

Rental value reduction and remission according to Omani Civil Transactions Law in light of COVID-19

Abdulrahman Al Sabai - Senior Associate - Litigation
a.alsabai@tamimi.com - Muscat

Tenants affected by the coronavirus pandemic often enquire about the possibility of reducing or remitting rents. In this regard, the pandemic is governed by two theories: emergencies ('Emergencies'); and force majeure ('Force Majeure'). Most of the affected cases constitute Emergencies, under the first theory while some cases may constitute Force Majeure. In order to identify which doctrine applies a distinction must be made between the two. Such a distinction shall be made by clarifying the impact of the pandemic on the contractual obligations of the landlord and the tenant. Whereas, the tenancy contract is a continuous contract binding on both parties, under which, the landlord shall lease the premises to the tenant, and the tenant shall pay the agreed rental value. If the performance of the contractual obligations is oppressive and causes a severe loss, however, this case amounts to an Emergency. If performance of the contractual obligations becomes impossible, this falls under Force Majeure. This distinction is very important, because the consequences of both theories is to destabilise the binding force of the contract but to differing extents in terms of reducing the rental value in case of Emergency and remitting the rental value in case of Force Majeure.

To identify the pandemic's effects on tenancy contracts, we categorise the temporary cases into three types:

1. The places covered by the temporary partial closure decision (such as the closure of food courts in some sections of malls)

This case is governed by the principle of Emergency that gives the tenant the right to reduce the rental value, by agreement with the landlord or a court order. This will inevitably restore the balance between the corresponding obligations between the Tenant and the Landlord, and the obligation will be reasonably reinstated, as stipulated in Article (159) of the Omani Civil Transactions Law:

"If exceptional circumstances of a public nature that could not have been foreseen at the time of the contract occur, as a result of which performance of a contract becomes oppressive for a party, but not necessarily impossible, the judge has discretion, after weighing the interests of each party, to reduce the obligation to a reasonable level if justice so requires. Any agreement to the contrary shall be invalid."

In light of the partial closure decision, it is not impossible to perform the obligation, but it becomes oppressive. An oppressive obligation is a difficult obligation but not an impossible one. Partial closure of the leased premises would add difficulty and oppression to the tenant's performance of their obligations, i.e. payment of the rental value, as he or she is unable to fully and normally benefit from the leased premises, which results in a severe loss, rather than customary loss, to the tenant. The theory of Emergency may be applied if a severe loss is sustained. The burden lies with the tenant to prove the alleged loss.

2. The places covered by the temporary total closure decision (such as clothing stores and barbershops)

The optimal doctrine to be applied to this case is the Force Majeure Theory, as represented in the temporary impossibility stipulated in Article (172-2) of the Civil Transactions Law:

“1- In bilateral contracts, if force majeure occurs rendering the performance of the obligation impossible, the corresponding obligation shall be extinguished, and the contract shall automatically be revoked.

2- If the impossibility is partial, the amount covering the part that cannot be performed shall be extinguished, and this provision applies to the temporary impossibility in continuous contracts. In these two cases, the creditor may terminate the contract, provided that the debtor shall be notified of such termination”.

Performance of contractual obligations in this case is transformed from the state of oppression to the state of impossibility. It is a temporary impossibility as described in the provision mentioned above, as the closure decision is temporary as opposed to permanent. This impossibility is closely related to the utilisation/non-utilisation of the leased premises, as the tenancy contract is one of the utility contracts. When the leased premises are fully closed, it will be then impossible for the landlord to perform his or her obligation, i.e. enabling the tenant to use the leased premises, so that the landlord cannot perform its duties as they are considered impossible obligations. In this case, the tenant has one of the two options:

First option: temporary suspension of the tenancy contract

The tenant is entitled to suspend the tenancy contract by agreement or litigation, such that the rental value related to the contract suspension should be extinguished, on the basis of temporary impossibility, i.e. the amount of the unperformed obligation is extinguished. Such extinguishment remains until the impossibility is removed, while termination may, rather than must, be made. This is an exception to the original rule stipulating that the contract must be terminated if Force Majeure arises. Potentially this has two effects as confirmed by the Omani High Court in Principle (13 – Cassation Appeal No. 92/2004), as follows:

“Impossibility of obligation performance due to force majeure must be a final impossibility until the contract is annulled by the force of law. However, if the impossibility is temporary, the contract shall be only suspended until this impossibility is removed. The standard, according to the general principles in the contracts, is that the contract shall be revoked when a force majeure rendering the performance of obligation arising out thereof impossible occurs”.

Second option: termination of the tenancy contract unilaterally without compensation

Force Majeure gives the tenant the right to terminate the tenancy contract unilaterally without being required to compensate the landlord for such termination, provided that the landlord is notified of such termination. At such time, the rental value should be extinguished as of the date of notification.

3. The places that are not covered by any closure decision (such as foodstuffs' stores and auto repair shops)

This case is consistent with the first case regarding the application of the Emergency theory, but it is unlike the previous two cases with regard to the utilisation. The tenant, in this case, fully utilises the leased premises, but, at the same time, the tenant does not gain the usual income in return for such utilisation, due to the pandemic impacting consumers' demand for various types of life services, and creating a recession in the market, rendering the tenant unable to pay the full rental value because of the severe loss sustained. Due to such loss, the tenant is entitled to request a reasonable reduction in the rental value, whether by agreement with the landlord or by recourse to the court, provided that the tenant shall prove that he or she sustained a severe loss, pursuant to the provision of Article (159) of the Omani Civil Transactions Law.

Conclusion

- Corona pandemic constitutes an Emergency for most tenancy contracts affected by it and a Force Majeure for some tenancy contracts;
- in the case of a partial closure, the tenant has the right to reduce the rental value by agreement or litigation, as having only partially utilised the leased premises, where the tenant's obligation to pay the initially agreed rental value became oppressive in addition to the tenant sustaining severe loss. It should be noted that the burden lies with the tenant to prove the same, according to the emergency theory stipulated in Article (159) of the Omani Civil Transactions Law;
- in the case of a total closure, the tenant has the right to temporarily suspend or terminate the tenancy contract, on the grounds that the tenant did not utilise the leased premises, which renders the performance of the contractual obligations temporarily impossible, in accordance with the Force Majeure theory stipulated in Article (172) of the Civil Transactions Law, which is fully set out in the principle of the Omani High Court (13 - Cassation Appeal No. 92/2004);
- in the case of non-closure, despite the tenant fully utilising the leased premises, the tenant has the right to request a reduction in rent as the pandemic rendered the tenant unable to pay the rental value which, in turn, caused severe loss to the tenant. It should be noted that the burden lies with the tenant to prove such loss, according to the Emergency theory stipulated in Article (159) of the Omani Civil Transactions Law.

For further information, please contact [Ahmed Al Barwani](mailto:a.albarwani@tamimi.com) (a.albarwani@tamimi.com) or [Abdulrahman Al Sabai](mailto:a.alsabai@tamimi.com) (a.alsabai@tamimi.com).