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COVID-19
Global Real Estate Guide

MARCH 2020



COVID-19

Global Real Estate Guide



AS THE COVID-19 PANDEMIC SPREADS GLOBALLY, MANY OWNERS AND OCCUPIERS OF COMMERCIAL PROPERTIES ARE GROWING CONCERNED ABOUT ITS POTENTIAL IMPACT ON THEIR BUSINESSES. PARTIES WISH TO CLARIFY THEIR OBLIGATIONS AND REMEDIES IN THE LIGHT OF CONSTANTLY EVOLVING GOVERNMENT REQUIREMENTS. MULTI-NATIONAL COMPANIES FACE THE ADDED CHALLENGE OF HAVING TO DEAL WITH REAL ESTATE LAWS AND PRACTICES THAT VARY SIGNIFICANTLY ACROSS JURISDICTIONS.

The Baker McKenzie Real Estate Practice Group is pleased to provide you with this guide, which is designed to address some common questions that landlords and tenants will be considering in these unprecedented and uncertain times. In this guide, Baker McKenzie lawyers from 39 jurisdictions share their high-level views on these key questions:

1. If the government has imposed additional public health requirements, can the landlord require the tenant to comply with these?
2. If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?
3. If the tenant cannot use its property, does it have to continue paying rent?
4. Is it common for leases in this jurisdiction to contain a tenant's keep-open covenant? If the lease contains a keep-open covenant, would the closure of the premises due to a governmental quarantine or shutdown result in an actionable breach of the covenant?
5. Can the parties claim that COVID-19 is a *force majeure* event, which excuses the parties from performing the lease obligations?
6. Can the parties claim that the lease contract is frustrated (and therefore terminated) by COVID-19?
7. Do landlords and tenants commonly obtain business interruption insurance?

We hope that this guide encourages landlords and tenants to begin dialogue on some of these difficult questions. Generally, there are no clear-cut answers to these issues, in any jurisdiction. Therefore, there is no substitute for a careful review of the provisions of each lease and a thorough assessment against the relevant factual circumstances in each jurisdiction. The content of this guide is current as of 25 March 2020 and does not constitute legal advice.



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The COVID-19 outbreak is an escalating situation and authorities are issuing advice on a daily basis. It is critical to assess the effectiveness, proportionality and reasonableness of any proposed action carefully on a case-by-case basis and in light of the most recent information and developments.

You may also want to visit the Baker McKenzie [Coronavirus Resource Page](#) at bakermckenzie.com to access a wealth of materials around this topic.

We thank the Real Estate Practice Group leaders and lawyers who contributed the content, for their willingness to share their expertise and for the time they spent in preparing the chapters. We are also grateful to our knowledge and business development teams who helped prepare this guide.



MALGORZATA PIETRZAK-PACIOREK
Chair, Global Real Estate Practice Group





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- 1** **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Leases in Australia often require tenants to comply with all laws relating to the use or occupation of the premises.
- 2** **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

There is often a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management
- 3** **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay.

It is standard for leases to contain a rent suspension clause, however this typically provides that an abatement of rent (or potentially a termination right) is available where the premises are inaccessible due to damage or destruction. That is, if the government proceeds to force landlords to close property, under typical leases tenants will not have an ability to cease to pay rent or terminate the lease.
- 4** **Is it common for leases to contain a tenant's keep-open covenant?**

Yes

Keep-open covenants are common in retail leases in Australia. However, whilst it is possible for a landlord to seek to enforce a keep-open covenant by specific performance, case law has indicated an unwillingness to enforce such covenants against impecunious tenants.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not.

Force majeure clauses are not typically included in leases in Australia, and there is no common law protection from *force majeure* events.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Case law is not clear on whether a lease can be frustrated at common law and there is an absence of Australian case law on frustration of leases, with the High Court of Australia last considering the issue in 1926 (in a decision that did not produce a majority on whether a lease is capable of being frustrated).

It is probable that the House of Lords National Carriers [1981] AC 675 decision would be followed in Australia. In that case, the only road allowing vehicle access to the property was closed by the local council. Although the Court held that it did not apply on those facts, the Court did find that the doctrine of frustration could apply to leases.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

The standard insurance provisions in a lease usually require insurance cover for loss of rent and outgoings.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Often, leases in China contain a tenant's covenant to comply with all legal obligations or statutory requirements from time to time.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

The landlord may have to pay.

The rate of the property management/service fees payable by the tenant to the landlord is usually specified in the lease. There are usually some requirements and procedures to effect a change to the pre-agreed rate. It is difficult for a landlord to impose a new service charge, or increase the rate of an existing fee without complying with the requirements and procedures agreed in the lease.

3 If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant may not have to continue to pay.

Contractually speaking, the common rent suspension clause in a lease in China usually deals with the situation where the premises is destroyed or physically damaged. It does not apply to inaccessibility caused by virus spread.

However, Chinese law recognizes the doctrine of "change of circumstance" and "fairness". Under these doctrines, if there has been an unforeseeable material adverse change to the fundamental assumptions of a contract and such change would make the continued performance of the contract egregiously inequitable to a party, that disadvantaged party is entitled to request the adjudicators to modify or set aside the contract. If a tenant cannot use its premises, it should have a fairly strong case to seek abatement of at least part of the rent under these doctrines.

We have seen a number of cases during the 2003 SARS outbreak where the courts used either of these doctrines to order rent relief.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

A keep-open covenant is common in retail leases especially those with turnover rent provisions.

We tend to think that a keep-open covenant cannot be enforced by specific performance.

The application of *force majeure* will in general overrule the keep-open covenant if the tenant cannot keep open due to a governmental quarantine or shutdown.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

The parties can claim that COVID-19 is a *force majeure* event, but whether such event can excuse the parties from performing the lease obligations will have to be reviewed and determined on a case-by-case basis.

It is common for a lease in China to carry a *force majeure* clause. Even without such a clause, *force majeure*, as a statutory principal, will apply by operation of law.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

For a tenant to terminate its lease, the *force majeure* event must frustrate the purpose of the lease. This is usually very difficult to meet due to the temporary nature of COVID-19, unless it is a short-term lease that has to be performed during the COVID-19 outbreak period. We have seen several cases in China where the court rejected a tenant's request to terminate its lease by reason of COVID-19.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

In general, leases do not contain provisions that require the parties to obtain business interruption insurance. In practice, the landlord usually obtains property all risks insurance which may cover the loss of rent.

We have reviewed a number of business interruption policies in recent weeks, and found that they in general only cover losses caused by physical damage. In other words, loss of rent caused by the outbreak or spread of a disease, such as COVID-19, is not covered.

Tenants are not required to obtain business interruption insurance and do not typically obtain such insurance under a lease.

Many landlords in China have taken the initiatives to offer rent relieves to their tenants, particularly to retail tenants.

A number of local governments in China have also issued policy guidance for rental abatements. While the policy guidance varies from local government to government, common recommendations usually come in two forms, firstly (i) requesting state-owned landlords to exempt the rent for certain period, and (ii) encouraging commercial landlords to provide rent abatements to their tenants.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

There would generally be requirements that the tenant comply with all legal obligations insofar as such statutory requirements are in relation to the leased premises, the business of the tenant and the use and occupation of the premises.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

A typical lease would contain a mechanism for the increase or adjustment of management fees. A service charge may form part of the management fees.

Such mechanism generally covers an increase of fees due to the need to implement extra sanitization or clean-up measures regarding the common areas or utilities.

Depending on the actual agreed terms, there may or may not be any standard for the determination of an increase of such costs. For example, the costs may be:

- reasonably determined by the landlord/manager of the building;
- absolutely determined by the landlord/manager of the building;
- be comparable to other tenants of the same building/shopping mall.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

No, the tenant may not have to continue to pay rent if the relevant event(s) trigger the mechanism under rent suspension clause.

There would generally be a rent suspension clause which covers the scenario where the premises are damaged, destroyed, or rendered inaccessible or uninhabitable. Depending on the actual terms of the lease, such clause would normally be applicable only to cases of physical damage which are not caused by the tenant's default.

In situations where such a rent suspension clause is applicable:

- the rent payable (or part of which) may be suspended for the affected period
- the tenant may after certain length of time (e.g. after 6 months) give notice to terminate the lease.



4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes

A keep-open covenant is standard in retail leases, which typically include a clause requiring the tenant to keep premises open for trading all year round (and/or during specific days of the week) and within certain hours.

There would generally be a mechanism where a certain period of closing is allowed and/or approved by the landlord.

A landlord may enforce a keep-open covenant by specific performance but specific performance is an "equitable remedy". The Court would generally be slow to order a specific performance unless damages (i.e. monetary compensation) is an insufficient remedy.

5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not

A *force majeure* clause is uncommon in Hong Kong. However, rent suspension is possible if the rent suspension clause is applicable in the circumstances.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Termination by frustration is a common law doctrine. The circumstances for applying are exceedingly rare. An event which causes an interruption in the expected use of a premises by the tenant would not frustrate the lease, unless the interruption was to last for the whole unexpired term of the lease. The Court would decide on a case by case basis.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

This is not common in Hong Kong.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Normally, leases will contain a general covenant requiring tenants to comply with laws and regulations.

However, there are no laws/regulations that generally allow landlords to require tenants to comply with additional requirements. These additional requirements must be specifically set out in the lease to be binding.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

The landlord may have to pay.

The landlord will have to pay if not already specified in the list of service charge. It is not common to have a sweeper clause enabling costs to be charged if incurred in accordance with the principles of good estate management.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

No

The tenant may not have to continue to pay.

A rent suspension clause is common in leases.

In some cases, the landlord may, in special circumstances where there is disturbance that may endanger the building, decide to close the building. In such a situation, the tenant will not need to pay any rent during the time access is denied.

4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes

It is common to have a keep-open covenant in retail leases.

However, a tenant cannot be compelled to keep premises open for trading contrary to any government or regulatory order.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

A party may claim that COVID-19 is a *force majeure* event given the pandemic declaration. The list of *force majeure* is generally inclusive.

If the *force majeure* exists for an agreed extended period of time then either party can terminate, although in some cases, the *force majeure* must result in the destruction of the premises or the tenant's inability to occupy the premises. Payment of rent and service charges would normally be up to the date the lease is terminated.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

The parties cannot claim that the lease contract is frustrated unless in the event of a *force majeure*.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

Business interruption insurance is commonly obtained.

However, there may only be very specific cases where the insurance will be applicable (e.g., in case where the premises are inaccessible or destroyed).



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

No

It is not standard for leases in Japan to contain a general covenant to have a tenant comply with all "legal obligations", and there are no specific laws/regulations that allow landlords to require tenants to comply with additional requirements. However, if the additional public health requirements are applicable to tenants, then the tenant must comply with them.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Generally, the landlord would have to pay.

Usually, the tenant pays for cleaning of the premises itself but the landlord is responsible for cleaning of common areas including any additional costs imposed by public health requirements.

Japan leases typically include provisions specifying the costs and expenses to be borne by a tenant but these provisions do not normally contemplate costs and expenses for additional items such as an enhanced cleaning regime, etc. Therefore, it is highly likely that the landlord will bear such costs.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, in the absence of landlord default, typically the tenant has to continue to pay.

Leases in Japan typically do not contain a rent suspension clause which would entitle the tenant to cease payment of rent if the premises are damaged, destroyed or inaccessible.

4 **Is it common for leases to contain a tenant's keep-open covenant? If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes

A keep-open covenant is standard only in retail leases. It is not possible to enforce by specific performance in Japan.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Generally, no.

In most leases in Japan, *force majeure* clauses usually only excuse the parties from performance in the event of damage or destruction of the premises due to natural disaster or other events not attributable to either party.

These clauses typically provide that if the damage or destruction is such as to render the premises totally unusable, the lease will automatically terminate. If the premises are rendered partially unusable, neither party is entitled to terminate the lease but the landlord is required to repair the premises.

While it is arguable that COVID-19 can be said to “indirectly” render the premises unusable, since it does not affect the physical condition of the premises, it would be difficult for a tenant to assert termination of the lease based on a typical *force majeure* clause.

That said, Japan does have laws which give the tenant a statutory right to request a landlord to reduce the rent in certain circumstances. For more detail regarding this right, please refer to the [client alert](#) we recently issued addressing this point.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

There is a doctrine analogous to “frustration” which enable the landlord to terminate, e.g. where the tenant fails to pay the rent for an extended period, but we don’t think this doctrine would enable either party to claim based on COVID-19.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Business interruption insurance is not usually required in a standard commercial lease.

In some leases, a tenant is required to purchase certain insurance to cover loss arising from fire, theft, etc., but not business interruption.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Often, leases/tenancies in Malaysia contain a tenant's covenant to comply with all legal obligations or statutory requirements from time to time.

The relevant authorities will also be able to compel the tenant to comply under the specific legislation, in particular under the Prevention and Control of Infectious Diseases Act, Destruction of Disease Bearing Insects Act and the Food Act (if premises are a food premises).

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs for maintenance of common areas and providing services in the common area are generally borne by the landlord, with the definition of services for which service charges are imposed, generally being non-exhaustive.

Where the landlord does not have control over the maintenance of the common areas, the costs will be borne by the management. It is common for the management/landlord (where the landlord manages the building) to retain the right to increase service charges where there is an increase in the cost of maintenance of the building.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay.

A rent suspension clause is common, however, it is typically only limited to instances where the premises is destroyed or damaged. Some leases/tenancies may provide for rent suspension where the premises are not accessible or cannot be used for its intended use. Whether the tenant will be obliged to pay rent will depend on the provisions in the lease/tenancy.

4 **Is it common for leases to contain a tenant's keep-open covenant? If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes

A keep open obligation is common in retail leases. It is not common for offices and other leases.

A tenant cannot be compelled to keep premises open contrary to any governmental or regulatory order.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not.

There is no general doctrine of *force majeure* though this is often provided for in contract. Accordingly, any right for parties to be excused from performing their obligations under the lease/tenancy will need to be construed in accordance with the provisions of the lease/tenancy and under Malaysian contract law.

Force majeure clauses will typically provide for suspension of obligations for a certain period and the possibility to terminate after a certain defined period has elapsed. The right will need to be interpreted taking note of the specific terms of the clause.

The doctrine of frustration is recognized but the threshold to prove frustration is very high.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

Frustration of a lease is theoretically possible but the threshold to prove frustration is very high in Malaysia. The party seeking frustration must prove that the pandemic has fundamentally changed the contractual obligations to become radically different from what was agreed in the lease/tenancy and such contractual obligations have been rendered impossible to perform.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

Large institutional landlords and international tenants will normally have business interruption insurance. This will typically cover loss of rent for landlords.

A tenant's insurance coverage will depend on the terms of their policies.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Leases in the Philippines often contain a mutual warranty of the landlord and the tenant that the performance of the lease would not violate any law or regulation. A landlord may use such warranty as basis for requiring a tenant to comply with all "legal obligations".

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs would usually be recoverable from the tenant.

Typically, the list and rate of service charges are open/variable, so the costs may be added if incurred in accordance with the principles of good estate management.

3 If the tenant cannot use its property, does it have to continue paying rent?

Yes, the tenant may have to continue to pay.

Leases in the Philippines do not normally contain a rent suspension clause. However, where applicable, *force majeure* may possibly be invoked to suspend the payment of rent.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

A keep-open covenant is standard in retail leases.

However, a tenant cannot be compelled to keep the premises open for trading contrary to any government or regulatory order.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

Leases in the Philippines normally contain *force majeure* clauses. These are generally based on the principles from the Civil Code of the Philippines and jurisprudence. Such clause may be used as basis for suspension of rent payment and delivery by landlord of certain services. There are leases, however, that expressly allow the suspension of rent payment and delivery by landlord of certain services, in cases of *force majeure*. Leases also usually allow the termination of the contract due to a *force majeure* event that persists for an agreed period.

The following are usually required for a party to be excused from an obligation by reason of *force majeure*:

- the party who wishes to be excused from the obligation was not the cause of the breach
- the event must either be unforeseeable or unavoidable
- the event must render it impossible for the party to fulfill his obligation in a normal manner, and
- the party must be not have aggravated the damage caused to the other party.

In any case, even in instances where the lease is silent with respect to *force majeure*, non-compliance with contractual obligations may be excused based on the Civil Code.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

A party may be excused from performing its obligation if it becomes legally or physically impossible to do so, without the fault of the said party. This may possibly be used as a basis to terminate the lease if the leased premises remain inaccessible for a prolonged period of time due to COVID-19.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Business interruption insurance is not usually required under leases in the Philippines.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Compliance with statutory requirements is a standard tenant's covenant.

Save as otherwise provided in the lease or mandated by law e.g. the Infections Disease Act, landlords cannot compel tenants to comply with additional requirements (e.g. public health requirements such as deep cleaning, social distancing, etc.).

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant where the landlord reserves the right to vary the service charge under the lease.

There is often a widely-drafted list of services included as outgoing for calculating service charge, enabling landlords to pass on such costs to tenants in the form of increase in service charge if such additional costs are incurred over a period of time in accordance with the principles of good estate management.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay rent depending on the terms of the lease.

It is common for leases to contain a rent suspension clause, entitling the tenant to cease or suspend payment of a proportion of rent where the premises are damaged or destroyed or (in some cases) rendered inaccessible.

The rental suspension is for a specific period and in proportion to the nature and extent of damage at the premises.

4 **Is it common for leases to contain a tenant's keep-open covenant?**
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

A keep-open covenant is common in retail leases. If the tenant is in breach, it may give rise to a landlord's right of termination or a contractual penalty.

The landlord can enforce this by specific performance. However, a tenant cannot be compelled via specific performance to keep premises open contrary to any government or regulatory order.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

However, the standard *force majeure* clause in leases do not usually specify disease outbreak (such as COVID-19) as a *force majeure* event. Whether a *force majeure* event applies depend on the ambit and interpretation of the *force majeure* clause against the facts of each case.

Suspension of rent and/or service charges is typically provided for in the event the premises are damaged or destroyed due to events outside the control of the parties e.g. act of God.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

Frustration of a lease is theoretically possible but the threshold to prove frustration is very high in Singapore. The party seeking frustration must prove that the pandemic has fundamentally changed the contractual obligations to become radically different from what was agreed in the lease and such contractual obligations have been rendered impossible to perform.

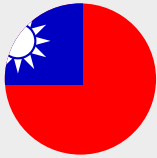
7 **Do landlords and tenants commonly obtain business interruption insurance?**

Landlord - Yes. Generally, the landlord's cover for loss of rent would cover rent suspension period, which typically provides for rent suspension in the event of physical damage or destruction to the property. Whether inaccessibility extends to deep cleaning or government quarantine measures will depend on the terms of the policy.

Tenant - No. Landlords do not usually require tenants to take out business interruption insurance as part of a tenant's lease obligations, save for anchor tenants leasing the whole or a large part of the property. Whether tenants can claim under its business interruption insurance will depend on the terms of the policy.

Rental concessions offered by landlords in the current situation are mostly done out of goodwill.

The relationship between landlords and tenants has come under increasing scrutiny in light of the pandemic. Retail tenants have called for a fairer rental structure, which is currently in favor of the landlords. Most retail rental agreements are structured in the form of a high fixed-base rent and a small variable component based on a business' gross turnover. This formula shields landlords in times of low sales. A fairer structure would be rental agreements comprising a higher or full variable gross turnover component.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

A covenant to comply with all “legal obligations” or not to use the premises illegally is common especially in commercial leases entered into by parties that are more sophisticated. It is also common to require the tenants to comply with building management rules, which the landlord can amend from time to time to include public health requirements when necessary.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

The landlord may have to pay.

The rate of the property management/service fees payable by the tenant to the landlord is usually fixed and specified in the lease.

3 If the tenant cannot use its property, does it have to continue paying rent?

No. The tenant generally does not have to continue paying rent during such period.

Some rent suspension clauses only include the situation where the premise is destroyed or damaged, but some also cover the situation where the premises are unusable.

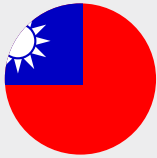
However, under Taiwan Civil Code, a party to a mutual contract may refuse to perform its obligation if the counterparty does not perform its obligations. Therefore, if the landlord cannot perform its main obligation under the lease, including, for example, the tenant not being able to use the premises for its purpose, the tenant may argue that it does not have to honor its rent payment obligation during the landlord’s failure of performance.

4 Is it common for leases to contain a tenant’s keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

A keep-open covenant is common in retail leases especially those with turnover rent provisions. This is usually coupled with monetary indemnification.

However, the obligation to keep-open the premises may be excused because of *force majeure* or governmental/statutory restriction.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

The parties can claim that COVID-19 is a *force majeure* event, however, a *force majeure* event does not necessarily excuse the parties from performing all the lease obligations.

If a *force majeure* event has caused the premises to be unusable or unable to be used in accordance with purpose of the lease, for example, the premises is physically damaged or destroyed, the parties may suspend performance of the lease or even terminate the lease.

Therefore, whether COVID-19 can be used as an excuse for either party to perform the lease obligations, or even constitute change of circumstances, and thus may request adjustment of contractual obligations, will depend on how it affects the parties' ability to fulfill the contractual obligations, and whether it frustrates the purposes of the lease. Those are to be determined by the court on case-by-case basis.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

Under the Taiwan Civil Code, the lease can be terminated if performance of the obligations under the lease has become entirely impossible. However, whether COVID-19 will fundamentally frustrate the purpose of the lease has to be determined on a case-by-case basis especially in the case of a long-term lease.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

In general, leases do not contain provisions that require the parties to obtain business interruption insurance. In practice, the landlords usually have property insurance and require tenants to have its own insurance covering the property within the premises. The insurances mostly cover the damages to the property caused by earthquake, fires or other events as specified and purchased in the policies.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Leases in Thailand often contain a tenant's covenant to comply with all legal obligations or statutory requirements.

However, there are no laws/regulations that generally allow landlords to require tenants to comply with additional requirements. However, if the additional public health requirements are applicable to the tenant, then the tenant will have to comply.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

The landlord may have to pay.

A landlord's main obligation is to maintain the common area.

The list of services to be provided by the landlord is usually specified in the agreement. Therefore, it may be difficult to recover unexpected costs from the tenant via the service charge.

A sweeper clause is not common for leases in Thailand.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

No. In general, the tenant may not have to continue to pay.

The main purpose of the lease is the right to use the premises in exchange for the rent payment. The right of the tenant to suspend rent depends on the terms of the lease on the trigger for rent payment suspension.

It is common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the premises are damaged, destroyed or (in some cases) inaccessible.

4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes

A keep-open covenant is common in retail leases. However, it is rare to see a landlord successfully seeking enforcement of this covenant by specific performance.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

It is standard for leases in Thailand to contain a *force majeure* clause which entitles the tenant to suspend the rent payment, or the landlord to suspend all/some services or to perform their obligations. However, most of these *force majeure* clauses do not trigger a right of lease termination.

For a lease that does not contain a *force majeure* clause, the parties may rely on the general principles in the Thai Civil and Commercial Code (where the legal definition of *force majeure* is also provided).

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

Under the Thai Civil and Commercial Code, in order to terminate the lease by claiming that the obligation performance by parties is impossible, such impossibility must be permanent (e.g. the leased property lost or destroyed), rather than temporary.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No, this is not standard.

Business interruption insurance can be procured and tied with property all risk insurance which normally cover the loss of rent in case of property damage. The additional coverage to cover rent suspension for a situation where the property is inaccessible is not common.

Property all risk policies subscribed by the landlord often cover loss of rent (due to the insured event).

In general, the property all risk insurance or business interruption insurance maintained by the landlord will not cover the tenant's loss of revenue. The tenant has to procure its own insurance to cover such risk.



1

If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Typically, there is a clause requiring a tenant to comply with all “applicable laws”. However, there are no laws/regulations that generally allow landlords to require tenants to comply with additional requirements.

2

If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

A landlord is typically entitled to increase the service charge by giving notice to the tenant.

3

If the tenant cannot use its property, does it have to continue paying rent?

No. The tenant may not have to continue to pay.

A rent suspension is typically included in leases. Rent payments are typically suspended until the premises become fit for use/occupation.

4

Is it common for leases to contain a tenant’s keep-open covenant?

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

Retail leases typically require the tenant to keep the premises open during trading hours/days.

The tenant is often required to pay a penalty for failing to comply with the keep-open-covenant.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not.

Although a *force majeure* clause is common in leases, a pandemic is not often included expressly as a *force majeure* event.

Typically, leases allow the tenant to terminate the lease if the *force majeure* renders the premises inaccessible or unfit for occupation/use, and if the *force majeure* exceeds a period of time, usually 90 days or 3 months.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

Excluding *force majeure* events, termination due to "frustration" is not commonly provided in leases. However, certain lease contracts provide early termination for convenience with prior written notice.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Business interruption insurance is sometimes (mostly applicable to the tenant), but not commonly, required. Insurance provisions usually only cover property insurance, third party liability and fire/explosion.

Vietnamese leasing practice is not uniform or consistent in respect to many of the points above. Before taking action, advice of counsel in light of the particular facts and contractual agreements in question should be sought.



EUROPE, MIDDLE EAST & AFRICA



Austria



Belgium



Czech Republic



England & Wales



France



Germany



Hungary



Italy



Luxembourg



Netherlands



Poland



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Sweden



Switzerland



Turkey



UAE



Ukraine

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1

If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Nearly all business leases contain a tenant's covenant to comply with all legal obligations or statutory requirements. Only very old leases do not contain this standard clause.

2

If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

Normally, the landlord is asked for an overview of these costs before entering into the lease.

In most cases, a fixed fee is prepaid monthly and at the end of the year a surplus is charged if the management costs are higher.

3

If the tenant cannot use its property, does it have to continue paying rent?

Yes, the tenant may have to continue to pay. It is not common for Austrian leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or inaccessible. Any suspension of rent is regulated by the Austrian Civil Law Code.

4

Is it common for leases to contain a tenant's keep-open covenant?

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

It is standard for retail leases to contain a covenant requiring the tenant to operate its business. A breach of this covenant usually gives rise to a landlord right to terminate the lease.



5

Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?

Yes, possibly.

Rarely, Austrian leases refer to the Austrian Civil Law Code, which contains *force majeure* provisions entitling tenants to suspend payment of rent.

Leases may also contain a *force majeure* clause but this is not common.

6

Could the parties argue that the lease contract is frustrated by COVID-19?

Yes, possibly.

The tenant is entitled to withdraw from the contract without notice, even before the end of the stipulated period, if the property has been handed over in a condition or, through no fault of its own, has fallen into a condition that makes it unsuitable for the permitted use, or if a considerable part of the property is accidentally unavailable for use during a longer period, or becomes unusable at all.

7

Do landlords and tenants commonly obtain business interruption insurance?

No

Austrian leases only rarely contain a tenant's covenant to obtain business interruption insurance.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Possibly. Leases in Belgium often contain a tenant's covenant to comply with a wide range of legal obligations or statutory requirements, (usually concerning environment, fire safety and health and safety in the workplace), and it will depend if these cover regulations on public health requirements. In any event, the public authorities are able to compel the tenant.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

For costs relating to the common parts or equipment, or the property in general, leases often contain a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management.

In addition, leases often contain a clause stating that if new regulations are introduced, the tenant shall be responsible for and bear all costs that may result from any works to be carried out in the property or on its equipment.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay. It is very uncommon for Belgian leases to contain a rent suspension clause, entitling the tenant to cease payment of rent when the property cannot be accessed or used.

The tenant could still seek to invoke the general concept of *force majeure*, which is impliedly included in every agreement, but that will be difficult in the current circumstances, given that it is in principle not impossible for tenants to pay their rent (that being a merely financial obligation), and such impossibility is a condition for application of *force majeure*.

Pursuant to the risk theory it may be possible for the tenant to suspend rent payment for the duration of the landlord's default, where:

- mandatory closure takes place (at the date of publication this affects non-essential retail tenants); and
- the landlord has an obligation which requires it to make the property available for a specific use (rare in Belgian leases).

4 **Is it common for leases to contain a tenant's keep-open covenant? If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes, It could be argued that this is an implied obligation under Belgian law in every retail lease.

If in the case of a governmental quarantine or shutdown the Government obliges retail tenants to close their stores, a keep-open covenant will not be enforceable. Retail tenants will in that case be able to invoke *force majeure* as it is impossible to comply with their keep-open obligations due to government measures.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not (tenant).

Yes, possibly (landlord).

In order for a party to invoke *force majeure* successfully, it must be (temporarily or definitively) impossible for the invoking party to comply with its obligations (i.e. for tenants, mainly, the payment of the rent and for landlords, mainly, the availability of the property for the permitted use).

It will therefore be difficult for tenants to invoke *force majeure* to suspend rent payments, given that it is in principle not impossible for tenants to pay their rent (being a merely financial obligation). However tenants may be able to invoke *force majeure*, to excuse their performance of the keep-open covenant, where the authorities have ordered mandatory closure (at the date of publication, this affects non-essential shops).

Landlords, on the other hand, can very likely invoke COVID-19 as a *force majeure* event to excuse themselves in case of non-compliance with obligations under the lease (e.g. provision of certain services).

Pursuant to the risk theory it may be possible for the tenant to suspend rent payments when the landlord invokes *force majeure*, where:

- mandatory closure takes place (at the date of publication this affects non-essential retail tenants); and
- the landlord has an obligation which requires it to make the property available for a specific use (rare in Belgian leases).

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Possibly, but the specific concept of frustration does not exist under Belgian law.

If the property has been physically or legally destroyed the lease could be ended. If the lease is impossible to perform, please refer to our *force majeure* analysis under question 3 above.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

However 'Property all risk' policies subscribed by the landlord often cover loss of rent (due to the insured event) as well.

This is not normally taken out as a tenant insurance. Generally, business interruption would not be covered. However, the insurance may cover loss of "turnover" as opposed to continuing fixed costs.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Normally, a tenant is contractually required to comply with a wide range of applicable legal regulations (usually concerning construction, fire safety and the environment).

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant as a part of the service charges. However, in each case depending on the terms of the particular lease.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay rent. It is common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or (in some cases) inaccessible. However, the government-ordered closure of retail stores does not automatically allow the tenant to cease paying the rent.

4 **Is it common for leases to contain a tenant's keep-open covenant?**
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

It is standard for retail leases.

If the tenant is in breach, the landlord may generally seek damages, claim contractual penalties, and possibly terminate the lease.

However, in the event that a statutory order has been enacted to keep retail premises closed, the landlord would very likely not be in a position to successfully enforce such a covenant.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not.

This would depend highly on the individual contractual arrangement.

In the case of COVID-19 and related governmental emergency measures, both parties could claim a substantial change in circumstances and request the other party to renegotiate the respective lease arrangement.

The parties could also be released from their duty to compensate for a breach of contractual obligations, provided that performance was made impossible by COVID-19, and that COVID-19 would qualify as an extraordinary, unforeseeable and insurmountable obstacle that arose independently of the respective party's will.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

This is normally covered by the lease, including potential rights for termination or rent suspension.

Furthermore, the Czech Civil Code also recognises grounds for termination of an obligation where there is an objective impossibility of performance.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

This is common.

However, it is unlikely that the government-ordered closure of retail stores would be covered by either tenant's or landlord's business interruption insurance.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Often, leases in England and Wales contain a tenant's covenant to comply with all legal obligations or statutory requirements from time to time.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

There is often a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management.

3 If the tenant cannot use its property, does it have to continue paying rent?

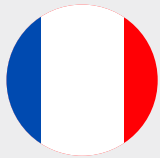
Yes in general the tenant will have to continue paying rent even if it cannot use its property although there are some specific circumstances where this may not be the case depending on both the terms of the lease and any government intervention.

In particular it is common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or (in some cases) inaccessible. This remains subject to negotiation, but generally, if the property is substantially damaged or destroyed by an "insured risk," then the lease will provide that the tenant is relieved from its obligations to pay the rent for a period of up to three years, during which time the landlord takes on an obligation to rebuild or reinstate the property to allow the tenant to resume its occupation. Accordingly, the landlord will usually take out loss of rent insurance, the premium for which may be met by the tenant as part of the service charge. However it is appears unlikely that COVID-19 will fall within the category of "insured risks" in most commercial leases and, even if it does, the insurance obligations would have to apply where the property is rendered inaccessible, rather than only damaged or destroyed. Therefore the rent suspension provisions in most institutional leases in England and Wales are perhaps unlikely to assist during the current COVID-19 pandemic.

The Coronavirus Act 2020 includes a moratorium on forfeiture of commercial leases for non-payment of sums reserved as rent from 25 March 2020 until 30 June 2020 (with a right for the government to extend further). This does not relieve the tenant of its debt for the unpaid rent, but prevents the landlord from taking action to forfeit the lease for non-payment during this period.



- 4** **Is it common for leases to contain a tenant's keep-open covenant? If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**
- Yes
- A keep-open covenant is common in retail leases, especially those with turnover rent provisions. However, it is rare to see a landlord successfully seeking enforcement of this covenant by specific performance.
- Note that on 21 March 2020, the UK government brought into force the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020. These apply from 2 p.m. on 21 March 2020, and require the closure of certain retail, hospitality and leisure businesses. It seems unlikely, in such circumstances, that a landlord would be able to enforce a keep-open covenant.
- 5** **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**
- No, probably not.
- Force majeure* provisions are rare in institutional leases.
- 6** **Could the parties argue that the lease contract is frustrated by COVID-19?**
- No, probably not.
- Frustration of a lease of property in England and Wales is theoretically possible, but there is no recorded case in this jurisdiction. It appears that the property demised by the lease would have to be absolutely incapable of enjoyment in any form before frustration could be claimed.
- 7** **Do landlords and tenants commonly obtain business interruption insurance?**
- Yes
- Generally the landlord's cover for loss of rent would mirror the rent suspension period under the lease.



- 1** **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Often, leases in France contain a tenant's covenant to comply with all legal obligations or statutory requirements applicable to its activity.
- 2** **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Yes, costs may be recoverable from the tenant to some extent.

Leases in France usually include an extensive list of service charges, authorizing the landlord to charge services back to the tenant. There are some legal limitations, however, in providing further invoices and some costs cannot be charged back to the tenant.
- 3** **If the tenant cannot use its property, does it have to continue paying rent?**

No, the tenant may not have to continue to pay but this is subject to the terms of the lease.

For example, it is common for leases to contain a rent suspension clause, entitling the tenant to suspend payments of rent where the property is damaged or destroyed.

These provisions will either duplicate or derogate from article 1722 of the French Civil Code, pursuant to which leases can be terminated before expiry of the term if the premises are totally destroyed during the lease. If the rented premises are only partially destroyed, the tenant may choose between reducing the rent or terminating the lease.
- 4** **Is it common for leases to contain a tenant's keep-open covenant?**

Yes

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

It is possible for the landlord to seek performance of a keep-open covenant. However, in the event that a public order has been enacted to keep premises closed, this would take precedence over any keep-open covenant stipulated in the lease.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

The above would apply to the landlord's performance and provision of services that are affected by a *force majeure* event, should such event meet the criteria set forth by courts on a case by case basis. The above would also apply to tenant's keep open provision. The above would be subject to discussions regarding the tenant's obligation to pay rent.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

The concept of frustration does not exist as such under French law.

However, the French Civil Code provides a right for a party to request the other party renegotiate the terms and conditions of a contract if the execution of its obligations has become excessively onerous because of an extraordinary and unforeseeable event at the time of entering into the contract. Parties, however, may have contracted out of such a solution and an analysis on a lease by lease basis is necessary.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

Usually, the landlord's coverage for loss of rent would mirror the tenant's coverage for business interruption.



Note that the answers below for Germany are current as at 1 April 2020.

1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Often, leases in Germany contain a tenant's covenant to comply with all legal obligations or statutory requirements that are related to its business within the leased premises.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant as part of the service charges.

However, service charge costs can only be allocated to the tenant if this is expressly agreed in the lease. Commercial leases often provide for a widely-drafted list of services charges and enable landlords to charge for additional services provided in accordance with the principles of good estate management.

3 If the tenant cannot use its property, does it have to continue paying rent?

It depends.

It is common for German leases to contain wording that explicitly excludes the tenant's right to reduce or suspend rent payments, unless there is a defect of the premises which is acknowledged by the landlord or confirmed by binding court decision. If a tenant wants to reserve the right to claim back overpaid rent, payments should be made with reservation. Exceptions may apply if the lease includes a force majeure clause or if the landlord can no longer grant the use of the leased premises.

In order to claim a reduction of rent (in full or in part), the tenant would need to demonstrate a defect of the leased premises. While it could be argued that a defect may also result from external factors such as governmental bans to open certain type of stores, others in German legal doctrine hold the view that such bans do not target the location or (structural) condition of the individual leased premises but rather relate to general types of use and thus only affect the utilization risk of the tenant which shall not qualify as a defect of the leased premises.

On 1 April 2020, a new German law on mitigating the consequences of the COVID-19 pandemic has entered into force that shall protect tenants from a termination of the lease due to rent payment default in the period from 1 April 2020 to 30 June 2020. A landlord is barred from terminating the lease if the tenant has made it sufficiently plausible and convincing (Glaubhaftmachung) that it cannot pay rent due to the COVID-19 pandemic. However, the general obligation of the tenant to pay rent shall neither cease nor be suspended and the landlord shall remain entitled to claim the outstanding rent payment plus interest accrued. If the tenant does not compensate the default on payment by 30 June 2022, at the latest, the suspended termination right shall come to life again.



4 **Is it common for leases to contain a tenant's keep-open covenant?**
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

A keep-open covenant is common in retail leases, especially those with turnover rent provisions and for locations in shopping malls and outlet centres.

If the tenant is in breach, the landlord could seek to enforce the covenant by specific performance. Often, the breach also gives rise to a contractual penalty and a landlord right of termination.

However, if an administrative order is issued to keep the property closed, this would take precedence over any keep-open covenant in the lease.

5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not.

Force majeure clauses are not standard in leases in Germany and need to be explicitly agreed between the parties. Where a *force majeure* clause is agreed between the parties, it usually only covers the destruction or damage of the leased premises, i.e. the direct physical impact on the leased premises.

If a *force majeure* clause is triggered it may entitle the tenant to reduce the rent if, and to the extent that, the leased premises are partially unusable or inaccessible. The rent suspension would apply for the period of time that the leased premises are entirely unusable or inaccessible.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

There is very old case law from the German Imperial Court of Justice (Reichsgericht) dating back to 1915, pursuant to which tenants were granted rent suspension rights due to official closure orders in light of World War I.

However, German legal literature today differentiates as follows: the landlord shall only bear the risk of the tenant being limited in its right to use the property if restrictions are directly linked to the location or the (structural) condition of the property. In all other cases, only the tenant's profit expectations are affected, and the landlord cannot be considered liable for this loss.

For an unprecedented event like the COVID-19 pandemic it is hard to predict in which direction the allocation of risks by German courts may shift in the future. However, given that the new law (referred to in the answer to Question 3 above) aims to find a reasonable balance for both the interests of the tenant and the landlord, it seems that tenants shall not be entitled to further rights or remedies because of the COVID-19 pandemic.



7

Do landlords and tenants commonly obtain business interruption insurance?

No

Business interruption insurance is usually not required as part of the standard insurance provisions in a German lease. If such insurance coverage is agreed, a basic loss of rent insurance would typically cover rent loss resulting from damage to or destruction of the building. Depending on the terms of the insurance policy, further cases of rent loss may also be covered (e.g. due to payment default of the tenant or non-payment for other reasons).

'Property all risk' policies subscribed by landlords sometimes also cover loss of rent (due to the insured event) but the policy terms need to be checked in the individual case.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

No

Leases in Hungary do not usually contain a general covenant of this nature and a tenant would not be bound to comply with customary practices. However, a covenant to comply with specific statutory or legal obligations may be set out in the lease.

Outside of the landlord and tenant relationship, both parties would be bound to comply with all governmental requirements imposed in the form of a decree.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

There is often a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

No

The tenant may not have to continue to pay, but this depends on the terms of the lease. It is common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or (in some cases) inaccessible.

4 **Is it common for leases to contain a tenant's keep-open covenant? If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

Yes

Retail tenants are generally required to keep the property open for trading. If the tenant is in breach, it gives rise to a penalty and a landlord right of termination.

However, if a government decree is issued to keep the property closed, this would take precedence over any keep-open covenant in the lease.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

Force majeure is not defined in Hungarian law.

However, general regulations of the Hungarian Civil Code stipulate that the lease would be terminated if performance has become impossible.

Where performance has become impossible for a reason that cannot be attributed to either of the parties, the parties may come to an agreement with each other.

Often if there is a reference to *force majeure* in a lease, this is to stipulate that the parties will expressly not be liable if a default occurs due to a *force majeure* event.

If the property is unusable due to *force majeure*, the lease terminates. If the property is partially unusable both parties are likely to be entitled to terminate the lease.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Under the Hungarian Civil Code, the lease can be terminated if performance has become impossible. If performance has become impossible for a reason that cannot be attributed to either of the parties, the services provided under the terminated contract shall be accounted for. In doing so, the monetary consideration for a service already provided before termination shall be payable. If the party has already paid the fee but has not received the service in exchange, the monetary consideration for the non-performed service would be refunded.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

However, this is not specifically required under the terms of the lease.

It is usual for landlords to obtain loss of rent insurance.



- 1** **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

No

A specific covenant in leases is not necessary, as public law prevails over the terms of the lease. Therefore, although the landlord cannot compel the tenant to comply with government requirements, the public authorities can do so.
- 2** **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

The category of expenses in a standard service charge in Italy is open.
- 3** **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay. It is not common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or inaccessible.

However, remedies may be available depending on the specific circumstances (e.g., cause of the impossibility to use the property, duration of the agreement, etc).
- 4** **Is it common for leases to contain a tenant's keep-open covenant?**

No

However, retail premises are often leased through a lease of the business as a going concern (rather than through a lease of the property). In such a case, it is common for the lease to include a keep open obligation. If the tenant is in breach, the landlord can seek damages, but not specific performance.



- 5** **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**
- Yes, possibly, depending on the type of lease obligations.
However, this is not usually contained in the lease itself. Italian case law has developed a definition of *force majeure* for contracts.
- 6** **Could the parties argue that the lease contract is frustrated by COVID-19?**
- No, probably not on the basis of frustration.
However, the Civil Code provides for the right to terminate the contract if fulfillment of its obligations have become excessively cumbersome from an economic standpoint because of an extraordinary event that was unforeseeable (at the time of entering into the contract). Such an event imposes an economic sacrifice which is beyond the regular commercial risks that may have been contemplated by the parties.
- 7** **Do landlords and tenants commonly obtain business interruption insurance?**
- No
Business interruption insurance is not usually required as part of the standard insurance provisions in a lease.



- 1** If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

It is market practice for leases in Luxembourg to contain a covenant from the tenant to comply with all applicable legal and statutory requirements.
- 2** If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

These costs should, in principle, be recoverable from the tenant, unless the lease provides for an exhaustive list of the recoverable charges.
- 3** If the tenant cannot use its property, does it have to continue paying rent?

Yes, unless there are provisions to the contrary in the lease agreement or the tenant can demonstrate that there is a force majeure event which prevents paying the rent (in full or partially).

Even where there is no *force majeure*, the tenant may invoke alternative provisions such as for example the so-called *exception d'inexécution* (lawful non-performance) or art. 1722 of the Luxembourg civil code (i.e. reduction in case of a partial loss of the building). This may relieve the tenant from liability for (full or partial) payment of its rents.
- 4** Is it common for leases to contain a tenant's keep-open covenant?

No

However, it is usually standard for retail leases (in particular for shopping centres).

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

In principle, the tenant should not be in breach of its keep-open covenant, if there is a governmental quarantine or shutdown.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly for retail leases.

For other types of leases, and in terms of force majeure relieving the tenant from its obligations, it will most notably depend on the situation of the tenant and of the building.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not since the situation is not definitive.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No, this is not standard.

If the landlord or the tenant has taken out a specific insurance, outside of the terms of the lease, the ability to make a claim under the policy will depend upon whether COVID-19 qualifies as an insured event covered by this specific insurance.



Note that under Dutch law both the tenant and landlord have the obligation to act as good lessee and good lessor (goed huurder, goed verhuurder). Both parties can reasonably be expected to take adequate measures to prevent the spread of the Covid-19 virus, especially those measures advocated by the government (RIVM).

The answers below are based on the presumption of the use of ROZ model leases for office space (art. 7:230a DCC).

This type of lease provides for a great deal of contractual freedom. The answers therefore rely on the facts and circumstances of the particular lease. Furthermore, leases are governed by the principle of reasonableness and fairness (art. 6:248 DCC). Any given clause may be inapplicable if this would be unacceptable within this principle.

On 24 March 2020 a covenant was reached between branch organisations of retail landlords and tenants in the Netherlands. This has led to the following recommendations for retail owners in the Netherlands:

- change quarterly rents to monthly rents;
- delay rent invoices until 20 April 2020;
- do not collect invoices until 20 April 2020;
- do not charge rent penalties during crisis months;
- do not invoke 'keep open' clauses.

These recommendations apply for retail stores with a substantial sales decline (more than 25%) and are not binding.

The parties are negotiating a further covenant that is expected on 20 April 2020.

1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

No

It is not standard for leases in the Netherlands to contain a tenant's covenant to comply with all legal obligations or statutory requirements.

However, there is a requirement under statute to comply with all laws and customary practices (see art. 5.2 of the GTC).

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

Normally this is covered by a catch all such as "any future charges required for good estate management".

3 If the tenant cannot use its property, does it have to continue paying rent?

Yes, the tenant may have to continue to pay.

A tenant may claim a rent reduction if there is a defect (gebrek) in the property, but only a serious breach by the landlord may lead to a successful claim.

If the property is fully destroyed (e.g. due to fire) the lease can be dissolved on application to the court. However, this is a discretionary remedy, which means the court is unlikely to make an order unless the defaulting party is in serious and persistent breach of its obligations.



4

Is it common for leases to contain a tenant's keep-open covenant?

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

It is standard for retail leases.

If the tenant is in breach it gives rise to a contractual penalty.

It is also included in art. 5.1 of the GTC (exploitatieplicht).

5

Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?

No, probably not.

However, there is a *force majeure* provision under art. 6:75 DCC. A party cannot be held liable in case of *force majeure*. For this to apply, the event must not be the result of a fault of the party, nor of circumstances that are at the risk of that party. There is a high bar to be met to establish *force majeure*.

6

Could the parties argue that the lease contract is frustrated by COVID-19?

Yes, possibly.

If a lease obligation is impossible to perform, one party may dissolve the lease if this is proportionate to the nature of the breach. However a court ruling is required before an office lease can be dissolved.

Under the Dutch Civil Code, a contract can theoretically be dissolved, due to unforeseen circumstances. There is a high bar to be met to establish such circumstances.

Dissolution of a lease in the Netherlands may be by the parties, or the courts, and results in the termination of the lease contract. If a lease is entered into for a fixed period, it will not be possible for the tenant or the landlord to unilaterally terminate the lease prematurely, unless the other party is in serious breach of its obligations under the lease (for example non-payment of the rent for a significant period of time – in general – at least three months). In such cases, the competent court can be asked to dissolve the lease – the court will assess whether the breach of the obligation is serious enough to justify termination of the lease on the basis of all circumstances involved.

7

Do landlords and tenants commonly obtain business interruption insurance?

No

This is not a standard requirement in Dutch leases.

Under Dutch law both the tenant and landlord have the obligation to act as good tenant and good landlord (goed huurder, goed verhuurder). Both parties can reasonably be expected to take adequate measures to prevent the spread of the COVID-19 virus, especially those measures advocated by the Government (RIVM).



Note that the answers below for Poland are current as at 1 April 2020.

1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

No

It is not standard for leases in Poland to contain a tenant's covenant to comply with all legal obligations or statutory requirements.

However, tenants would have to comply with any mandatory regulations or governmental legislation which come into force, which apply to tenants and existing leases.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

There is often a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management.

3 If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant may not have to continue to pay, but this depends on the terms of the lease.

If the property has defects that limit its suitability for the permitted use, the tenant may require a proportionate rent reduction until the defect is remedied. Whether COVID-19 or its consequences constitute a "defect" would have to be reviewed on a case-by-case basis.

On 31 March 2020 the Polish Parliament passed an amendment to the Act on special solutions related to preventing, counteracting and fighting COVID-19, other infectious diseases and emergencies caused by them and some other acts ("**Amendment**"). According to the Amendment, during the period in which tenant's activities in a retail facility with retail space of over 2,000 m² have been prohibited, mutual obligations of the parties to the lease, tenancy or other similar agreements under which the retail space is let for use, will expire (including tenants' obligation to pay the rent).

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

It is standard for retail leases.

If the tenant is in breach it gives rise to a landlord right of termination.

The Amendment, referred to in the answer to question 3 above, provides that leases generally may not be terminated by the landlord until 30 June 2020.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

Under certain circumstances, the parties may claim that the coronavirus is a *force majeure* event, if it influences the ability of the parties to perform their obligations under the lease. For example, the tenant may be able to suspend the rent if property is inaccessible due to a *force majeure* event (e.g. governmental acts).

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Under the Polish Civil Code, if a lease obligation is impossible to perform due to circumstances for which neither party is liable, the obligation will expire.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

However, this is not specifically required under the terms of the lease.

It is usual for landlords to obtain loss of rent insurance.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes.

Often, leases in Russia provide an obligation for the tenant to comply with all statutory requirements while using and occupying the premises, including sanitary-epidemiological requirements.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

The list of the landlord's services provided under the lease is usually subject to adjustments. The respective service costs are usually paid by the tenant as a part of the rent (variable rent). Therefore, the actual expenses aligned with such additional services will be also included in the rent (variable rent) and hence may be recoverable from the tenant.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Yes, the tenant may have to continue to pay, however this is subject to the terms of the lease.

A rent suspension clause is sometimes included in the lease, however it is normally limited (for example, it may apply if the utilities are not provided in the premises or if the landlord denies access to the premises).

Generally, under the Russian Civil Code a tenant may claim a rent reduction if the use of the premises (as set out in the lease) substantially worsens due to circumstances for which the tenant is not responsible. However, this may only implicitly apply to the COVID-19 situation.

4 **Is it common for leases to contain a tenant's keep-open covenant?**
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

This is generally standard for retail leases (most often - for shopping malls), especially for those with turnover rent provisions.

If the tenant is in breach, the landlord might claim a penalty. Potentially a governmental quarantine in this specific situation might be considered as force majeure or as the ground for tenant's inability to perform (i.e., a situation when the tenant is not able to perform its obligation to keep the premises open due to governmental restriction). Therefore, it might be a ground for the tenant to claim that it should not be subject to a penalty due to inability to perform.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly, but subject to a number of stipulations.

Force majeure clauses are standard for leases. However, force majeure wording in leases is usually quite broad, so in most cases the parties will have to refer to the Russian law provisions on force majeure in order to apply the relevant lease provisions.

Force majeure circumstances under Russian law are unavoidable circumstances which a party could neither foresee nor prevent, and due to which it is not able to perform its obligations under a contract.

At the moment there is no unified position as to whether COVID-19 should be considered a force majeure event. Also, it is relatively difficult to predict how the courts will treat various circumstances aligned with COVID-19 (whether they will be considered force majeure or not). It should be noted that some of the most recent law-enforcement practice recognizes COVID-19 as a force majeure (for example, the Moscow Major Decree of 14 March 2020).

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly, but subject to the below clarifications.

Russian law provides for the right of the parties to amend or terminate a contract due to substantial change of circumstances (and COVID-19-related circumstances may, under certain conditions, constitute a substantial change). However, this Russian law provision applies only to the extent it is not waived by the parties in the contract (and the parties to the lease often waive this legal provision).

Moreover, under Russian law an obligation may be ceased if:

- it is not possible to perform it due to a circumstance which occurred after the obligation arose and for which neither of the parties is liable; and
- the performance of such obligation becomes impossible due to an act of state or municipal body.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Normally such insurance is obtained by large institutional landlords and/or for large real estate facilities (shopping malls, business centers, production sites). Apart from that, such insurance is not common in Russia.



- 1** If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Regardless of the position under the lease, and whether or not it includes a provision requiring the tenant to comply with all legal obligations or statutory requirements, the Government is strictly enforcing the closure of all shopping malls and the imposition of a country-wide curfew that requires all shops regardless of their location to close by 3pm each day.
- 2** If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Service charges are often levied as a fixed percentage of rent and accordingly, additional costs arising from deep cleaning and similar health measures will need to be absorbed by the landlord.

Where service charges are based on an annual budget and a pass through mechanism, events like this will be unbudgeted and again landlords will have difficulty recovering the additional costs incurred unless specific provisions for the same was provided for in the lease.
- 3** If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant will not have to continue to pay.
- 4** Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

However, only in retail leases. A government quarantine or shutdown amounts to an event of *force majeure* and will excuse the tenant from compliance with this obligation.



- 5** **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**
- Yes
- The tenant can suspend payment of rent if it is unable to access the property or claim a reduction in rent where a curfew significantly reduces its trading hours.
- 6** **Could the parties argue that the lease contract is frustrated by COVID-19?**
- Yes, but the consequences of frustration would depend on the duration of the COVID-19 pandemic and the measures implemented to contain it.
- 7** **Do landlords and tenants commonly obtain business interruption insurance?**
- No, with the exception of high value leases.
- The landlord would cover the loss of rent. Specifics relating to extra cleaning services will depend on the terms of the policy.
- The tenant may have coverage, subject to the terms of its policy.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Although it is not standard for leases in Spain to contain a tenant's covenant to comply with all legal obligations or statutory requirements from time to time, it is a mandatory duty for all persons and entities to comply any applicable regulations.

Therefore, a landlord could compel (from a contractual standpoint only, because only the Government and the Authorities may do it) the tenant to comply with applicable requirements if they are legally necessary for the performance of the tenant's permitted use of the property.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

However, this depends on the language of each lease. Some leases state that service charge payments are to be reconciled at the end of the year and, therefore, such additional service charge costs could be recoverable from the tenant.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

The COVID-19 outbreak is not impeding monetary payments and the Government measures do not provide for suspension of rent payments. Therefore, the tenant may have to continue to pay, unless otherwise agreed by the parties.

However, tenants are arguing that the current sanitary crisis and the Government measures constitute *force majeure*, imbalance of the obligations under the lease, and a frustration of the contract's purpose, particularly when the Government has imposed the mandatory closure of their properties.

4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

No

A keep-open covenant is common in certain commercial leases such as those of retail units in shopping centres.

A keep-open covenant will not be enforceable in Spain if it affects a business whose activity has been statutorily banned by the Government.

If the tenant is in breach, the landlord could seek to enforce the covenant by specific performance.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

It depends on the particular circumstances of the properties and the extent to which Government measures may affect them.

The COVID-19 situation provides grounds to the parties to negotiate in good faith but not to unilaterally decide not to fulfil their contractual obligations.

The tenant could try to invoke the *rebus sic stantibus* doctrine (unenforceable and inevitable imbalance of the contract's obligations).

Under this doctrine, the Court may decide to balance obligations owed by each party to the lease should there be a dramatic change in the circumstances under which the lease was executed (e.g. outbreak of an economic crisis or war).

Please note that additional measures of the Government may affect the above answers.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Although it is legally and physically possible to pay the rent, some tenants have been prevented from using their properties by the mandatory closure measures decided by the Government.

This has caused many tenants, particularly those affected by Government prohibitions, to start negotiations to temporarily suspend the payment of rent, renegotiate the rent and expenses payable or other terms of the lease.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

This is not a standard provision in Spanish leases. But in more sophisticated leases it is not uncommon for it to be included.

However, a professional landlord may take this policy out in order to cover such risk.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

No

It is not standard for leases in Sweden to contain a tenant's covenant to comply with all legal obligations or statutory requirements from time to time.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

The landlord may have to pay.

The list of services to be provided by the landlord is usually closed.

Therefore it may be difficult to recover unexpected costs from the tenant via the service charge.

3 If the tenant cannot use its property, does it have to continue paying rent?

Yes, the tenant may have to continue to pay. It is not common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or inaccessible.

However, statutory remedies are available.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes, this is common in leases with turnover rents, such as retail leases in shopping centres. Other leases will not normally contain keep-open covenants.

It is possible for a landlord to seek to enforce a keep-open covenant by specific performance. However, if an administrative order is issued to keep property closed, this would take precedence over any keep-open covenant in the lease.

There is often a delay in having enforcement of this covenant granted, so a breach is often linked to a penalty payment.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

A landlord's performance and any services that are affected by a force majeure event may be excused under certain circumstances.

The tenant may be entitled to a rent reduction.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

For the lease to be terminated, the frustration must constitute a material breach of the lease.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

This is normally handled by the parties separately to the lease.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Often, leases in Switzerland contain a tenant's covenant to comply with all legal obligations or statutory requirements from time to time.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

Costs may be recoverable from the tenant.

Normally, this is covered in the lease.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

Whether the restrictions and prohibitions imposed by the authorities in connection with COVID-19 constitute a defect in the sense of tenancy law, which may lead to a tenant's right to suspend rent payments, has not yet been decided by the supreme court and comparable earlier situations do not exist. Arguments can be found in both directions.

In our opinion, there are good reasons to argue that such restrictions and prohibitions are aimed at individuals and restrict the types of use of tenants and are not aimed at the relevant properties on which such businesses are located. It is therefore possible to argue that these restrictions and prohibitions fall rather within the risk area of the tenant and therefore cannot qualify as a defect in the sense of tenancy law. On the other hand, case law might protect the tenant in particular in cases where the lease covers a narrow and now prohibited business area.

4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

No, not generally. Whether or not there is a keep-open obligation depends on the intended use.

If there is such keep-open obligation but the tenant is forced to close the business due to the restrictions and prohibitions imposed by the authorities in connection with COVID-19, the tenant may claim impossibility of performance through no fault of its own, in which case it would be released from any contractually agreed keep-open obligation.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, COVID-19 can be considered as *force majeure*.

Regarding the legal consequences, however, the rights of the parties must be examined separately for each specific obligation (see responses to questions 4 and 6).

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, as a result of the COVID-19 pandemic some obligations may become impossible to perform.

Regarding the legal consequences, however, the rights of the parties must be examined having regard to each specific obligation.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

Normally, only tenants have business interruption insurance, and it will be a landlord requirement that this is in the lease.

Landlords will very rarely take out business interruption insurance. The concept of inaccessibility would extend to deep cleaning or forced government closures.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Often, leases in Turkey contain a tenant's covenant to comply with all legal obligations or statutory requirements.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

There is often a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management.

3 If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant may not have to continue to pay, but this depends on the terms of the lease.

In addition to obligations under the Turkish Code of Obligations, if the property is damaged, the tenant can exercise the following options:

- request the landlord to remedy the defects
- decrease the rent in proportion to damage (where the property is inaccessible, payment of rent can be suspended)
- request the landlord to compensate tenant's losses and damages.

Where there is a major defect or if the landlord does not comply with a request of the tenant to remedy the defect, decrease the rent or compensate the tenant, the tenant has a right to terminate the lease.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

This is standard in retail properties in shopping malls.

However, the tenant cannot be forced to use the leased property or keep it open for trading. It is not possible to enforce by specific performance. Accordingly, the parties usually agree on a penalty to be applied if the tenant is in breach.

The application of *force majeure* will in general overrule the keep-open covenant if the tenant cannot keep open due to public order restrictions.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

It depends on the nature of intended use of the leased property. The complete shut-down of tenants' businesses as a governmental precautionary measure against the COVID-19 pandemic (such as cinemas, cafés, playgrounds, sport centers, barber shops etc.) may be deemed a *force majeure*. For leased properties which are not subject to governmental precautionary measures, COVID-19 can be deemed an extraordinary event.

The Court may decide to balance obligations owed by each party to the lease should there be a *force majeure* or extraordinary event under which the lease was executed (e.g. outbreak of a pandemic).

Force majeure clauses are not standard for leases. However some leases may contain *force majeure* clauses such as larger properties (offices of more than 5,000 sqm), warehouses, hotels, production facilities and distribution centres. Such a clause may provide a right for the parties to suspend their lease obligations.

Moreover, under the Turkish Code of Obligations, either party can terminate the lease based on extraordinary reasons which make the lease unbearable for the affected party.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Under the Turkish Code of Obligations, either of the parties may terminate the lease based on extraordinary reasons which make the lease unbearable for the affected party.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Business interruption insurance is not usual in the Turkish commercial real estate market, except in relation to hotel leases, which is normally maintained by the tenant to cover tenant's loss of revenue.



This analysis applies to financial free zone leases.

- 1** **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Often, financial free zone leases in the UAE contain a tenant's covenant to comply with all legal obligations or statutory requirements.
- 2** **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

The landlord may have to pay.

Other than in very limited circumstances, the list of services to be provided by the landlord is usually closed.

Therefore it may be difficult to recover unexpected costs from the tenant via the service charge.
- 3** **If the tenant cannot use its property, does it have to continue paying rent?**

No, the tenant may not have to continue to pay, but this depends on the terms of the lease. It is common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or (in some cases) inaccessible.

It is worth noting that the Dubai Free Zone Council has recently announced a rent postponement for 6 months that is applicable for all Free Zones in the Emirate of Dubai. The details of the rent postponement have not been published at the time this guide is issued, but we will provide further updates as they become available. In the meantime, please contact us directly for any further clarification or updates.
- 4** **Is it common for leases to contain a tenant's keep-open covenant?**

Yes

However, a tenant cannot be compelled to keep property open for trading contrary to any government or regulatory order.

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?



- 5** **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**
- No, probably not.
Force majeure clauses are common in leases. However, it will be specific to the lease whether a tenant is able to terminate the lease or suspend payment of rent.
- 6** **Could the parties argue that the lease contract is frustrated by COVID-19?**
- Yes, possibly.
- 7** **Do landlords and tenants commonly obtain business interruption insurance?**
- Yes
Normally only for large institutional landlords and international tenants. This is more common in the financial free zones and less so 'on shore' in Dubai and Abu Dhabi.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

Yes

Often, leases in Ukraine contain a landlord and tenant covenant to comply with legal or statutory requirements.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

The landlord may have to pay.

The list of services (maintenance services, operational services) provided by the landlord is usually exhaustive and expressly defined in the lease. As such, it may be difficult to recover unexpected costs from the tenant via the service charge.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

No, the tenant may not have to continue to pay, but this depends on the terms of the lease. It is common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent if the property is damaged, destroyed or inaccessible.

Statutory remedies are also available. Under art. 762 (6) of the Civil Code of Ukraine, a tenant is relieved of its obligation to pay rent for the period during which the tenant could not use the leased property, where this is due to circumstances for which the tenant is not responsible.

4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

No

It is not common, and we are not aware of cases where landlords would seek to enforce a keep-open covenant.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

It is common for leases in Ukraine to include a *force majeure* clause.

Termination would depend on the terms of the lease. Usually, both the landlord and the tenant would be entitled to terminate the lease where a *force majeure* event lasts for more than 60/90 days.

However, *force majeure* does not entitle the tenant to suspend payment of rent. Instead, it relieves the tenant from liability (i.e. penalties) for late payment. This is the same for landlords - *force majeure* grants relief from liability for non-performance or improper performance, rather than from performing the obligation itself.

On 17 March 2020 the COVID-19 Law became effective officially recognizing COVID-19 quarantine as a *force majeure* event.

Under Ukrainian law, *force majeure* must be confirmed by a certificate issued by the Chamber of Commerce and Industry in Ukraine.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, theoretically possible.

In Ukraine, there is a statutory provision covering frustration, but it is very rarely enforced.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Business interruption insurance is not common as stand-alone insurance.

"Property All Risk" insurance policies may possibly cover the loss of rent for landlords. Loss of revenue for tenants is unlikely to be covered.



LATIN AMERICA



Argentina



Brazil



Chile



Colombia



Mexico



Peru



Venezuela

COVID-19



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1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

No

It is not standard for leases in Argentina to contain a tenant's covenant to comply with all legal obligations or statutory requirements.

However, tenants must comply with all laws and regulations. Third parties are allowed to report any breach of the public health emergency regulations to the relevant authorities.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

Usually lease agreements establish that the costs/actions related to ownership of the property are assumed by landlord. Costs/actions related to the use of the property are assumed by tenant.

Consequently, those costs would have to be assumed by tenant. Common spaces will be the responsibility of the building in general and unless an extraordinary cost is incurred, it will be charged as a common expense and paid by the tenant. The landlord usually pays if an extraordinary cost is incurred.

3 If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant may not have to continue to pay if it can prove COVID-19 as a *force majeure* event.

There is a general provision of law that would release payment obligations if the premises cannot be used. However, for COVID-19 to be a *force majeure* event, the tenant would have to prove that the tenant is unable to use the premises. The impact will need to be negotiated in good faith by the parties taking into consideration the effect of COVID-19 on both parties.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

No

It is not common for leases to contain a keep-open covenant.

However, shopping centers usually have such a covenant, which should be reviewed based on the emergency regulations.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

This is arguable. Lease agreements generally have clauses on *force majeure* events and should be reviewed in each case.

In principle, although COVID-19 is a *force majeure* event, it must have a direct impact on the premises. The impact should be evidenced by the tenant. If the tenant can use the premises, COVID-19 would not excuse lease obligations. Again, this will be subject to analysis on a case-by-case basis depending on the specific situation and the emergency regulations.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

There is no concept of automatic termination by reason of frustration of contracts in Argentina.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

It is not common practice to have business interruption insurance for lease agreements.



- 1** If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Tenants would have to comply with any mandatory regulations or governmental legislation which come into force.
- 2** If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

Unless the lease specifies differently, such costs are considered common expenses (despesas ordinárias) pursuant to law and chargeable to the tenant.
- 3** If the tenant cannot use its property, does it have to continue paying rent?

Yes, to the extent that such avoided use is not attributed to a problem in the real estate itself, the tenant may have to continue to pay.

It is not common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or inaccessible.

Negotiation between the parties about any suspension of rent is always recommended.
- 4** Is it common for leases to contain a tenant's keep-open covenant?

Yes

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

It is standard for retail leases. If the closure is mandatorily determined by an authority, this should not be considered a breach of the agreement.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

The parties may be able to claim to the extent that COVID-19 has a direct impact which prevents them from complying with their obligations under the lease.

If the lease has a section on *force majeure* and the event exceeds the term of tolerance provided in such section, the consequence specified in the agreement (e.g. termination) may be triggered.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

The parties may be able to claim to the extent that COVID-19 prevents a party from complying with their obligations under the lease. If the lease has a section on *force majeure* and the event exceeds the term of tolerance provided in such section the consequence specified in the agreement (e.g. termination) may be triggered.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Although legally viable, it is not common in Brazil.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Leases in Chile often contain a tenant's covenant to comply with all legal obligations or statutory requirements.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant, unless something different has been agreed on the lease contract.

Leases usually establish the allocation of costs and actions relating to public requirements:

- costs and actions related to the ownership of the asset fall to the landlord
- costs and actions related to the occupancy of the asset fall to the tenant.

3 If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant may not have to continue to pay, but this depends on the terms of the lease, provided that the tenant was not responsible for the event that caused the property to become unusable and the responsibility of the event rested on the landlord.

4 Is it common for leases to contain a tenant's keep-open covenant?

Yes

It is standard for retail leases.

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

However, the closure of the premises due to a governmental quarantine or shutdown may be construed as an event of *force majeure* by local courts.



5

Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?

No, probably not.

Under Chilean Law, COVID-19 (as a pandemic) is not an event of *force majeure*, but in the event COVID-19 causes the performance of an obligation to become impossible (e.g. either because of factual reasons or because the government decrees a local ban), then it could be trigger an event of *force majeure*.

6

Could the parties argue that the lease contract is frustrated by COVID-19?

Yes, possibly.

Under Chilean Law, COVID-19 is not an event of *force majeure*, but in the event it makes the fulfilment of an obligation impossible (e.g. either because of factual reasons or because the government decrees a local ban), it could be construed as an event of *force majeure*.

Frustration can be claimed by the tenant, if the property is unusable for a reasonable period of time, and it is foreseeable that landlord will not be able to cure the defect.

7

Do landlords and tenants commonly obtain business interruption insurance?

No

It is not common for tenants nor landlords to have such insurance.



1

If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Leases in Colombia often contain a tenant's covenant to comply with all legal obligations or statutory requirements.

2

If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant. If the property is subject to the horizontal property regime, any repair and maintenance of the common areas must be performed by the administration of the building in which the property is located. Monthly administration services are paid by the tenant, so if there is an increase in said value for the maintenance that must be done, the tenant should pay it (as long as it is justified).

3

If the tenant cannot use its property, does it have to continue paying rent?

Yes, the tenant may have to continue to pay.

In general, if the property has defects which limit its suitability for the agreed use, the tenant may demand an appropriate reduction in rent for as long as the premises are damaged or inaccessible.

4

Is it common for leases to contain a tenant's keep-open covenant?

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

No

It is not common for leases to contain a keep-open covenant. However, more recently, a keep-open covenant is being included in leases in shopping centres.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

For the parties to consider COVID-19 as an event of *force majeure*, there must be a causal link between the impacts of COVID-19 and the impossibility of performing the obligations under the lease. If such a causal link exists, the *force majeure* event would allow the agreements to be suspended. In any case, based on the principle of good faith, the parties must act diligently to mitigate the effects of *force majeure*. It is common practice for leases to include a *force majeure* section, whereby if such event arises for a term of approximately 180 days, the lease will automatically terminate. However, if the parties did not expressly agree that an event of *force majeure* is cause for termination, neither party could terminate the lease, since it would be understood that it is doing so without just cause, for which it would have to indemnify the other party. Where an event is irresistible and unpredictable, it would be considered a *force majeure* event under the Colombian Civil Code. For a party to invoke a *force majeure* event, these conditions must be met.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Provided the agreement contains a section whereby a *force majeure* is a cause for termination. Nevertheless, if the agreement does not contain such section, a termination for an event of *force majeure* will be understood as a termination without cause and thus the terminating party must indemnify the other party. If the *force majeure* suspension clause was not agreed in the agreement, and the likelihood to suspend the performance due to the outbreak is high, or significant, our recommendation is to execute an amendment to the agreement in which the parties agree on a potential suspension as a result of the event.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Such type of insurance does not exist in Colombia. In Colombia, there are insurances between the parties, such as the performance bond, whereby the tenant guarantees the landlord that it will comply with its obligations, including the rent payment.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Leases in Mexico often contain a tenant's covenant to comply with all legal obligations or statutory requirements. Tenants would have to comply with any mandatory regulations or governmental legislation which come into force. In certain states and for certain types of leases (i.e. residential leases), the landlord is the one legally obliged to maintain the premises compliant with any health and safety legal requirements. This provision is typically waived in most leases.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant. Usually the lease will specify the costs payable or reimbursable to the landlord and there will typically be a cap on such costs.

3 If the tenant cannot use its property, does it have to continue paying rent?

Yes, the tenant may have to continue to pay, subject to the exceptions mentioned below.

It is not common for leases to contain a rent suspension clause, entitling the tenant to cease payment of rent where the property is damaged, destroyed or inaccessible. If a suspension clause is not included, in Mexico, any suspension of rent is generally provided by statute if caused by reason of *force majeure*. In certain states if the tenant totally loses the ability to use and enjoy the property due to *force majeure*, it may have the right not to pay rent during such impediment (or to request a rent reduction in case of a partial loss of use) and if the cause lasts for more than 2 months, then the tenant has the right to terminate the lease. This provision of law is commonly waived in commercial leases, and in certain states it is forbidden by law to waive to this provision.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

It is standard for retail leases. The application of *force majeure* will in general overrule the keep-open covenant if the tenant cannot stay open due to public order restrictions, and in such case landlord would not be able to enforce the keep-open covenant. This is a general provision in the Civil Codes of most states.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly.

There are clauses in some leases (typically mandatory term, triple net leases) that provide that the parties will not be liable for a delay or breach of obligations under a lease even if such delay or breach is caused by *force majeure*. In the event that COVID-19 causes the performance of an obligation to become impossible (e.g. either because of factual reasons or because the government decrees a local shut-down), then it could be a trigger to attempt to classify it as an event of *force majeure*.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Under the Civil Codes of different states in Mexico, the parties may be able to claim that the lease is frustrated, as a *force majeure* event.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

Business interruption insurance is common in triple net leases and in a relevant portion of more sophisticated commercial leases. The key issue is whether the events causing the interruption are covered under *force majeure* and thus rent is payable by the insurance company.



1

If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

No

It is not standard for leases in Peru to contain a tenant's covenant to comply with all legal obligations or statutory requirements.

However, tenants would have to comply with any mandatory regulations or governmental legislation which come into force.

2

If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Costs may be recoverable from the tenant.

Leases usually establish the allocation of costs and actions relating to public requirements:

- costs and actions related to the ownership of the asset fall to the landlord
- costs and actions related to the occupancy of the asset fall to the tenant.

Accordingly, the landlord may be able to recover these costs from the tenant.

3

If the tenant cannot use its property, does it have to continue paying rent?

No, the tenant may not have to continue to pay, but this depends on the terms of the lease, provided that tenant was not responsible for the event that caused the property to become unusable.

Such a provision is found in certain commercial leases.

4

Is it common for leases to contain a tenant's keep-open covenant?

No

It is not common for leases to contain a keep-open covenant.

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

However, more recently, a keep-open covenant is being included in leases in shopping centers.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes, possibly in the case of retail leases.

In the case of commercial leases (i.e. retail), if tenants cannot use the premises, payment of rent may be suspended.

Depending on the nature of the lease, where a tenant continues to use the property (i.e. home, warehouse) a *force majeure* event does not excuse lease obligations.

However, typically leases do not include a *force majeure* clause.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

No, probably not.

The non-use of the property due to COVID-19 is temporary. Obligations can be suspended during the term COVID-19 affects their fulfillment. However, the lease contract may be terminated if the affected party –justifiably – loses interest in the performance of the obligation or considers that such fulfillment is no longer useful. This should be considered in a case by case basis and the affected party will need to prove it. The other party may contest through an arbitration/judicial proceeding.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

In general, lease agreements do not contain provisions that require the parties to obtain business interruption insurance. In practice, the landlord or the tenant may obtain insurance which covers the loss of rent.



1 **If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?**

No

It is not standard for leases in Venezuela to contain a tenant's covenant to comply with all legal obligations or statutory requirements.

However, tenants would have to comply with any mandatory regulations or governmental legislation which come into force.

Although the lease laws do not provide for eviction in the event of non-compliance with health or public health standards, a landlord may require the termination of the lease or even compensation for damages if the tenant fails to comply with emergency public health standards.

2 **If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

The landlord may have to pay in residential and office leases. While costs may be recoverable from the tenant in retail leases.

3 **If the tenant cannot use its property, does it have to continue paying rent?**

No, the tenant may not have to continue to pay, but this depends on the terms of the lease. It is common for commercial and office leases to contain a rent suspension clause, entitling the tenant to cease payment of rent when the premises are damaged, destroyed or inaccessible.

4 **Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?**

No

It is not common for commercial leases to contain a keep-open covenant.

However, more recently a keep-open covenant is being included in leases in shopping centers.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

No, probably not.

However, the lease agreement can be terminated if performance has become impossible for a reason that cannot be attributed to the parties, such as government measures due to COVID-19.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, possibly.

Under the Venezuelan Civil Code, the lease agreement can be terminated if performance has become impossible for a reason that cannot be attributed to the parties.

Furthermore, Courts have recognized the right to terminate the contract if performance of parties' obligations have become excessively cumbersome from an economic standpoint because of an extraordinary and unforeseeable event.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

No

Business interruption insurance is not usually required as part of the standard insurance provisions in a lease.



NORTH AMERICA



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United States

COVID-19

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1

If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

Commercial leases in Canada typically contain a tenant covenant to comply with all applicable laws, statutes, governmental regulations, etc. which would extend to all legal obligations concerning public health, even if adopted after the commencement of the lease.

If the lease includes such a covenant, a failure to comply would constitute an event of default under the lease and the tenant would have a cure period to permit the Tenant to comply.

In some cases, legislation may impose additional public health requirements directly on the tenant as an occupier of premises.

2

If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Yes

Costs may be recoverable from the tenant as part of the operating costs. There is often a widely-drafted list of services, enabling landlords to charge for additional services provided in accordance with the principles of good estate management.

3

If the tenant cannot use its property, does it have to continue paying rent?

No

Generally, if the premises are damaged, destroyed, expropriated or (in limited cases) inaccessible, the commercial lease will specify that the parties can mutually agree to terminate the lease, the landlord may unilaterally terminate the lease, or the landlord may be excused from certain non-monetary obligations. The specific provision in the lease will dictate if the tenant has right to any suspension of rent.

4

Is it common for leases to contain a tenant's keep-open covenant?

If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Yes

A keep-open covenant is common in commercial leases especially retail leases with percentage rent provisions. Such clauses require tenants to operate their business continuously and during specific business hours at all times during the lease term, which, from the landlord's perspective, contributes to the appeal of the shopping mall or other space.

It is rare to see a landlord successfully seeking enforcement of this covenant by specific performance forcing the tenant to stay open.



5 **Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?**

Yes

Force majeure provisions are standard in commercial leases in Canada, but they generally do not apply to or excuse monetary obligations such as payment of rent. Usually, *force majeure* provisions excuse non-monetary obligations under a lease that require performance. In our current circumstances, this could excuse a tenant from keeping their premises open, but it would not excuse the non-payment of rent.

In general, *force majeure* provisions tend to be narrowly construed in Canada to exclude circumstances that do not clearly fall within the clause, and to exclude events that are not truly beyond the party's control. The *force majeure* clause must clearly contemplate a pandemic or a health emergency in order for a party to rely on the clause to absolve themselves of liability under the contract because of COVID-19.

6 **Could the parties argue that the lease contract is frustrated by COVID-19?**

Yes, but only in rare circumstances.

Leases do not typically include a specific provision in connection with frustration of purpose. As a general principle of contract law, the parties may be able to argue that the purpose of the lease has been frustrated. This remedy would only be available in cases where the property is absolutely incapable of enjoyment in any form. In the case of COVID-19, it would be unlikely that frustration would be successful.

7 **Do landlords and tenants commonly obtain business interruption insurance?**

Yes

Carrying business interruption insurance may or may not be included as a requirement in the lease (to be carried by the tenant). Regardless of what the lease requires, most tenants would carry business interruption insurance. Landlords will very rarely directly take out business interruption insurance.

Business interruption insurance is typically tied to the risk of material damage to the property, including risk of business interruptions arising from property damage that results in partial or total closure of the business, which in turn leads to loss of profits. The specific wording of the insurance policy will control whether tenants can recover for losses arising from COVID-19.



1 If the government has imposed additional public health requirements, can the landlord compel the tenant to comply with these?

Yes

U.S. commercial leases typically contain a tenant covenant to comply with all applicable laws, statutes, governmental regulations, etc. which would extend to all legal obligations concerning public health, even if adopted after the commencement of the lease.

2 If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?

Yes

Under triple net leases, a tenant pays its prorata share of the landlord's costs incurred in operating the building or space where the premises are located, in addition to certain other costs incurred by the landlord. Depending on what is negotiated between the parties, operating costs may include a "catch-all" for additional services provided in accordance with the principles of good estate management, and any such costs will be passed on to the tenants. These costs would typically apply to the common areas, where the tenant would typically be responsible for any such cleaning in their premises.

3 If the tenant cannot use its property, does it have to continue paying rent?

No

Generally, if the premises are damaged, condemned or taken by eminent domain, a U.S. commercial lease will specify that the parties can mutually agree to terminate the lease, the landlord may unilaterally terminate the lease, or the landlord may be excused from certain non-monetary obligations. The premises being inaccessible, unless taken by a governmental authority will not typically excuse the payment of rent.

4 Is it common for leases to contain a tenant's keep-open covenant?
If so, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

Depending on the type of lease, it is not unusual to have continuing operation covenants.

This will depend on the business of the applicable tenant entity and the context in which the tenant is leasing the premises. Specifically, operating covenants sometimes are negotiated under U.S. commercial leases for larger commercial tenants in specific retail spaces (i.e., a movie theater in a shopping mall). Such clauses require tenants to operate their business continuously and during specific business hours at all times during the lease term, which, from the landlord's perspective, contributes to the appeal of the shopping mall or other space. A landlord could enforce an operating covenant using any remedies granted to it under the lease, which may include specific performance. That being said, a landlord may not require the tenant to break the law, so if there is a governmental quarantine or mandatory shutdown, the landlord would not be able to enforce the covenant.



5 Could the parties claim that COVID-19 is a *force majeure* event which excuses the parties from performing the lease obligations?

Yes

Force majeure provisions are standard in U.S. commercial leases, but they generally do not apply to or excuse monetary obligations such as payment of rent. Usually, *force majeure* provisions excuse a landlord's or tenant's non-monetary obligations under a lease that require performance. In our current circumstances, this could excuse a tenant from keeping their premises open, but it would not excuse the non-payment of rent.

6 Could the parties argue that the lease contract is frustrated by COVID-19?

Yes

U.S. commercial leases do not typically include a specific provision in connection with frustration of purpose. Rather, under general contract law principles, the parties may be able to argue that the purpose of the lease has been frustrated, meaning that while performance is still possible, the parties no longer have a reason to carry out their obligations under the lease. The tenant typically would need to show that the purpose behind the lease has been completely frustrated, and not simply that its obligations under the lease have been rendered more unprofitable, difficult or expensive. This can be a difficult case to make, and the parties would most likely be best served by negotiating an early termination.

7 Do landlords and tenants commonly obtain business interruption insurance?

Yes

Landlords and tenants often obtain business interruption insurance; however, such policies typically cover business interruptions for physical loss or damage to the applicable commercial property. Further, some policies may explicitly exclude losses related to closings due to a viral or bacterial event or only provide limited coverage.

The specific wording of the insurance policy will control whether tenants can recover for losses arising from COVID-19 specifically.



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