

Lease Agreements during the Covid-19 emergency period

The pandemic resulting from the spread of the Coronavirus has had a strong impact on many areas of life, including commercial lease agreements.

Specifically, as a result of the containment measures provided by the Government and the Regional Presidents, many traders and entrepreneurs were forced to suspend their activities for not overlookable periods of time, thus suffering significant economic losses.

Since the first days of the lockdown, one of the most important issues was to understand how to regulate lease agreements for commercial use and how to rebalance the tenant-landlord relationship in light of the epidemiological emergency.

It seems intuitive that the tenant (trader or retailer) who had entered into a lease agreement in a period prior to the outbreak of the epidemic, believing he could fulfil his payment obligations, is now in serious crisis: on the one hand, due to the already mentioned economic losses resulting from the epidemiological emergency, and on the other hand due to the fact that neither the law nor the legislature have taken effective measures in order to regulate all the current lease agreements stipulated between private individuals.

At first, through Decree-Law no. 18 of March 17, 2020, the Italian legislature granted tenants a tax credit equal to 60% of the amount of the lease for buildings falling within the category of shops or stores (leaving out, however, all buildings designated for laboratory, office, or warehouse use).

The strictly tax-related nature of the intervention certainly did not solve the problem in its entirety, so it became necessary to try to identify which rules of the legal system (both in the Italian Civil Code and in special laws) could help the tenant or, at least, limit the occurrence of an excessive number of lawsuits concerning lease agreements.

In Italy, leases for commercial use are governed by Law 392/1978, which provides that the tenant, regardless of the agreement provisions, may terminate the lease at any time (with at least six months notice) if serious reasons arise: i.e. for reasons which have occurred with respect to the signature of the lease agreement and, at the same time, are outside the tenant's control

The above mentioned provisions are not particularly appropriate to the case in point: the tenant will often have no interest in terminating the contractual relationship definitively, but rather will aim at "suspending" the performance of the agreement for a certain period of time, until normal activities resume. Furthermore, it should be noted that in any event the tenant will be required to pay the lease agreement fee until the six-monthly notice period expires, regardless of whether the release took place earlier.

Coming to the discipline contained in the more general Italian Civil Code, which also regulates the lease relationship, the issue can be viewed from different perspectives.

First of all, it shall be pointed out that the landlord's obligations are to ensure that the property is handed over to the tenant in a good state of maintenance, to keep it suitable for the use for which it has been leased, and to guarantee the tenant peaceful enjoyment. It follows that during the emergency period there may be no breach by the landlord, since the landlord is only required to make the property available in the forms described above. From the beginning of the issue under analysis, an attempt has therefore been made to recover the general rules on agreements and obligations in order to remedy the tenant-landlord relationship, with the aim of restoring some form of fairness.

Article 1218 of the Italian Civil Code provides that the debtor (in this case the tenant, who is required to pay the lease fee) who fails to fulfil the performance is required to pay damages, unless the non-execution or delay in performance was caused by the impossibility of performance for reasons not due to him.

The Italian legislature has also tried to contain the effects that the strict application of the law would have produced, stating, once again in Decree Law no. 18 of 17 March 2020, that compliance with the contagion containment measures imposed by the Government must always be assessed for the purposes of excluding, pursuant to and for the purposes of articles 1218 and 1223 of the Italian Civil Code, the debtor's liability, also with regard to the application of any disqualification or penalties connected with delayed or omitted fulfilment.

That said, it cannot however be stated that the tenant is exempted, for this reason only, from the fulfilment of his performance, since the provisions of the Decree merely invite the judicial authorities to consider the context within which the possible non-fulfilment occurs.

It follows that the only solution for the debtor will be to demonstrate how the non-performance (or delay) depended on the impossibility of performance for reasons not ascribable to him.

And indeed, the first thought turned to the principles of force majeure and hardship, both remedies that would exclude the debtor's liability and would allow the termination of the agreement (assuming, as pointed out above, that the tenant has a real interest in dissolving the entire agreement).

The concept of force majeure needs a requirement of objectivity, such that Italian case-law does not generally recognise that it is possible to consider it as an impossibility to perform when the obligation is of a pecuniary nature, since economic failure is a subjective condition. To demonstrate what has just been said, it is enough to think to a multinational company with thousands of shops all over the world: if, for example, in Italy the single store had to remain closed due to the government provisions limiting contagion, it certainly cannot be said that the company is not able to pay the lease fee for the building, since it has sources of income from the rest of the world. Therefore, thinking deeply, the impossibility for the tenant does not concern, as just viewed, his performance to pay but rather the possibility to

receive landlords' performance (due to the containment measures).

Another solution would have to be found for the small retailer with only one point of sale: intuitively, the only source of income could be the one coming from the single activity carried out in Italy in the only shop managed by the latter.

The problem is still waiting to find a solution, which, on the one hand, can restore fairness and contractual equity and, on the other, which does not encourage abuse in the use of the rules of law.

Certainly, the remedy currently available with the greatest guarantee of success will be that of a private renegotiation between tenant and landlord of the lease, also by virtue, and taking into account, of the principles of fairness and good faith that should always inform the execution of performances and agreements.