economy to Mitigate the Effects of the COVID-19 Infectious Disease Epidemic, which entered into force on 1 May 2020, businesses which are prevented from carrying out their business activity, or whose business activity is heavily affected, in each case due to the imposed containment measures, are not required to pay the rent for business premises owned by the Republic of Slovenia or by local communities for the period from 13 March 2020, when the epidemic was declared in Slovenia, until the revocation of the epidemic, if certain conditions are met. The competent authorities may grant the exemption from the payment of rent in full or only in part, whereby the total amount of rent from which single lessee is exempt may not exceed EUR 800,000, or, in case of lessees active in certain business sectors, EUR 120,000 or EUR 100,000. No similar measure has been implemented in relation to leases of other business premises that are not owned by the Republic of Slovenia or local communities.

2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (*rebus sic stantibus*) caused by the Covid-19 pandemic? If yes, what

are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?

As a general rule, according to Article 112 of the Slovenian Obligations Code, a party to a commercial agreement may request a termination of an agreement, if after conclusion of the agreement circumstances arose which make the fulfilment of its contractual obligations significantly more difficult, or which prevent it from achieving the purpose of the agreement, in both cases to such an extent, that the agreement clearly no longer meets the expectations of the parties and, according to general perception, it would be unfair to keep the contract in force as it is. The party may not request termination of the agreement, if the circumstances are of such nature that it should have taken them into account when concluding the agreement, or it could have avoided them or averted their consequences. The counterparty can prevent the termination of the agreement if it offers a fair modification of the agreement. If the court grants a request of a party to terminate an agreement, the other party may request payment of a fair share of damages it suffered because of the termination.

The answer to the question whether a tenant is entitled to terminate or to request amendment to a commercial lease agreement due to the hardship in performance caused by the Covid-19 pandemic, will therefore depend on circumstances of each case. Specifically, it will have to be assessed whether the Covid-12 containment measures prevented the tenant from achieving the purpose of the lease, also taking into account the temporary nature of the measures and the term of the lease agreement. In this respect also any provisions of the lease agreement that contractually assign certain risks to one of the parties should be carefully analysed.

3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?

Slovenian Code of Obligations does not explicitly define the term force majeure. According to the Slovenian legal theory and jurisprudence, a force majeure is an event that is outside the sphere of the affected party and beyond its control, which was not foreseeable, and whose effects could not be avoided or prevented. Covid-19 pandemic would in our opinion, in relation to contractual relationships concluded before Covid-19 first occurred, be deemed force majeure under the Slovenian law, since it is an external cause, could generally not be expected, and its consequences could also not be completely avoided or prevented. If, however, a commercial agreement regulates force majeure and provides for a definition thereof, the contractual provisions must be taken into account and are decisive when assessing whether Covid-19 related measures are deemed to constitute force majeure.

Slovenian law does not provide for a general relief of contractual obligations in cases of force majeure.

A force majeure may result in a hardship in performance and may give the affected party the right to request termination of the agreement (please see above under 2.).

According to Article 116 of the Obligations Code, if due to the force majeure fulfilment of a contract becomes impossible, the contract terminates. If due to a force majeure fulfilment of contractual obligation is in part not possible, the other party may withdraw from the agreement, if partial fulfilment

does not meet its needs; otherwise the agreement remains in force with the counterparty having the right to require that its obligation is reduced accordingly. However, Covid-19 pandemic and the containment measures enacted by the public authorities do not directly prevent the fulfilment of commercial lease agreements: they do not prevent the lessors from making the leased premises available for use, do not prevent provision of public utility services, nor payment of the rent.

Generally, if a party fails to perform a contract, the counterparty has a right to demand performance of the contract as well as payment of the damages it suffered because of the breach. However, if the party proves that it failed to perform the contract because of the force majeure, it shall be exempt from the liability to pay damages (Article 240 of the Obligations Code).

4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?

Force majeure as well as rebus sic stantibus are exemptions from the general principle of Pacta sunt servanda and are interpreted restrictively by Slovenian courts. When assessing whether an event is outside the party's authority and unforeseeable, and whether its consequences are unavoidable and/or unverifiable, the party's authority is regarded very widely, in some cases the authority includes the whole area of the party's activities. The criterion for predictability, foreseeability and the controllability are objective and abstract, whereby the standard of a prudent person or professional should be regarded. If the event is predictable from a point of view of a prudent person or professional, a party should include it in his/her consideration and is expected to be able to avoid it or to avert it, or at least to do anything in his/her power to avoid or avert it. In Slovenian case law examples of force majeure are mainly natural disasters (floods, droughts).

5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?

As a result of the imposed containment measures, the tenant cannot continue its business as usual; the measures do not prevent or limit the lessor from making the leased property available for the use. Therefore, in our view the tenant is not able to claim deficiency of leased premises.

6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?

N/A

7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?

Yes, if certain conditions are met (please see above under 2). Unfortunately, there is no relevant court practice available yet.

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CROATIA:

1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?

The Covid-19 pandemic has caused major difficulties in the Croatian economy and day-to-day functioning, most notably since mid-March.

Based on the Civil Protection Act, starting from 19 March 2020 onwards, the Civil Protection Headquarters of the Republic of Croatia (CPH) has adopted several decisions introducing a series of measures aimed at preventing the spread of the new corona virus infection. A temporary ban on the movement of persons across border crossings is also in force.

The very first decision with significant impact on Croatian economy, adopted by the CPH on 19 March 2020 is the Decision on the Measures of Limiting Social Gathering, Working in Trade, Services and Maintaining Sports and Cultural Events. The anti-epidemic measures required by this Decision are ban on holding of all public events and gathering of more than 5 people at one place, suspension of trade activities with the exception to specific specialized stores (e.g. pharmacies, food and hygiene items stores). Service activities in which close contact with customers is inevitable (e.g. hairdressers, beauticians, barbers) are also suspended.

These measures undoubtedly affected commercial leases as all of the large shopping centers and malls are closed due to the measures applied. Craftsmen are banned from performing their business activities, but are still obliged to pay the lease for the business premises used.

All employers are obliged to organize work from home wherever possible and for workers who continue to work it is necessary to ensure strict adherence to protective measures such as maintaining prescribed social distance for avoiding close personal contact of workers of at least two meters indoors and one meter outdoors, cancelling meetings or organizing teleconferences including using other technologies to hold remote meetings. That said, it is obvious that many business premises are not in use due to strict obligatory protective measures and exceptional circumstances.

While the Croatian Government has offered job retention solutions through financial supports for employers and employees on the one hand, many entrepreneurs and craftsmen are still facing the issue of settling the obligations arising from lease agreements for the premises they are not allowed to use according to the CPH's decisions.

2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (*rebus sic stantibus*) caused by the Covid-19 pandemic? If yes, what are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?

Croatian Civil Obligations Act prescribes the conditions under which a contract may be amended or terminated due to changed circumstances (*rebus sic stantibus* clause).

Pursuant to Art 369, if the fulfillment of an obligation of one contracting party becomes excessively difficult or would cause an excessively large loss, the affected party may require the contract to be amended or even terminated, but only if all of the following conditions are met: (i) extraordinary circumstances arose after the conclusion of the contract and could not have been foreseen at the time of the conclusion of the contract, (ii) the contracting party was not obliged to take them into account at the time of the conclusion of the contract or could not avoid or overcome them, and (iii) the circumstances must occur before the expiry of the deadline for fulfillment of the obligation by that party.

Amendment of the contract is possible only if the other contracting party agrees to the amendment but if the other party does not agree, the affected party may request termination of the contract by the court.

When deciding on termination of the contract, the court will be guided by the principle of good faith paying particular attention to the purpose of the contract, the division of risk arising from the contract or law, the duration of extraordinary circumstances and the interests of both parties.

Decision on whether an extraordinary circumstance is such that it may be categorized under the *rebus sic stantibus* clause, shall be decided separately for each case. In addition, it should be emphasized that the occurrence of an extraordinary circumstance must be such as to have created a new situation for the affected party such as that the purpose in respect of which the contract has been concluded fell off and therefore, the contract lost its earlier economic purpose.

According to the relevant judicial practice, such extraordinary circumstances may include: unrecoverable natural events (*e.g.* earthquake or flood) or new unpredictable economic conditions or measures taken by the government (*e.g.* prohibition or restriction of free movements of goods).

Having regard to the fact that COVID-19 pandemic undoubtedly caused the changed circumstances in relation to the lease agreements, unless particular lease agreements exclude such an option the affected party (both the lessees in shopping malls as well as in office spaces) is entitled to request termination or amendment of the commercial lease agreements due to the *rebus sic stantibus* clause, provided the statutory requirements are fulfilled which shall be evaluated from case to case.

3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?

Pursuant to the Croatian Civil Obligations Act, force majeure may be defined as extraordinary external event that occurred after entering into a contract and before the performance is due and which could not have been foreseen or prevented, avoided or eliminated by a party to a contract and for which neither of the parties is liable. Therefore, force majeure must be unexpected, unpredictable and extraordinary, such as a state of war or natural disasters.

The force majeure clause has become a common provision of lease agreements providing for the suspension or reduction of the lease payments due to force majeure.

Croatia is a part of the European Union and the common internal EU market, where the force majeure is considered a general principle of the European law. According to the European court practice, the condition for recognition of a force majeure is that the external circumstance invoked by the legal entities has consequences that are so indisputable and inevitable that it is objectively impossible for the persons concerned to fulfill their obligations. The force majeure must be interpreted as an unusual and unpredictable circumstance beyond the control of the subject concerned, the consequences of which could not have been avoided despite their due diligence.

Therefore it should be concluded that there is no general rule that would say in which cases the COVID-19 pandemic of a corona virus would be treated as a force majeure and as a justification for non-performance of a contractual obligation that would not entail liability for damages.

For this reason, it is necessary to review and interpret the force majeure provisions of each separate lease agreement regarding each separate contractual relationship.

4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?

There is still no relevant court practice that could be entirely applied to a COVID-19 pandemic as a force majeure / rebus sic stantibus. The court practice regarding pandemic has yet to be created, which poses a great challenge to the Croatian judiciary system.

5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?

Pursuant to Art 522 of the Civil Obligations Act, the landlord shall maintain the property in a good state during the term of the lease agreement and shall carry out all the necessary repairs to keep it in such state. The property shall be considered to be in a good state if in a state stipulated in the agreement, or, in the absence of an agreement, in a condition that ensures its enjoyment for the purpose for which the agreement was entered into.

In addition, the landlord shall be liable towards the tenant for all defects in the leased premises that interfere with its agreed or regular enjoyment, irrespective of the fact whether he knew of such defects or not and for any defects in the characteristics or traits either stipulated in the contract or implied.

In this respect, we find it quite difficult to prove that the tenant's inability to use the leased premises due to COVID-19 pandemic measures, subsume under the provision of liability for material or legal deficiencies. According to Art 548 of the Civil Obligations Act in the case of partial destruction or damage of the leased premises due to force majeure, the tenant may terminate lease agreement or keep the lease in force and demand an appropriate reduction of rent.

6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?

Except for where causes for the termination of the lease contract are prescribed by the law (e.g. in the case of the entire destruction of the leased premises) termination of the lease contract would be possible only if explicitly foreseen in the particular lease agreement.

7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?

The significant impairment of tenant's business as well as severe reduction in income as a direct consequence of the COVID-19 pandemic measures, may be interpreted as a valid legal ground for termination or amendment of the lease contract.

Whether the impairment of tenant's business may be linked to the COVID-19 pandemic shall be assessed in each particular case.

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SERBIA:

1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?

Massive disruption caused by Covid – 19 pandemics on the entire Serbian economy, has a significant impact on commercial leases as well. This is especially so in the retail market. In addition, several decisions made by the Government of Serbia aimed to reduce spreading of the pandemic, made it almost impossible for some tenants (in particular in large shopping malls) to carry-on their business. For others this may be possible albeit difficult, risky and costly.

Pursuant to the Decision on Restricting Provision of Services in the Field of Retail Trade in Shopping Malls the Government prohibited, for the entire period of pandemic, the sale of goods and/or providing services directly to customers in shopping centers and similar establishments engaged in retail activity, which includes the sale of goods and services in venues that are entered into from a larger indoor space. This resulted in closure of almost all retail stores in shopping malls in Serbia.

The Government also declared a curfew, which applied until recently every day. This also immanently affected all retail businesses.

Further, in its Decree on Organization of Work of Employers During the State of Emergency the Government instructed all employers in Serbia to introduce home-based work of employees wherever this is possible. This effectively resulted in office spaces being mostly vacated during the pandemic.

All this resulted in major disruption of economy of commercial leases. For most tenants contracted terms of leases no longer correspond to the new market reality. To make things worse, no one knows whether and when the economy might return to the pre-pandemic state based on which lease arrangements were negotiated. On the other side of the token, landlords have their own economic calculations and projections, making alterations of contracted lease terms for them difficult and sometimes unacceptable.

2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (*rebus sic stantibus*) caused by the Covid-19 pandemic? If yes, what are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?

Pursuant to the Serbian Law on Contracts and Torts (the "LCT") a hardship (in Serbian law: *rebus sic stantibus* or *termination due to changed circumstances*) is defined as circumstance(s) occurring after conclusion of a contract, which either significantly hinder fulfilment of contract for one party or make impossible fulfilment of purpose of the contract, in both cases to the extent that a contract does not any

longer correspond to the expectation of the parties and that in general opinion it would be unjust to keep it in force under contracted terms. In that case a party affected by a hardship may request a court termination of the contract.

However, prior to court termination of a contract, a party affected by a hardship is obliged to inform the other party of its intention to seek termination of the contract. If the other party (not affected by a hardship) offers to justly amend relevant provisions of the contract, then such contract will not be terminated by the court. In any case the other party (not affected by a hardship) is entitled, in case of termination of a contract, to compensation of a fair share of damage suffered due to termination of a contract.

Seemingly, Covid-19 pandemics could potentially constitute a hardship in performance of commercial lease agreements. However, for such hardship to exist it is not sufficient to generally invoke the pandemic as a "changed circumstance" in the sense of quoted provisions of the LCT. Instead, hardship in performance must be demonstrated and proved *in concreto* – i.e. it is necessary to concretize and prove how did this pandemic affect specific lease to such extent that it:

- significantly hinders fulfilment of contract for one party or makes impossible fulfilment of the purpose of the contract, and
- would be unfair to keep the contract in force under its contracted terms.

3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?

Force majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance occurs, that can be neither anticipated nor controlled. The term includes both an act of people (such as war, strike, riot, crime) or an event described by the legal term "act of God" (hurricane, flood, earthquake, volcanic eruption, etc.). In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure.

The LCT does not explicitly define the term force majeure. However, the LCT indirectly mentions force majeure in several provisions related to the inability to fulfil contractual obligations and liability for damages if a force majeure situation occurs. Namely, pursuant to Article 137 of the LCT it could be stated that force majeure exists in case where a fulfilment of certain obligation of a party to the contract has become impossible due to an event not attributable to either of the parties. Restrictive measures, such as quarantine, borders' closure, curfew and in particular closure of shopping malls, could be perceived to support the existence of force majeure in these cases.

However, considering the current practice of Serbian courts, it is arguable whether in case of a court dispute due to termination of a contract for existence of force majeure, the court would automatically accept interpretation that the existence of Covid – 19 pandemic represents *per se* a force majeure event.

In cases where a respective lease agreement contains a force majeure clause, the question whether Covid-19 pandemic will represent a force majeure event will in the first place depend on the wording of that clause.

With the absence of clear court practice, the parties should turn to their lease contracts and force majeure clauses. Naturally, the party should be very careful with terminating a contract calling upon force majeure event, evaluating each case separately. Such an event does not automatically release the contracting party from fulfilling its obligations. Furthermore, the claiming party must be able to prove that it is not in a position to take reasonable measures in order to avoid or reduce the occurrence of the event or its effects, including sending notifications of the event, in due manner, to the other contracting party. If the notification is not provided within a reasonable timeframe from the occurrence of force majeure moment, that party may be held responsible to the other party for the suffered loss.

4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?

As already stated, current practice of Serbian courts may be summarized in a manner that Covid-19 cannot represent *per se* a force majeure event or a hardship, unless explicitly explained in each case by a party how such existence (i) makes impossible fulfilment of obligation due to reasons that are not attributable to respective party or (ii) significantly hinders fulfilment of contract for one party or makes impossible fulfilment of the purpose of the contract so that it would be unfair to keep it in force under its contracted terms.

In that regard, according to the Higher Court in Subotica Judgement no. Gž 197/2014:

"The event requiring the termination of a contract should be inevitable and irreparable and should entail an obligation for the party affected by the circumstances to prove that it could not avoid and overcome them, i.e. it was not able to eliminate the consequences, although in that sense it took all necessary measures".

According to the Judgement no. Pž 6501/2014 passed by the Commercial Appellate Court:

"In order for the contract to be altered or terminated due to changed circumstances, the contracting party for whom the circumstances have changed substantially must inform the other contracting party about changed circumstances, otherwise the contract remains in force".

According to the Decision no. Pž. 5494/2004 issued by Higher Commercial Court:

"...in the opinion of this court, it is not sufficient just to make reference to certain circumstances in a general way, but to prove a causal link between such circumstances and a particular inability to fulfill an obligation. It is therefore necessary to prove that the defendant did everything in his power and still could not fulfill his obligation, in accordance with the principle of honesty, good-faith and professional responsibility".

5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?

Pursuant to the Article 578 of the LCT a tenant is entitled to terminate a lease contract in case of existence of a deficiency of leased premises. In addition, according to the Article 579 of the LCT it is considered that the leased premises are deficient if during the term of the lease contract they lose characteristics that ought to have under the concluded lease contract or common practice.

In most cases, the main reason for leasing retail space in shopping malls represents the fact that they are placed on attractive location and are better visited by customers than single standing commercial space. The location significantly determines the success of sale of goods or services, which affects the tenant's desire for the lease as well as the price of the lease. This is, inter alia, why retail spaces in shopping malls are considered as premium spaces. However, due to Covid – 19 outbreak as well as the Government's measures (e.g. curfew, closure of shopping centers, etc.), retail space leased in shopping malls could not have been used by tenants. Therefore, it could be argued that by combining these two factors leased premium space in shopping malls lost its essential characteristic – because tenants were prevented to use them due to the outbreak. Yet, this inability was only of a temporary nature that now ended – so most likely it would not suffice to justify termination of the contract.

6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?

As explained above, this inability was only of a temporary nature that now ended – so most likely it would not suffice to justify termination of the contract.

7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?

Possibly, yes. However, this would largely depend on circumstances of each individual case. For example, in its Judgement no. Pž 2117/2015 the Commercial Appellate Court took a stand that the 2008 world economic crisis did not represent *per se* the hardship, i.e. there was an obligation to prove how the existence of the world economic crisis affected the party's inability to fulfil its contractual obligation.

"The plaintiff's allegations that the court's obligation to terminate a contract that was not performed due to the known fact of the global economic crisis were not founded. The plaintiff did not prove in the proceedings before the trial court that the changed circumstances existed until the expiry of the deadline set for fulfillment of the obligations. The plaintiff's reference to the existence of a global economic crisis is an imprecise and arbitrary allegation and does not have the treatment of a well-known fact which, within the meaning of Article 230 (4) of the Law on Civil Procedure, does not need to be proved..."

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BOSNIA & HERZEGOVINA:

- 1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?**

Federation of Bosnia and Herzegovina

Federal Headquarter for Civil Protection (the "**FHCP**") of the Federation of Bosnia and Herzegovina (the "**FBH**") issued the Order no. 12-40-6-148-26/20 closing almost all retail shops except pharmacies, grocery stores, and other stores for sale of food and medical products.

Also, by issuing the Order no. 12-40-6-148-36-1/20 the FHCP declared a curfew, which applied every day from 20:00h until 05:00h next day.

In addition, the FHCP instructed all employers in the FBH to introduce home-based work of employees wherever this is possible. This effectively resulted in office spaces being mostly vacated during the pandemic.

Finally, the Government of FBH decided to decrease rents for lease of real estate owned by the FBH for 50% for the entire duration of Covid-19 pandemic.

Republic of Srpska

For the purpose of preventing further spreading of Covid-19 outbreak Republic Emergency Situations Headquarters (the "**RESH**") issued several decisions, which significantly limited and in certain cases entirely prevented tenants (in particular in large shopping malls) to carry-on their business. Pursuant to the Conclusion no. 11-2/20 of the RESH, except in certain cases (such as pharmacies, grocery stores, stores for car spare parts, construction materials, etc.) work of all retail shops in shopping malls was closed.

In addition, based on the Conclusion no. 16-3/20 the RESH also declared a curfew, which applied every day from 20:00h until 05:00h next day, except on weekends when it started from Saturday 12:00h and lasted until Sunday 18:00h. This also immanently affected all retail businesses.

All this resulted in major disruption of economy of commercial leases. For most tenants contracted terms of leases no longer correspond to the new market reality.

- 2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (*rebus sic stantibus*) caused by the Covid-19 pandemic? If yes, what**

are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?

Federation of Bosnia and Herzegovina / Republic of Srpska

Pursuant to the Article 133 of the Laws on Contracts and Torts (the "**LCTs**") of both FBH and Republic of Srpska a hardship (*rebus sic stantibus* or *termination due to changed circumstances*) is defined as circumstance(s) occurring after conclusion of a contract, which either significantly hinder fulfilment of contract for one party or make impossible fulfilment of purpose of the contract, in both cases to the extent that a contract does not any longer correspond to the expectation of the parties and that in general opinion it would be unjust to keep it in force under contracted terms. In that case a party affected by a hardship may request a court termination of the contract.

However, prior to court termination of a contract, a party affected by a hardship is obliged to inform the other party of its intention to seek termination of the contract. If the other party (not affected by a hardship) offers to justly amend relevant provisions of the contract, then such contract will not be terminated by the court. In any case the other party (not affected by a hardship) is entitled, in case of termination of a contract, to compensation of a fair share of damage suffered due to termination of a contract.

Seemingly, Covid-19 pandemics could potentially constitute a hardship in performance of commercial lease agreements. However, for such hardship to exist it is not sufficient to generally invoke the pandemic as a "changed circumstance" in the sense of quoted provisions of the LCTs. Instead, hardship in performance must be demonstrated and proved *in concreto* – i.e. it is necessary to concretize and prove how did this pandemic affect specific lease to such extent that it:

- significantly hinders fulfilment of contract for one party or makes impossible fulfilment of the purpose of the contract, and
- would be unfair to keep the contract in force under its contracted terms.

3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?

Federation of Bosnia and Herzegovina / Republic of Srpska

Force majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance occurs, that can be neither anticipated nor controlled. The term includes both an act of people (such as war, strike, riot, crime) or an event described by the legal term "act of God" (hurricane, flood, earthquake, volcanic eruption, etc.). In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure.

The LCTs do not explicitly define the term force majeure. However, the LCTs indirectly mention force majeure in several provisions related to the inability to fulfil contractual obligations and liability for

damages if a force majeure situation occurs. Namely, pursuant to Article 137 of both LCTs it could be stated that force majeure exists in case where a fulfilment of certain obligation of a party to the contract has become impossible due to an event not attributable to either of the parties. Restrictive measures, such as quarantine, borders' closure, curfew and in particular closure of shopping malls, could be perceived to support the existence of force majeure in these cases.

However, considering the current practice of Bosnian courts (both in FBH and Republic of Srpska), it is arguable whether in case of a court dispute due to termination of a contract for existence of force majeure, the court would automatically accept interpretation that the existence of Covid – 19 pandemic represents *per se* a force majeure event.

In cases where a respective lease agreement contains a force majeure clause, the question whether Covid -19 pandemic will represent a force majeure event will in the first place depend on the wording of that clause.

With the absence of clear court practice, the parties should turn to their lease contracts and force majeure clauses. Naturally, the party should be very careful with terminating a contract calling upon force majeure event, evaluating each case separately. Such an event does not automatically release the contracting party from fulfilling its obligations. Furthermore, the claiming party must be able to prove that it is not in a position to take reasonable measures in order to avoid or reduce the occurrence of the event or its effects, including sending notifications of the event, in due manner, to the other contracting party. If the notification is not provided within a reasonable timeframe from the occurrence of force majeure moment, that party may be held responsible to the other party for the suffered loss.

4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?

As already stated, current practice of Bosnian courts may be summarized in a manner that Covid-19 cannot represent *per se* a force majeure event or a hardship, unless explicitly explained in each case by a party how such existence (i) makes impossible fulfilment of obligation due to reasons that are not attributable to respective party or (ii) significantly hinders fulfilment of contract for one party or makes impossible fulfilment of the purpose of the contract so that it would be unfair to keep it in force under its contracted terms.

In that regard, according to the Supreme Court of Republic of Srpska Judgement no. 71 0 P 211239 18 Rev:

"Objective unforeseen circumstances that arise during the contractual relationship, and which make difficult to fulfil the obligation of the borrower to the extent that objectively question the purpose of further survival of the contract itself, are the legal basis for termination or amendment of the contract in question..."

According to the Judgement no. Rev 169858/2017(2) of the Supreme Court of Republic of Srpska:

"The economic and legal consequences of the enormous growth of the Swiss franc exchange rate, which occur after the conclusion of the loan agreement, and during its validity, represent objective unforeseeable circumstances and are the legal basis for termination or amendment of the subject contract..."

According to the Judgement no. Pz 84/2007 of the District Court in Trebinje:

"A contractual party may terminate the contract when there is a partial inability to fulfil its contractual obligation due to arising of circumstances not related to the event for which either party is responsible."

5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?

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Pursuant to the Article 578 of the LCTs a tenant is entitled to terminate a lease contract in case of existence of a deficiency of leased premises. In addition, according to the Article 579 of the LCTs it is considered that the leased premises are deficient if during the term of the lease contract they lose characteristics that ought to have under the concluded lease contract or common practice.

In most cases, the main reason for leasing retail space in shopping malls represents the fact that they are placed on attractive location and are better visited by customers than single standing commercial space. The location significantly determines the success of sale of goods or services, which affects the tenant's desire for the lease as well as the price of the lease. This is, inter alia, why retail spaces in shopping malls are considered as premium spaces. However, due to Covid – 19 outbreak as well as the introduced measures (e.g. curfew, closure of shopping centers, etc.), retail space leased in shopping malls could not have been used by tenants. Therefore, it could be argued that by combining these two factors leased premium space in shopping malls lost its essential characteristic – because tenants were prevented to use them due to the outbreak. Yet, this inability was only of a temporary nature – so most likely it would not suffice to justify termination of the contract.

6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?

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As explained above, this inability was only of a temporary nature that ended – so most likely it would not suffice to justify termination of the contract.

7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?

Federation of Bosnia and Herzegovina / Republic of Srpska

Possibly, yes. However, this would largely depend on circumstances of each individual case.

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NORTH MACEDONIA:

1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?

The President of the Republic of North Macedonia declared the state emergency on 18 March 2020, for a period of 30 days. The state of emergency was later extended for another 30-days period. During the state of emergency, the Government is authorized to enact decrees with the force of law.

Due to the Covid – 19 pandemics, the Government, among others, imposed the following measures:

- The malls and all shops in the malls are closed for visitors, except supermarkets, grocery stores and pharmacies located within the malls;
- The restaurants and other premises where food is prepared are closed for visitors. Still they are allowed to prepare food, but only for delivery;
- The clubs and bars are closed;
- All public gatherings are prohibited;
- Curfew i.e. prohibition for movement was imposed, which has been subject to several amendments and modifications by the Government. According to the most recent decisions of the Government, the movement of the citizens is prohibited from Monday to Sunday from 19:00 h – 05:00 h, on the entire territory of the country.

2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (*rebus sic stantibus*) caused by the Covid-19 pandemic? If yes, what are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?

The Law on Obligations prescribes options for termination or amendment of contracts due to hardship in performance, occurred as a result of events which could not be foreseen or predicted by the parties at the time of the signing of the agreement. According to the general rule, the obligation of a party that is unable to perform is ceased, while the agreement is considered terminated.

The above rule does not strictly apply to lease agreements, taking into consideration that such agreements usually include permanent obligations that are applicable for extensive period of time. In this context, it would be considered that, in case of hardship due to unpredictable event such as pandemic, the execution of the agreement is temporarily suspended or delayed due to circumstances that are not under the control of the parties.

Although both options for amendment and termination of commercial lease agreements would be legally available, we find that the conditions for termination of the agreements would be more restrictive and would be interpreted as such by the courts, taking into consideration the specifics of lease agreement as a lasting agreement, as well as the pandemic as a reason that led to hardship. On the other hand, we find that the option for amendment of the agreements (e.g. by temporary suspension of payment of rent) could be the first scenario that should be opted, and in case of failure of the parties to agree upon amendment of the agreement, the potential termination could be considered.

The applicable laws do not prescribe different approaches regarding the lease agreements that refer to the lease of premises in shopping malls and office spaces.

3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?

As the pandemic is unforeseeable and unpreventable event, and could have not been predicted by the parties at the moment of signing of the agreement (provided that the agreement is signed prior to the declaring of the pandemic), in our opinion it could be considered as a force majeure. The party that is affected by the force majeure could invoke to such event by seeking amendment or termination of the agreement, depending on the specific situation.

In any case, it should be taken in consideration that, many parties in the commercial lease agreements prescribe the manner of execution of the agreement during a situation of force majeure within the contractual provisions. In such case the rights and obligations would be performed in the specific manner provided in the agreement.

4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?

Taking into consideration that this is the first officially declared pandemic and generally the first state of emergency in the country, while the courts have been closed as of the moment of the declaring of the state of emergency, we do not identify any existing court practice that could provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus.

5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?

According to the Macedonian Law on Obligations, the measures imposed by the state authorities due to the COVID – 19 pandemics that prohibit performance of specific business activities (e.g. sales activities in malls) could not be considered as legal or material deficiencies of the leased premises. This is based on the fact that the premises that are subject to the lease are still eligible for use from legal and material perspective, while the inability for use occurred due to an unpredictable and unpreventable event which is not under the control of the parties.

6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?

The tenant would not be authorized to terminate the lease contract due to deficiency of the leased premises. The tenant could potentially seek suspension of payment of the rent or termination of the agreement based on occurred force majeure or changed circumstances.

7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?

The significant impairment of tenant's business might be treated as consequence of force majeure or changed circumstances, which could be generally considered as a ground for amendment or termination of the agreement, as explained above. In any case, the contract will not be terminated if the other party offers or agrees to amend the terms of the agreement, for the purpose of its fair execution.

There is extensive court practice regarding termination of agreements due to changed circumstances, however, we do not find any of that practice applicable to the current situation, taking into consideration that legality of the contractual parties' actions in a situation of declared pandemic and state emergency has not been yet tested before the courts.

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MONTENEGRO:

1. Are there any measures issued by the Government or other authorities that may have legal impact on commercial leases (e.g. closure of shopping malls, ban of public gatherings, curfew, etc.)?

Pursuant to the Decision on Temporary Closure of Catering, Service and Other Facilities issued by the Government of Montenegro all trade, service, catering and other facilities (including retail shops), except pharmacies, grocery stores, stores for sale of construction material, were temporarily closed. Also, the Government of Montenegro prohibited all public gatherings.

In addition, the Government of Montenegro also declared a curfew, which applied every day from 19:00h until 05:00h next day, except on weekends when it started from Sunday 11:00h and lasted until Monday 05:00h. This also immanently affected all retail businesses.

Finally, the Government of Montenegro decided to postpone payment of rents for state owned real estate for the ninety days' period.

2. Is it generally possible to terminate or amend commercial lease agreements due to the hardship in performance (*rebus sic stantibus*) caused by the Covid-19 pandemic? If yes, what are the conditions for that? Is there any difference in this regard between leases of premises in shopping malls and office space?

Pursuant to the Article 128 of the Montenegrin Law on Contracts and Torts (the "**LCT**") a hardship (*rebus sic stantibus* or *amendment or termination due to changed circumstances*) is defined as circumstance(s) occurring after conclusion of a contract, which could not have been foreseen, which either significantly hinder fulfilment of contract for one party or in case of fulfilment would cause significant damage to respective party. In that case a party affected by a hardship may request a court termination or amendment of the contract.

However, prior to court termination of a contract, a party affected by a hardship is obliged to inform the other party of its intention to seek termination of the contract. If the other party (not affected by a hardship) offers to justly amend relevant provisions of the contract, then such contract will not be terminated by the court. In any case the other party (not affected by a hardship) is entitled, in case of termination of a contract, to compensation of a fair share of damage suffered due to termination of a contract.

Seemingly, Covid-19 pandemics could potentially constitute a hardship in performance of commercial lease agreements. However, for such hardship to exist it is not sufficient to generally invoke the pandemic as a "changed circumstance" in the sense of quoted provisions of the LCT. Instead, hardship

in performance must be demonstrated and proved *in concreto* – i.e. it is necessary to concretize and prove how did this pandemic affect specific lease to such extent that it:

- significantly hinders fulfilment of contract for one party or in case of fulfilment of contract would cause significant damage for that party, and
- could not have been foreseen by respective party.

According to the Article 130 of the LCT, when deciding about amendment or termination of contract, the court is obliged to take into consideration principle of good faith and to pay particular attention to the purpose of the respective contract, usual risk for the same or similar types of contracts, impact and duration of the extraordinary circumstances, and the balanced interests of both parties.

3. Can Covid-19 pandemic be considered as a force majeure under local law regarding the commercial lease agreements? If yes, how can this be invoked by the affected party?

Force majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance occurs, that can be neither anticipated nor controlled. The term includes both an act of people (such as war, strike, riot, crime) or an event described by the legal term "act of God" (hurricane, flood, earthquake, volcanic eruption, etc.). In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure.

The LCT does not explicitly define the term force majeure. However, the LCT indirectly mentions force majeure in several provisions related to the inability to fulfil contractual obligations and liability for damages if a force majeure situation occurs. Namely, pursuant to Article 132 of the LCT it could be stated that force majeure exists in case where a fulfilment of certain obligation of a party to the contract has become impossible due to an event not attributable to either of the parties. Restrictive measures, such as quarantine, borders' closure, curfew and in particular closure of shopping malls, could be perceived to support the existence of force majeure in these cases.

However, considering the current practice of Montenegrin courts, it is arguable whether in case of a court dispute due to termination of a contract for existence of force majeure, the court would automatically accept interpretation that the existence of Covid – 19 pandemic represents *per se* a force majeure event.

In cases where a respective lease agreement contains a force majeure clause, the question whether Covid -19 pandemic will represent a force majeure event will in the first place depend on the wording of that clause.

With the absence of clear court practice, the parties should turn to their lease contracts and force majeure clauses. Naturally, the party should be very careful with terminating a contract calling upon force majeure event, evaluating each case separately. Such an event does not automatically release the contracting party from fulfilling its obligations. Furthermore, the claiming party must be able to prove that it is not in a position to take reasonable measures in order to avoid or reduce the occurrence of the

event or its effects, including sending notifications of the event, in due manner, to the other contracting party. If the notification is not provided within a reasonable timeframe from the occurrence of force majeure moment, that party may be held responsible to the other party for the suffered loss.

4. Is there any court practice that may provide guidance on considering COVID -19 as a force majeure / rebus sic stantibus?

As already stated, current practice of Montenegrin courts may be summarized in a manner that Covid-19 cannot represent *per se* a force majeure event or a hardship, unless explicitly explained in each case by a party how such existence (i) makes impossible fulfilment of obligation due to reasons that are not attributable to respective party or (ii) significantly hinders fulfilment of contract for one party or in case of fulfilment would cause significant damage for respective party.

In that regard, according to the Supreme Court of Montenegro Judgement no. Rev Ip 130/2018:

"In order to terminate the contract due to the changed circumstances, it is necessary for the respective circumstances to be irrevocable and the consequences to be unavoidable, and if there was a decrease in the scope of use of the assigned rights, this cannot be a reason for termination of the contract, but it can lead to amendment of the contract."

5. May measures imposed due to the COVID – 19 pandemic lead to deficiency of leased premises that arose after conclusion of the contract (i.e. that the leased premises lost its essential characteristics for which a tenant leased such premises)?

Pursuant to the Article 606 of the LCT a tenant is entitled to terminate a lease contract in case of existence of a deficiency of leased premises. In addition, according to the Article 607 of the LCT it is considered that the leased premises are deficient if during the term of the lease contract they lose characteristics that ought to have under the concluded lease contract or common practice.

In most cases, the main reason for leasing retail space in shopping malls represents the fact that they are placed on attractive location and are better visited by customers than single standing commercial space. The location significantly determines the success of sale of goods or services, which affects the tenant's desire for the lease as well as the price of the lease. This is, inter alia, why retail spaces in shopping malls are considered as premium spaces. However, due to Covid – 19 outbreak as well as the introduced measures (e.g. curfew, closure of shopping centers, etc.), retail space leased in shopping malls could not have been used by tenants. Therefore, it could be argued that by combining these two factors leased premium space in shopping malls lost its essential characteristic – because tenants were prevented to use them due to the outbreak. Yet, this inability was only of a temporary nature that now ended – so most likely it would not suffice to justify termination of the contract.

6. In case of positive answer to the question no. 5, would in such case a tenant be authorized to terminate the lease contract?

As explained above, this inability was only of a temporary nature that now ended – so most likely it would not suffice to justify termination of the contract.

7. May a significant impairment of tenant's business be interpreted as a valid legal ground for termination or amendment of lease contract? Is there any court practice in this regard?

Possibly, yes. However, this would largely depend on circumstances of each individual case.

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