



## Evaluation of the provisions of the Turkish code of obligations concerning the termination of lease contracts by litigation due to reasons arising from the lessor

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### Abstract

Due to its geographical location and natural resources, numerous foreigners are acquiring immovables in Turkey and consequently, conducting legal transactions related to acquisition of property. According to Article 25 of the Law on International Private Law and Procedure Law entitled “Contracts Concerning Immovables”, contracts concerning immovables and their use are subject to the domestic law of the country in which they are located. Hence, this paper aims to provide information about the relevant regulations existing under Turkish Law for foreigners. Provisions concerning lease contracts were primarily regulated under the Law on Real Property Leases (Law No. 6570) and were also dealt under the general provisions of the Turkish Code of Obligations (Law No. 818). This dualist framework was terminated by the adoption of the Turkish Code of Obligations (Law No. 6098) and the abolition of the Law on Real Property Leases on the 1<sup>st</sup> of July 2011. Within this context, lease contracts have been regulated under the fourth section of the Turkish Code of Obligations which includes the first division on “General Provision”, the second division on “Housing and Roofed Workplace Leases” and the third division on “Product Leases”. Within the framework of this study, after sharing information on the concepts of housing and roofed workplace and upon the determination of the scope of application of lease contracts, the termination of lease contracts due to the housing / workplace necessity of the lessor or the new owner or due to the reconstruction or development of the leased property shall be examined in detail.

**Keywords:** code of obligations, Turkish code of obligation law no. 818, Turkish Real Property Leases law no. 6570, Turkish code of obligation law no. 6098, lessor, reasons for eviction

### 1. Introduction

As a type of contract which provides for the right to use and enjoy, lease contracts have been foreseen under the fourth section of the Turkish Code of Obligations<sup>[1]</sup> on private debt relations, or more specifically, between articles 299 and 378 of the Code. The definition of a lease contract resides under the division regulating the general provisions concerning lease relations. Under article 299 of the Code, a lease contract is a contract according to which the lessor undertakes to leave to the lessee the use of something or in addition to its use, also leaves the right to benefit from it, and in return, the lessee undertakes to pay the sum mutually agreed upon by the parties.

The previous the Code of Obligations<sup>[2]</sup> foresaw general provisions applicable to lease contracts, however, some of the reasons for termination of contracts enumerated under that legislation were not applied to housing and roofed workplace leases. Moreover, some reasons for termination of contracts were regulated under a separate legislation, namely the Law on Real Property Leases<sup>[3]</sup>, which was known to have a wider scope of application.

The regulation of lease contracts under two separate legal frameworks caused legal clutter. The provisions of the Law on Real Property Leases were later adopted under the new Turkish Code of Obligations, either directly or with certain modifications. In other words, the reasons for termination which did not exist under the previous Code of Obligations, but which appeared under the Law on Real Property Leases were adopted as provisions concerning the lease of housing and roofed workplaces of the new Turkish Code of Obligations, and the Law on Real Property Leases was

abolished by virtue of article 10 of the Law on the Entry into Force and Application of the Turkish Code of Obligations.

However, we must remark that under provisional article 2 of the Turkish Code of Obligations, in case of lease contracts in which the lessee is to be considered a merchant according to the Turkish Code of Commerce or is a private or public legal person, articles 323, 325, 331, 340, 342, 346 and 354 of the Turkish Code of Obligations will not be applicable for a duration of eight years, starting from the 1<sup>st</sup> of July 2012. In such a situation and when the lease contract does not include a specific provision on the issue, the absolute and relative imperative provisions of the previous Code of Obligations and the abolished Law on Real Property Leases continue to be applicable. It is for this reason that, as we are still in the foreseen eight-year procrastination period, the relevant provisions existing before the adoption of the Turkish Code of Obligations must not be ignored. Consequently, this study will look at the relevant provisions, both old and new, in a comparative manner and take notice of the relevant modifications brought on with the adoption of the new legal regime. Considering the abovementioned, this study will primarily deal with the concepts of housing and roofed workplaces. It will then share information on the scope of application of the relevant legislation. Finally, it will examine the regulations on the termination of lease contracts due to the housing or workplace necessity of the lessor or the new owner of the property or due to the reconstruction or development of the leased property. As such, this study aims to provide an accessible source of information on the subject, especially for foreigners who have a recognized right to property in our country.

## 2. The concepts of housing and roofed workplace

The Turkish Code of Obligations article 339 and the following provisions foresee regulations concerning the lease of housing and roofed workplaces. In lack of a definition under the Code, the contents of these concepts have been developed by legal scholarship and the Court of Cassation.

Housing is considered to be a structure which fulfils the shelter requirements of a person, it is where a person lives their private life, and which is considered to be minimally protected from external environmental factors <sup>[4-10]</sup>. Within the framework of the provisions of the Turkish Code of Obligations, there are diverging views on whether a residence must necessarily be an immovable structure. The first view is that only immovable should be considered within the framework of the provisions of the Code <sup>[5, 11]</sup>. According to the jurisprudence of the Court of Cassation concerning the scope of application of the Law on Real Property Leases, leased property had to correspond to a fixed structure and moveable structures regulated under article 728 of the Turkish Civil Code, in principle, remained outside the scope of the law <sup>[11, 12]</sup>. The second view defends that in case the structure satisfies a person's need for shelter, it should be considered within the scope of the Turkish Code of Obligations <sup>[6, 13, 14, 15, 16]</sup>. This issue is of importance since the determination of whether the provisions of the Code could be applied to disputes arising from the lease of structures such as yachts, tents, sheds, ship cabins or containers depends on the view adopted. On the other hand, with regards to the applicability of the Code, questions such as whether the property in question is registered, whether it is used as a family house or whether it is used as a settled residence is not of importance. In fact, even if a single room is leased, since the purpose is to provide shelter the provisions of the Code would be applicable. However, this inference should not be interpreted as including, for example, single rooms of student dormitories within the scope of applicability of the relevant provisions <sup>[4, 6, 14, 16]</sup>.

Unlike a house which meets the fundamental need for shelter, a workplace is a structure used to provide livelihood to the person and / or is where a profession or an industrial or commercial activity is held <sup>[5, 6, 7, 8, 9, 17]</sup>. However, if the leased property is not used for the realization of an activity related to a profession or with the purpose of acquiring revenue, the lease relationship would not be considered within the scope of a workplace lease relationship, even if the lease holder was business <sup>[14, 17]</sup>.

The Turkish Code of Obligations explicitly refers to the concept of roofed workplace. Similarly, the Court of Cassation's established jurisprudence does not consider structures without a roof as a workplace. Offices, shops, workshops would thus meet this requirement to the full extent. However, concerning the lease of non-roofed workplaces, article 299 and the following provisions of the Code would be applicable. Outdoor cinemas, carpet fields, tea gardens and similar examples would be considered within this context <sup>[6, 8, 14, 16]</sup>. Considering the subject integrally, the distinction based on whether the workplace is roofed or not is in fact nonsensical.

## 3. Scope of application of the provisions concerning the lease of housing and roofed workplace

The legislator has regulated the scope of application of housing and roofed workplace leases under article 339 of the Turkish Code of Obligations. This is a novel regulation which

did not exist under the previous Code of Obligations and partially corresponds to article 1 of Law of Real Property Leases <sup>[18]</sup>. Under this latter regulation, the legislator had foreseen two specific conditions to be satisfied simultaneously for the determination of the scope of application of the law. The first one required that the immovable in question was covered and the second one required that it was established within a municipality or if residing outside a municipality, it was established within a location such as a pier, port or station. The Turkish Code of Obligations has extended the scope of the previous framework by including all housing and workshop leases within the scope of application of the law. Thus, the limitation on the applicability of the legislation based on location was not upheld within the new regime; currently it is sufficient for leased property be a house or roofed workplace for the relevant provisions to be applicable.

Another difference between the two regimes is that, unlike the Law on Real Property Leases, the Turkish Code of Obligations provides that it will not be applicable to leases of immovables such as hotel rooms, summer houses, hostels and motels which due to their nature are allocated for temporary use, if the term of the lease is six months or shorter. Disputes concerning whether an immovable is by nature allocated for temporary use will be resolved by the competent judge, in light of the circumstances of the case. Moreover, the Code also foresees the applicability of its provisions to objects left to the use of the lessee. Ovens, dishwashers, heating boilers, furniture, and garages can be provided as examples of such objects <sup>[5, 6, 9, 14]</sup>.

As stipulated under paragraph 2 of the same article, the Turkish Code of Obligations is also applicable to all lease contracts to which public institutions and establishments are party to, regardless of the procedure and principle by which they were concluded. We can remark that in this respect, this provision is parallel with the regulation foreseen under article 14 of the Law on Real Property Leases.

## 4. Termination of housing and roofed workplace lease contracts by litigation due to reasons arising from the lessor

Housing or roofed workplace lease contracts can be terminated by two methods: Notification or litigation. This study will be limited to the examination of the provisions concerning the termination of lease contracts by litigation due to reasons arising from the lessor.

When a lease contract cannot be terminated by notification, the legal relation between the parties can be terminated by litigation. This would be done by filing for an eviction action. Only the lessor can go forward with such a legal action. Litigation due to reasons arising out of the lessor regulated under articles 350 and 351 of the Turkish Code of Obligations is not concerned with the conformity of the lessee's conduct with his contractual obligations. In other words, as long as the conditions set forth under the relevant provisions are satisfied, the legislator has recognized the right to litigation <sup>[5, 9]</sup>.

### 4.1 Reasons of Termination

The lessor may only file legal action and obtain a result if it is proven that the conditions required by the Turkish Code of Obligations have been satisfied. The law foresees only a limited number of circumstances which the lessor may rely upon. This is in order to protect the lessee, who is considered

to be in a more disadvantaged position in contrast with the lessor<sup>[5, 9, 15, 19]</sup>. The basis of the limitedness of the conditions is stipulated under article 354 of the Code entitled "Limitedness of Reasons for Litigation". This article foresees that regulations concerning the termination of lease contracts by litigation cannot be amended to the prejudice of the lessee. Consequently, as stipulated under the article, parties to a lease contract cannot provide for a reason of termination of contract not foreseen by the law<sup>[20]</sup>. Currently, in a case filed against the lessee, the lessor of a house or roofed workplace or a new owner of such property may either rely on necessity or the reconstruction or development of the leased property.

#### 4.1.1 Termination Due to Necessity

Lease contracts may be terminated by litigation due to the necessity of the lessor to use the property as a house or a workplace.

##### 4.1.1.1 Termination of the Lease Contract due to Housing Necessity

In order to claim housing necessity for the termination of a lease contract, the lessor's necessity to use the leased property for himself, his spouse, his descendants, his linear ancestors or for other people who by law he is obliged to support must have materialized. For example, the lessor might himself be subject to eviction from the house he is currently residing as a lessee, he might have suffered certain health conditions and the leased property which is located at the seafront might be more suitable during his treatment period or due to a devaluation in the national currency the leased property might be economically more appropriate for the lessor to live in. When these or similar exigences arise, it is possible to speak of a housing necessity for the lessor<sup>[5, 14, 21]</sup>. Within this context, the legislator has not been satisfied with regulating the lessor's housing necessity but has also given due consideration to regulate the right of the lessor to terminate the lease contract based on the housing necessity of his spouse, descendants and linear ancestor as well as other people who by law the lessor is obliged to support. To this regard, the Turkish Code of Obligations has regulated more extensively the scope of those individuals whose housing necessity might be relied upon in order to terminate the lease relationship in comparison to the Law on Real Property Leases. It can be said that family ties and the traditional lifestyle of Turkish society has been prioritized during the drafting of the Code. Moreover, it can be observed that due consideration was afforded to criticisms on the subject directed at the Law on Real Property Leases which considered usage of the property as a garage, for animals and for storage of valuables as valid grounds for a necessity claim while at the same time refused to recognize the housing necessities of the linear ancestors or collateral kin of the lessor<sup>[4, 11, 15, 22]</sup>. In other words, by adding descendants and linear ancestors to the list of individuals on whose behalf a necessity claim may be brought, the right to terminate the lease contract has been recognized for the housing necessities of the lessor's mother, father, children, adopted children, grandparents, grandchildren and even the children of the grandchildren.

The legislator has taken one more step forward by including other people that by law the lessor is obliged to support. Article 364 of the Turkish Civil Code has identified ancestors, descendants and siblings as those individuals who a person is obliged to support. Since according to Turkish

Code of Obligations the lessor can directly terminate the lease contract by litigation in case of a housing necessity of his descendants and linear ancestors, the concept of people that the lessor is obliged to support by law in fact corresponds to his siblings. While the Code does not require the existence of poverty in case of the spouse, descendants and linear ancestors of the lessor, as expressed in the justification of the law, in order for the provision to be applied for the necessities of the lessor's siblings there needs to be an alimony obligation in the sense of article 364 of Turkish Civil Code. That is to say, the person who seeks assistance alimony must be in threat of declining into poverty if not aided and the relevant sibling must be in a prosperous condition. In line with this regulation, if the lessor has siblings who would decline into poverty unless assistance is provided, he has the right to file an eviction action based on their necessity<sup>[4, 5, 9, 23]</sup>.

On the other hand, the step children of the lessor are not considered within the scope of this regulation. Under paragraph 1 of article 338 of the Turkish Civil Code spouses are under the obligation to show due diligence and concern with regards to their non-adult step children. Yet this obligation does not correspond to people that one is required by law to support within the sense of Article 350 and 351 of the Turkish Code of Obligations. Since the individuals enumerated under the regulation are of limited number, for example, the necessities of an uncle, aunt, father in law, sister in law, partner or fiancée will also not be taken into consideration<sup>[20]</sup>.

In summary, the extension of the scope of individuals whose housing necessity could be claimed in order to terminate a lease contract by litigation would have been contrary to the spirit of the Law on Real Property Leases, since that legislation was specifically regulated with the aim of protecting the lessee. However, this extension is to be considered fairly accurate considering the strong family ties in Turkish society.

With regards to standing in an eviction action based on necessity no distinction has been made between real and legal persons or private and public persons<sup>[6, 15, 20, 24, 25]</sup>. According to article 350 of the Turkish Code of Obligations, the right to terminate the lease contract has been recognized not to the owner but to the lessor of the property. In an eviction case the lessor, the usufructuary or the lessee who has subleased the property would constitute the claimant, while the lessee would be considered the defendant<sup>[4, 5, 11]</sup>. Even if the action is brought due to the necessity of an individual who is enumerated under the Code, such as the lessor's children or father, the lessor will still hold the title of claimant. In other words, the relatives of the lessor do not possess the right to terminate the lease contract by way of litigation. If the lessor is more than one person who are co-owners in common, then the authorization of all title holders is necessary. However, if they are co-owners in shares, a majority decision of the shares and shareholders will be sufficient. Moreover, if there is more than one lessee, since the obligation of eviction and restitution are indivisible, legal action should aim all of them. In addition, if the lessor has more than one property under lease, he possesses the right to choose in directing the eviction action<sup>[5, 11, 13, 20]</sup>.

The second condition required to evoke housing necessity is that the claim should be real<sup>[4, 11, 14, 24, 25]</sup>. The legislator has required this condition so that the lessor does not file an eviction action in order to punish the lessee due to some

personal dispute. To this respect, the necessity must exist at the date that legal action is filed. In case the lessor's necessity to use the property as a house emerges yet by the time eviction action is filed it no longer exists, then the eviction action due to a necessity claim will not be considered sincere. For example, if another house obtained through inheritance satisfies the lessor's necessity or if the lessor leases another property before judicial process begins which would in fact satisfy the necessity then the lessor's claim will not be perceived as reasonable. The competent judge is afforded decisive discretion in determining whether a necessity claim is sincere and real. However, the competent judge will take into consideration the educational backgrounds, health conditions and economic circumstances of the parties. Yet, the lessor carries the burden of proof that a necessity exists [5, 20, 25].

In practice, the Court of Cassation has insisted that in addition to the real and sincere nature of the necessity claim, it should also be continuous and compulsory<sup>[9, 15]</sup>. In fact, the Court of Cassation does not find justifications such as the proximity of the leased property to the lessor's workplace or that the lessor prefers to live in a more impressive house or that the lessor is currently residing in a noisier neighbourhood as satisfactory reasons for filing for an eviction action<sup>[9, 21, 26]</sup>. On the other hand, it is also not possible to bring a case based on a possible necessity which has not yet materialized. However, a claim may be brought for a future necessity provided that its materialization is certain. For example, a necessity claim should not be denied if the lessor has been assigned by work to the city in which the leased property is established but his relocation will take place within three months<sup>[20]</sup>.

The last condition regulated under article 350 of the Turkish Code of Obligations concerns time limits. In case of a fixed term lease contract, the lessor must file an action at the end of the fixed term. In case of an indefinite term lease contract, the lessor must file an action within one month starting from the date determined in accordance with the general provisions set forth for the termination period or the notice of termination. The Law on Real Property Leases did not provide any specific regulation to this respect. The lacuna was filled by virtue of analogy with article 272 of the Bankruptcy and Execution Law<sup>[22, 1]</sup>. In this context, the inclusion of the one-month time limit within the text of article 350 of the Turkish Code of Obligations clearly demonstrates that practice was taken into consideration during the preparation of legislation.

With regards to fixed term lease contracts, an action should be filed within one month from the termination date. This corresponds to a prescription period and the lessor's right to terminate the contract ends with its completion. In fixed term lease contracts, the lessor does not need to send prior notice in order to file an action within this timeframe. However, if the lessor has notified the lessee of his eviction request according to article 353 of the Turkish Code of Obligations, even if the one-month prescription period has passed, the lessor may still bring an eviction claim within a one-year extension period which begins at the termination date of the lease then he may still bring an eviction claim within a one-year. However, this notification which reserves the right to bring action must have reached the lessee before the end of

the prescription period<sup>[9, 11, 14]</sup>. By virtue of this regulation which did not exist in the previous Code of Obligations, if the lessor notifies the lessee that he intends to file an action rather than directly filing an action, the lessor will reserve the right to file an action for a one lease year period and thus benefit from the legal provisions concerning the extension of the time limits. In addition, by way of notification the lease contract is prevented from turning into an indefinite term contract and the lessor gains the right to bring an eviction claim based on termination anytime he so desires. This provision constitutes another evidence that practice has been taken into consideration during the drafting of the legislation. However, if the lessor does not inform through written notice in the sense of article 353 of the Turkish Code of Obligations, accepts without prejudice the first month's payment for the lease after the termination of the lease contract and does not file an eviction action, then, the lessor loses the right to litigate<sup>[11]</sup>.

In fixed term lease contracts, if the lease relation is continued without an explicit agreement between the parties the lease contract becomes an indefinite term leased contract. Under paragraph 1 of article 328 of the Turkish Code of Obligations, in case of an indefinite term lease contract, unless the parties decide on a longer notice of termination term or another termination period, the contract could be terminated in accordance with the legal termination periods and notice of termination terms. In case the lease contract concerns immovable property, according to article 329 of the Code, a termination date shall be determined by notification at least three months prior to the end of the six-month termination period and eviction action should be filed within one month of the termination date which is the relevant prescription period. While the conditions of cause of action will not have been satisfied if there is failure to comply with the termination period or notification terms, the notice will still be considered valid for the following term of the lease. In other words, by use of notification the option to terminate the lease during the following term will be protected<sup>[11]</sup>.

Under paragraph 1 of article 328 of the Turkish Code of Obligations, the starting date of the lease contract is considered the basis of determining termination periods. The claimant carries the burden of proof concerning the determination of the starting date of the lease contract. The claimant may prove his claim by use of all types of evidence such as utility bills, contracts signed with relevant institutions and establishments or testimonies from neighbours. The proof of date is very important in determining whether legal action was brought within the time limits. In case the claimant cannot or does not satisfy the obligation to prove, the starting date of the lease contract will be based on the respondent's statements<sup>[5, 11, 21, 27]</sup>.

The time limits designated under the law aim to protect the lessee from uncertainties. In this context, the time limits under the Code relates to public order, and as such, contracts between the lessor and lessee which foresee the possibility of filing an eviction action before the termination of the contract are not considered to be legally valid. In fact, the competent judge will take into consideration *ex officio* whether or not the relevant legal terms have been respected<sup>[5, 6, 13, 14, 19]</sup>.

<sup>1</sup> Court of Cassation, YHGK, T.11.10.2000, E.2000/6-1256, K.2000/1254, Y6.HD, T.22.03.2011, E.2010/12640, K.2011/3457 "... by virtue of analogy with the Law on Bankruptcy and Execution article 272, eviction actions according to the provisions in articles 7/b-c and ç of the Law on

Real Property Leases No. 6750 must be filed within one month following the termination of the lease contract." <https://www.corpus.com.tr/> (online), 8 December 2018.

#### 4.1.1.2 Termination of the Lease Contract due to Workplace Necessity

In order to claim workplace necessity, the necessity for the lessor to use the leased property for himself, his spouse, his descendants or linear ancestors or for other people who by law he is obliged to support must have materialized. Those individuals who may terminate the lease contract by litigation due to workplace necessity are the same as those who may claim termination of the lease contract due to housing necessity. As such, and in order to avoid repetition, reference the considerations expressed above would be sufficient.

Termination of a lease contract by litigation due to workplace necessity is tied to the condition that the individual who claims such a necessity must exercise a profession or trade. The Law on Real Property Leases required that the individual who claimed workplace necessity should personally execute the relevant profession or trade. This requirement does not appear under the Turkish Code of Obligations. Consequently, according to the Code, the relevant work can either be done personally or with assistance. However, in any case, the work should be clearly indicated. The competent judge has broad discretion in determining whether the workplace necessity is sincere or not. Thus, for example, in case the suggested work requires specific expertise, legal action brought by an individual who does not possess such an expertise will be denied. However, if the work will be conducted through assistance, it would be sufficient for the individual who claims necessity to be able to oversee the work in order to obtain an eviction<sup>[11, 14, 20]</sup>.

In addition to these conditions, the necessity to use the leased property as a workplace must be real. In other words, the lessor's eviction request will be refused if the workplace necessity is not real, sincere and compulsory. For example, the lessor's eviction request will not be accepted if it aims to provide additional work for himself, that is, a second source of income additional to an already existing work. Besides, the leased property must be appropriate for the work that is supposed to take place in that structure. Apart from this, an eviction request will also be denied if the lessor's health condition is not suitable for the suggested work. Examples of an eviction request that would be refused would include a workplace necessity claim brought on behalf of a son who has in fact left the country for long-term studies abroad. Similarly, a workplace necessity claim filed without having taken the necessary steps to obtain the required authorizations and licences for the work from the competent authorities would not be accepted<sup>[5, 9, 21]</sup>. While it is possible to provide numerous additional examples in which workplace necessity claims are not real and sincere, it must be noted that these examples should not be taken as *numerus clausus* and that each case will be considered within the scope of article 2 of the Turkish Civil Code, thus, according to the concrete circumstances of the case<sup>[14, 19, 28]</sup>. To this respect, the competent judge possesses a wide margin of appreciation in determining whether the workplace necessity is sincere. For example, if the lessor needs to use the property as a workplace

even though it is subject to a housing lease contract and the judge determines that the necessity is sincere, then the lessor would be able to terminate the contract by filing an eviction action against the lessee. What would be required in such a case is to show the appropriateness of the immovable for the proposed work<sup>[20]</sup>. According to the Court of Cassation, to accept the existence of a necessity, either the claimant should be under threat of eviction or the leased property subject to eviction should possess superior properties with regards to the realization of the work or the leased property should at least possess equivalent properties as the current workplace. With regards to this latter possibility, it can be observed that eviction claims are accepted on the basis of the supremacy of property rights. To accept the existence of the necessity claim, the satisfaction of either one of the aforementioned conditions would be sufficient<sup>[9, 11, 21, 22, 29, 2]</sup>.

Another factor demonstrating the sincerity of a necessity claim is the fact that it materializes after the conclusion of the lease contract. Since, if an individual was allegedly faced with necessity at the time of the conclusion of the contract and yet the still leased the property, this would demonstrate that his necessity was not real and sincere. On the other hand, if a necessity existed during the conclusion of the lease contract yet it was not claimed at that moment in time, filing an eviction action afterwards would prove that the necessity is not sincere<sup>[20]</sup>.

Finally, the considerations expressed above with regards to the time element in the termination of lease contracts by litigation due to residential necessity are also valid in cases of workplace necessity. Consequently, it is sufficient to remark that in fixed term contracts the lessor must file an action within the one-month prescription period starting from the date of termination of contract. In indefinite termed contracts the lessor must file an action within one month starting from the date determined in accordance with the general provisions set forth for the termination period or the notice of termination.

#### 4.1.2 Termination of the Lease Contract due to Reconstruction or Development of the Leased Property

Like all living beings who have a lifespan, the physical conditions of structures decline with the years that pass. The Turkish Code of Obligations provides the right to terminate the lease contract due to reconstruction or development of the leased property. Reconstruction is the demolition and reconstruction of the structure. In case of reconstruction, a separate intent to develop is not required. Development is providing better circumstances for the structure, making the structure more useful and / or the embellishment of the structure without requiring it to be destroyed beforehand. Development can be realized on the existing structure. In order for the lessor to bring an eviction claim against the lessee according to paragraph 2 of article 350 of the Code, either the lessor must aim to reconstruct the leased property, or any reparation, extension or modification for the development of the leased property must be of a major

<sup>2</sup> Court of Cassation, Y6. HD, T.25.03.2002, E.2002/1933, K.2002/2064; Court of Cassation, Y6.HD, T.16.11.2015, E.2015/7429, K.2015/9890: “[...] for eviction actions filed due to workplace necessity according to article 350/1 and 351 of the Code of Obligations, if the person in necessity is under lease, in order to accept the existence of the necessity, the person in necessity must be under threat of eviction or the leased property must have superior properties with regards to the work to be conducted, or at least must have equivalent properties as the premise in which the work is already being conducted. In case of equivalence of properties superiority

*must be recognized to property rights. The existence of one of these two situations is sufficient to accept necessity. These to situations do not have to co-exist. If eviction threat has not been claimed by the claimant, it will not be taken into consideration by the court. However, even if the superior priorities of the leased property in comparison to the existing workplace has not been claimed, since this issue resides within a necessity claim the Court should determine this situation by virtue of comparison after making use of an expert discovery.”, <https://www.corpus.com.tr/> online, 8 December 2018.*

character<sup>[5, 9, 13, 14, 21, 25]</sup>.

According to the deep-rooted jurisprudence of the Court of Cassation, when technically or in consideration of the necessities of the lessor, it is not required to repair, extend or modify the leased property or transform into a workplace the property which was leased as a house, reparations conducted with the sole aim of improving the value of the house / workplace are considered as not entailing the application of paragraph 2 of article 350 of the Turkish Code of Obligations since there no purpose to develop<sup>[5, 11, 13, 20]</sup>.

Another condition required for the lessor to file an eviction action concerns the impossibility to live inside the leased property during the reparation, extension or modification work. Within this context, minor modifications would not be considered within the scope of the regulation<sup>[21, 30, 3]</sup>. Consequently, in order for the lessor to file an eviction action based on development, the planed repair, extension and modification of the structure must be of a major character. Minor modifications would be considered under article 319 of the Turkish Code of Obligations, thus entailing the applicability of temporary eviction measures. In any case, impossibility of use of the leased property is determined with the help of experts<sup>[5, 15, 21, 23]</sup>.

In addition, a submitted project and licence for reconstruction or reparation must be technically and legally applicable to the premise. The project may be submitted during the case. It is not necessary to have obtained a construction permit before the case, a confirmed preliminary project would be sufficient to file an action to terminate the lease contract<sup>[9, 14, 15, 19, 31, 4]</sup>. According to article 350 of the Turkish Code of Obligations, the right to bring an eviction claim resides with the lessor, whom will thus gain the title claimant. When co-ownership in shares is in question, considering that under article 691 of the Code reconstruction is considered as a work of extraordinary governance, unanimity is required in order to file an action. However, in case of a major reparation, extension or modification with the aim of development, a majority of shares and shareholders would be sufficient<sup>[11, 20]</sup>. The time limits are the same as those foreseen for eviction actions due to necessity. Consequently, in fixed term contracts the lessor must file an action within the one-month prescription period starting from the date of termination of contract. In indefinite termed contracts the lessor must file an action within one month starting from the date determined in accordance with the general provisions set forth for the termination period or the notice of termination<sup>[11, 20]</sup>.

#### 4.1.3 Due to the necessity of the new owner

As a general rule, contracts establish relative obligations between the parties. However, article 310 of the Turkish Code of Obligations entitled handover of leased property is an exception to this rule. If for a reason the leased property is transferred to a third party after the establishment of the lease contract the new owner of the property will become party to the lease contract. If this provision did not exist, the new owner of the leased property would not be bound by the contract concluded between the previous owner and the lessee. As it was during the period in when the Code of

Obligations was applicable, the lessee would be damaged due to this situation. To this respect, thanks to the new regulation, the principle that the sale of the property cancels the lease contract, as it was applied under the previous legal regime, has lost its validity<sup>[32]</sup>.

The legislator has not only regulated the acquisition of the property as one of the reasons for termination of contract but has also recognized the right of the new owner to file an action for eviction due to necessity, either for himself or for those individuals stipulated under the Turkish Code of Obligations. In other words, the exception to article 310 of the Code has been regulated under article 351. Within this context, unlike article 350, article 351 is based on the new owner and not the lessor. The acquisition of the leased property may be based on various reasons. For example, the leased property may have been acquired through out of registry means such as court order or compulsory execution or legal title may have been obtained through derivative acquisition such as through a sale or donation. The term acquisition at this point has a wider meaning than “procurement of a property right” or “owner”. In addition to an individual who procures property rights over the leased property, individuals who have obtained usufruct title or a right of occupancy may benefit from this article. However, someone who has only acquired *nuda proprietas* may not file an action<sup>[5, 11, 13, 21, 33, 34]</sup>.

In order to file an action, registration of the property at the land registry is not relevant. When the leased property (house / workplace) is under co-ownership in common, the question may arise whether the new owner may use this right based on necessity. In such a case, the new owner may file for an eviction action as long as he has achieved share and shareholder majority<sup>[9, 21, 33, 35]</sup>.

In other words, under article 351 of the Code of Obligations, the legislator has recognized the right to terminate the lease contract to the new owner six months after the acquisition of the property, provided that he has notified the lessee within one month of acquiring the house/ workplace. In this case, legal action filed by a person who has acquired the leased property before six months have passed would be refused. With this regulation the lessee is afforded the possibility to find a new immovable to move to before eviction.

In case the person who has acquired the leased property does not want to be bound by the existing lease, he must send a written notice to the lessee within one month of the acquisition. Written notice as it appears under article 351 of the Turkish Code of Obligations used to be regulated as a protest under the Law on Real Property Leases. Taking into consideration that this action was in fact a declaration of intention, under the Code, the legislator preferred to use the term written notice instead of protest. However, this notification must absolutely be in written form<sup>[13]</sup>.

Since the one month written notice period will start from the moment of acquisition, the beginning of this time limit will change depending on the legal transaction which allowed for the acquisition. For example, a new owner who has acquired the property by mean of compulsory execution must, according to article 705 of Turkish Civil Code, send a written

<sup>3</sup> Court of Cassation, Y6. HD, T.25.03.1996, E.1996/2581, K.1996/2838: “[...] It is evident that the removal of a wall and the modification of the floor in the leased property are not major and do not aim development. For this reason, refusal of the case should be decided.”

<sup>4</sup> Court of Cassation, Y6. HD, T.21.01.2008, E.2007/10608, K.2008/321: “[...] it is desired that the current situation would fit the original

*architectural project by virtue of a fire detection and extinction project, a major modification and a reparation. Since a major modification and reparation project has not been submitted, the current case involves temporary eviction. However, rather than a temporary eviction case this case has been opened as a major reparation case. As such, the admission of the case is not found to be correct.”*

notice to the lessee within one month from the tender date. The new owner must openly inform the lessee via written notification of his ownership of the property and his eviction request <sup>[4]</sup>.

While under paragraph 1 of article 351 of the Turkish Code of Obligations the right to terminate the contract before its termination date has been recognized to the new owner, annotation of the contract would constitute an exception to this rule. In other words, reliance on article 351 by the new owner depends on the fact that the lease contract was not annotated to the land registry. According to article 312 of the Code, in immovable leases the right to lease of the lessee can be agreed upon by annotation at the land registry. The previous regulation under paragraph 2 of article 255 of the Code of Obligations according to which new owners were bound by the lease agreement in case of acquisition of an immovable which was annotated was not adopted under the Turkish Code of Obligations. However, article 1009 of the Code explicitly recognizes that annotation can be claimed towards anyone who gains new rights on the said property. As such, the new owner should not be able to terminate the lease contract according to article 351 of Code. In fact, the function of annotation of housing or roofed workplace lease contracts is specifically to prevent legal action based on article 351 <sup>[20]</sup>.

Another exception preventing legal action by the lessor under article 351 involves the acquisition of a naked property which includes a usufruct or construction right. It is obvious that eviction action due to necessity filed by someone who does not possess the right to use the property is not real and sincere. Moreover, eviction action due to necessity is not possible even if the lessor has later acquired the property of that immovable. As required by the principle *pacta sunt servanda*, he will be bound by the lease agreement <sup>[20]</sup>.

Under paragraph 2 of article 351 of the Turkish Code of Obligations the legislator has also foreseen for the new owner the right to bring action due to necessity within one month of the termination of the lease contract. In case there is less than six months left for the termination of the contract, it is certain that the individual who has acquired the property has more interest to go with the legal remedy found under paragraph 2 of article 351. At this point, it is important for the person who has acquired the property to clearly specify in the notification sent to the lessee which legal remedy he has chosen, whether it be that foreseen under paragraph 1 or paragraph 2 of article 351. Since the lessee will settle his own plans according to this notification, a change in the means chosen by the lessor after the delivery of the notification would be considered to amount to an abuse of rights <sup>[20]</sup>.

A final remark on this subject would be that in case the six-month period beginning from the date of acquisition corresponds to a date after the lease period, this would not terminate the lessor's right to litigation. For example, even if a lease agreement concerning an immovable acquired on the 1<sup>st</sup> of January 2018 ends on the 1<sup>st</sup> of March 2018, the lessor may go to litigation until the 1<sup>st</sup> of March 2019. Because, paragraph 2 of article 351 of the Turkish Code of Obligations only provides the lessor with an opportunity and as such, this provision cannot be interpreted as requiring an eviction action to be brought within one month of the termination date, which in our example would correspond to the 1<sup>st</sup> of March 2018.

#### 4.2. The consequences of the termination of the lease contract due to reasons arising from the lessor

In disputes concerning lease contracts, the courts of the respondent's place of residence or the place of execution of the contract have jurisdiction and the competent court is the civil court of peace. There are different opinions concerning whether the action for the termination of the lease contract is declaratory or constitutive in nature. According to the first view, the nature of the court's judgment is that of performance with regards to achieving restitution of the leased property and constitutive with regards to termination of the lease contract. The date of termination of the lease contract is the date in which the court's judgment becomes final <sup>[5, 8, 9]</sup>. In other words, according to this view, the lease contract does not terminate with the filing of the eviction action but terminates with the court's judgment. To this respect, the court judgment is of constitutive nature. According to another view, the lease contract terminates with the filing of legal action. To this respect, the competent judge's decision is declaratory in nature. For this view, since the lessee is not in a position to know whether the claimed necessity is sincere or not, the lessee cannot be characterized as a possessor *mala fide*. For this reason, as a rule, the lessee would not be obliged to pay adequate pay or compensation, but due to the *de facto* continuation of the lease relation, would be obliged to pay a certain amount corresponding to the rent <sup>[20]</sup>.

Another consequence of the termination of the lease contract due to reasons arising from the lessor is the prohibition to re-lease. Article 355 of the Turkish Code of Obligations provides a priority right to the evicted lessee to re-lease the previously evicted property. In case the lessor has evicted the leased property due to necessity, in lack of a just cause, the relevant property may not be leased before three years have passed to anyone else but the former lessee. A similar provision existed under the Law on Real Property Leases, however, it used the term *force majeure* instead of just cause. According to the provision under the Turkish Code of Obligations, for example, in case a lessor had the leased property evicted due to the necessity of his daughter but later lost her daughter due to an unfortunate airplane accident, the loss would be considered as a just cause and in the context of this example the prohibition to re-lease would cease. In such a case, the lessor may lease the property to a third party. However, the fact that the previous lessee is currently residing in another house could not be used as an excuse to violate the prohibition to re-lease.

Under the final paragraph of article 355 of the Turkish Code of Obligations, the legislator has not ignored to regulate sanctions in case the lessor violates these provisions. Accordingly, violation of these provisions would result with the obligation to pay compensation to the former lessee, amounting to a sum not less than one-year worth of rent paid during the final year of the lease. This one-year worth of rent is foreseen as the lower limit. The fact that the damages incurred by the lessee amount to a lesser amount would not change the outcome. The lessee may demand this amount even if he has concluded another lease contract much under that sum. Since this provision aims to punish the lessor, a balance between damage and compensation need not be observed. Concerning the claim for compensation, there is no difference between the lessee having willingly evicted the

property upon the request of the lessor and his eviction through enforcement of execution<sup>[20]</sup>. This regulation differs from the regulation that existed under the Law on Real Property Leases which foresaw criminal sanctions in case of violation of the prohibition to re-lease and it can be easily said that the new regulation is critically more accurate since under article 38 of the Constitution it is not possible to render a sentence limiting personal liberty due to the non-execution of a contractual obligation. Consequently, no one can be deprived of their liberty for the sole reason of non-execution of contractual obligations. Thus, the new provision is in harmony with the Constitution, since the sanction for the violation of the prohibition to re-lease has is explicitly limited to compensation.

As stated earlier, according to paragraph 2 of article 355 of the Turkish Code of Obligations, immovables which have been evicted due to reconstruction and development cannot be leased to someone else in its former state before three years unless there is just cause. The sanction for a violation of this prohibition is parallel to those considered for eviction actions due to necessity. However, when reconstruction or reparation, expansion or modification is involved, it cannot be denied that the immovable in questions would experience an increase in value. Consequently, the lease price of the property will experience a proportional increase. Under the above cited provision of the Code the former lessee has a priority right deriving from law according to which he may re-lease the property subject to reconstruction and development under the new situation and new lease price. Unless the lessor fulfils his written notice as is required under law, or in other words, unless this priority right is not terminated, the lessor may not lease the property to someone else for three years. In accordance with the rules of honesty, the lessor must inform the lessee by written notice in the shortest possible time on the new lease price and ask whether the lessee would want to re-lease the property. The lessee must transmit to the lessor his answer within one month from the receipt of the written notice declaring whether he will use his priority right or not. If the lessee does not respond in a positive way within the one-month time frame, he will lose this priority right<sup>[4]</sup>. However, an exception is foreseen if the lessor personally uses the leased property or sells the immovable to a third party an exception. In such a case the lessee no longer possesses a priority right<sup>[20]</sup>.

If the new owner terminates the lease contract according to paragraph 1 of article 351 of the Turkish Code of Obligations without waiting for the expiration of the contract, the lessee may claim compensation from the former owner for having caused an early termination. Taking into consideration that the former owner was the holder of the right to transfer the property, his conduct gave rise to a violation of the lease contract and as such he may be considered to be in gross fault. According to article 51 of the Code the competent judge will determine the scope of the compensation and the method of payment according to the circumstances of the case and specifically taking into consideration the gravity of the fault. Within the scope of the compensation claim the lessee may demand moving expenses, difference between rents, loss of income, furnishing expenses and judicial expenses. However, litigation against the former owner is only valid in case the new owner evicts the lessee according to paragraph 1 of article 351 of the Code. In case the new owner evicts the lessee according to paragraph 2 of the same provision, then the former owner does not bear responsibility to compensate.

Moreover, it must not be forgotten that during the initial conclusion of the lease contract it is always possible for the parties to agree upon a penal clause in case of sale to a third party.

## 5. Conclusion

This study has focused specifically on article 350 and 351 of the Turkish Code of Obligations concerning the termination of lease contracts by "Litigation due to Reasons Arising from the Lessor". In the previous regime, certain subjects which had not been regulated under the Code of Obligations were regulated under the Law on Real Property Leases. The existence of two distinct regimes had raised conflict of law disputes. In order to circumvent this situation, the Law on Real Property Leases was abrogated, and all existing provisions on the subject were gathered under the division of the Turkish Code of Obligations on housing and roofed workplace leases, thus regulating the issue under a single legal framework. It is decidedly accurate that these provisions which are of great importance and which involve society closely have been transferred within the framework of a fundamental law such as Turkish Code of Obligation. Thanks to this development, it has been possible to terminate the dualist framework of Turkish lease law.

In preparation of the regulations foreseen under the Turkish Code of Obligations issues arising out of the application of the Law on Real Property Leases, jurisprudence, legal scholarship and established practice was taken into consideration. For example, before the adoption of Code, in determining the time limits concerning legal action based on necessity article 272 of the Bankruptcy and Enforcement Law was relied upon by analogy. With the adoption of Code this established practice was afforded a positive law basis. Moreover, the scope of individuals who could claim necessity was extended. Unlike the Law on Real Property Leases, individuals who could claim necessity of housing according to the Code was foreseen as encompassing descendants, ancestors and other people who must be supported due to legal obligation. While such a regulation would be contrary to the spirit of the Law on Real Property Leases, within the context of Turkish society in which family ties are especially strong, this is a welcome modification. In fact, this law which includes regulations on the most fundamental requirements of individuals who form society cannot be conceived remote from the exigences, problems and requirements of individuals. However, while the legislator has extended the rights of the lessor, it has not neglected to include provisions aiming to balance the legal interest of the parties. The regulations which foresee the non-modification of the provisions of the lease contract concerning termination by litigation to the prejudice of the lessee and the prohibition to re-lease clearly demonstrate that the balance between the legal interest of the parties has been protected. In light of the considerations above, it can be determined that the current rules and principles correspond to modern and purposeful provisions and the regulation of housing and workplace leases under a single legislation, specifically by virtue of a fundamental law is appropriate.

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