

Date: 4 April 2020

PROPOSAL FOR AMENDING THE CODE OF OBLIGATIONS

Chapter X LEASE (TENANCY) AGREEMENT

Inability to use a thing due to exceptional circumstances

Article 598 (a)

(1) If the leased property cannot be used during the lease period due to emergencies such as fire, war, infectious disease, major floods or other natural disasters that are beyond the control of the parties, in the way or for the purpose for which the lease has been agreed prior to the occurrence of such events, the lessor shall not be obliged to maintain or repair the property for the duration of such events, and the lessee shall be exonerated of lease payments.

(2) If the lessee continues to make limited use of the property despite such extraordinary events, he shall be obliged to pay the lessor a proportionate part of the lease in line with the actual scope of use.

(3) If the lessee claims a partial reduction or exoneration of lease payments due to the occurrence of emergency circumstances referred to in the first paragraph, he shall immediately notify the lessor in writing.

TRANSITIONAL AND FINAL PROVISIONS

Application of this Act

The provisions of this Act shall apply from the date of entry into force of the Decree declaring the SARS-CoV-2 (COVID-19) epidemic in the territory of the Republic of Slovenia (Official Gazette of RS, No. 19/2020 of 12 March 2020).

STATEMENT OF GROUNDS:

The proposed provision was similarly regulated in the General Civil Code (ABGB, ACC), adopted in 1811 (§ 1104, § 1105 and § 1108). The GCC ceased to apply with the entry into force of the Federal Obligations Act in 1978, which did not adopt such detailed arrangements regarding the inability to use leased things (property) due to extraordinary events. Likewise, the Code of Obligations from 2001, being currently in force, is unaware of such arrangements.

However, there is an urgent need for its re-entry into the Slovenian legal order, as demonstrated by the ongoing epidemic of coronavirus (COVID-19), in order to balance the burden and risks between both parties (lessor and lessee) as a result of the inability to use the leased thing (property).

This is a special regulation of the temporary failed intention of the contracting parties in permanent contractual relations, which acts in a similar manner as the changed circumstances (Code of Obligations, Article 112).

In the 1st paragraph, which had been regulated with similar contents in § 1104 GCC (Austrian Civil Code) and is currently regulated in the Austrian legal system (§ 1104 ABGB (Allgemeines bürgerliches Gesetzbuch)), we propose a similar wording of such provision. Instead of using the term *außerordentliche Zufälle* (extraordinary events), which has a specific meaning in the Austrian law, our national Code of Obligations uses the term *extraordinary circumstances*, which, however, must be beyond the control of the parties. For example, if a fire is caused by a contracting party, this provision does not apply. However, if the fire spreads out of the woods and was caused by lightning or was started by an act of arson, the provision applies. It should be borne in mind (in Slovenia, general provisions in the Code of Obligations apply for things rented or leased out), so that even during emergencies, certain things can be used in the same way as prior to their occurrence (e.g. movable property, flats, apartments). We believe that the term *infectious disease* should be used to denote an extraordinary event (emergency) rather than the term *epidemic*. According to the Communicable Diseases Act (Official Gazette of RS, No. 33/06 - Official Consolidated Text), communicable diseases are those that threaten the health of the population, without the need to declare a *communicable disease epidemic* pursuant to the 1st paragraph of Article 7 of this Act, which states that "a communicable disease epidemic is an outbreak of an infectious disease that, by the *time and place of occurrence* and the *number* of persons affected, *exceeds the normal conditions* and therefore requires immediate action." Thus, a life situation may arise when an epidemic is not declared because the conditions for its declaration are not met (because, for example, the number of affected persons does not exceed the usual situation in a certain area), and the lessee is nevertheless not able to use the leased property due to the occurrence of an infectious disease in that area or in a smaller area with a concentrated number of cases of infection, until the state of emergency has been lifted (e.g. in a particular municipality or locality, or even in a single commercial or residential facility). An important implication, which we believe should be taken into account and was demonstrated by the current coronavirus epidemic is, that due to quarantine measures implemented by the government, the lessee cannot or may not use the leased property (e.g. an establishment, business premises) for the intended purpose. For example, a ban on the operation of a hairdressing salon that must not accept customers, and can therefore not be used for the hairdressing business (and, of course, to generate revenue), but can be used by the lessee for some other purpose (e.g. product warehouse). This does not correspond to the original purpose of the contractual parties at the time of entering the lease relationship, as the hair salon is equipped for a specific purpose, that is, hairdressing services. Pursuant to § 1104 of the Austrian Civil Code (ACC) and Austrian legislation (§ 1104 ABGB), the lessor has no obligation to maintain and repair the property, i.e. restore it to its original state: »... lessor or landlord shall not be obliged to *repair* the property ...«, and the lessee has no obligation to pay the lease (rent).

The second paragraph of the proposed new article of the Code of Obligations is based on the provisions of § 1105 ACC and § 1105 ABGB. The Austrian provision arises mainly from the problem of lease of land, the destruction of crops or the inability to produce them. Short-term land leases are not common in Slovenia, and long-term leases are encouraged instead. Here, too, different cases must be considered. An emergency may have no bearing on the vineyard leaseholder's position if the epidemic takes place, for example, in December and January.

The leaseholder has grown the grapes, produced the wine and generated unreduced income. If his income was reduced due to a price depression in the market or inability to sell, this is not a risk he could pass on to the lessor.

The third paragraph of the proposed new article of the Code of Obligations is based on the provisions of § 1108 ACC and § 1108 ABGB and specifies the lessee's obligation to notify (similar to the buyer's obligation to notify the seller when enforcing warranty claims for defects in merchandise). It is important that the lessor learns as soon as possible that the lessee cannot or should not use the property due to extraordinary events, and that will therefore be facing a loss of income.

We propose that such adopted legislation should apply retroactively from the date of entry into force of the Decree declaring the SARS-CoV-2 (COVID-19) epidemic on the territory of the Republic of Slovenia (Official Gazette of RS, No. 19/2020 of 12 March 2020). Editorially, this provision (if adopted) would then be entered in the transitional and final provisions of the Act completing and amending the Code of Obligations.

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