



CORONAVIRUS AND LEASES IN SHOPPING MALLS IN THE CZECH REPUBLIC

1. IMPACT ON SHOPPING MALLS:

- The current emergency measures **do not regulate the operation of shopping malls**. Current emergency measures regulate the operation of individual establishments (shops and services providers) including those located in shopping malls, or people themselves (wording: “*presence of public is prohibited*”).
- Current measures do not impose an operating ban on shopping malls. Landlords are not obliged to close shopping malls or parts of them to the public.
- Current measures impose an operating ban on a vast majority of retailers and providers including those located in shopping malls, with specified exclusions (such as shops selling foodstuffs, sanitary and drugstore goods, pharmacies, etc.).
- At the same time, no current measure prohibits landlords from closing shopping malls to the public at their own discretion (without taking potential ethical aspects into account, as regards closing drugstores, pharmacies, grocery shops etc.).
- Individual retailers and providers (shopping malls’ tenants) are liable for their compliance with the operating ban ensuing from the current measures.
- Emergency measures are updated regularly and the imposition of an operating ban on shopping malls is under discussion.

2. IMPACT ON LEASE AGREEMENTS:

(i) Termination:

- Change in circumstances: The change must be distinguished between lease agreements executed according to the Old Civil Code (i.e. until 31 December 2013) and lease agreements executed according to the New Civil Code (i.e. from 1 January 2014). Lease agreements executed according to the New Civil Code or old ones amended according to the New Civil Code usually include a clause by which tenants assume a risk in a change of circumstances (hardship). If such a clause is included, the tenant cannot claim the coronavirus pandemic / the adopted emergency measures to constitute a change in circumstances (hardship) and request renegotiation of the lease agreement or its termination due to the coronavirus pandemic / the adopted emergency measures. Lease agreements executed according to the Old Civil Code and not yet amended probably do not include such a clause and by virtue of law such tenants may request renegotiation of the lease agreements or their termination due to the coronavirus pandemic / the adopted emergency measures being the change of circumstances (however, tenants still have obligation to pay the rent until the renegotiation).
- Force Majeure: It must be confirmed if such a clause is included in the lease agreement. If not, general rules governing the change in circumstances shall apply regardless under which law (the Old Civil Code or the New Civil Code) the lease agreement was concluded.
- Attendance: Decreased shopping mall attendance may constitute a termination reason if agreed in the lease agreement or if it constitutes the change in circumstances and relevant clause was not included in the lease agreement (see above).
- Inability to perform: An obligation may cease to exist if the performance of the obligation becomes unrealisable. If the suspension of operations is limited in time, long term leases should not be affected. Since there is not a case law for this particular situation it is subject to further interpretation.



- Breach of Landlord's obligation to ensure free and uninterrupted use: If the landlord closes the shopping mall or a part thereof based on their own discretion and not mandatory legislation, affected tenants (i.e. those who are entitled to operate under the emergency measures – see exemptions above) may invoke landlord's breach of this obligation.
- (ii) Discounts:
 - If operations are prohibited or limited (opening hours are limited) by emergency measures, tenants are not entitled to rent discounts. As stated above, landlords are not liable for closure of establishments or the operating ban.
 - Tenants may be insured for the event of business interruption however only a few tenants are so insured. They usually point out high expenses for such insurance.
 - Nevertheless, if tenants do not operate, they do not have earnings and the tenants are likely to be unable to pay the rent because of the cash flow. According to our opinion an agreement on a compromise between a landlord and a tenant will always be necessary.
 - If a shopping mall or a part thereof is closed based on a landlord's discretion (as a recommendation, but not an order or regulation), tenants are entitled to rent discounts.
 - Contractual penalties: The compliance of tenants with the operating ban imposed by mandatory emergency measures usually does not constitute a breach on their side to operate. Landlords are not entitled to contractual penalties for tenants' compliance with such a mandatory ban on operation.
 - If a shopping mall or a part thereof is closed based on the emergency measures, tenants are usually not entitled to any contractual penalties agreed in the lease agreements (if any) for landlords' breach of its obligation to ensure free and uninterrupted use.
 - If a shopping mall or a part thereof is closed by the landlord, but such a closure is not ordered by legislation, affected tenants (i.e. those who may operate under the emergency legislation) may claim contractual penalties agreed for such cases (i.e. cases when the landlord prevents the use of or does not ensure the free and uninterrupted use of the leased premises) in the lease agreement; however, claims for such a contractual penalty might be disputed in this case (priority of one's health over one's earnings).
- (iii) Damages:
 - If shopping malls or single units (establishments) are closed based on the emergency measures, the state (the Czech Republic) is liable for damages incurred to natural persons and companies in connection with adopted emergency measures (Section 36 of the Crisis Management Act). Some of the extraordinary measures that were adopted in the early phase of pandemic were adopted under different laws than the Crisis Management Act so the liability for these measures are to be assessed individually.
 - If shopping malls or parts thereof are closed by landlords (based on their discretion), but the emergency legislation does not order them to, affected tenants may claim damages from landlords unless there is a force majeure (which could be this case). The burden of proof regarding force majeure would be on the landlord.
 - The ethical aspects of claiming such damages also might be disputed and such claims denied in this case (pandemic) under other than force majeure provisions of the Civil Code.

3. CONCLUSION:

- **For the time being, shopping malls may stay open to the public, but individual establishments must suspend their operations.**
- **Individual shopping malls' tenants are liable for their compliance with the mandatory operating ban.**



- **If operations are prohibited or limited (opening hours are limited) by emergency legislation, tenants are not entitled to rent discounts.**
- **If a shopping mall or a part thereof is closed based on a landlord's discretion (as a recommendation, but not an order or regulation), tenants are entitled to rent discounts.**
- **If a landlord decides to close a shopping mall, it is liable for damages incurred to affected tenants (i.e. those who may operate under the emergency legislation), unless the landlord invokes and proves force majeure.**
- **The coronavirus pandemic / the state of emergency / the ban on operation may be regarded as a change of circumstances when an affected party may claim renegotiation or termination of the lease agreement (hardship) (however, tenants still have obligation to pay the rent) but only in case the affected party has not assumed the risk in the change of circumstances (relevant clause in the lease agreement as mentioned above). The operating ban (or the pandemic itself in some cases) imposed on a landlord (a shopping mall) may be regarded as reasons liberating the landlord from its obligation to pay damages to tenants for mandatory closing the shopping mall or its parts.**
- **The Czech Republic is liable for damages incurred to individuals and companies in connection with adopted emergency measures under the Crisis Management Act (i.e. those including closure of business premises), but such claims or the extension of such claims may be disputed.**