COVID-19: Notes on the impacts of the pandemic on leases

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Recent shutdowns of many commercial establishments in Brazil, such as shopping centers, gyms, and cinemas, as part of the measures adopted by state governments to fight the COVID-19 pandemic have generated many questions – and some disputes – among lessors and lessees, especially with respect to the payment of rent, condominium fees, and other charges, depending on the establishment involved.

Where shopping centers are concerned, some operators took the initiative and have suspended payment of rent while the center is closed. In fact, this is position taken by the Brazilian Association of Shopping Centers – ABRASCE, which also recommends that operators also suspend or reduce condominium fees and amounts payable to advertising funds during the shutdown.

Some shopping center tenants have brought lawsuits to implement the recommended suspension of rent and other amounts. Early decisions, however, have taken diametrically opposed positions and demonstrate the complexity of the issues. In one case brought in Brasília (Application for Precautionary Relief – Proceeding 070938-25.2020.8.07.0001 – 25th Civil Court of Brasília), the court issued an injunction suspending payment of minimum rent and contributions to the advertising fund, but not of the condominium fees. In another case, brought in Salvador, Bahia (Application for Preliminary Relief – Proceeding 8030234-10.2020.8.05.0001 – 2nd Civil Court of Salvador), the court entirely rejected the tenant's request to suspend payment.

Not only are these issues novel from a legal point of view, they are very recent, and involve matters that require a careful case-by-case analysis, especially the amount of time that the establishment will remain closed, which is still uncertain. As a result, it can be expected that courts around Brazil will issue conflicting decisions, making it even more important for parties to negotiate in good faith to identify solutions for dealing with the challenges created by the COVID-19 pandemic.

Legislation has been proposed to govern the relationship between lessors and lessees in the current crisis, but all proposals are still in the earliest stages:

(i) Bill 936/2020: This bill is intended to ensure that leases cannot be terminated while emergency measures related to the COVID-19 pandemic are in effect, and to protect tenants from eviction. The bill also provides for discounts and deferrals of the debt on which eviction actions are based;

(ii) Bill 1028/2020: This bill provides for a stay of actions for eviction for failure to pay rent under residential and non-residential leases for a period of 90 days;

(iii) Bill 1179/2020: This bill proposes to establish a Temporary Emergency Regime for private law matters that would apply during the COVID-19 pandemic. On the subject of leases, the bill provides for a ban on preliminary eviction orders until 31 December 2020 in actions filed after 19 March 2020, and a partial or total suspension of rent payable from 20 March 2020 to 30 October 2020 for residential tenants who have suffered economic/financial setbacks; and

(iv) Bill 872/2020: This bill provides for a stay of all actions for eviction or repossession based on non-payment of rent and loans for residential properties, including foreclosures on mortgages. These Bills propose solutions that have never before been adopted in Brazil, inspired by measures taken by other countries, such as Germany.

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