

COVID-19 and leases: implications for tenants and landlords

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With the COVID-19 pandemic gaining momentum, the authorities are recommending, and in some cases requiring, that individuals confine themselves as much as possible to home.

As a result, organisations are transferring their employees on a massive scale to a remote mode of operation and are considering the possibility of temporary office closures. Shopping and entertainment centres are empty, and tenants of retail premises complain of an unprecedented reduction in customer traffic.

At the same time, state bodies have set restrictions on holding mass events and have closed certain activities and facilities. For example, in Moscow, any indoor cultural and recreational activities involving over 50 people are prohibited, and fitness centres, swimming pools and other sports facilities have been closed since 21 March 2020. Similar restrictions are being adopted by authorities in other regions.

The spread of COVID-19 was declared a *force majeure* event in Moscow and the Moscow Region (and, at the time of publication on 23 March 2020, possibly in other Russian cities and regions).

Below we will try to answer key questions about how the current situation can affect the relationship between landlords and tenants of commercial real estate.

Is it possible not to pay rent, referring to COVID-19 as a *force majeure* event?

Unless the parties expressly stipulated in their contract that the performance of obligations may be suspended due to *force majeure*, the mere fact that COVID-19 is recognised as a *force majeure* event does not exempt the tenant from paying rent.

If the tenant is not formally prohibited from accessing the property by virtue of the *force majeure* event, this may only serve as a basis for postponing the contract's term and the tenant may avoid liability under the contract for failure to fulfil its obligations. However, the rent itself will still have to be fully paid after the *force majeure* event is suspended. By way of example, if the tenant fails to pay rent for some time, it may be exempt from any late payment penalty.

However the tenant will still have to prove that this was a direct result of the *force majeure* event. The tenant's lack of funds due to this *force majeure* event would not itself relieve the tenant of its obligations under the contract.

The restrictions and measures to combat COVID-19 that have been adopted by the authorities (at the time of publication, 23 March 2020) do not, in general, prevent tenants and landlords of office and retail premises from performing their contractual obligations. Except in rare cases (e.g. the decision of Rospotrebnadzor to close fitness centres in Moscow or the official recommendation of the Russian Ministry of Culture to close cinemas), access to shopping centres and office buildings remains unrestricted, and there are no significant changes to their operation. This means that it will be difficult for tenants to justify the delay in rental payments by the occurrence of a *force majeure* event.

However, there is some good news for some tenants. The Russian government announced a temporary deferment of lease payments under leases of state or municipal property until 1 May 2020. But this does not mean that tenants are exempt from paying rent. Instead, rental payments can be paid late without having to pay any penalties or incur other sanctions.

How will the closing of office or shopping centres by a landlord at the request of the authorities or on their own initiative affect payments?

In the absence of relevant decisions by authorities, the closure of commercial properties at the initiative of the landlord is likely to be recognised as a restriction of access to rented premises. In this case, the tenant would not only be in a position to claim for exemption from paying rent, but also would be entitled to demand compensation for losses from the landlord.

As we noted above, the landlord will be able to avoid liability only if it can prove that the *force majeure* event (in the form of the COVID-19 situation) was the basis for closing the premises and not performing the lease.

If leased premises are closed by order of state authorities due to *force majeure*, the consequences are different. In this case, the landlord will not be liable for losses suffered by the tenants or for any other penalties under the contract.

Russian law also allows for an obligation under an agreement to be terminated if, as a result of an order of a state authority, the performance of an obligation becomes impossible. However, based on prevailing court practice, in order to terminate obligations on these grounds, it is necessary to prove that it is impossible to perform the obligation on a permanent basis. If an order of the authorities (e.g. the closure of a shopping or business centre) leads to a temporary restriction of activities which exceeds the lease term, the parties may terminate the lease.

What will happen if the tenant suspends activities at will?

As mentioned above, the suspension of activity by the tenant on the premises, in view of the recognition of the epidemic/pandemic as *force majeure*, does not in itself qualify as a ground for not paying rent under the contract.

If the lease does not expressly state that the tenant is relieved from having to perform obligations upon the occurrence of a *force majeure* event, it will be obliged to continue to pay rent even for the period when it does not use the premises.

In addition, some leases provide that, if the tenant does not use the premises or conducts no activity there, it will be contractually liable and will have to pay a penalty.

Can a tenant demand a reduction in rent due to COVID-19?

In theory, the tenant has the right to demand a reduction in rent if it proves that the conditions provided for by the lease regarding the use of the premises have deteriorated significantly due to the spread of the coronavirus. However, without a detailed analysis of the specific situation and the terms of the lease, it is currently impossible to assess the likelihood that such claims will succeed.

Is it possible to terminate the lease in connection with the recognition of COVID-19 as a *force majeure* event?

The legislation does not expressly provide that a contract may be terminated in connection with the occurrence of a *force majeure* event. That said, the parties may decide themselves, when negotiating a lease, to provide for a mechanism of unilateral termination due to *force majeure*.

In practice, lease agreements very often give parties the right to unilaterally terminate it in the event of *force majeure* if such circumstances impede the performance of the agreement and last, for example, more than one or three months – the time limits usually specified in lease agreements.

Main conclusions

In summary, tenants of premises in shopping and business centres can claim for exemption from paying rent or a reduction of rent under their contracts in connection with the spread of COVID-19 in one of the following cases:

- if these centres are closed by a regulatory legal act;
- if the landlord suspends access to them of its own will; or
- if the lease agreement expressly provides that the tenant is exempt from paying rent in the event of *force majeure* and the performance of the agreement is impossible precisely because of the coronavirus pandemic.

In other cases, the obligation to pay rent continues even if *force majeure* is announced.

There is no doubt that the spread of COVID-19 may significantly affect the rental market. However, an accurate assessment of the possible consequences in a particular case will depend primarily on the actual conditions of the lease agreement. In order to prepare for various scenarios on how the current situation may develop, we recommend that both tenants and landlords analyse in detail the *force majeure* provisions in their agreements and the possible effect of this on their obligations or liability under the contract.

This eAlert was prepared by **Artashes Oganov** and **Natalya Gegechkory**, who are part of our team of specialists specifically dedicated to following legal developments and new restrictions related to COVID-19. They prepare daily on-stream summaries on any related legal acts that are sent to our local clients and their head offices.

If you have any questions on the above or wish to be informed about our on-stream summaries on the legal measures adopted in response to the COVID-19 epidemic in Russia, contact our local CMS experts [Artashes Oganov](#), [Natalya Gegechkory](#) or your regular CMS advisor.

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