



# SHOPPING CENTRE LEASE CONTRACTS: A PAN EUROPEAN OVERVIEW



## ABOUT ECSP

The European Council of Shopping Places provides a European voice for an industry that designs, creates, funds, develops, builds and manages places anchored by retail across Europe. Its members are a catalyst for sustainable urban regeneration and represent an important civic function in virtually every European community. For more information, please visit [www.ecsp.eu](http://www.ecsp.eu)

## FOREWORD

ECSP's Legal Working Group together with colleagues around Europe has developed an overview of the main terms in leasing contracts used in shopping centres in thirty-six countries.

The report<sup>1</sup> takes into account both legal requirements and standard practice. By filling a critical knowledge gap within the sector, the report enables retail professionals, policymakers, and government authorities to compare and contrast approaches within different European markets.

It seeks to facilitate a better understanding between different stakeholders to identify best practice in drafting leasing contracts and supports the development of a coherent and harmonised legal framework for the retail property sector.

Our thanks to everyone who contributed. This document would not exist without your commitment and support.

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<sup>1</sup> This document does not constitute a legal advice and should not be relied upon as such.

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# GENERAL COUNTRY TEMPLATE

By

*Insert name*

*Insert company name*

*Insert city*

## Preliminary Remarks

This section aims to provide a legal framework of the legal platform applied to lease contracts in the jurisdiction covered.

### 1. TERM

#### 1.1 Contractual Term

In some jurisdictions, for example England and Wales, the contractual term could theoretically be of almost any length but the intention here is to indicate what is typical market practice in a Shopping Centre.

#### 1.2 Break Rights

Where contractual lease terms are substantial, it is quite common in a number of jurisdictions for one party or the other or both to have a right to terminate early. Again each report will summarise typical arrangements for the particular jurisdiction.

#### 1.3 Renewal Rights

Statutory rights of renewal exist in different forms in a number of jurisdictions and these will be summarised. Occasionally leases will also have rights of renewal or a right of pre-emption which have been negotiated on a contractual basis, especially where statutory rights do not exist.

#### 1.4 Disputes and Forfeiture

### 2. RENT

2.1 The law and practice relating to rents payable by a Tenant to a Landlord vary considerably from jurisdiction to jurisdiction. In England and Wales, it is common for leases to separate a net rent payable to the landlord from other "rents" intended to reimburse the Landlord for expenditure relating to repairs of common parts, provision of services to the Centre and insurances. In other jurisdictions, the Landlord is obliged by statute to bear some [or all] of these costs within the rental charged and contractual provisions to the contrary will be invalid. Also rents may in some cases be linked to open market values, while in other cases rent is related to the sales turnover of the shop in question. Are there any VAT considerations on rent e.g. Germany and Belgium?

2.2 Because of these wide variations in practice this topic has been divided into subjects entitled "Principal Rent" and "Turnover" but it is also relevant to refer to section 8 "Service Charge". What is the market position on including online sales within turnover?

#### 2.3 Rent Review

In this section, each report seeks to deal with the mechanisms by which rents may become adjusted during the term of the lease, whether through indexation, market revaluation or adjustment of the base rents applicable in turnover rent leases.

#### 2.4 Procedures to recover unpaid rent

This section should consider how Landlord's can recover unpaid rent ? Are there any alternative approaches to court process permitted or required by a market lease agreement e.g. ceasure of tenant goods or termination provisions? Are there any guarentees or rent deposits available for recovering arrears?

### 3. PREMISES

#### 3.1 Extent of Demise

The definition of the shop premises to be let is not just a matter of identifying which unit a tenant may occupy. It can also determine the extent and cost of various contractual obligations, such as obligations to repair, maintain and insure, which may be tied very closely to the definition of the premises. Market practice differs considerably from jurisdiction to jurisdiction, and may even vary significantly from Centre to Centre within a given jurisdiction.

#### 3.2 Extent of the Shopping Centre

Again, a description of what constitutes a Shopping Centre may well have a significant impact on the financial obligations of the parties, either in terms of a primary obligation to repair and maintain, or in terms of the cost of service charge or other reimbursements to a Landlord. In many jurisdictions, it has become common practice to define the Centre as including any future extension, subject to appropriate formulas for adjusting the calculation of service charge as and when an extension is created.

#### 3.3 Common Parts

Quite apart from defining the extent of obligations to repair and maintain a Centre, it is important to establish the extent to which Tenants of a unit (and their customers) can use other parts of the Centre. Some common parts may need to be reserved exclusively for centre management purposes. Can Landlord's use the common parts for commercialisation?

#### 3.4 Rights Reserved by Landlord

Landlords will always require a number of rights to enable them to maintain a centre in good order over time, including the right to close certain areas for repair and some rights to extend or alter the centre. On the other hand, there are generally laws or contractual provisions which will limit the exercise of those rights where they are seen to have an unduly adverse impact on the Tenant's business. Landlord's may have rights to enter in certain scenarios, for example, checking the tenant complying with tenant covenants.

### 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

The fluctuations in the retail market make it increasingly desirable for individual Tenants to be able to dispose of or sub-let all or part of their premises. On the other hand, the identity of tenants and the maintenance of a good retail mix in a Centre, is important in maintaining the attractiveness of the Centre as a whole and the value of Landlord's investment. Achieving a balance between the interests of the respective parties is dealt with in a wide variety of ways, even within a single jurisdiction, and there is even greater divergence when one compares the market practices in different jurisdictions. This section is divided for ease into three sub sections:

4.1 **Assignment**, that is the ability to dispose entirely of the lease to another Tenant;

4.2 **Underletting**, which means the Tenant does not escape the terms of the lease but is able to pass on the obligations relating to all or part of the premises to a sub-tenant; and

4.3 **Sharing occupation**, which may arise in a variety of circumstances; for example, a corporate Tenant may wish to allow a subsidiary or associated company to trade from the same premises; a department store may wish to allow an independent fashion retailer to use a designated area in the department store under an independent brand name; or a book shop may wish to licence an independent coffee shop to operate within its premises. Such circumstances are dealt with in a variety of ways in different jurisdictions.

4.4 **Change of control**, whether restrictions on change of control are usual in a market lease agreement and what are the benefits?

## 5. ALTERATIONS/REPAIR

Tenant's have a variety of practical or promotional reasons why they may wish to make alterations in any given shop, including simply to adhere to a new brand image adopted by a multiple retailer in all its outlets. At the same time, the Landlord is concerned to control alterations for a variety of estate management reasons, including minimising nuisance to other Tenants, protecting the structural integrity of the centre and seeing that all works are properly insured. This section deals with alterations, fitting out, signage and repair and decoration. Who is responsible for statutory requirements to carry out alterations e.g. energy efficiency improvements, entry for disabled persons (e.g.DDA) ? Are there any standard contractual arrangements in relation to who owns the tenant's fit out works?

## 6. TRADING

- 6.1 This section deals with the issue of whether a Tenant can be obliged to keep open for trade, which the Landlord will regard as being important for maintaining the Centre's image as a lively retail destination. Does the landlord have a right of enforcement and/or are there any financial penalties or incentives on the tenant to comply?; and
- 6.2 The use of trading names, given that major Tenant's frequently re-brand and rename themselves.
- 6.3 Can the landlord control the Tenant's opening hours? Does the tenant have to comply with any Tenant handbooks or house rules?
- 6.4 Competition rules – is it usual for there to be prohibitions on the Landlord letting to competitors? To what extent can the Landlord restrict the business activity of the Tenant (for example user restrictions or radius)?

## 7. INSURANCE

The ability to insure buildings against various risks will vary not only from country to country but from region to region and this section is split into two sub sections:

### 7.1 Insured risks

Risks that can or should be insured, and

### 7.2 Uninsured risks

This summarises the treatment of risks which are uninsurable. Provisions on this topic has become more common in locations where terrorism is an issue. Would this extend to pandemics?

### 7.3 Business insurance

What other insurance policies would a landlord and/or tenant take out in the context of its occupation (e.g business interruption insurance)? What circumstances do they pay out in?

## 8. SERVICE CHARGE

As mentioned above, service charge arrangements may need to be considered in conjunction with provisions for rent. For example, certain elements of expenditure on a Shopping Centre which an English Landlord would typically seek to recover by way of service charge will not be recoverable by a Landlord in Germany, who will be expected to meet those expenses out of the rental reserved by the lease. In this section, service charges are dealt with under three sub headings:

### 8.1 Typical regime;

### 8.2 Promotions and marketing; and

### 8.3 Tenants associations.

From the Tenant's point of view, it is important that services are carried out on an economical and efficient basis and, from the Landlord's point of view, services should be carried out to a standard which maintains an attractive and high quality environment throughout the Centre.

## 9. GREEN LEASE

Does the market lease in the jurisdiction include provisions requiring the parties to share of data on the consumption of utilities, energy performance etc. and are these on the landlord's terms?

## 10. FORCE MAJEURE AND COVID

This section should consider the changes in the standard lease or lease interpretation as a result of Covid events. Is there a legal concept of hardship? Is Covid a force majeure event under the lease – does rent continue to be payable? Does the law allow the lease agreement to be varied or renegotiated? Are there any existing or new pandemic laws arising e.g. Austria.

## 11. OTHER POINTS TO NOTE

- 11.1 In this section, the author of each chapter draws attention to special points which have not been addressed elsewhere and may also give an overview on whether government policy tends to favour the Landlord or the Tenant. It may also draw attention to codes of practice which have been promulgated by national trade bodies concerned with shopping centres.
- 11.2 Tenant ESG data: can a Landlord require a Tenant to provide data information related to business operations and the products sold.
- 11.3 Money laundering: does money laundering legislation impose duties on the landlord to provide information, and should the tenant's duties to provide information be regulated in the lease?
- 11.4 Terrorism and security: Is it necessary to oblige the tenant under the lease to support security exercises and to participate actively?
- 11.5 Prescribed form: Are there any form of lease requirements? For example, in the UK there are land registry prescribed form requirements for registerable leases.

# AUSTRIA

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## Preliminary Remarks

Austrian law differentiates between two types of leases, i.e. the lease of premises (*Miete*) and the lease of an enterprise (*Pacht*). The vast majority of leases are qualified as a lease of premises (*Miete*), however under certain circumstances leases in shopping centres are qualified as a lease of an enterprise (*Pacht*). The main consequence of this differentiation is that the tenant of premises can benefit from certain protections provided by mandatory law, particularly with regard to the termination of the lease by the landlord. The landlord can terminate a lease of premises concluded for any indefinite period of time only if one of the conditions for termination provided by mandatory law is satisfied.

The Austrian Tenancy Act (*MRG*) applies to leases of premises. As shopping centres are normally built on provision of a building permit issued after 30 June 1953 the application of the *MRG* is restricted to the mandatory provisions granting the tenant of a lease of premises for an indefinite period of time protection against termination without cause.

With regard to the terms specified below we presume that the lease is a lease of premises subject to the limited scope of application of the *MRG*.

## 1. TERM

### 1.1 Contractual Term

The leases are generally for a fixed term period. To be enforceable the agreement has to be in writing and the lease has to expire at the end of the fixed term due to the lapse of time.

The fixed term is normally for a period of 5 to 10 years. Leases with anchor tenants may have longer terms.

### 1.2 Break Rights

Tenants often benefit from the possibility of break rights after a couple of years. Break rights in favour of landlords are unenforceable.

### 1.3 Renewal Rights

There are no statutory rights of renewal. Leases often contain renewal options in favour of the tenant for additional fixed terms.

## 2. RENT

### 2.1 Principal rent and turnover rent

Turnover rent is a percentage of the turnover generated by the tenant of the lease combined with a minimum amount of fixed rent. The landlord may subject the rent to VAT only if the tenant uses the object of the lease for the sale of goods and/or services that are almost entirely (minimum of 95%) subject to VAT.

### 2.2 Definition of turnover

The definition of "turnover" is usually wide and includes online sales generated by the tenant from the object of the lease.

### 2.3 Rent Review

The fixed rent is linked to the consumer price index. Market revaluation of the fixed rent is rare.

## 2.4 Procedures to recover unpaid rent

Security deposits/bank guarantees covering at least 3 months rent are required.. Otherwise court proceedings are necessary to recover unpaid rent. The landlord has a statutory lien over the goods owned by the tenant and brought into the lease object. Arrears of the lease payments for more than one rental term (normally one month) entitle the landlord to terminate the lease. The tenant can avoid such termination of the lease under certain circumstances i.e., if the tenant repays the entire outstanding rent before the end of the trial court proceedings.

## 3. PREMISES

### 3.1 Extent of Demise

The definition of the shop premises is normally clearly defined on a plan attached to the lease. The tenant is responsible for the maintenance, repair and often even the renewal of the object of the lease.

### 3.2 Extent of the Shopping Centre

Leases contain a description of the entire shopping centre and references to future extensions are rare. The obligation of the repair and maintenance of the common parts is with the landlord. The costs are therefore charged to the tenants by way of a service charge.

### 3.3 Common Parts

Common parts may be used by the tenants and their customers on a non-exclusive basis. The use of (a certain area) of the by the tenant for the display of goods requires a specific right in the lease.

### 3.4 Rights Reserved by Landlord

Due to the statutory protection for the tenant against termination of the lease without good cause, the clauses in the lease entitling the landlord to interfere with the use of the object of the lease by the tenant, i.e. relocation clauses, run the risk of being unenforceable.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

Normally, assignments are rare, except for the assignment to a new tenant from the same group of companies as the original tenant.

### 4.2 Underletting,

Normally, underletting is prohibited except for a sub-lease to a company from the same group of companies as the tenant, under leases for “shop in shop concepts” and restricted to a very small portion of the object of the lease.

### 4.3 Sharing occupation

See above under underletting.

### 4.4 Change of control

Change of control clauses are not usual in market leases.

## 5. ALTERATIONS/REPAIR

The tenant is not restricted with regards to alterations or repairs to the internal areas of the object of the lease. However, the use of its external areas including its signage is regulated in the lease subject to any changes to the landlord’s approval, not to be unreasonably withheld.

If the tenant’s fit out construction work are legally inseparable from the centre itself the landlord by operation of law will become the owner of it.

## 6. TRADING

### 6.1 Obligation to operate

It is common for leases to provide an obligation on the tenant to operate its premises during the opening hours of the centre. Often there are financial penalties agreed for a breach of this obligation.

### 6.2 Competition rules

There are often some tenants that benefit from an obligation on the landlord not to let the premises to any competitors of the tenant. Radius clauses are, except for certain centres, rare and its enforceability depends on the effect on competition of the respective clause.

## 7. INSURANCE

### 7.1 Insured risks

There is a broad range of insured risks including insurance against terrorist attacks..

### 7.2 Business insurance

Business interruption insurances are rare.

## 8. SERVICE CHARGE

### 8.1 Typical regime

The tenant usually has to bear its portion of more or less all expenses incurred by the landlord in connection with operating the shopping centre.

### 8.2 Promotions and marketing

Tenants often have to contribute a specific amount per square meter, whereby anchor tenants or tenants with larger spaces are either exempt or contribute with a lower amount per square meter.

### 8.3 Tenants associations

Some centres request that promotions and marketing are the responsibility of the tenants' associations.

## 9. GREEN LEASE

As a relatively new phenomenon landlords implement such green lease provisions into leases and in most cases on a best effort basis for the tenant.

## 10. FORCE MAJEURE AND COVID

A direct interference by the authorities on the use of the object of the lease as a consequence of COVID-19 is the prohibition on customers to enter the leased object. This entitles the tenant to mitigate the rent and service charges appropriately. It is at issue whether the hardship caused by the COVID-19-pandemic irrespective of such direct interference by the authorities entitles the tenant to mitigate the rent and service charges.

## 11. OTHER POINTS TO NOTE

### 11.1 Government policy

Government policy tends to favour the tenants

### 11.2 **Tenant ESG data**

A landlord cannot require a tenant to provide data information related to business operations and the products sold, unless there is a specific provision in the lease.

### 11.3 **Money laundering:**

Money laundering legislation imposes certain duties in this respect on real estate agents.

### 11.4 **Terrorism and security:**

It is necessary to oblige the tenant under the lease to support security exercises and to participate actively.

### 11.5 **Form of lease requirements:**

There is no form of lease requirements. The lease can be concluded by an oral agreement as well. The agreement on a fixed and enforceable term of the lease has to be in writing.

## AZERBAIJAN

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### Preliminary Remarks

A lease is the temporary possession and use of property, land and other natural resources on a contractual basis, with compensation.

Commercial leases are regulated by the Civil Code of the Republic of Azerbaijan (the “Civil Code”), the Law of the Republic of Azerbaijan On Land Lease, and other normative legal acts, as adopted in accordance with the ones as above.

A lease agreement is an agreement on the lease of property, according to which the Landlord transfers to the Tenant the right to use the leased object and the right to use and gain profits from it; and in exchange the Tenant is obliged to pay to the Landlord the lease fees as stipulated under the lease agreement. Objects of lease may be land plots, buildings, moveable items, rights and enterprises. Although there are common provisions that are applied to all objects of lease, there are special provisions are also considered in order to apply to real estate objects.

### 1. TERM

#### 1.1 Contractual Term

The term of the lease agreement may be entered into either for a definite, or for an indefinite period. The lease agreement without a term specified therein is deemed entered into for an indefinite period.

#### 1.2 Break Rights

Non-judicial procedure: upon expiration of the definite term of the lease agreement and absence of the parties’ willingness for renewal thereof or earlier termination at a request of one of the parties, as may be set forth by the lease agreement. Termination of a lease agreement with an indefinite term is allowed only at the end of the year and only subject to 6 months’ prior notice.

Judicial procedure: if one of the parties to the lease agreement breaks the provisions of the lease agreement, court may dissolve relations between the parties at request of the other party.

#### 1.3 Renewal Rights

Either party to the lease agreement shall have a right to renew it upon expiration thereof. In case of no offers by one of the parties on amendments and termination of lease agreement, the lease agreement shall be deemed extended for the same period and with same conditions. The lease agreement may be extended for a different new term, as may be agreed between the parties.

#### 1.4 Disputes and Forfeiture

The parties to the lease agreement shall bear legal and material liability in accordance with the legislation of Azerbaijan for violation or improper performance of obligations arising from the lease agreement. The parties shall, within reasonable period of time, attempt to resolve any disputes or disagreements arising out of or in connection with the lease agreement or any breach of the provisions thereof through the pre-trial procedure. If such attempts were not helpful to resolve the dispute or disagreements cannot be resolved through the pre-trial procedure, the Parties may exercise their right to appeal to the relevant court of the Republic of Azerbaijan.

### 2. LEASE FEES

#### 2.1 Basic Lease Fees

The parties may agree within the lease agreement any options for payment of lease fees. In the practice, most of the time the lease fees are calculated per square meters of the leased area and are paid monthly.

## 2.2 Additional Lease Fees

In addition to the basic lease fees, the Landlord usually charges the Tenant additional lease fees for the services on maintaining common areas, cleaning the territory of the Shopping Centre, maintaining security, marketing, activities, management fees, etc. Tenants' consumption of utilities is usually measured by separate meters and is also paid in addition to the basic lease fees.

The lease agreement may also contain a requirement to the Tenant to pay a security payment to the Landlord.

## 2.3 VAT

Leasing out property is generally subject to VAT. To calculate the VAT, the Landlord multiplies the lease fees by 14%. Where the Tenant is a legal entity and/or the state or an individual is acting as a Landlord, then VAT is paid by the tax agent (the Tenant). Also, if the security payment under the lease agreement is counted toward the rent, then its amount is subject to VAT, since these monies carry not only the security, but also an advance payment function.

## 2.4 Turnover

Landlord may require the Tenant to pay percentage of the turnover generated through the leased object in addition to the fixed part of the basic lease fee under the lease agreement. This is a purely commercial issue and the legislation of Azerbaijan keeps silence on this.

## 2.5 Rent Review

It is common market practice to stipulate a yearly indexation of rent payments. Such indexation in most cases is tied to the Consumer Price Index for the previous year and is done automatically without signing an addendum to the lease.

## 2.6 Procedures to recover unpaid rent

In case of non-payment of the rent, the Landlord is obliged to comply with the pre-trial procedure for resolving the dispute and to send the Tenant an official notice demanding that the debt be paid. If such a demand was not satisfied, the Landlord usually goes to court. However, more often and as an alternative to the court procedure, the Landlord writes off the debt on the account of the security payment provided by the Tenant or, if such methods of securing the Tenant's obligations are agreed by the parties in advance, requests that a guarantor or a surety are to pay. There are also more practical, but severe measures such as disconnecting the utilities in the Tenant's premises (water, heat and electricity) or seizing the Tenant's goods until the debt is paid in full. It should be noted that the latter case is legal when such goods appear to be in the Landlord's possession lawfully, for instance, when the Tenant leaves its goods in the premises after termination of the lease.

# 3. PREMISES

## 3.1 Extent of Demise

The Tenant will be provided the internal portion of the premises measured by the Technical Inventory Bureau. It is also typical for parties to stipulate in lease agreements that certain parts of the common area directly outside the shop front will not be leased to other Tenants and will be free of any decorative furniture, so that they are visible for potential customers. The building structure and the common areas remain with the Landlord.

## 3.2 Extent of the Shopping Centre

The Shopping Centre comprises all premises, common areas and any external areas adjacent to it, which are usually occupied by parking spaces. The entire area of the Shopping Centre may be leased out, except for premises already leased to other Tenants and the common areas needed for the functioning of the Shopping Centre.

## 3.3 Common areas of the Shopping Centre

The common areas of a Shopping Centre, such as halls, elevators, parking lots, atriums, can be freely used by Tenants and their customers. The service charges for common areas of a Shopping Centre are typically allocated

among the Tenants. Sometimes, additional fees may be collected from the customers, for example, for the use of parking spaces. However, the Landlord usually provides parts of the common areas for lease, for instance, for installation of vending machines, ATMs, coffee stations, small shops, advertising structures or seasonal fairs.

### 3.4 Rights Reserved by Landlord

Landlords typically require a number of rights to be set forth under the lease agreement so to enable them to maintain a Shopping Centre in good order. Such may include:

Landlord's prior consent for and supervision over any works or repairs inside the leased premises;

Access to the premises to check the compliance with the terms of the lease, technical, ecological, other mandatory requirements, as well as to carry out needed repair works inside the premises that effect the functioning of the entire Shopping Centre;

Suspension of certain services (for example, utilities) if the Tenant breaches its payment obligations;

Assigning of the Landlord's rights and obligations under the lease agreement.

On the other hand, the Landlord usually undertakes to exercise these rights in such a manner as to not adversely impact the Tenant's business.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

The Tenant is usually forbidden from assigning its rights and obligations under the lease agreement, including assignments between affiliates, without prior consent of the Landlord.

### 4.2 Underletting

The Tenant is usually forbidden from subleasing all or part of the premises without prior consent of the Landlord. If sublease is allowed, the Tenant will be held liable for any damages to the premises caused by the subtenant. A sublease agreement may not be entered into for a term superseding the term of the lease agreement. The terms and conditions of the lease agreement shall be applied to the sublease agreement, unless otherwise provided by the legislation.

### 4.3 Sharing occupation

Sharing occupation of premises is not a common practice in commercial lease and is rather carried out in the form of a partial sublease, which is generally forbidden without prior consent of the Landlord.

### 4.4 Change of control

Stipulating restrictions on change of control is not a widespread practice in Azerbaijan, and the parties to the lease agreement are normally obliged to notify the other party without delay when change of control occurs. However, the parties may agree to include provisions on termination of the lease or collecting a penalty if either party fails to follow the agreed procedure.

## 5. ALTERATIONS/REPAIR

### 5.1 Alterations

Typically, Tenants are prohibited from making any structural alternations that may involve any changes to the load-bearing elements of the premises or the Shopping Centre, including alterations of security or energy efficiency improvement nature. Generally, the Landlord is responsible for carrying out alterations under statute, unless otherwise provided by the lease agreement. In addition, leases usually stipulate an approval procedure that the Tenant has to undergo in order to obtain the Landlord's consent to the planned alternations.

## 5.2 Tenant's fitting out

Tenants typically conduct their own fit-out works under the supervision of the Landlord and with prior approval by the Landlord of the fit-out project. Tenants are often granted a grace period for the time needed to complete fit-out works. Most lease agreements stipulate that upon termination of the lease agreement, the Tenant is to remove any alterations and return the premises in the same condition as at beginning of the lease or that any inseparable improvements made to the premises become the property of the Landlord without compensation.

## 5.3 Signage

Placement of informational signage is usually carried out by the Landlord free of charge for the anchor Tenants, since it increases the consumer appeal of the Shopping Centre.

## 5.4 Repair and decoration

It is widespread practice for the Landlords to supervise any repairs inside the premises. The necessary repairs, unless their need arose due to the Landlord's fault, are performed by the Tenant at its own expense. Decorations are generally allowed without any limitations and even may be mandatory during festive seasons.

## 6. TRADE

6.1 Typically, the Tenant is required to operate in the leased premises under a specific trading name stipulated in the lease agreement. Any re-branding is usually subject to the Landlord's approval.

6.2 The Landlord may control the Tenant's opening hours, if this is stipulated under the lease agreement (usually contains a special provision that the Tenant undertakes to comply with the rules of the Shopping Centre and special lease rules). Such documents describe in detail the rules for using premises in a Shopping Centre and the procedure for carrying out retail activities. Their breach by the Tenant may lead to fines or termination of the lease agreement.

6.3 The parties shall not include a clause stating that the Landlord undertakes not to lease the premises out in the same building to other Tenants if they sell the same goods / provide the same services as the Tenant under a lease agreement, as such would be a breach of antitrust laws.

## 7. INSURANCE

### 7.1 Insured Risks

The Landlord shall have a compulsory insurance for the property (the Shopping Centre) and civil liability before third parties in connection with the use of the Shopping Centre, while the Tenant does not have an obligation to have a compulsory insurance in connection to the lease thereof. The Landlord may require the Tenant to get the latter's liability during fit-out works and its property inside the leased premises insured.

### 7.2 Uninsured risks

Any uninsured events are subject to the provisions of the Civil Code. In such a case, the party at fault will have to compensate the damages and losses of the other party.

### 7.3 Business insurance

It is a practice for the Tenants to insure their civil liability in connection with the risk of causing harm to third parties (Landlord, other Tenants, customers, visitors) during the operation of the leased premises or the Shopping Centre. The parties also insure their property (the Shopping Center and the Tenant's goods) from damage or theft. As for the business interruption insurance, it is not so popular in Azerbaijan among retailers.

## 8. SERVICE CHARGE

### 8.1 Typical regime

Tenants pay a fixed contribution for servicing the common areas, cleaning, maintaining security, marketing activities, etc.

### 8.2 Promotions and marketing

Tenants may participate in common marketing activities organized by the Landlord at the expense of the payable marketing fees. Any additional marketing activities carried by the Tenants inside the Shopping Centre or using its name usually require prior consent from the Landlord.

### 8.3 Tenants associations

There is no such practice in Azerbaijan.

## 9. GREEN LEASE

Such practice is not yet a market trend in Azerbaijan. The Tenants usually provide data on consumed utilities to the Landlord for the purpose of making payments for such consumed utilities. At the same time, lease agreements often include provisions on organizing garbage collection, cleaning of the leased premises and overseeing compliance with technical requirements when operating hazardous production facilities and equipment.

## 10. FORCE MAJEURE AND COVID

Depending on the restriction measures adopted by state bodies, a pandemic can be recognized as a force majeure circumstance, whereby the Tenant can be released from civil liability in the form of paying penalties or compensation for losses, obligations under a lease agreement can be terminated, a lease agreement can be terminated or changed by court, although it is difficult to apply the last two pandemic consequences in practice, as the court investigates every particular case very closely.

## 11. OTHER POINTS TO NOTE

### 11.1 Security Payment

It is very widespread on the retail market for the Landlords to require the provision of a security payment (typically in the amount of 3 to 6 monthly rent payments) in order to secure the execution of the Tenant's obligations under the lease agreement.

### 11.2 Anti money laundering

An anti-corruption clause may be provided in lease agreements as a separate annex, which prohibits the parties from taking actions to legalize/laundry the proceeds of crime and other corruption violations both in relations between the parties to the Agreement and in relations with third parties and state bodies.

### 11.3 Terrorism and security

Regardless of the terms of the lease agreement, the Landlord and the Tenant shall comply with anti-terrorism laws and take appropriate measures.

### 11.4 Prescribed form

A lease agreement entered into shall be entered into in writing, and, if entered into for a period of more than 11 (eleven) months, shall be registered with the state authority. An application for such registration may be submitted by either of the parties. There are no special forms of a lease agreement to follow. Also, the lease

agreement must indicate the following essential conditions: subject (cadastral number, address, floor area) and the amount of the lease.

# BELGIUM

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## Preliminary Remarks

In principle, shopping centre leases and leases for shops will be considered as commercial leases which will be subject to the 1951 Act on commercial leases (the “1951 Act”), of which many of the provisions are mandatory. Due to Belgium’s sixth state reform of 2011 the competency to establish new rules for commercial leases has been transferred to the three regions, i.e. Flanders, Wallonia and Brussels Capital.

None of the three regions has used this competency so far extensively to establish a new legislative system for its region. In some regions draft legislative texts do circulate, so in the nearby future it is possible that 3 different regimes for a commercial lease will apply in Belgium. But so far, only punctual modifications were made to the 1951 Act by some regions. The only exception is that each of the three regions has created its own slightly different legislation for short-term (maximum 1-year leases) for “pop-up stores”.

As of 1 September 2021 Book III “Goods” of the new Civil Code enters into force, in which more flexible rules for long-term leases (“*erfpacht/emphytéose*”) are established. The minimum term for a long-term lease is now fifteen (15) years, whereas before the entry into force of Book III it was twenty-seven (27) years. It is thus not unlikely that parties as of now will agree more on entering into a long-term lease instead of a regular commercial lease in order to avoid the mandatory rules of the 1951 Act.

It is to be noted that in the Walloon Region the 1951 Act now also applies “*to leases concluded within the framework of a commercial partnership contract*” within the meaning of the Code of Economic Law. These are agreements in which one of the parties grants the other the right to use, when selling products or providing services, a commercial formula in one or more forms. In other words, the franchise agreement - but also certain other types of distribution agreements - are covered by this definition. As a result, commercial lease agreements that are “ancillary” to franchise agreements, i.e. where the franchisor is also the landlord, will now be autonomous from the franchise agreement and therefore only regulated by the 1951 Act. In Wallonia the lease agreement should not be affected by the end of the franchise agreement. In practice, this means that the lessor cannot terminate the commercial lease agreement at will. The only way to terminate the contractual relationship with the tenant is to refuse the requested renewal, which can only happen in cases strictly limited by the 1951 Act (see below).

## 1. TERM

### 1.1 Contractual Term

Pursuant to the 1951 Act, the initial lease agreement must have a fixed duration of at least nine years. Hence, 9-year leases are most common.

If the duration of the initial lease exceeds nine years, the lease needs to be notarised (deed under seal) in order to make the duration exceeding 9 years enforceable against third parties, i.e. potential buyer of the shopping centre.

### 1.2 Break Rights

Pursuant to the 1951 Act, the tenant is entitled to terminate the lease by bailiff’s summon or registered mail at no cost at the end of each three-year period, provided a six months’ notice is given.

As the provisions of the 1951 Act relating to early termination are mandatory, the parties cannot include break rights which are less favourable to the tenant than what is set out above.

Further, the 1951 Act determines that, provided a specific provision in the lease is granted to the lessor in this respect, the lessor may also terminate the lease at the expiry of each three-year period, upon one year notice by bailiff's summon or by registered letter, to exercise in the property a business for itself, or to have it exercised by his descendants, his adopted children or his ascending relatives, his spouse and her descendants, her ascending relatives or her adopted children or by a private company of which the active partners and partners, who own at least 3/4 of the capital, have the same relation of blood relationship, affinity or adoption as the lessor or his spouse.

A clause pursuant to which a lessor can terminate the lease ipso jure without bringing the case before the competent court when the tenant does not comply with its contractual obligations, is not allowed under Belgian law.

A judge will only allow the dissolution of the lease at the request of a party if the breach by the other party constitutes a serious breach of that party's obligations. Therefore, most lease agreements determine that certain breaches (e.g. non-compliance with the destination of the premises, rent arrears of more than 3 months' rent) constitute such serious breach.

Most leases determine as well that, in case the lease agreement is dissolved at the request of the lessor due to the fault of the tenant, the latter shall have to pay a reletting indemnity equivalent to 3 or 6 months' rent (in addition to the usual indemnities for breach of agreement, as determined by the judge).

### 1.3 Renewal Rights

The 1951 Act provides that, at the end of the initial period, the tenant has the right to ask the renewal of the lease for a period of nine years in order to continue the same trade in the premises. He may ask up to three renewals of nine years.

The exercise by the tenant of his right to ask the renewal of the lease is subject to strict requirements with respect to the wording and the timing. The tenant's letter or summon in which he mentions his intent to have the lease renewed, has to mention amongst others the new contractual terms and conditions.

If the lessor subjects the renewal to different conditions from those proposed by the tenant and no agreement is reached between the parties in this respect, the renewal will be made under the conditions determined in all fairness by the justice of the peace.

If the lessor invokes the offer of a third party, the 1951 Act organises in this case a procedure which will result in the tenant having the right of first refusal, provided equal conditions are offered by the tenant.

The lessor can only refuse the renewal in very specific circumstances set out in the 1951 Act (e.g. the lessor intends to rebuild the premises) and even in these circumstances the lessor will have to pay an eviction indemnity in most cases, ranging from 1 to 3 years' rent. If the lessor refuses without invoking one of these circumstances or if afterwards he does not comply with the circumstance invoked, at least 3 years' rent will be due.

## 2. RENT

### 2.1 Principal rent

Rent will generally be based on the open market value. Tenants will often be granted a rent free period or a rent reduction allowing the fitting out by the tenants.

### 2.2 Turnover

Turnover provisions have become more usual the last couple of years. Particular attention needs to be paid to the provisions that describe the elements of which the turnover is composed of, as well as the reporting formalities of the tenant to the landlord in this respect.

### 2.3 Rent Review

The base rent as agreed in the lease agreement is a fixed rent (without prejudice to what is set out above with respect to renewal) which is in principle not open for review on an open market basis.

### 2.4 Indexation

It is common practice to link the rent to the evolution of the cost of life (index). If the parties agree to link the rent to the index, mandatory provisions of the Civil Code are applicable, pursuant to which:

- the rent can only be adjusted once a year and at the earliest at the anniversary of the entry into force of the lease agreement; and
- the new rent cannot exceed the amount calculated on the basis of the following formula:

(basic rent x new index) / original index, whereby

- the basic rent is the rent (excluding charges and taxes) as agreed in the lease agreement;
- the new index is the health index (i.e. the index of consumption prices but excluding fuel and tobacco) of the month preceding the anniversary of the entry into force of the lease; and
- the original index is the health index of the month preceding the month during which the agreement is made (which in most cases is also the month of signing of the agreement).

### 2.5 Rent revision

Article 6 of the 1951 Act determines that, at the expiry of each three-year period of the lease, parties are entitled to ask the Justice of Peace for a revision of the rent, provided that they prove that the normal rent of the leased premises is at least 15% higher or lower than the rent as determined in the lease agreement or fixed at the last revision. The judge resorts to “equity”, without paying attention to the favourable or unfavourable output that is exclusively attributed to the tenant. It must be said that this legal provision has not been successfully invoked in most cases, given the conditions that need to be met. Even in the aftermath of the measures of closing shops due to the Covid-pandemic, judges declined the application of rent revision requests.

## 3. PREMISES

### 3.1 Extent of Demise

The tenant is let well-defined private premises, usually located on a map and with reference to the surface of the premises. In new shopping centres, it is common practice that the premises are delivered “casco”, implying that the tenant has to finish them.

The obligations of repair, maintenance and insurance of both parties are set forth in separate provisions of the lease agreement.

### 3.2 Extent of the Shopping Centre

In addition to the description of the shopping centre itself, reference is made to the services provided to the tenant in this respect (commercial attraction point, putting at disposal of an aesthetic environment etc.).

Such description has its importance as, in most shopping centres, the total compensation to be paid by the tenant is split up in the rent (in most cases no VAT is applied) and the service charges (upon which VAT is to be applied).

### 3.3 Common Parts

The tenant will bear a proportion of the charges for the common parts in the centre (based on the surface of the private premises). This share or proportion is in most cases clearly indicated in the lease agreement.

The lessor will be responsible for the maintenance and repair of those common parts and will recover this cost through the service charge, whereby each tenant contributes according to its proportion in the common parts.

As VAT does apply to the charges (which is in most cases not the case for the rent, see below), it was not uncommon to have a tax ruling confirming which part of the payments by the tenants is subject to VAT and which part is considered as rent (without VAT).

Depending on the rules set forth in the shopping centre, landlords can use some common parts for commercialisation (e.g. publicity or kiosks), be it that tenants often impose certain restrictions in respect of visibility and attractiveness of the common areas of the shopping centres

### 3.4 Rights Reserved by Landlord

The lessor will typically reserve the rights to enter the premises to carry out inspections (after appointment with the tenant).

Shopping centre rules will set out a number of landlord's rights to enable them to maintain a centre in good order over time, including the right to close certain areas for repair and some rights to extend or alter the centre.

The 1951 Act does provide that the tenant is not entitled to any proportional rent reduction or compensation if the landlord has to carry out repairs in the leased premises that cannot be postponed insofar as these repairs do not last more than 40 days. Be it that in most cases the parties agree upon another system.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

Typically, the lease agreement will determine that the tenant will only be allowed to assign the lease provided the prior written approval from the lessor is obtained. The initial tenant will remain jointly and severally liable for all obligations arising from the initial lease.

However, even where the lease agreement provides that the tenant cannot transfer the lease without the prior consent of the lessor, the 1951 Act determines that the tenant is in any event entitled to transfer the lease (as a whole), provided that such transfer occurs in connection with the transfer or lease of the business of the tenant, unless the lessor or his family live in a part of the premises. The lessor can oppose to the intended transfer. The opposition will be well-founded when the tenant has practised the business in the premises since less than two years, or when he has obtained the renewal of the lease since less than two years. In case of such transfer in connection with the transfer of the business, the original tenant remains, however, in any case jointly and severally liable for all obligations arising from the initial lease, unless otherwise provided in the initial lease, or unless the lessor has expressly given its consent to release the tenant from its liability in this respect.

Sometimes the landlords provide for a pre-emption right in case the business is sold by the tenant. This is mostly not the case if the tenant is part of a larger group.

### 4.2 Subletting

Typically, the agreement will determine that the tenant will only be allowed to sublease provided the prior written approval from the lessor is obtained. In any event, the initial tenant remains a party to the initial lease, implying that he will remain liable for all obligations arising from the initial lease vis-à-vis the lessor.

However, even where the lease agreement provides that the tenant cannot sublease the premises without the prior consent of the lessor, the tenant is in any event entitled to sublease the premises (as a whole), provided that such sublease occurs in connection with the transfer or lease of the business of the tenant, unless the lessor or his family live in part of the premises. The same reasoning as for assignments (see under 4.1) does apply.

In some lease agreements you will find more flexible sub-letting arrangements for group companies of the tenant.

### 4.3 Sharing occupation

Lease agreements typically do not refer to a possibility to share occupation with other group companies, but it is common practice to provide that assignment or subletting of all or part of the premises to an affiliated company does not require approval from the lessor.

#### 4.4 Change of control

Most leases do not provide for wording in respect of change of control of the tenant, with the exception of the pre-emption right for the landlord that can sometimes be found.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions affecting alterations

Non-structural alterations to the premises are usually permitted subject to the consent of the lessor, not to be unreasonably withheld or delayed. Structural alterations are not permitted.

However, even where the lease agreement provides that the tenant cannot execute alteration works to the leased premises without the prior written consent of the lessor, the 1951 Act determines that the tenant is in principle entitled to execute all alteration works to the leased premises which are suitable for its company and of which the costs do not exceed three years' rent, without endangering the security, the neatness or the aesthetic value of the building. The tenant is obliged to inform the lessor in advance by registered letter or by bailiff's summon of all intended alterations, on submission of plans and specifications, so that the lessor can oppose thereto for legal reasons should the case arise.

#### 5.2 Tenant's fitting out

The tenant's fitting out is usually to be completed prior to the centre opening date when the centre is in its development phase. It is common to attach to the lease agreement the technical requirements which should be complied with by the tenant for the fitting out.

#### 5.3 Signage

Tenants are usually allowed to use their own signage within the standard framework provided for by the lessor.

A certain mixture of tenants will be required within the shopping centre, also in line with the permit held in that respect by the shopping centre owner.

#### 5.4 Repair and decoration

The tenant will be under the obligation to maintain and repair the private premises. The lessor will be responsible for the major repairs of the private premises and the common parts of the centre, but will recover that cost through the service charges.

### 6. TRADING

#### 6.1 Keep open

Most leases contain a clause requiring the tenant to keep the premises open and trading during the centre's trading hours. More detailed rules are to be found in the shopping centre's house rules.

#### 6.2 Trading names

The tenant is often required to trade under a specified trading name or brand, not allowing them to switch. A certain mixture of tenants will be required within the shopping centre, also in line with the permit held in that respect by the shopping centre owner.

It is to be noted that in the Walloon Region, it is now expressly prohibited to provide for a clause requiring the tenant to operate the leased premises exclusively under a specific trade name. It should be noted, however, that this prohibition not only applies to commercial leases entered into under commercial partnership agreements such as a franchise agreement (see preliminary remarks), but also to any commercial lease agreement that contains such a clause.

In practice, in the absence of a valid post-contractual non-competition clause in the franchise agreement, this should allow the ex-franchisee to continue using the commercial premises, even if the franchise agreement has

been terminated in one way or another. However, even in the absence of a non-competition clause, a change of activity could require the landlord's prior agreement under the lease agreement.

## **7. INSURANCE**

### **7.1 Insured risks**

The lessor will insure the centre (including the premises let to the tenant) against a standard set of risks relating to the centre (fire, flood, hail, explosion, civil liability, etc.). The lessor will recover the premiums from the tenants through the service charges. Often a mutual waiver of recourse between the lessor and the tenants is provided for.

The tenant will usually have the obligation to insure his belongings in the leased premises against a standard set of risks relating to the centre (fire, flood, hail, explosion, etc.) and to insure his liability vis-à-vis the lessor (tenant's liability).

### **7.2 Uninsured risks**

Insurance policies concluded by lessors will usually cover a very broad range of risks. The major banks now also require insurance against terrorism.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

The lessor will be responsible for providing various services to the centre. These can vary depending on the nature of the centre, but standard items include repair, cleaning, insurance, heating and hot water, air-conditioning, maintenance of common parts, security, property management and the provision of staff to service the centre. The lessor will recover the cost of providing these services through the service charge regime, under which the tenant will be required to pay a provision for service charges in advance, with a reconciliation at the end of the service charge year or quarter.

The usual method of apportionment of service charges is a weighted floor space basis (surface of the leased private premises).

### **8.2 Promotions and marketing**

The costs of promotion and marketing of the centre are usually included as a cost in the service charges, unless this is organised on the level of the tenants' association. Sometimes it is agreed that the tenant pays a fixed sum.

### **8.3 Tenants' Associations**

Tenants' associations are common in large shopping centres.

## **9. GREEN LEASE**

More and more leases do provide for provisions requiring the parties to share data on the consumption of utilities, energy performance etc. and in most cases the landlords do provide for the common set of terms in this respect.

## **10. FORCE MAJEURE AND COVID-19**

The Belgian Federal Government imposed two lockdowns for most of the retail shops as a result of the Covid-pandemic. Bars and restaurants had to close for the longest period. Under Belgian law no particular provisions deal with the consequences of a pandemic, even situations of "hardship" are currently not dealt with under Belgian lease law. In the draft Book V of the new Belgian Civil Code the concept of hardship will be introduced, but that has not yet been approved as at the time of this publication.

Most of the existing lease agreements do not provide for special clauses covering a pandemic or hardship. So a vast majority of lessors and tenants did agree on an addendum in order to deal with this unusual event. Parties mostly agreed in a partial waiver of rent or a partial deferment of payment.

If we look at the case law in relation to the Covid-pandemic, a majority of case law does not qualify this as a case of “force majeure” so that rent remains due, but most of the courts try to come to an equitable solution insofar as the tenant was not yet in default as at the start of the Covid-pandemic.

## 11. OTHER POINTS TO NOTE

- 11.1 A lease agreement has to be registered with the tax administration within 4 months of its signing and a registration duty of 0.2% of the aggregate amount of rent and charges paid during the term of the lease is due.
- 11.2 A lease agreement with a duration of more than 9 years needs to be transcribed in the Mortgage Register as a supplemental formality next to the above described registration in order for the lease to have effect against third parties.
- 11.3 As of 1 January 2019 parties can opt to apply VAT to rent in relation to professionally used premises, insofar as it concerns new or (seriously) renovated premises. The tenant must be subject to VAT and needs to use the premises for VAT-subject economic activities. Both parties need to expressly opt for VAT in the lease agreement in a pro fisco declaration. The period for revision of VAT is in such a case 25 years. In case of a short-term lease of maximum 6 months, there is no option, VAT shall be applied.
- 11.4 Terrorism and security : The lease agreements do not impose specific obligations for tenants with regard to prevention of terrorism and security. The shopping centre manager will coordinate the preventive or corrective actions to be applied in the shopping centre.
- 11.5 The Law of 4 April 2019 introduced three new sets of rules governing B2B-relationships in Belgium : (1) a prohibition of unfair market practices, (2) a prohibition of abuse of economic dependence, and (3) rules on unfair contract clauses. These new rules will all apply to any agreement concluded, renewed, extended or amended as from 1 December 2020. The new rules on unfair clauses in B2B agreements have a very broad scope, as they will apply to all agreements entered into between professionals, so also lease agreements. In general a transparency rule is introduced, which provides that all written contract provisions must be drafted in a clear and comprehensible way. The law also introduces a ‘black list’ and a ‘grey list’ of unfair clauses, which are similar to the ones provided for under B2C-agreements. Unfair clauses are prohibited and will be null and void. The agreement itself will remain binding for the parties, provided it can continue to exist without the unfair clause. So attention is to be paid during drafting of a lease agreement.

# BELARUS

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## Preliminary Remarks

In Belarus lease agreements are regulated by the Civil Code of the Republic of Belarus. This Code consists of the common provisions applied to leases and special provisions which are applied exclusively to real estate lease. From a legal standpoint, it is the property owner who is entitled to lease it out, unless the owner has authorised a third party for the matter. However, conclusion of a lease agreement may also happen as a part of the property management performed by a specialised company acting as a “Discretionary manager” under a discretionary management agreement (the owner transfers the property to the discretionary manager, who manages it for a fee acting in its own name but in favour of the owner).

According to Belarus laws, a lease agreement must be concluded in written by drafting a single document stipulating all obligatory (substantial) provisions (object of lease, rent etc) and other provisions agreed by the parties (term, termination of the agreement etc.). Thus the lease agreement should contain an exact definition of the lease object, otherwise such agreement may be challenged and recognised as non-concluded and non-valid. A plan of the leased property is usually included as an annex to the lease agreement. For this a plan of the leased property from the technical passport of the real estate (prepared by the authorised technical inventory specialists of a local territory agency on state registration of real estate, rights thereto and deals therewith) is generally used.

While leases under Belarus law are recognised as an encumbrance on real estate, neither lease rights on shopping centres (be it buildings or separate premises) nor the respective lease agreements are registered at the land register (the “Unified State Register on Real Estate, Rights Thereto and Dela Therewith”).

## 1. TERM

### 1.1 Contractual Term

The term is not an obligatory (substantial) provision of a lease agreement under Belarus law. While the parties usually stipulate the exact term, the legislation provides for the possibility to conclude a lease agreement for an indefinite period of time.

Typically the lease agreement is concluded for a period of time between 3-10 years. Short term lease agreements are also concluded, however leases with a term less than a year are uncommon.

### 1.2 Break Rights

The break rights vary depending on the parties and the leased premises, but there are usually two possible break options for the lease agreement without applying to the court:

- the Landlord has an exclusive right to unilaterally withdraw from the lease agreement;
- both parties have a right to unilaterally withdraw from the lease agreement.

This right is exercised by giving a prior written notification to the other party. The term for notifying is usually equal to 1 month. However, the longer the lease contractual term the longer may be the term for prior notification (up to 6-9 months).

If the lease agreement is concluded for an indefinite term under Belarus law it may be terminated by either party within 3 months written notice.

### 1.3 Renewal Rights

As a general rule under Belarus law (unless otherwise is stated in the lease agreement) the Tenant properly performing its obligations has a privileged right to continue the lease agreement for a new term. To exercise the

right the Tenant must send a respective notification to the Landlord for a reasonable period of time (usually 1-3 month) prior to the lease term expiration. If Landlord refuses to conclude the lease agreement with the former Tenant, but concluded a lease agreement with another company within one year the Tenant may require the Landlord to reverse lease rights to the Tenant's name on the same terms and / or compensation of any losses through the courts.

This "privileged right" rule could be excluded in the lease agreement but in practice this is not often the case.

For long-term lease agreements it is usually stipulated that the prolongation right may be exercised one time for the same term as the initial lease term. It is also quite usual to have a possibility to extend the lease term for one year for an indefinite amount of times.

Under Belarus law, if the parties continue the lease after the expiry date the lease agreement is recognised as extended for an indefinite lease term.

#### 1.4 Disputes and Forfeiture

Under Belarus law and in practice, both the Landlord and the Tenant have a right to terminate the lease agreement by applying to the court if the other party is in breach of an essential duty or does not perform its covenants / conditions as set out in the lease.

Typically the lease agreements provide for the mandatory pre-judicial procedure for dispute resolution (a claim must be sent to the party breaching the agreement prior to applying to the court). If the dispute was not resolved it should be settled by a competent economic court of the Republic of Belarus. An arbitration clause is used in practice mostly in cases when one of the parties is a foreign company or has foreign shareholders.

## 2. RENT

### 2.1 Principal rent

The rent is usually paid on a monthly basis commencing on the lease agreement effective date. Advance monthly payments could be used as well, but these generally require the Landlord's approval. A "grace period" is not normally used, but can be stipulated for the period when the Tenant is preparing (redesigning) the leased object for its needs (usually 3 months).

Rent is generally based on the open market value and includes the Landlord's expenses for capital repairs of the object. Utilities and operational costs are usually paid in addition to rent.

Rent is paid in Belarusian roubles but is stipulated in a sum equal to a sum in EUR or USD.

### 2.2 Turnover

Turnover provisions are being increasingly used. However due to COVID-19 pandemic, Landlord's may insist on stipulating a reasonable fixed part of the rent. A variable part of the rent is an amount equal to the per cent (in most cases – not exceeding 10%) of the total profit (in some cases - revenue) earned by the Tenant within the particular period (usually one month) and reimbursement of utility and operational costs incurred by the Landlord.

### 2.3 Rent review

Under Belarus law, the rent amount may be changed by the parties agreement not more frequently than once a year. However in practice the lease agreements usually stipulate the Landlord's right to unilaterally change the rent amount not more frequently than once a year and for not more than 10 per cent at a time.

## 3. PREMISES

### 3.1 Extent of Demise

The Tenant is granted a right to use the internal areas of the leased object, common areas in the Shopping Centre and a territory of the adjoining land plot, whilst usually incurring obligation to maintain the internal areas of the leased object in a good repair and working condition. Common areas in the Shopping Centre and a

territory of the adjoining land plot are usually cared for by the Landlord or the Shopping Centre operation company.

### 3.2 Extent of the Shopping Centre

Usually, all of the Shopping Centres' area can be leased with the exception of (i) the premises already let to Tenants and (ii) premises serving the whole Shopping Centre (or a certain part of it such as lobbies on each floor with places for the customers' rest).

Lease agreements do not restrict the Landlord's right to extend or reconstruct the Shopping Centre, however the Landlord is usually obliged to inform the Tenant of the scope and term of such works and to ensure the minimum disturbances to the Tenant's activities in the leased premises.

### 3.3 Common Parts

The Tenant has a right to use common areas (e.g. lobbies, malls, parking areas) of the Shopping Centre to the extent not inhibiting the respective rights of other Tenants and customers (e.g. not to store goods outside the leased object, not to perform marketing activities in the common areas without prior approval of the Landlord or the Shopping Centre operation company). The Landlord (the Shopping Centre operation company) will be responsible for the maintenance of the common areas and will recover this cost through the operation costs, reimbursed by the Tenants. In some cases, some parts of the common areas may be used by the Tenants for a separate fee (such as underground parking).

### 3.4 Rights Reserved by Landlord

The Landlord usually reserves the right to:

- access the leased objects (premises) for the purpose of verifying compliance with the lease agreement of its usage by the Tenant, as well as compliance technical, ecological, other mandatory legal requirements;
- access the leased objects (premises) for the purpose of checking the working condition of engineering networks located in the leased object (premises);
- perform the supervision of any works or repairs that could affect the leased object (premises) or the entire Shopping Centre;
- use the commercial name of the Tenant on "no fee" basis in the marketing purposes;
- check the accounting data provided by the Tenant to verify the variable part of the rent;
- extend, modernise, reconstruct the Shopping Centre and mortgage it (or parts) (usually subject to prior notification of the);
- suspend provision of the utilities to the leased object (premises) and the Tenant's access to it in case of the Tenant major breach of the lease agreement provisions;
- access to the leased object (premises) in case of emergency (subject to immediately notifying the Tenant and ensuring protection of the Tenant's property until the Tenant's representative is present at the leased object (premises)).

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

The ability to assign the Tenant's rights and obligations under the lease agreement might be either restricted or subject to the Landlord's prior written approval. Sometimes the lease agreement may stipulate change of control clauses (the requirement to give the Landlord prior notice of the upcoming change of the Tenant's shareholders e.g. due to shares purchase deal).

#### 4.2 Underletting

Underletting is generally allowed by the Belarus law, but in practice is either prohibited or subject to the Landlord's prior written approval.

#### 4.3 Sharing occupation

The leased object (premises) should be used by the Tenant only if not subleased. However, sometimes the lease agreement may stipulate the Tenant's right to share occupation of the premises with a group company within the limits strictly prescribed by the agreement.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions affecting alterations

Structural and non-structural alterations of the leased object (premises), such as reconstruction, re-equipment, modernisation and redesign are usually subject to the prior written approval of the Landlord and shall be performed in accordance with technical and other legal requirements and must cause minimum disturbance to other tenants and customers (e.g. the construction works may be performed after working hours or on weekends, construction waste shall not be storages in the common areas of the Shopping center).

#### 5.2 Tenant's fitting out

The Tenant's fitting out shall be performed in accordance with technical and other legal requirements. Usually the lease agreement may constitute the term for the initial fitting out of the leased object (premises) prior to the commencement of the Tenant's operational activity in it. For such term the "grace period" may be provided.

The lease agreement may rarely stipulate the Landlord performing or financially participating in the initial fitting out of the leased object (premises) for the Tenant's needs.

#### 5.3 Signage

The Tenant is usually allowed to place any signs within the leased object (premises). Placement of any outdoors signs (on the territory of the adjoint land plot or on the Shopping Centre facade) require the Landlord's prior written approval and is subject to compliance with the legal regulation requirements.

#### 5.4 Repair and decoration

Any permanent repairs of the leased object (premises) should be performed by the Tenant at its own expense (sometimes the scope and term of works should be priorly approved by the Landlord). In most cases any inseparable improvements form part of the property of the Landlord at the moment of the leased object (premises) return without any compensation paid to the Tenant; however, sometimes compensation is envisaged.

Decorations within the leased object (premises) are allowed in most cases without any limitations. Placement of decorations outside the leased object (premises) require the Landlord's (the Shopping Centre operation company) prior written approval .

### 6. TRADING

#### 6.1 Keep open

The Tenants are usually obliged to comply with the Shopping Centre Schedule. The Tenant's must inform the Landlord (the Shopping Centre operation company) of any necessary temporary closure of the leased object (premises) in advance and limits of such "closed" periods of time may be stipulated in the lease agreement.

#### 6.2 Trading names

No particular provisions are usually provided with regard to the Tenants' change of trading name. A respective notification to the Landlord (the Shopping Centre operation company) may be stipulated in the lease agreement to ensure the usage of correct trading names for marketing purposes.

## **7. INSURANCE**

### **7.1 Insured risks**

Risks related to the building of the Shopping Centre and its common areas are usually insured by the owner (the Landlord) and may be recovered through operation costs reimbursed by the Tenants.

Risks relating to the leased object (premises) as well as damages caused by the Tenant's business, its workers or customers are insured by the Tenant.

The most common risks which are usually insured include: fire, flood, lightning, destruction and / or insurance of the Tenant's civil liability related to its (its workers or customers) activity in the leased object (premises) or in common areas of the Shopping Centre.

### **7.2 Uninsured risks**

All of the risks not specifically mentioned in the lease agreement as the ones to be insured by either of the parties are deemed as uninsured, unless any of the parties voluntarily insure against such risks.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

Cleaning, security, technical management of engineering networks and equipment, capital repairs and similar services related to the maintenance of the common areas are carried out by the Landlord (the Shopping Centre operation company), who is also responsible for providing utilities to both the common areas and leased objects (premises) as an obligation under the lease agreement. The respective expenses are usually reimbursed within operation and utilities costs paid by the Tenants in addition to rent.

### **8.2 Promotions and marketing**

It is becoming more common in practice for the lease agreements to include provisions regarding the Landlord's (the Shopping Centre operation company's) obligation to promote the Shopping Centre and organise other marketing activities. The respective costs are reimbursed within marketing payments additional to the rent, utilities and operation costs.

The lease agreements may also include the Landlord's right to use the commercial names (trade marks) of the Tenants in the respective marketing tools without payment.

### **8.3 Tenants associations.**

No respective practice in Belarus.

## **9. GREEN LEASE**

Is not common in practice.

## **10. OTHER POINTS TO NOTE**

As a general rule, change of the leased property owner (due to sale, legal succession etc.) does not cause the lease to terminate, instead it continues to be in effect on the same conditions unless the Tenant and the new Landlord conclude an addendum to the lease agreement and agree upon new lease conditions.

Sometimes security deposits are stipulated by lease agreements in an amount equal to 1-3 months' rent. During the term of the lease the Tenant must maintain the respective sum, which is usually returned upon termination of the agreement. However it may not be returned as a sanction for the Tenant's unilateral withdrawal from the lease agreement.

# BULGARIA

By  
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## Preliminary Remarks

The general legal framework regulating the rights and obligations of the parties to a lease agreement is provided under the Bulgarian Obligations and Contracts Act (the “OCA”). Predominantly, the provisions of the OCA are applied unless otherwise agreed. Therefore, the parties to a lease agreement are free to determine their rights and to undertake other obligations under the lease agreement beyond the main obligations under the OCA.

## 1. TERM

### 1.1 Contractual Term

Commercial leases (for example retail leases) can have a term exceeding 10 years. Non-commercial leases cannot have a term longer than 10 years.

### 1.2 Break Rights

The parties may agree a break option i.e. right of early termination for the landlord, the tenant or both, even if there is no event of default by the other party. Pursuant to law, if the lease is entered for an indefinite term, each of the parties may terminate by providing a 1-month prior written notice to the other party.

Typically, the landlord under a commercial lease is entitled to terminate the lease before the end of its term in the event of default caused by the tenant. Depending on the terms of the specific lease agreement, such events of default could be considered: (i) the tenant’s failure to pay the rent, service charge or other monetary obligations in the agreed terms; (ii) breach of the tenant’s obligation to maintain the agreed security; (iii) damages caused to the premises or the use of the premises by the tenant contrary to their intended purpose; (iv) insolvency of the tenant; and (v) other non-performance by the tenant of its obligations under the lease agreement. The parties may agree remedy periods for certain events of default.

### 1.3 Renewal Rights

Pursuant to law, if after expiry of the term the tenant continues to occupy the leased premises with the knowledge and without the objection of the landlord, the lease agreement shall be deemed to have extended for an undefined term but capable of being terminated by either party by giving a 1-month prior written notice.

If the tenant continues to use the premises despite the landlord’s objection to the use, the tenant shall compensate the landlord and perform all of its obligations as per the terminated lease agreement.

The lease agreement may provide for a renewal option to one or both of the parties. If a renewal option is agreed, the lease may be continued under the same terms and conditions, or the rent price / other payments may have to be renegotiated in a specific period before the end of the initial term of the lease.

### 1.4 Disputes and Forfeiture

The eviction of the tenant from the premises, if the tenant does not voluntarily vacate it, can be done through an accelerated court procedure.

In the event of tenant’s failure to fulfil its payment obligations and if the lease agreement is notarised, the landlord may request an enforcement order from the court based on a special expeditive enforcement process with respect to the payment obligations contained in the notarised lease agreement.

The landlord may also ask the court to impose a statutory lien on the tenant’s property as a security of future claim, which shall be granted by the court if the request is supported by convincing written evidence, or the landlord provides a security in an amount determined by the court.

Leases usually refer all disputes arising out in relation to the lease agreement to be settled by the Bulgarian courts. However, some leases may include an arbitration clause.

## **2. RENT**

- 2.1 The parties under commercial leases may agree to have a fixed monthly rent depending on the leased premises area, turnover rent, service charges, marketing costs, utilities' charges etc.
- 2.2 The turnover rent (if applicable) may be calculated monthly or in some cases on a quarterly or yearly basis.
- 2.3 Commercial lease agreements may contain an indexation clause, for example in accordance with the Harmonized Index of Consumer Prices of EUROSTAT.

## **3. PREMISES**

### **3.1 Extent of Demise**

The parties under a lease agreement shall reach a consent for the leased premises, which the landlord shall rent to the tenant to be used by the latter during the lease term. The leased premises in a shopping centre includes the shop area, but may also consist of other spaces, such as storage area, loading area and façade spaces for placing a logo. The surface area is calculated following technical criteria included in the lease agreement or in its annexes.

### **3.2 Extent of the Shopping Centre**

The shopping centre is usually defined by its administrative address, comprising of all the premises let to tenants, the common areas and parts (including areas accessible by the public, parking areas, technical areas and equipment). The shopping centre also includes the land and building and any internal and external areas adjacent to it and integrating the property, as they may be from time to time extended or amended by the landlord.

### **3.3 Common Parts**

Usually, the tenant under such leases would have a non-exclusive right (together with the landlord and all other persons having similar rights) under the conditions and terms of the lease agreement to use the common areas and parts as designated by the landlord for the use of the tenants of the commercial centre, but the tenant shall neither obstruct the common areas and parts nor hinder access to and from the commercial centre in any other way.

### **3.4 Rights Reserved by Landlord**

The landlord is usually entitled to execute works related to the common areas and parts, such as: to extend, maintain, repair and renew any parts of the shopping centre, to make changes in the design, to control the access of the common areas and parts etc). In addition, the landlord under a typical commercial lease has the right to:

- approve the fit-out project and the completion of the tenant's fit-out works in the premises;
- enter the leased premises to carry out any required maintenance and to examine the condition thereof;
- any rights agreed under the contract.

## **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

### **4.1 Assignment**

Pursuant to law, a party to a commercial lease agreement can assign its rights (but not the obligations for which consent is required) under the lease, unless the law, the lease agreement or the nature of the rights prohibits

this. The parties under a lease agreement may agree that the tenant may not assign its rights without the prior explicit consent of the landlord.

#### 4.2 Underletting

Pursuant to law, the tenant may sublet parts of the leased property without the consent of the landlord unless otherwise agreed under the lease agreement, but the tenant is not released from its obligations under the lease and the subtenant cannot have more rights granted to it than the tenant.

#### 4.3 Sharing occupation

Please refer to the subletting section.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions Affecting Alterations

Pursuant to law, the tenant's use of the premises will be specified in the lease agreement. If the tenant's use is not specified, the tenant shall use the premises in accordance with its designation. The tenant shall compensate the landlord for any damage caused during its use of the premises, except if the tenant proves that the damage is caused by reasons for which it is not responsible for. Pursuant to the terms of a specific lease, the tenants may be required to obtain the landlord's prior approval and pay for any alterations made by the tenants in and in relation to the leased premises.

#### 5.2 Tenant's Fitting out Works

Based on the terms of the specific lease agreement, the tenants may perform the fit-out works in relation to the leased premises at their expense during a particular term before the opening date, and the fit-out project and the completion of the works may have to be approved by the landlord.

#### 5.3 Signage

The tenants may or may not place their logos and brand names in accordance with the provisions of the lease agreement, which may be allowed under additional remuneration and there could be requirements to which the signs must comply with.

#### 5.4 Repair and Decoration / Maintenance

Pursuant to law, minor repairs relating to damage caused by normal use, such as contamination of walls in the premises, corrosion of taps, locks, and others, are at the expense of the tenant, but the repair of other damages not caused by the tenant shall be at the expense of the lessor.

Regarding commercial leases for shopping centres, it may be agreed under the lease agreement that the tenant shall be responsible for the maintenance and repair of the leased premises and the landlord must perform at its sole cost and expense all repairs, except for (unless the tenant is responsible for the damage) structural elements of the building, such as roof, external walls, structural walls etc. The landlord may be responsible for the maintenance and repair of the common areas and parts and the structural elements of the building.

### 6. TRADING

6.1 The tenants must comply with the internal rules determined by the landlord and keep the premises open for clients during the working hours of the shopping centre.

6.2 Change of the brand names under which the tenants operate or any change of the type of commercial activity carried out by the tenants in the leased premises may require the landlord's prior approval.

## **7. INSURANCE**

Insurance requirements are agreed under the lease agreement, as the law does not provide for mandatory insurance to be obtained by the tenant or the landlord.

### **7.1 Insured risks**

Depending on the terms of the specific lease agreement, the tenants may be obliged to enter and maintain at their own cost and throughout the whole term of the lease, property and business interruption insurance covering loss or damage to their own property in the leased premises and loss of profit due to interruption of their activity at the insured location, as well as general third-party liability insurance. In addition, they may be required to obtain construction purposes “all risk” insurance during the fit out works for the duration of such works.

The landlord typically maintains property insurance of the shopping centre and third-party liability insurance.

### **7.2 Uninsured risks**

The lease agreements do not usually contain provisions regulating uninsured risks.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

The tenants may pay a service charge, which comprise of all costs, taxes and expenses associated with the common areas and parts due for the operation of the shopping centre paid by the landlord. There may be various payment methods that may be agreed upon via negotiations between the parties.

### **8.2 Promotions and marketing**

It may be agreed that the marketing fees are paid separately by the tenants, in order to cover the costs for promoting and marketing of the shopping centre.

### **8.3 Tenants associations**

There are existing tenants’ associations in Bulgaria, but the participation of the tenants is not mandatory.

## **9. GREEN LEASE**

All buildings (with some exceptions, such as places of worship, non-residential agricultural and manufacturing buildings, residential buildings with a limited use, and buildings with a gross floor area up to 50 sq. m.) must be examined and certified in accordance with the Energy Efficiency Act. Pursuant to law, when renting a new or existing building (or an individual building unit therein), the landlord must provide the tenant with a copy of the energy performance certificate of the building.

## **10. OTHER POINTS TO NOTE**

### **10.1 Guarantee**

The tenant will usually provide and maintain during the lease term a cash deposit or a first demand unconditional bank guarantee as a security for the performance of its obligations under the lease agreement.

### **10.2 Registration of the lease contract with the Property Register**

Pursuant to law, in the event of a transfer of a leased real estate, the lease agreement shall remain valid with respect to the transferee if it has been registered with the Property Register. A lease agreement concluded before the transfer of the real estate, which has been notarised and therefore has a verifiable date, shall bind the transferee for the term stated under the lease agreement, but not longer than one year from the date of the transfer. If the lease agreement is not notarised (i.e. does not have a verifiable date) and the tenant is in

possession of the leased real estate, the agreement shall be binding for the transferee as a lease with an indefinite term (i.e. each of the parties may terminate it by providing 1-month prior written notice to the other party).

## CZECH REPUBLIC

By

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### Preliminary Remarks

This contribution concerns solely legal provisions and general practice in the Czech Republic, and does not refer to any particular practical situation that can be identified as a particular commercial relationship. In the Czech Republic, retail leases including leases of premises located in a Shopping Centre (as well as any other leases) are governed by Act No. 89/2012 Sb., the Civil Code, as amended, (the “**Civil Code**”). Effective from 1 January 2014, the Civil Code replaced original Act No. 106/1990 Sb. governing the lease and sublease of non-residential premises and the original civil code, Act No. 60/1964 Sb. Also, leases concluded prior 1 January 2014 are governed by the Civil Code.

The Civil Code includes general provisions on leases and special provisions on leases of business premises (premises serving a business use). The Civil Code also governs further rights and obligations of Landlords and Tenants ensuing from lease contracts. Most of the provisions of the Civil Code are not mandatory and the parties may agree otherwise in a lease contract, unless deviation from a certain provision or principle of the Civil Code is explicitly prohibited by the Civil Code or unless such deviation is contrary to general principles of good morals or public order.

The expressions Tenant, Landlord, Shopping Centre, Premises, Rent, Service Charges etc. used in capitalized letters in this document have the meaning usually assigned to such expressions by Czech laws and do not and cannot be interpreted to refer to any particular tenant, landlord, shopping centre, premises, rent, service charges, etc.

### 1. TERM

#### 1.1 Contractual Term

Usually, a definite period of 5 years, but there are no statutory limitations as to the length of the lease term. Lease contracts may be concluded even for an indefinite period, but it is not usual for commercial leases.

#### 1.2 Break Rights

It is not a typical provision in lease contracts, but parties may agree a break option, i.e. a premature termination without breach of a contract. Usually, *Anchor Tenants* or Tenants with a strong market position may request such break options. Sometimes such break options are conditioned, e.g. by an amount of the Tenant’s turnover and/or expiry of a minimum agreed period.

In case of a breach of the lease contract by either party, the other party may terminate the contract with a notice of termination (with immediate effect or with a notice period), or withdraw from the contract (i.e. terminate with immediate effect) for reasons stipulated in the Civil Code, unless further or other termination reasons are agreed in the lease contract. Typically, the Landlord may terminate the lease if the Tenant defaults in lease payments, uses the Premises contrary to the lease contract or otherwise breaches the lease contract or its obligations under the lease contract or if the Tenant is bankrupt (bankruptcy is declared over the Tenant’s assets) or in case of insolvency proceedings in respect of the Tenant. Typically, the Tenant may terminate the lease if the Premises becomes not usable or the Landlord breaches its obligations under the lease contract.

#### 1.3 Renewal Rights

It is not a typical provision in lease contracts, but parties may agree a renewal option. If the renewal option is agreed, it is either agreed under the same terms and conditions or the amount of the Rent (and/or other lease payments) are renegotiated.

Even if the renewal option is not agreed, the lease contract may be renewed by virtue of the law if the following conditions prescribed by the Civil Code are fulfilled: if the Tenant continues to use the Premises for at least 3 months after the day the lease contract was to end and the Landlord fails to notify the Tenant in writing to leave the Premises within this period, the lease is conclusively presumed to have been stipulated again for the same period as before but for no more than 2 years but this does not apply if the lease contract stipulates otherwise.

## 1.4 Disputes and Forfeiture

As mentioned above, reasons for termination are stipulated in the Civil Code, or the parties may agree otherwise. Prior warning notice or a remedy period (before serving a termination notice) is not mandatory, but may be agreed in the lease contract (usually 5 / 7 or 10 days / working days depending on the nature of the particular breach).

## 2. RENT

### 2.1 Principal Rent

The amount of the Principal Rent may be freely agreed between the parties, usually payable monthly or quarterly in advance.

### 2.2 Turnover Rent

Turnover Rent is usual in the Czech Shopping Centre lease contracts and is calculated on a monthly or annual basis as a positive difference between a certain percentage of the Tenants' monthly or annual gross sales (VAT excluded) and the Principal Rent due for the same month or year.

It is not usual but following the Covid restrictions, Tenants (*Anchor Tenants* and/or Tenants with a strong market position) may even request that they pay only the Turnover Rent, i.e. all rent is derived from the Tenant's turnover while no Principal Rent would be payable.

Usually, monthly and annual turnover declarations are submitted by Tenants.

### 2.3 Rent Review

There are no mandatory Rent reviews prescribed by the Civil Code, but annual reviews of the Principal Rent based on inflation are usually agreed in lease contracts. Usually, HICP or inflation rate announced by the Czech Statistical Office (the "CSU", where the CSU announces different types of the Czech inflation) are used.

In the case of contractual lease renewals or contractual lease prolongations, the amount of the Principal Rent and the Turnover percentage rate are also usually subjected to a review and are newly agreed by the parties.

### 2.4 Procedures to Recover unpaid Rent

Default in payment of Rent (and Service Charges) constitutes a statutory termination reason under the Civil Code. Usually, a default in lease payments (both Principal Rent and Turnover Rent as well as other lease payments, typically Service Charge and Marketing Contribution) is also agreed as a contractual termination reason.

By virtue of the Civil Code, the Landlord may retain the Tenant's movables in and on the Premises to pay for the Landlord's claims towards the Tenant.

Payment of Rent and other lease payments is usually secured by a cash Security Deposit, Bank Guarantee or Mother Company Guarantee (usually only in the case of *Anchor Tenants* or Tenants with a strong market position). Typically, such guarantees are in the amount of quarterly lease payments plus the applicable VAT.

## 3. PREMISES

### 3.1 Extent of Demise

Usually, the whole Premises (i.e. the interior as well as the exterior parts and all structural parts of the premises) are leased to Tenants. Even if the whole Premises (including the exterior and structural parts) are leased to Tenants, maintenance and repairs of such external and structural parts may be regulated so that Tenants cannot interfere with such structural or external parts (see Art. 5.4 below).

### 3.2 Extent of the Shopping Centre

The Shopping Centre comprises of building(s), land(s) where the building(s) is/are situated and the adjacent lands are to be used together with and for the purposes of the Shopping Centre. The Shopping Centre includes all the premises in the building(s), i.e. including the premises leased to Tenants (shops, storages and offices), Common Parts (as defined in Art. 3.3 below) and administration offices used by the Landlord for the operation of the Shopping Centre. The Shopping Centre also usually includes any extensions to the buildings and lands, as may be made by the Landlord from time to time.

### 3.3 Common Parts

The Landlord manages the Shopping Centre Common Parts and grants the Tenants access to the Common Parts. The Common Parts usually comprise of the indoor and outdoor areas accessible by the public, e.g. the mall, food court, parking areas, sanitary facilities, and indoor and outdoor areas accessible by Tenants, e.g. service areas and passages and loading docks.

The Landlord may lease the Common Parts (parts thereof) e.g. for the purpose of the operation of the sale stands.

The Landlord is responsible for the maintenance of the Common Parts, recovering the related cost through the Service Charges.

### 3.4 Rights reserved by Landlord

The Landlord usually has the exclusive right to manage and to execute works related to the Common Parts, including reconstructions of and additions to the Common Parts and the Shopping Centre (but excluding the Premises, i.e. premises leased to individual Tenants; according to the Civil Code, the Landlord may not modify the Premises during the lease term).

In addition, the Landlord usually has the right to:

- access the Premises in order to verify their use and maintenance by the Tenant and the Tenant's compliance with its obligations under the lease contract and the Shopping Centre's rules;
- be provided with accounting data related to the Turnover made in the Premises, and review accounting data and books related to the Premises if it has doubts regarding the accuracy of the Turnover data provided by the Tenant.
- decide to exploit the parking as a paid-parking;
- assign the lease contract.

## 4. ABILITY TO TRANSFER THE LEASE OR SUBLET

### 4.1 Assignment

According to the Civil Code, either party may assign its rights and obligations under the lease contract if the other party agrees to such transfer. It is usually agreed in the lease contracts that the Landlord may assign the lease contract up to its discretion, but the Tenant may assign the lease contract only with the Landlord's prior written and explicit consent.

Usually, only Tenants with a strong market position obtain the right to assign the lease contract directly in the lease contract, and in most of these cases it can be assigned only to companies within the Tenant's group of companies. Otherwise, assignment by the Tenant is usually agreed case by case by the Landlord.

### 4.2 Underletting

The Tenant may sublet the Premises only with the Landlord's consent. Subletting without the Landlord's consent is a serious breach of the lease contract. The sublease always terminates upon the termination of the lease at the latest.

#### 4.3 Sharing Occupation

According to the Czech law, sharing occupation of the Premises constitutes a sublease and the principles governing sublease apply, i.e. it is only possible with the Landlord's consent and sharing occupation without such consent constitutes a serious breach of the lease contract.

#### 4.4 Change of Control

Change of control is not regulated by the Civil Code with respect to contracts, but transfer of shares or an ownership interest in the Tenant which may result in the change of control may be agreed in the lease contract to constitute an assignment of the lease contract. In such case the same rules and principles as agreed in the case of the assignment of the contract shall apply.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions Affecting Alterations

Any alterations to be made by the Tenants in and to the Premises are paid by the Tenant and require the Landlord's prior approval following submission by the Tenant of a detailed specification. The Tenant may not carry out any alterations outside the Premises (i.e. in the Common Parts). Any alterations (including the initial Tenant's fit out – see below) must usually be removed from the Premises before or upon the termination of the lease at the Tenant's cost, unless the parties agree that any alterations may remain in the Premises and in such case the parties agree a compensation to be paid by the Landlord to the Tenant for the retained alterations.

#### 5.2 Tenant's Fitting out Works

Initial fit out to the Premises is made by the Tenant (Premises are usually handed over to Tenant in the shell & core condition) at its cost, following the Landlord's approval of the Tenant's works, projects and designs.

#### 5.3 Signage

Any business establishment must bear a signage and Tenants are allowed to place their trade name on the Premises by virtue of the Civil Code, but details of placing the Tenant's signage on the Premises are usually agreed in the lease contract (typically, on the façade above the Premises' entrance and the signage must comply with the Landlord's / Shopping Centre's standards).

#### 5.4 Repair and Decoration / Maintenance

According to the Civil Code, the Landlord is liable for all maintenance and repairs of the Shopping Centre including the Premises, save for ordinary maintenance of and minor repairs to the Premises to be carried out by the Tenant. But it is usually agreed in the lease contracts that the Landlord is liable only for the maintenance and repairs of the Common Parts of the Shopping Centre (including common distribution systems such as HVAC, electricity, fire-fighting systems, etc.) and common distribution systems forming part of the Premises and the Tenant is liable for and pays costs for all other maintenance of and repairs to the Premises. The above maintenance and repairs by the Landlord are recovered through the Service Charges.

### 6. TRADING

#### 6.1 Keep Open

The Tenants must comply with the opening hours, have the Premises open for trading and for the public during the opening hours stipulated for the Shopping Centre by the Landlord, unless the Tenants are not allowed to have the Premises open by virtue of legal regulations (e.g. an act prohibiting sale on certain state holidays for premises exceeding certain area).

#### 6.2 Trading Names

The trade name under which the Tenant operates the Premises is usually agreed in the lease contract and any change requires the Landlord's consent. Mono as well as multi brand shops are usual in the Czech Republic. The

Landlord usually agrees to the change of the trading name if the whole international or at least the Czech chain of the stores changes its brand name.

## 7. INSURANCE

### 7.1 Insured risks

The Landlord maintains insurance of the Shopping Centre, usually including the Premises; costs of such insurance are recovered through the Service Charges.

The Tenants maintain at their cost, insurance of their assets placed in the Premises and liability insurance for damage caused to third parties in connection with the Tenants' use of the Premises, including damage caused by the performance of the fitting out works and alterations. Business interruption insurance is not very common among the Tenants in the Czech Republic.

### 7.2 Uninsured risks

Usually, there are no provisions in the lease contracts regulating uninsured risks.

## 8. SERVICE CHARGE

### 8.1 Typical regime

The Landlord is responsible for providing common services necessary for the due operation of the Shopping Centre, including maintenance, repairs and cleaning of the Common Parts and Shopping Centre's common systems and equipment, and including supplies of utilities to the Common Parts and security of the Common Parts, where the costs are recovered through the Service Charges.

The Tenants pay their share of the Service Charges in form of advance payments reconciled annually and usually based on the share of the area of the Premises. Only *Anchor Tenants* pay the Service Charges as a fixed amount not subjected to the annual reconciliation.

### 8.2 Promotions and marketing

The Landlord is responsible for the promotion of the Shopping Centre and the Tenants pay their share of the promotion cost, usually as a fixed amount that is not reconciled, but may be subject to the annual review (indexation based on the HICP or the Czech inflation announced by the CSU).

### 8.3 Tenant's Associations

The Landlord may form a Tenants' association in the Shopping Centre and selected Tenants then must take part in such association.

## 9. OTHER POINTS TO NOTE

- **Compensation for Acquisition of Customer Base** – according to the Civil Code, if a lease terminates by the Landlord's notice of termination, the Tenant is entitled to compensation for the benefit which the Landlord or a new Tenant gained by acquiring the customer base established by the terminated Tenant (in the Premises). The Tenant has no such right if the lease was terminated due to a material breach of its duties. This provision may be excluded by an agreement of the parties in the lease contract.
- **Change of Circumstances** – according to the Civil Code, if there is a substantial change in circumstances creating a gross disproportion in the rights and duties of the parties, the affected party may claim the renegotiation of the contract, but it cannot suspend its performance. Furthermore, according to the Civil Code, the Tenant may terminate a lease for a definite period if the circumstances have changed to the extent that the Tenant cannot be reasonably required to continue the lease. Both provisions may be excluded by an agreement of the parties in the lease contract. Both provisions were highly demanded

and invoked by the Tenants in connection with the closure of the stores based on a measured approach adopted by the Czech government in connection with the Covid 19 pandemic.

- **Destruction of the Premises** – according to the Civil Code, if the Premises as the subject of lease cease to exist (e.g. due to their destruction), the lease shall terminate. This provision may be excluded by an agreement of the parties in the lease contract.
- **Force Majeure (circumstances excluding liability)** – according to the Civil Code, a party is not liable for default if the default is caused by an extraordinary, unforeseeable and insurmountable obstacle created independently of its will. This provision may be excluded by an agreement of the parties in the lease contract.

## CROATIA

By

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### Preliminary Remarks

This contribution concerns solely legal provisions and the general practice in Croatia and does not refer to any particular practical situation that can be identified as a particular commercial relationship.

The concept of a modern shopping mall, as recognised nowadays by the customers and the entrepreneurs, started to develop in Croatia rapidly in early nineties of the past century, soon after gaining independence and introducing a constitutional concept in favour of a free-market economy and legislative framework as in the western European markets. Since then, the legislative frame and the provisions regulating the lease relationship have become more specific and detailed. Generally, the lease relationship in Croatia is governed by the provisions of the Business Premises Lease and Purchase Act (*Official Gazette No. 125/2011, 64/2015 and 112/2018*) which as a special and separate legal regulation sets forth essential elements of lease (such as the form of the lease contract and mandatory content thereof, main rights and obligations, cessation of lease) between the contractual parties involved in the lease relationship. The provisions of the Business Premises Lease and Purchase Act are mandatory and may not be superseded by different understanding of the contractual parties, unless where this is explicitly provided for the parties under the referred law.

Although the essential elements of the lease contract are defined under the Business Premises Lease and Purchase Act, the complexity of shopping mall operation caused a wider scope of non-essential contract elements to be included in the contract. Namely, such additions are primarily aimed at providing the landlord with appropriate and efficient legal tools to operate the shopping mall as a community of the owner, tenants, and the customers. Hence, the lease contracts in practice also include detailed provisions on granted business activity, contractual security, calculation of the lease fees and common operational costs of the shopping mall, split of maintenance obligations, etc. Such non-essential elements of the lease are the subject of the Obligations' Act (*Official Gazette No. 125/2011, 78/2015 and 29/2018*) which regulates the principles of obligations, as well as contractual and non-contractual obligations.

In practice, the relationship of landlords and tenants is regulated by provisions of the Business Premises Lease and Purchase Act, the Obligations' Act, and the lease agreement. These work together in a specific hierarchy starting from the draft of the agreement and throughout its entire life cycle. The rules of these acts apply in the following order: Primarily, due to dispositive character of the civil obligations law, provisions of the lease agreement (provided they are in accordance with mandatory provisions of the Business Premises Lease and Purchase Act and the Obligations' Act; alternatively, provisions of the Business Premises Lease and Purchase Act as a special regulation due to *lex specialis* principle; and finally, provisions of the Obligations' Act as a general regulation.

### 1. TERM

#### 1.1 Contractual Term

There is no mandatory minimum or maximum duration set for lease agreements in Croatian law, and retail lease agreements can legally be concluded for either a definite or indefinite term. However, it is common business practice to conclude retail lease agreements for a definite term, mostly for period of up to 5 or 10 years. In order to establish long-term relationship between the parties, lasting beyond initial lease term, conditions of future extension options can be included in the lease agreement.

#### 1.2 Break Rights

Under the Business Premises Lease and Purchase Act (*Art. 26*) the landlord may terminate the lease agreement, regardless of the term of the agreement and its duration upon realisation of one of the following conditions: (1) the tenant uses the premises in a manner contrary to what was set out in the lease agreement or causes considerable damage to the premises, (2) the tenant does not pay due rent within 15 days as from the date of a written notice, (3) the landlord, due to reasons for which he cannot be held liable, cannot use premises in which

he used to perform his activities and, therefore, intends to use the premises occupied by the tenant. Under the same Act (Art. 27) the tenant may terminate the lease agreement at any time, regardless of the contractual or legal provisions on duration if the landlord does not deliver the premises in the agreed state within the agreed term. Additionally, under Art. 28, either party may terminate the lease agreement, regardless of its duration, at any time if the other party does not fulfil its obligation.

Moreover, the lease agreement, due to dispositive character of the governing law, may be terminated (1) for reasons which the parties had determined themselves through the lease agreement and (2) by mutual agreement between the parties.

### 1.3 Renewal Rights

Renewal rights are not foreseen under Croatian law. For a long period, it had been considered a lease was renewed indefinitely if there was no opposition from the landlord on these matters. However, the Supreme Court of the Republic of Croatia has taken a stand against this in various cases (*Rev-3218/1999-2*, *Rev 420/10-2*, *Rev-x 184/14-2*) holding no lease agreement of retail premises should be considered automatically renewed.

Nowadays, it is a common business practice in retail sector to include contractual clauses expressly disavowing tacit renewal of the lease agreement.

### 1.4 Disputes and Forfeiture

Under the Business Premises Lease and Purchase Act (Art. 32) disputes of tenants and landlords regarding their mutual rights and obligations fall within court jurisdictions and such procedures are considered urgent. There are no legislative provisions regarding forfeiture. Moreover, forfeiture by the landlord, without the Court's order, may be deemed as trespassing.

However, it has become a common business practice to include amicable dispute resolution provisions within lease agreements of retail premises. Such provisions are known to envisage negotiation, mediation, and other forms of ADR.

Furthermore, forfeiture has become a standard feature of such lease agreements, whereas the parties will contract multiple different penalties for different breaches of agreement. Some of the highest penalties of this kind are commonly agreed upon for breaches of confidentiality and can reach millions of HRK in amount. Other common reasons for implementing penalties are early termination against agreement provisions, breach of rule or code of demeanour instilled for retail centres, delay in payment of due fees, etc.

## 2. RENT

2.1 While there are no legislative provisions regarding rent, except that it has to be agreed upon, form and means of payment of rent have been firmly established in practice. Additionally, it is worth mentioning that under Croatian law, namely the Financial Conduct Act, all transactions between parties need to be carried out in Croatian Kuna (HRK). Furthermore, while prices may be specified in Euro within the agreement, such agreements must contain a clause determining the relevant rate for recalculation of due amounts to HRK and defining the obligation of respective party to undertake payment in HRK.

Moreover, it has become a common practice to split the total rent into individual components, such as fixed rent and turnover rent, and in addition commonly service charge, marketing costs, etc. Furthermore, lease agreements of longer duration usually contain an indexation clause (such as EURIBOR) which allows for calibration of set fixed rent.

Additionally, it should also be stated that fee amounts tend to be specified without VAT, and hence contain a clause obligating tenant to increase paid amount in accordance with enforceable VAT regulations on the day of the payment.

### 2.2 Online sales and Turnover Rent

Because online sales make such a massive part of turnover nowadays, especially having in mind the restrictive measures imposed on retail centres regarding the COVID-19 pandemic, a stricter regulation of online sales with connection to business premises has been developing. This regulation comprises of including online sales with

store pick-ups into the monthly turnover, prohibition of online shopping advertising within retail premises and prohibition of online shopping points of “kiosks” within the retail premises, etc.

As online shopping is rather a new fad when considered on a larger timescale, it yet remains to be seen how the practice leasing of retail premises will adapt over time.

### 2.3 Rent Review

While there are generally no provisions regarding rent revision in Croatian law, and hence there is no rent revision procedure unless otherwise agreed in the lease agreement, provisions regarding such revision have become an integral part of these agreements through practice.

Basic means for rent review, which operates automatically and is agreed upon at the start of the lease, is indexation. Indexation is normally contracted with regard of a specific index which will be used throughout the duration of the lease, as well as with a specific date on which the indexation will be done.

Additionally, it is worth mentioning, there are certain circumstances, described in the Business Premises Lease and Purchase Act (*Art. 12, 13*) whereas rent revision is permitted even if not previously agreed upon. Therein the landlord is entitled to modify the rent in order to perform repairs to retail premises for the purpose of decoration or reduction of energy and maintenance costs, provided they have notified the tenant in writing at least 2 months in advance. Additionally, the tenant is entitled to ask for a proportionate reduction of the rent in certain circumstances, such as partial limitation of the agreed use of the premises, or even rent-free periods.

### 2.4 Procedures to recover unpaid rent

There are no mandatory rules regarding procedures to recover unpaid rent. However, it is a well-established business practice to require security for the payment of rent, either in form of security deposit or a bank guarantee.

## 3. PREMISES

### 3.1 Extent of Demise

Under the Business Premises Lease and Purchase Act (*Art. 18.*) the Tenant is obliged to bear the costs of normal maintenance (cleaning, wall painting, small repairs) unless otherwise agreed, and cannot be held liable for deterioration of state of business premises, devices, and equipment due to their regular use. Additionally, the tenant is obliged to undertake repairs of damage to the business premises they, or the person within their responsibility caused.

Moreover, it needs to be mentioned that the landlord is obliged to maintain the premises in a condition suitable for tenant's performance of their agreement stipulated activities and is obliged to make any respective repairs necessary. However, should the tenant notice the need for such repairs, they are obligated to immediately notify the landlord in writing, or could be liable for possible damage.

### 3.2 Extent of the Shopping Centre

Again, a description of what constitutes a Shopping Centre may well have a significant impact on the financial obligations of the parties, either in terms of a primary obligation to repair and maintain, or in terms of the cost-of-service charge or other reimbursements to a Landlord. In many jurisdictions, it has become common practice to define the Centre as including any future extension, subject to appropriate formulas for adjusting the calculation of service charge as and when an extension is created.

### 3.3 Common Parts

Common Parts comprise of all areas accessible to everyone, both tenants, landlord and in most cases visitors. The use of this areas is commonly defined in detail through the lease agreements and rules/codes of conduct within the retail centres. These always include the obligation of tenants to use the Common Parts with the greatest diligence and contain provisions on full material responsibility of the tenants for any damages caused in these areas.

Regarding the landlord's responsibilities with respect to these areas, these are also regularly defined within the lease agreements and rules/codes of conduct and include responsibility for the repair and maintenance of the Common Parts.

### 3.4 Rights Reserved by Landlord

There are no specific reserved rights defined by the legislation, however, some reserved rights have become more or less established in practice.

Such rights include:

- landlord's entitlement to enter tenant's premises in order to inspect and supervise whether the tenant uses the premises properly and in compliance with the lease agreement, as well as landlord's entitlement to enter tenant's premises outside of working hours, without their permission, in case of force majeure and/or necessary works
- to set working hours of the shopping centre,
- to charge/not charge parking,
- to collect tenant's accounting data for the purpose of calculating the turnover rent,
- assign the contract,
- the landlord commonly retains the right to enter tenants' premises without any limitation, in the period near the end of the lease term, in order to show it to possible future tenants and/or buyers.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

Regarding sub-letting of the premises, the tenant is only entitled to sub-let (either premises as a whole, or parts of the premises) with a prior written approval of the landlord (*Business Premises Lease and Purchase Act, Art. 19*).

4.1 Assignment – tenant is commonly not allowed to assign without landlord's consent.

4.2 Underletting is not a common practice when regarding leasing of retail premises in Croatia.

4.3 Sharing occupation, as with underletting, is not a common practice when regarding leasing of retail premises in Croatia, although both are legally allowed.

4.4 Change of control, while there are no legal provisions regarding change of control with respect to the lease agreement it is common to instil lease agreement termination clauses in cases of major (+50%) changes in ownership structure of the tenant. However, even when such clauses exist in the agreement, it is possible (and common) for parties to override them with *ad hoc* written approvals/agreements.

## 5. ALTERATIONS/REPAIR

5.1 **Restrictions affecting alternations** there are no mandatory provisions regarding fit-out works, it is common for the parties to agree the terms, condition, and manner for these works through the lease agreement, as well as which party will be bearing the costs (and whether such cost will be divided). Regarding repairs of the premises, as mentioned under 3. above, the tenant is obliged to undertake repairs of damage to the business premises they, or the person within their responsibility caused as well as regular cleaning and maintenance, while the

landlord is obliged to maintain the premises in a condition suitable for tenant's performance of their agreement stipulated activities and is obliged to make any respective repairs necessary.

## 5.2 Tenant's fitting out

Tenants fitting out is commonly performed and paid by the tenant but in some cases, landlords pay it entirely or partially. Fitting out is not allowed without landlord's prior's approval.

## 5.3 Signage

Tenant is allowed to place its signage which must be approved by the landlord in advance. Change of the signage is also subject to landlord's approval.

## 5.4 Repair and decoration

Regarding common business practices concerning repairs and decorations, it needs to be said that it is well established to have detailed rules on this topic defined by rules or codes of conduct within the retail centres. Some of the standard rules regarding any execution of works are (1) that all of them have to be done outside of the working hours of the retail centre, (2) the tenant must have prior written approval for any works undertaken and must deliver exact schedule of these works as must have approval for the contractor used, (3) the tenant needs to provide insurance for works undertaken, etc.

## 6. TRADING

6.1 It is common to define all trading-related rules and policies of the landlord within the lease agreement and rules/code of conduct which usually make an integral part of all lease agreements. The standard practice for retail centres in Croatia is to impose working hours on tenants which exactly match the working hours of the retail centre, except for special tenants such as cinemas, bars and restaurants, casinos, gyms, supermarkets, etc. During these hours tenants are not allowed to close their premises without the prior written notice of the landlord, and should they do so, there are usually contractual penalties.

### 6.2 Tenants' Trade Name

Moreover, it is an established practice to have the trading name of the tenant entered into the lease agreement, along with the clause prohibiting them from altering it without prior written agreement of the landlord.

### 6.3 Tenants' Working Hours

As mentioned in 6.1. it is established practice for the landlord to dictate working hours of the tenant's premises.

### 6.4 Competition rules

While there are no legally imposed competition rules, it is common for anchor tenants to insist on input competition clauses into their lease agreements. In this way, anchor tenants somewhat restrict business activity of the landlord regarding freedom of letting activity. However, due to importance of such tenants, which regularly hold extremely long leases (+10 years) and occupy large areas within the retail centres, it is established practices for landlords to meet such requests.

## 7. INSURANCE

Generally, both the landlord and tenants obtain various insurance policies covering different risks. Landlord's policies generally cover common areas and the entire building, along with all liabilities thereto connected, whereas the tenant's policies will cover tenant's premises and liabilities thereto connected.

It is well established for the landlord to provide comprehensive general liability insurance under the civil law, as well as landlord's liability insurance, as well as various property insurances.

## 7.1 Insured risks

Throughout the insurance policies the landlord would insure for general liability under civil law, landlord's liability insurance, property insurance against fire, water damages, Force Majeure covering all movable and immovable assets owned by the landlord (or for which they are responsible). The insurance would also cover damages arising from temporary suspension of activity of the retail centre.

Additionally, it is common to define tenant's insurance obligations within the lease agreement in detail, whereas even the acceptable insurance companies and coverage limits are defined. In context of occupation of leased premises, it is common for lease agreements to contain clauses on mandatory insurance policies a tenant must obtain. Such policies include (1) Construction All Risk policies in cases where the tenant undertakes fit-out works, (2) All risk property insurance covering assets owned by the tenant (or those for which they are responsible), and (3) General liability insurance against property damages and personal injuries. The insurance also commonly covers the period of construction and major repair works in the centre and tenant's premises.

## 7.2 Uninsured risks

Although it is internationally common practice to have uninsurable risks, such as terrorism, this is not the case in Croatia. Namely, as of recently certain insurance companies enable their customers to contract terrorism coverage within their property insurance policies, however this will cause a much higher fee.

It is important to bear in mind the extent of the insurance coverage when choosing the policies, especially regarding policies covering earthquakes which have been a common hazard lately. Namely, most of basic property insurance policies covering earthquakes will cover damages caused by earthquakes up to certain magnitude and will completely annul the coverage should damage be caused by an earthquake of higher magnitude, whereas the coverage for the latter needs to be specifically contracted under a higher fee.

## 8. SERVICE CHARGE

Service charge is a common tenant's obligation. Although majority of common costs are directly paid by the landlord, they are nonetheless in reality financed by tenants through service charge. In reality tenants pay for any and all services used, both in the premises and in the common areas, including insurance, water, gas, power, sewage, fire protection, garbage collection services, cleaning, central loud-speaking system, air conditioning, heating, cooling, administrative services, development, equipping, etc. Service charge is paid usually per square meter of the premises.

Moreover, it is worth mentioning that service charges are also subject to VAT under Croatian law and are never included in rent unless parties explicitly agree accordingly.

### 8.1 Promotion and Marketing

Additionally, when considering marketing and promotion costs, it needs to be mentioned these can either be included in the general service charge, or can be an individual aspect of marketing fee, contractually defined as an individual component. On the Croatian retail market, it is common to define this cost as a separate fee, as they are specifically used by the landlord for marketing purposes which benefit the entire shopping centre.

### 8.2 Tenants associations.

Tenants' associations are not widespread or obligatory for tenants. There have been few attempts to establish mass member tenants' associations, but such attempts were not successful.

## 9. GREEN LEASE

The market lease does not include provisions requiring the parties to share of data on the consumption of utilities, energy performance etc. The landlord cannot lease the premises without having the energy certificate of the premises.

## **10. FORCE MAJEURE AND COVID**

There is a general legal concept of hardship, i.e., the situations when in the case of force majeure obligations between parties end by the law or by the court's decision. Neither of those two is a situation applicable to the lease agreements in Shopping Centres and Covid-19 restrictions, nor we are aware of such pending court case. The rent so far has been continued to be payable throughout restrictions, although must be said that massive rent reductions, agreed voluntarily by the tenant and the landlord, have been in place. The law does not allow for the lease agreements to be varied or negotiated due to Covid-19 restrictions or situations, although most landlords do try to help tenants' during Covid-19 situations, but entirely on the voluntary basis. There are no existing or new pandemic laws in Croatia that effect lease agreements or the shopping centre industry.

## **11. OTHER POINTS TO NOTE**

- 11.1 Due to strict anti-money laundering and prevention of terrorism regulations in Croatia, it is a regular business practice to include anti-money laundering and anti-terrorism clauses in all lease agreements. By these clauses, the tenant undertakes to oblige all national and EU anti-money laundering and prevention of terrorism regulations. Moreover, these clauses allow landlord to immediately terminate the agreement should he find the tenant in breach of any of these regulations or rules thereof.
- 11.2 Furthermore, in order to oblige with national anti-corruption policies, all lease agreements tend to contain anti-corruption clauses whereas tenants undertake to insure neither them nor their collaborators are included in acts of corruption, as well as insure they comply with all regulations aimed towards prevention of corruption.
- 11.3 Additionally, in order to comply with all General Data Protection Regulation No. 679/2016 (hereinafter: GDPR), and respective national legislation, the parties will commonly conclude some kind of a personal data processing agreement which is normally appended to the lease agreement. As parties necessarily exchange personal information during conclusion of the lease agreement it is necessary for them to establish their rights and obligations as mutual Controllers as defined under GDPR.

## DENMARK

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### Preliminary remarks

In Denmark commercial leases in shopping centres are subject to the Danish Business Lease Act, (“Act no. 934 of 20 December 1999”, in Danish: “*Erhvervslejeloven*”). The Business Lease Act was enacted on 1 January 2000 and applies to premises used entirely for other purposes than residential. Premises used for residential purposes are subject to the Danish Rent Act, (“Act no. 927 of 4 September 2019”, in Danish: “*Lejeloven*”).

Properties may include both leases subject to the Business Lease Act and leases subject to the Rent Act at the same time.

The Business Lease Act includes detailed regulation of business leases inspired by the Rent Act. However, contrary to the Rent Act, most of the rules of the Business Lease Act are facultative and may be deferred from by agreement.

## 1. TERM

### 1.1 Contractual term

Commercial leases in Danish shopping centres are entered for an infinite term, unless specific circumstances apply. The relevant specific circumstance to justify a fixed lease term is the material need for a fixed term on the part of the landlord at the time when the lease contract is entered. A tenant may contest a fixed-lease term if the automatic expiration of the lease at the end of the fixed term is not justified by such material needs of the landlord. The application of a fixed-lease term cannot be justified by reference to the landlord’s desire to keep options for reletting or negotiation of the lease terms open. For this reason business leases in Danish shopping centres are generally entered into for an indefinite term.

The Business Lease Act includes strict mandatory rules limiting the rights of the landlord to terminate a lease, if the tenant is not in default. In practice, a landlord can only terminate a lease if the landlord intends to use the premises for his own purposes (not for reletting) or if the property (not only the leased premises) is being demolished or rebuilt, and such demolition or construction works require the premises to be abandoned by the tenant. “Own purposes” is interpreted strictly to the legal entity of the landlord, and thus not holding companies or subsidiaries.

Unless otherwise agreed, a lease may be terminated by the tenant at any time with a 3 months’ written notice. It is usual to agree that termination of a lease shall be subject to 6 months’ written notice.

It is also customary to agree on a mutual period during which the lease may not be terminated (except in case of default by the other party). The period of non-termination is usually 2 to 4 years for the tenant, depending on the investments that the landlord may have made to improve the premises specifically for the demands of the tenant. The agreed non-termination period for the landlord is usually agreed for an equal or a longer period.

### 1.2 Break rights

It is prohibited by law to agree that the landlord can exercise any break rights.

It is not customary to agree that the tenant can exercise break rights. If the landlord has made investments to improve the leased premises, it is possible to agree that the tenant must pay a fixed amount to the landlord if the tenant terminates the lease before the expiration of an agreed non-termination period.

### 1.3 Renewal rights

Since leases are generally entered into for an indefinite term, renewal rights are usually irrelevant.

## 1.4 Disputes and forfeiture

Both parties may terminate the lease if the other party is in material breach of an obligation under the lease. Termination in case of default is generally subject to prior written notice in order to give the defaulting party the opportunity to meet its obligations.

Should the tenant fail to pay the rent or other payments under the lease (for instance service charges/the tenant's share of common operating expenses, taxes and consumption) in due time, such default may be considered a material breach that entitles the landlord to terminate the lease, provided that payment is not made within 3 days from the tenant receiving written notice from the landlord. Disputes between the parties to a lease are brought before the housing tribunal of the local City Court. It is possible, but not customary, to agree on dispute resolution by arbitration.

## 2. RENT

### 2.1 Principal rent

Rent is usually based on the turnover of the tenant's business in the leased premises (see below, section 2.2), with a minimum rent based on the open market value. However, in older shopping centres rent is frequently a fixed rent independent of the turnover of the tenant and subject to rent review. Minimum rent is usually calculated as rent per square metre gross area (see below, section 3.1).

Minimum rent is usually subject to annual automatic rent adjustment in accordance with the annual increase in the Danish Net Consumer Price Index (in Danish: "*Nettoprisindekset*"), calculated by the Danish Statistical Office. It is often agreed that the annual increase of the minimum rent shall be minimum 2% and maximum 3%.

As shopping centres in Denmark are VAT-registered, invoices from landlords to tenants include VAT on 25%.

### 2.2 Turnover

Turnover based rent is calculated as a percentage of the gross turnover from the business conducted in the premises by the tenant. The applicable percentage depends on the business of the tenant.

With an increased number of sales channels for the tenants via online sales, i.e. "click-and-collect" and "return-in-store what is bought online" the demand for clauses that define the tenant's gross turnover is increased. Depending on how attractive the tenant is for the landlord/how attractive the leased premises are for the tenant, the clauses include different variations of definitions of gross turnover, such as "the gross turnover includes the total turnover in or from the leased premises, including direct and indirect turnover without any reductions".

### 2.3 Rent review

Unless otherwise agreed, the Business Lease Act entitles both parties to call for an adjustment of the rent (minimum rent) to market rent every 4<sup>th</sup> year, although no earlier than 4 years from the commencement of the lease contract/last adjustment. It is customary to agree that the parties waive their right to call for a rent review during periods of agreed non-termination.

In addition, the landlord may call for an increase of the rent if the landlord improves the property and/or the premises. The rent increase is calculated as a total, and is divided into 4, so the increase is fully implemented after 4 years.

### 2.4 Procedures to recover unpaid rent

The landlord is entitled to terminate the lease contract if rent or other mandatory payments have not been paid in due time by the tenant. Prior to a termination, the landlord must have sent a demand letter after the due date of payment with a 3 days' notice for payment. If the tenant omits to pay, the landlord can file the case with the bailiffs court to recover unpaid rent and costs incurred due to the default. This also applies for rent during the COVID pandemic however, many landlords have accepted a postponed payment of rent for the periods during which COVID restrictions have applied to Danish shopping centres.

It is common to agree on a deposit equivalent to 6 months' rent, alternatively a bank guarantee on the same amount from the tenant. This security is not for rent arrears, but for potential claims of the landlord when the lease expires.

### **3. PREMISES**

#### **3.1 Extent of demise**

Leases typically include a net area covering the unit used by the tenant along with the addition of a proportionate part of the common areas, in total the gross area.

#### **3.2 Extent of the Shopping Centre**

The definition of the shopping centre is typically described in the lease contract, and the address of the centre is a mandatory part of the description. It is not common practice to make reservations in the contract regarding extensions of a shopping centre, as the Business Lease Act regulates the right for a landlord to make changes in the premises and at the property if the changes do not change the identity of the premises significantly and permanently. This right of the landlord applies even though it may have an impact on the lease.

#### **3.3 Common Parts**

Common areas are used for common purposes by all tenants in accordance with house rules provided by the landlord. Tenants are usually not granted any individual rights to usage of the common areas. The landlord maintains the common areas and may recover the costs of such maintenance through the service charges paid by the tenants (see also section 8 below).

It is possible for the landlord to reserve rights in the lease contract to use the common parts of the shopping centre for commercialisation hence this is a part of general negotiations.

#### **3.4 Rights Reserved by Landlord**

According to the Business Lease Act the landlord has a right to enter the premises at any given time when the conditions require it, for instance to repair or reduce the extent of a damage on the property or in the premises.

### **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

#### **4.1 Assignment**

The landlord is entitled to transfer a shopping centre to a new owner with all rights and obligations towards the tenants and without the approval of the tenants.

According to facultative provisions in the Business Lease Act, a tenant in a shopping centre is entitled to assign a lease to a new tenant, unless the landlord opposes to the assignment and justifies the opposition by reference to material reasons such as insufficient financial capability or trade knowledge on the part of the new tenant. If the tenant is a natural person or a company without limited liability, assignment to a new tenant that is a company with limited liability is subject to the natural person or company without limited liability remaining in control of the majority of the votes in the company intended to be the new tenant, and subject to guarantee from the natural person or company without limited liability for the new tenant's fulfilment of all obligations according to the lease.

Assignment of a lease can be subject to the payment of an amount in goodwill consideration from the new tenant to the existing tenant. Thus, the right to assign may represent a substantial value for the tenant. It is customary to agree that assignment is subject to approval from the landlord and that the approval of the landlord may be subject to renegotiation of the terms of the lease. Furthermore, it is customary to agree that assignment to a third party is subject to a first right of refusal (purchase option) in favour of the landlord.

#### **4.2 Underletting**

According to the facultative provisions of the Business Lease Act, a tenant is not allowed to sublet without the landlord's consent. It is customary in shopping centre leases to allow the tenant to sublet the premises as a

whole to a subtenant or let the premises to a franchisee to use for the same purposes as allowed to the tenant under the lease. The subtenant or franchisee must be approved by the landlord and the letting or franchise shall not reduce the obligations of the tenant towards the landlord. Thus, the tenant will remain fully obliged to fulfil all obligations towards the landlord according to the lease, including restrictions on which purposes the leased premises can be used for.

Previously, it was common in some cases only to allow subletting if the tenant paid an additional subletting surcharge to the landlord. Subletting surcharges are seldom practiced today.

#### 4.3 Sharing occupation

Shared occupation of a lease is usually not allowed, sometimes with the exception of speciality stores (bakers, butchers, etc.) within a supermarket or similar store and in such cases only as subletting by the primary tenant. As demands from customers to have innovative shopping experiences increase, the demand from tenants to have wider descriptions of how the leased premises may be used may also increase. However, wider definitions on the tenants lawful activities in the lease are not common yet.

#### 4.4 Change of control

Clauses on change of control are common in Danish shopping centre leases, as the landlord has a legitimate interest in having full transparency on the legal identity of the tenant.

### 5. ALTERATIONS/REPAIRS

#### 5.1 Permitted alterations

It is customary to agree that the landlord is allowed to renovate and improve the shopping centre and the premises at all times in order for the shopping centre to comply with modern requirements and standards. If such alterations of the shopping centre or the premises are considered an improvement of the lease, the landlord may claim a rent increase calculated as an annual yield of the investment in the improvement.

In accordance with (mandatory) provisions in the Business Lease Act, a tenant is entitled to install usual installations on the premises and carry out alterations required by competent authorities as a condition for the legal continuation of the business conducted by the tenant from the premises. All other structural and non-structural alterations of the premises by the tenant are permitted only with the landlord's consent. It is also customary to agree that the tenant's installations in the premises do not significantly and permanently improve the premises and that these changes shall be removed at the end of the lease and that the premises shall be handed back to the landlord as they were given to the tenant on the commencement date.

The Business Lease Act does not govern statutory requirements to carry out alterations as energy efficiency improvements, entry for disabled persons etc. This is a part of the landlord's obligations as the owner of the property and it is not customary to hand such future obligations over to the tenant. However, it is customary to agree on the tenant's obligations to make sure, that the premises always comply with government requirements.

#### 5.2 Equipping the premises

The tenant's equipping of the premises is subject to the approval of the landlord, which is not to be unreasonably withheld or delayed. In most cases the premises are delivered by the landlord with basic installations and fittings (shop front; sanitary and electrical installations; cooling; walls, ceiling and floor covering). However, in recent years in several new shopping centres it has been agreed that the premises are delivered by the landlord to the tenant without any (or only very limited) installations or fittings. In these cases it is relevant to define in the lease contract exactly what "white box", "grey box" or any other state of the premises by handover includes, to avoid disputes about costs and possible delays.

In shopping centres under construction, it is usually agreed that the premises are handed over to the tenant 5 to 8 weeks prior to the opening of the shopping centre to the public. The tenant is allowed and obliged to equip the premises prior to the opening of the shopping centre. It is often agreed that rent payments shall commence at the scheduled opening of the shopping centre and that the lease shall be rent-free in the 5 to 8 weeks allowed for the tenant to equip the premises. During this period of time the tenant is usually required to pay service charges.

In existing shopping centres the landlord will often offer a new tenant a rent-free period in order for the tenant to furnish the premises if the new lease requires that the new tenant carries out substantial new equipping of the premises. To attract anchor tenants it may also be agreed that the landlord contributes with a payment for the tenant's investment in equipping the premises.

### 5.3 Signage

Tenants are usually allowed to use their own signage. Signage on shop fronts and facades towards common areas are generally subject to the landlord's approval in accordance with the landlord's shop front guidelines.

### 5.4 Repair and decoration

The landlord carries out and pays for the maintenance, replacement and renewal of the structural parts of the shopping centre (exterior walls, bearing walls, foundations and roof).

The landlord carries out the cleaning, maintenance, replacement and renewal of all common areas in the shopping centre. The costs of such maintenance, replacement and renewal are paid by the tenants as a part of the service charges.

Tenants are obliged to carry out and pay for all interior cleaning, maintenance, replacement and renewal of non-structural parts of the premises, including its installations, at regular intervals. It is not customary to oblige the tenant to bring the design and layout of premises up to date. However, the premises must at all times be kept in good repair.

## 6. TRADING

### 6.1 Opening hours

Tenants are obliged to keep the premises open for trade to the extent customary by the nature of the premises. Usually, it is agreed that tenants shall keep the premises open during the trading hours fixed by the landlord. According to mandatory provisions in the Business Lease Act, the tenants in shopping centres shall not be obliged to keep the premises open Monday to Friday after 20:00 or Saturday from 17:00 to Monday 06:00.

In practice more detailed requirements to opening hours are often handled in the article of association of the shopping centre/tenants' association in which it is mandatory for the tenant to be a member. Such articles of association can include provisions on mandatory opening hours on Sundays and at other opening hours, because this does not qualify to a business lease agreement with the landlord.

Failure of a tenant to keep the premises open for trade as required may entitle the landlord to terminate the lease. During the COVID-restrictions where it was mandatory by temporary, public legislation that non-essential shops in shopping centres were closed, these opening hours requirements were deferred from.

### 6.2 Trading names

The tenant is usually required to trade under a specified trading name to be approved by the Landlord in connection with approval of the premises' external signage (towards common areas).

### 6.3 Competition rules

The Business Lease Act does not include competition rules, and the parties are free to agree any competition clauses. In practice it is uncommon that landlords accept a clause preventing to let to a competitor in a shopping centre, but if the tenant is very attractive and has a unique concept a competition clause might be accepted by the landlord. It could be in combination with requirements to a minimum turnover of the tenant.

## 7. INSURANCE

### 7.1 Insured risks

The landlord arranges the insurance of shopping centres (including the rentable premises) against customary damages to the shopping centre, including fire. In recent years most major shopping centres have extended

their insurance coverage to include damage due to terrorism. It is not yet common for the landlord to take out an insurance on pandemics/public restrictions due to pandemics, but this might be relevant in the coming years.

The expenses of insurance are included in the service charges.

## 7.2 Uninsured risks

It is not customary to include provisions relating to uninsured risks in a shopping centre lease.

If a shopping centre is destroyed by fire or as a result of other damage, all leases are void.

## 7.3 Business Insurance

Risks due to a pandemic/public restriction caused by a pandemic are usually not covered by an insurance. Thus a financial risk for the tenant of not obtaining a turnover during mandatory periods of closed shops lie solely upon the tenant.

With a potential shift from simple rent models to more complex rent models with an impact on the tenant's business, there might be a shift towards more risk sharing between landlord and tenant. However, business interruption insurances are not yet common for Danish shopping centre owners.

# 8. SERVICE CHARGE

## 8.1 Typical regime

The landlord is usually obliged to provide water, gas heating, cooling, ventilation and electricity, security, cleaning, maintenance, repair and renewal of common areas. The costs of providing these services are recovered by the landlord through the service charges, which usually also include property taxes and duties as well as insurance premiums and centre management. The service charges are apportioned between the tenants on an agreed measure, which is typically a weighted floor area basis. Payments are required in advance according to an annual budget and with reconciliation at the end of the service charge year. According to provisions in the Business Lease Act, a landlord can only recover the service charges if each category of cost is expressly agreed, and if the estimated amount of the service charges is specified in detail in the lease on each category. Thus, it is possible to make reservations for changes in the costs, if these cannot be foreseen by the landlord. However, a best guess estimate must be made. Therefore defining a category of costs but stating the amount to zero would not be sufficient unless described further.

## 8.2 Promotions and marketing

Traditionally, promotion and marketing of shopping centres have been left primarily for the tenants to organize through tenants' associations. In recent years, landlords of several new shopping centres have assumed responsibility for the overall promotion and marketing of the shopping centre. The costs of such promotion and marketing are recovered from the tenants through a marketing charge paid by the tenants in addition to the rent and service charges.

## 8.3 Tenants' association

Tenants are customarily required to be members of a tenants' association. Tenants' associations are established with the purpose of representing the tenants towards the landlord, and to cooperate with the landlord in connection with all issues relating to the shopping centre. In many shopping centres, the tenants' associations are also responsible for the overall promotion and marketing of the shopping centre. The significance of the tenants' associations is materially reduced in shopping centres where the landlord has assumed responsibility for the overall promotion and marketing of the shopping centre.

# 9. GREEN LEASE

## 9.1 ESG policies

As transparency on energy consumption is increasingly important as part of the CSR policies of both landlords and tenants it is becoming more usual to agree on green lease terms and compliance with ESG policies. The

contract clauses usually consider that the landlord is subject to reporting obligations regarding compliance with ESG policies and is therefore required to provide consumption data for the shopping centre. Therefore it can be agreed that by signing the lease, the tenant accepts that the landlord contacts the suppliers regarding consumption data for use in servicing and advising the tenant in relation to active management of the tenant's energy consumption and energy management on the shopping centre as a whole, and to fulfill the landlord's ESG policies.

It is common to agree that all data that is gathered about the tenant's energy consumption in relation to third parties will only be used for benchmarking in an anonymized form.

## 10. FORCE MAJEURE AND COVID

### 10.1 Key parameters to constitute force majeure

The key parameters applicable when assessing whether COVID-19 constitute a force majeure event under the Danish legal principles are:

- 1) extraordinary events,
- 2) preventing a contractual party from fulfilling its obligations under a contract; and
- 3) events which the relevant party could not foresee, prevent or overcome.

Typical examples of force majeure events include war, riots, import bans, blockade, public seizure, fire and natural disasters. The burden of proof rests with the party seeking to rely on the force majeure event.

The main legal implication of a force majeure event is temporary relief for the party being prevented from fulfilling its obligations. This applies even if this has not been explicitly agreed upon in the relevant contract, which it rarely has in Danish commercial lease contracts. Hence, the party subject to a force majeure event cannot be met by remedies for breach of contract from its counterparty. If performance of the contract is impeded by the force majeure event for an indefinite duration, a party's obligations to fulfil the contract may even cease altogether.

The public restrictions imposed due to COVID-19 in Denmark from the middle of March 2020 do not constitute a force majeure event which gives a temporary relief for any of the parties in commercial leases in shopping centres, as neither the landlord nor the tenant are being prevented from fulfilling contractual obligations. The only exception to this is the obligation of the tenant to keep the business in shops, restaurants and bars open, as this is made impossible due to the restrictions.

### 10.2 COVID-/Pandemic-Clauses

The stressful situation for many tenants makes it relevant to consider alternatives to a strict, legal solution, and to negotiate commercial solutions for existing leases to the extent that the landlord is in a financial position to do so.

When drafting new commercial lease contract in the future, the experiences from COVID-19 are important to take into account. It can be assumed that pandemics and the risk of potential public restrictions to utilize commercially leased premises 100 % will draw more attention than prior to COVID-19. Therefore it is relevant to consider a "pandemic-clause" that balances the risks of the parties and describes under which circumstances a party can be relieved from its contractual obligations. Such a clause could include the following focal points:

- That the landlord carries the risk that the leased premises and the shopping centre comply with all public requirement at the commencement of the lease contract.
- That the tenant carries the risk that the specific use of the premises, including public requirements to the business of the tenant, are complied with.
- If a public authority imposes restrictions due to a general health risk, including pandemics, requiring that the premises are closed for the public/customers, the tenant is granted a rent relief for a limited period, if the tenant does not obtain a turnover in an alternative way.
- If the restrictions are upheld after the agreed period, the parties are entitled to terminate the business lease contract without a notice/with a short notice.

The “pandemic-clause” must be adjusted to the specific circumstances for the contracting parties, and consider the bargaining power of the landlord and tenant.

## **11. OTHER POINTS TO NOTE**

### **11.1 Old lease contracts**

Until 1988 business leases were regulated by the Danish Rent Act. Between 1988 and 2000 different rent regulation acts applied on business leases. These acts are still relevant for shopping centre lease contracts entered prior to 1 January 2000. As they include some mandatory rules that cannot be derogated from by agreement it is necessary to pay attention to the commencement day in the lease contract.

### **11.2 Anti Money laundering**

Neither the Danish legislation on anti money laundering nor the Business Lease Act regulate duties for the landlord or the tenant regarding anti money laundering. It is customary to agree that the rent shall be paid to a designated bank account in a bank chosen by the landlord. Thus cash payments of rent are unusual. As of 1 July 2021 it is illegal for the landlord to receive cash amounts exceeding DKK 20,000 (EUR 2,700).

### **11.3 Terrorism and security**

It is not customary to regulate safety measures or to oblige the tenant to support security exercises in a shopping centre. However, it is customary for tenants to participate in fire drills. These kinds of obligations are usually not regulated in the contract, but considered as a part of the obligation of the tenant to maintain good order.

### **11.4 Prescribed form**

As the Business Lease Act does not require the use of a standard form (as opposed to residential leases) it is not common to use standard forms when entering a business lease agreement. To ease the management of the shopping centre the landlord typically operates with a standard lease agreement which is tailored to the specifically and individually agreed terms with each tenant, but with identical general terms.

### **11.5 Data Protection and Digital Communication**

It is customary to state in the shopping centre lease that the handling of the tenant’s data complies with the Data Protection Regulation of 1 May 2016. Furthermore it is customary to agree on digital communication between the two parties as a valid way of communicating on contract matters.

## ENGLAND AND WALES, NORTHERN IRELAND AND SCOTLAND

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### Preliminary Remarks

The key statute dealing with the law of leases in England and Wales (as distinct from Scotland and Northern Ireland) is the Landlord and Tenant Act 1954 which in certain scenarios grants to the tenant the right to renew again its business lease on the same terms (although at an updated market rent). The parties can choose to exclude these tenant specific rights under the 1954 Act and whether or not the parties do is entirely a commercial decision which must be made before entering into the lease or any agreement to enter into the lease.

There are industry codes of practice which may also apply to the leasing arrangements, most notably the RICS professional statement for service charges in commercial property published by the Royal Institution of Chartered Surveyors – which defines what is best practice for surveyors in the performance of their management duties of commercial property.

The Model Commercial Lease (MCL) is a commercial template document available for all parties to use without charge and is intended to be a balanced document between landlord and tenant with the aim of avoiding unnecessary negotiation on routine letting transactions. The provisions of the MCL lease are often a good point of reference for parties today negotiating retail leases.

## 1. TERM

### 1.1 Contractual term

The market is split between very short flexible occupations, typically around 1 year, and more permanent occupations of up to 5 years in either case usually outside the protection of the Landlord and Tenant Act 1954 (1954 Act). Strong retail tenants and food and beverage operators generally require 10 - 15 year terms (see more on breaks at 1.2 below) often with the protection of the 1954 Act.

The operators responsible for driving footfall at a shopping place, typically highly capitalised retailers or larger department style stores, are more likely to require terms between 15 to 25 years, sometimes with a tenant's right to break the lease at the end of the 15th or 20th year, although there is reducing demand for large, single-occupancy space.

### 1.2 Break rights

Tenants taking a lease of a 5 year term often require a break right at the end of year 3. It is common to see breaks every 3 or 5 years for a lease lasting longer than 5 years. However there is no market standard and the parties are free to agree and negotiate as they wish.

For the tenant to obtain a refund of any sums relating to any period after the break, this must be specified in the lease. For frequent or unusual break dates, or where the landlord has provided a capital contribution to the tenant, the landlord may require a break fee to be paid by the tenant.

Conditional break clauses are less common and usually the tenant will only be required to return the premises free of occupation and have paid the annual rent up to date. Where relevant, the parties will usually agree to a prompt reconciliation of turnover rent after the operation of a break right.

### 1.3 Renewal rights

Renewal rights take two forms, contractual and statutory. It is very unusual for a tenant to have a contractual right (i.e. option) to renew a retail or restaurant letting.

For those leases with the protection of the 1954 Act, subject to meeting some criteria, tenants have a statutory right to remain in the property on expiry of the contractual term and to request a renewal lease. The renewal lease is generally based on the terms of the existing lease (subject to limited modernisation – negotiations around 'green' clauses and recent regulations on minimum energy efficiency standards are common in relation to updating leases).

The parties can opt to exclude the statutory renewal rights from the lease and this will most likely be acceptable for leases shorter than 10 years, although tenants will generally resist this. It is a point for negotiation which may impact on the rental level a tenant is willing to pay.

### 1.4 Disputes and forfeiture

The ability to forfeit a lease provides the landlord with its most powerful sanction for breaches of covenant/condition by the tenant. Under a forfeiture clause, the landlord has the right to end the lease (either by peaceably re-entering the premises or by issuing court proceedings) if the tenant breaches or does not perform its covenants/conditions. This right of forfeiture will often also apply if the tenant becomes bankrupt or suffers an insolvency event (although this may be extremely limited in an administration). Particularly relevant in today's market is the rising number of tenants entering into company voluntary arrangements ("CVAs"), which may reduce the rents and other sums payable at the same time as limiting the circumstances in which the landlord is able to exercise its right to forfeit.

Before enforcing a right of forfeiture for any breach other than non-payment of rent, the landlord must serve on the tenant a statutory notice in a prescribed form allowing the tenant the opportunity to remedy the breach first. The tenant also has a statutory right to seek relief from forfeiture (i.e. it can contest the forfeiture) but that will require the tenant to remedy the breach. Even an undertenant has a statutory right to seek relief and to claim to be instated in place of the tenant under the terms of the tenant's lease.

The Coronavirus Act 2020 imposes a temporary moratorium on the termination of a lease by forfeiture for arrears of rent (rent is widely defined), until 25 March 2022 in England and until 30 September 2021 in Wales (although potentially subject to further extension). Forfeiture for other 'non-rent' breaches is still permitted.

If the tenant breaches the lease terms, the landlord may bring an action for specific performance or damages for breach of covenant, although in order to claim damages the landlord would have to prove loss caused by the breach and any monetary award generally seeks to reinstate the landlord to the position it would have otherwise been in but for the breach (save in some cases like a breach of repair where awards are limited by statute).

In certain other cases (e.g. third party property damage, death or injury) the tenant may be liable to the landlord pursuant to an indemnity. This may be the case notwithstanding that there may not be a breach by the tenant and in these circumstances, the landlord's loss (remote or otherwise) will be compensated for on a pound for pound basis (i.e., without penalty).

Typically leases will not contain a general dispute mechanism clause (although there may be one for certain elements like rent review, turnover rent and (less commonly) service charge). Depending on the negotiating strength of a particular tenant, it may persuade the landlord to include a clause for resolving disputes by arbitration or expert determination.

Some leases seek to impose an obligation to pay a pre-agreed sum where there is a breach of the lease. This is generally only market practice where a tenant breaches an obligation to 'keep open' the premises in a lease where turnover rent is payable. The lease will often require the tenant to pay a fixed sum (or a percentage of the previous years' turnover rent) to compensate the landlord for the tenant's failure to open and trade from the premises and loss of turnover rent caused to the landlord as a result. A clause which seeks to impose an arbitrary financial penalty where the lease terms are breached will generally not be enforceable. Any such clause

must contain a genuine pre-estimate of the loss that will be suffered as a result of the breach, if it is to be enforceable.

Often parties may agree a concessionary rent personal to the tenant in question. It is common for the parties to agree that such a rent concession will cease to apply in the event of breach of the tenant's obligations.

## **2. RENT**

### **2.1 Principal rent**

Rent will generally be based on the open market value. Tenants will typically be granted a rent-free period (and/or a capital contribution) of between 3 and 9 months at the beginning of the term (or smoothed across the first year of the term) of the lease. Longer rent free periods are awarded where tenants take longer leases or the lease is of premises in a new shopping place and for very new developments, tenants may pay abated rents from between 50% up to 100% correlating to rising occupational levels at the shopping centre.

It is common for leases to separate out the principal rent from other "rents" intended to reimburse the landlord for expenditure relating to repairs of common parts, provision of services to the Centre and insurances. Sometimes, the parties may agree that the principal rent is inclusive of other sums due under the lease (like service charge, insurance premiums and rates) in order to give a tenant cost certainty. This is most common in shorter term leases.

VAT at the standard rate (currently 20%) in respect of the rent will be payable to the landlord in addition to the rent amounts where a landlord has opted to charge VAT at the property.

A tenant may be required to pay a premium to its landlord for the grant of a lease in addition to, or instead of regular payments of rent. This is very unusual in the context of short term retail and restaurant leases. There are potential tax consequences for both landlord and tenant in respect of a lease premium.

### **2.2 Turnover**

Turnover rent provisions are more popular than ever before. Traditionally these took the form of the tenant agreeing to pay a base rent plus top-up rent linked to the turnover generated at the premises, e.g. to pay turnover rent at, say, 8% of the tenant's gross receipts at the premises exceeding the base rent, but turnover rents based purely on a percentage of the tenant's gross receipts and turnover rents payable only once a minimum gross receipts threshold is met are becoming more common in the market i.e. with no minimum guaranteed income for the landlord.

Calculating the gross receipts of the business at the premises for the purposes of turnover is increasingly tricky with the rise of online sales. The position adopted will depend on the strength of the negotiating parties but a few of the possible range of options include: deducting all online sales collected from the premises; including those online sales satisfied using store stock; including those online sales made using in-store devices or with the assistance of store staff; including any online sales credited to the business at the premises as opposed to the online business; not deducting online sale returns.

### **2.3 Rent review**

For leases longer than 5 years, the principal rent is usually reviewed every 5 years on an open market value basis or alternatively on an indexed linked basis. Rent reviews are upwards only. Any rent free periods, concessions or other inducements (like capital contributions) given in relation to the grant of the lease are ignored for the purposes of the review. If the parties are unable to agree on the reviewed rent, it can be referred to independent third party determination by arbitration or expert determination.

For shorter term leases, the parties might agree pre-determined stepped rent increases on an annual basis. For turnover top-up leases, parties might agree a ratchet rent mechanism so that the annual base rent will increase year on year as the tenant's gross turnover improves.

## 2.4 Recovery of rent arrears

### Commercial rent arrears recovery (CRAR)

For arrears of 7 days or more rent, the landlord has the option of using the CRAR regime, effectively seizing goods from the premises in lieu of arrears. There are temporary modifications in place to the CRAR regime until 25 March 2022, which require a minimum of 457 days' rent to be outstanding where action is commenced on or before 23 June 2021 (or at least 554 days' rent after 23 June 2021).

### Guarantors / former tenants / rent deposits

Some tenants may have provided a guarantor or rent deposit which the landlord may seek to use in the event of breach. In some circumstances the landlord may also be able to recover from former tenants.

There is no statutory limit on the amount of rent deposit which the landlord may require but the amount held is most commonly a sum equivalent to three to six months' rent plus a sum equivalent to VAT. These performance bond rent deposits usually secure the payment of all sums owed by the tenant to the landlord, so rent, insurance rent, service charge, interest and damages but can secure against all of the tenant's lease obligations. The rent deposit is usually only released when the lease ends or the tenant transfers the lease to another tenant, but occasionally the rent deposit will be returned to the tenant when the tenant entity meets a profit or assets rating test.

### County Court process

It is also possible to issue court proceedings and claim the arrears due from the tenant as a debt. If successful (there is limited scope for a successful defence) the landlord would obtain a County Court Judgment (CCJ) for the arrears. Once the landlord has a CCJ against the tenant (and the guarantor if there is one) the landlord can consider methods of enforcement.

### Statutory demands

Where the tenant has failed to pay rent or other sums due under the lease, the landlord may wish to consider commencing insolvency proceedings. Where there is no dispute as to the amount of the debt, the landlord can serve a statutory demand on the tenant. If this remains unpaid after 21 days, and it is £5,000 or more in relation to a tenant who is an individual (more than £750 for commercial tenants), then this may be deemed evidence of inability to pay a debt and therefore gives grounds to present a bankruptcy or winding up petition. The Corporate Insolvency and Governance Act 2020 currently restricts the presentation of debt-related winding-up petitions where a company cannot pay its bills (including rent) due to COVID-19. These restrictions will apply until at least 30 September 2021.

See paragraph 1.4 above for details on termination of a lease by forfeiture for arrears of rent.

## 3. PREMISES

### 3.1 Extent of demise

The demise will typically include the interior and shop front of the unit only so that the structure (and responsibility for repair of the structure) of the unit and shopping centre remains with the landlord.

### 3.2 Extent of the Shopping Centre

The shopping centre will usually be defined in the lease as the actual centre on the date of the lease plus any future extensions the landlord may carry out during the term. The tenant will often ask for some protection to ensure that future extensions do not have a material adverse effect on its service charge liability.

### 3.3 Common parts

The tenant will be given rights to use common parts in the centre (e.g. the malls, car parking for customers, washrooms, refuse areas, other communal areas). The landlord will be responsible for the maintenance of those common parts and will recover this cost through the service charge. Other areas like storage areas or roof space are sometimes made available to the tenant under a separate lease or licence. Roof space may be required by a

tenant for its plant in connection with ventilation and/or heating at the premises if there is no central ventilation system.

Landlord's may conduct commercialisation activity from the common parts like malls and car parks on the basis that the upkeep of these areas are excluded from service charge expenditure (or if included, any income generated should be credited to the service charge pot).

### 3.4 Right reserved by landlord

The landlord will typically reserve rights to extend or otherwise change the extent or layout of the shopping centre, to run services, to build into boundaries etc. and typically the lease will record that neither the enjoyment of light and air will prevent the exercise of the landlords rights. The landlord will also reserve the right to enter the premises to carry out inspections and to carry out repairs to the premises where the tenant has failed to keep the premises in repair and to recharge the tenant. The lease will generally allow the landlord to enter for any other reasonable management purpose.

It is increasingly common for landlords to reserve a right of access in connection with the environmental performance of the premises. See further details at paragraph 9 below.

## 4. ABILITY TO TRANSFER THE LEASE OR SUBLET

### 4.1 Assignment

The tenant will usually be allowed to assign the lease with the landlord's consent, such consent not to be unreasonably withheld or delayed. However, there is usually a restriction on the tenant assigning during the first 2 or 3 years of the term and sometimes restrictions on assignment to group companies (where the landlord doesn't want to lose a parent guarantee which may be prevented under repeat guarantee rules and/or where the group has a wide variety of businesses) or to foreign companies where enforcement may be problematic.

Since 1996, outgoing tenants are generally required to guarantee the performance of the incoming tenant during the incoming tenant's period of occupation. The landlord will apply various tests on assignment as a condition to consent, such as financial covenant strength of the proposed tenant and the landlord's tenant mix policy in the centre.

Institutional landlords usually require a pre-emption (i.e., right of first refusal) on an assignment, so that they have the option of taking the unit back by matching the terms offered by the incoming tenant.

As between the outgoing tenant and the incoming tenant, there is usually no restriction in the lease on the premium one may pay to the other for the assignment of the lease.

### 4.2 Underletting

Generally, underletting is not allowed except in the case of retailers or restaurateurs who operate franchise models. If underletting is permitted it is for whole (except part may sometimes be permitted in the case of much larger units) for a term shorter than the length of the lease and with corresponding landlord breaks (if any). For turnover leases, the landlord will be able to include in the gross receipts generated by any undertenant and/or business carried out at the premises.

### 4.3 Sharing occupation

The tenant is generally allowed to share occupation with other group companies. Some tenants negotiate the right to share with franchisees or trading concessions, but even where this right is granted, it is usually limited to 10 to 20% of the trading floor area of the premises and provided that the unit appears as one trading unit.

### 4.4 Tenant shares capital

Restrictions on changes of control of tenant share capital, voting rights or ownership are not found in retail or restaurant leases in the UK.

## 5. ALTERATIONS/REPAIRS

### 5.1 Restrictions affecting alterations

Non-structural alterations to the premises are usually permitted subject to the consent of the landlord, not to be unreasonably withheld or delayed, with some alterations like internal partitioning or alterations to tenants fixtures not requiring consent at all. Structural alterations are not permitted. All alterations will typically be subject to conditions that they do not adversely affect the environmental performance of the premises or the fire safety systems and similar.

Tenants are under an obligation to comply with all laws. The Equality Act 2010 is typically not singled out in the terms of a lease. However, the Equality Act may assist tenants in making alterations to their premises. In certain circumstances the Equality Act provides that a landlord must not unreasonably withhold consent to alterations which amount to reasonable adjustments to assist disabled users of a property, even where the lease would otherwise prohibit such alterations.

### 5.2 Tenant's fitting out

The tenant's fitting out of the premises is usually to be completed prior to the centre opening date when the centre is in its development phase, e.g., the premises will be handed to the tenant 16 weeks prior to the anticipated centre opening date and the tenant is then obliged to complete its fitting out works during that period (with penalties to apply for failing to do so such as erosion of any rent free period). Landlords will generally want to approve the nature of the fit out.

A tenant's fit out may help improve the environmental efficiency of a premises and so may help a landlord (at the tenant's cost) to meet its statutory liability not to let a sub-standard unit. From 1 April 2023, it will be unlawful for a landlord to *continue* to let a sub-standard unit (without registering an exemption) which could require landlords to carry out improvement works at its own cost during the life of a lease. See paragraph 9 below for more details.

As landlords become weary of tenant insolvency, some landlords may decide to "charge" particular elements of a tenant's fit out (like kitchen plant) in order to ensure the value in these items are returned to the landlord as a secured creditor. This is still fairly rare and not a perfect solution as other creditors may still rank ahead of the landlord. This arrangement would need to be separately documented (i.e. not documented within the context of a lease).

A tenant's obligations at the end of the lease (or sooner determination) will generally include a requirement to remove all alterations, its trade fixtures and contents and to reinstate the premises and return them in the state of repair required by the lease unless the landlord notifies otherwise or the tenant has negotiated at the outset of the lease that particular items (such as lifts and escalators) can remain in situ if in good working order. To the extent that the tenant fails to comply with these types of obligations at the end of the term, the landlord may seek to recover the costs it incurs instead by way of a dilapidations claim against the tenant, subject to statutory conditions and limits.

At the expiry of the lease term, the premises should be returned with vacant possession (contrast the break position at paragraph 1.2 above).

### 5.3 Signage

Tenants are usually allowed to use (and change in line with corporate branding) their own signage subject to the landlord's approval. There are also usually prohibitions on affixing signs to glazing as well as restrictions on the extent to which a tenant can obscure shop front windows and/or use sale signs and in store signage.

### 5.4 Repair and decoration

The tenant will be under an obligation to keep the premises in good and substantial repair and to redecorate them every 3 to 5 years (the style of such redecoration to be approved by the landlord in the last year of the term). For shorter term leases, the tenants' repairing obligations may be limited by reference to a photographic schedule of condition.

For new shopping places, the landlord may agree to allow the tenant to carve out liability for inherent defects, say for the first 3 – 6 years of the term. It is also usual to limit the tenants' repairing obligations in respect of any

insured risk damage and uninsured risk damage. The landlord will be responsible for external redecoration and repairing the structure and common parts of the centre, and will recover that cost through the service charge.

## 6. TRADING

### 6.1 Keep open

Most turnover rent leases, and increasingly non-turnover rent leases, contain a clause requiring the tenant to keep the premises open and trading during the centre's trading hours, which could include Sundays and Bank Holidays. Hours are specified in the lease and may be varied as directed by the landlord. There are common exceptions to the tenant's requirement to keep open including, where it cannot open in the event of insured/uninsured risk damage, where it chooses to close to carry out alterations or repairs, and/or where the tenant is required to close by law.

Traditionally, other than in the case of insured/uninsured risk damage, a tenant will be required to continue to pay its rent even where it cannot be open and trading. Since the occurrence of Covid-19, there has been considerable commercial negotiation as to the suspension of rent clause where the law requires the tenant to be closed and whether and to what extent the parties should share this risk. The market has not yet reached a standard position but where a tenant is not able to open due to the force of law, the tenant is at least excused from its trading obligation.

If the tenant fails to open, the landlord's remedy is one of damages for actual financial loss (which may for example be suffered through loss of turnover rent and/or depressed rental values through falling footfall at the centre). In practice, succeeding in proving such loss caused by the closure is extremely difficult. A claim for specific performance is not available to enforce a positive obligation such as keeping open.

### 6.2 Trading names and user

The tenant may sometimes be required to trade under a specified trading name for the first 2 to 3 years of the lease.

Often change of use is not allowed or if allowed is limited to the same planning use class with landlord's approval (not to be unreasonably withheld subject to taking into account estate management). For shopping centres there are often key restrictions on use such as gaming and betting or activities which create noise audible from outside the premises.

### 6.3 Tenant's handbooks

In carrying out alterations or operating the premises, tenants are likely to be obliged to comply with the reasonable provisions and regulations of any handbook published by the landlord from time to time, to the extent it does not conflict with the terms of the lease.

### 6.4 Competition

All leases are subject to the Competition Act 1998 which prohibits arrangements that are anti-competitive to an appreciable extent.

Landlords may often restrict the types of business that may be carried out by the lessee in order to ensure an appropriate "retail mix" and the ultimate attractiveness of a shopping place. These common business use restrictions will not usually pose an anti-competition problem, unless it is imposed by the landlord at the request of another tenant.

Restrictions that are required to be observed under planning obligations are excluded from the scope of anti-competition law.

Exclusivity arrangements promised by a landlord to a tenant not to allow that tenant's named competitors occupation at the shopping place or a business selling goods in competition with the tenant, by their nature prevent competition. However, such provisions are not automatically anti-competitive in an unlawful sense and must be considered in the context of detailed analysis including, the location of the premises and the extent of the relevant market, opportunity for the tenant's competitors to find other suitable premises in the vicinity and the duration of the exclusivity.

## **7. INSURANCE**

### **7.1 Insured risks**

The landlord will insure the centre (including the premises let to tenants) against a standard set of insured risks (terrorism may be included), including insurance for typically 3 – 5 years' loss of rent, in the event of damage to the centre. The landlord will recover that cost from the tenants on a fair proportion basis, usually on a weighted floor space basis. If the centre or premises are damaged by an insured risk, the rent will be suspended during such period as the landlord has coverage for loss of rent insurance. If the premises are not sufficiently reinstated by the end of that suspension period then it is common for either party to have the right to terminate the lease.

The tenant is required to insure for public liability and may separately insure for employee liability and for damage to its stock.

### **7.2 Uninsured risks**

Uninsured risk provisions have become usual in retail and restaurant leases. The tenant may request the right to break the lease if the landlord doesn't elect to reinstate damage (to the centre or premises) by an uninsured risk at its own cost. The landlord may choose either to terminate the lease itself or to reinstate, rent suspensions will apply during a fixed period to allow for reinstatement. As with insured risks, if the premises are not sufficiently reinstated by the end of that period then it is common for either party to have the right to terminate the lease.

It would be usual in the present market for a landlord of a shopping centre to take out terrorism insurance cover as part of its normal 'all-risks' policy moving an event of terrorism from an uninsured risk to an insured risk. There are no remaining business interruption policies in the current market that protect either landlord or tenants from pandemic losses.

### **7.3 Business interruption insurance and other policies**

Under the terms of the lease a tenant will be required to keep insured public liability risks relating to the premises and may be obliged to insure against damage to its fixtures fittings and stock. Tenant's may choose to take out business interruption insurance and in the UK, an important case brought by the Financial Conduct Authority on behalf of policyholders against a collection of the major insurers, came out largely in favour of the occupying businesses allowing them a potential claim for pandemic losses in two circumstances (1) where cover is triggered by the occurrence of an infectious disease or (2) where access or use of the Premises is prevented in part or whole as a consequence of public authority instructions.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

The landlord will be responsible for providing various services to the shopping development. These can vary depending on the nature of the centre, but standard items include repair, replacement in the nature of repair, cleaning, heating and hot water, air conditioning, maintenance of common parts, security and the provision of staff to service the centre. The landlord will recover the (reasonable and proper) cost of providing these services through the service charge regime, under which the tenant will be required to pay a service charge in advance based on budgeted expenditure with a reconciliation at the end of the service charge year.

The service charge will usually give the landlord the ability to employ managing agents and contract out services, and recover the costs of doing so through the service charge. If maintenance of the car park is recoverable as a service charge expenditure, revenues generated by the car park will usually be offset against such expenditure. Alternatively, the landlord may operate the car park under a separate regime so that the car park operator (which increasingly is the landlord itself) will contribute towards the service charge in the same way as other tenants but all income generated then remains with the car park operator:

Tenants will generally not allow the landlord to recover through the service charge the costs of repairing any inherent defects, reinstating insured or uninsured risk damage, or improving or refurbishing the centre.

The usual method of apportionment of service charge is a weighted floor space basis.

The tenant will be directly responsible for the payment of outgoing and rates.

## 8.2 Promotions and marketing

The cost of promotions and marketing of the centre is usually included as a head of cost in the service charge. Increasingly, landlords are agreeing to be responsible for 50% of the costs of promotion and marketing, with the tenants making up the 50% balance.

## 8.3 8.3 Tenants Associations

Historically, some leases allowed for tenants associations to be consulted (to a lesser or greater extent) about proposed service charge expenditure and use of common parts. Tenants associations are not so common for this purpose these days.

## 9. GREEN LEASE

It is common in leases to see a show of intention between the parties to achieve energy, water and waste efficiency at the premises and shopping centre and to share energy data (without any liability to incur costs).

By far, most of the 'green' drafting in leases is around the Energy Performance of Buildings (England and Wales) Regulations 2012 which (save for a few exceptions) requires landlords to commission and register an energy performance certificate (EPC) for each lettable unit in the shopping centre. Under the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 it is unlawful for a landlord to grant a lease with an asset rating below the minimum level of energy efficiency (currently an E) save for a few exceptions and exemptions.

From 1 April 2023, it will be unlawful for a landlord to *continue* to let a sub-standard unit (without registering an exemption) which could require landlords to carry out improvements works at its cost. To future proof, leases will require tenants not to commission their own EPC (unless required by law) during the term to avoid invalidating a compliant EPC for potentially a lower sub-standard rating. Leases will also prohibit the tenant from carrying out alterations which reduce the asset rating from that at the date of the lease or (depending on the negotiations) to a level below the lawful minimum level of energy efficiency that permits letting. Leases will also reserve rights for landlord's access in the event of breach to carry out the necessary works of improvement at the tenant's cost.

Leases should allow the landlord a right of access to carry out an EPC during the term (in case it is invalidated or the tenant requires one for the purposes of assignment or sub-letting).

Rent review clauses should include an assumption that 'the Premises may be lawfully let' in case the asset rating is lower than the minimum level of energy efficiency for the purposes of the 'hypothetical lease'.

## 10. FORCE MAJEURE AND COVID

In the UK it is remarkably rare for the concept of hardship or the issue of force majeure to be addressed in a commercial retail lease. Traditionally, the only situation in which annual rent is suspended is in connection with insured risk damage to the premises. So typically, even where a tenant is permitted to close, its obligation to pay rent continues. In the context of works obligations imposed on the parties prior to the grant of a lease, unless "COVID" is specifically drafted as a reason for an extension to works obligations, COVID related restrictions would most likely not be considered a force majeure event.

There is no suggestion that an inability to trade, a legal obligation to close, or the serious determination in custom has undermined the validity or continuity of a commercial retail lease. There are currently no court decisions, and no basis for court action, that would require either a landlord or tenant to vary or renegotiate their lease or for a court to superimpose its terms. In June 2020 the government issued a code of practice for commercial property relationships during the pandemic, but this is a voluntary code. *The code essentially said that landlords and tenants should work together and that where tenants could pay the rent they should pay – those businesses that cannot pay should pay what they can.*

Legislation has been introduced to protect tenants from losing their premises due to the non-payment of rent. See paragraph 2.4 above for more details. In addition, there has been a blanket suspension of **business rates**

payable to the local authority for premises in the retail, hospitality and leisure sectors for the 2020-2021 tax year. Business rates are a local tax and can be a very significant cost. There will be some further capped rates relief applied from 1 July 2021. By contrast, landlords have been obliged to continue to pay business rates on empty commercial property under the normal rules.

## **11. OTHER POINTS TO NOTE**

### **11.1 Electronic signature**

The validity of electronic signatures as a method of executing leases has not yet been definitively tested in the English courts. However, the Law Commission has advised that in its opinion, electronic execution of a deed is lawful and effective. HM Land Registry have agreed for now, in view of the Covid-19 pandemic, to register leases which have been signed electronically so long as the electronic signature process follows the Land Registry's strict requirements.

### **11.2 ESG Data**

As discussed already in this review, a lease will typically include provisions allowing the sharing of energy data and resource consumption between the parties. Increasingly common, whether or not a turnover lease, is an obligation on the tenant to disclose its daily trading information in return for key shopping place centre statistics from the landlord, like footfall and centre ranking information. In the context of a turnover lease, the tenant's daily trading information will likely be far more detailed and audited at annual intervals during the term of the lease. However, outside of these regimes there is little or no requirement to share environmental criteria, social, operational or governance information.

In the development of a new shopping place, often planning requirements are imposed on developers to collect employment information or to achieve particular environmental ratings (such as BREEAM). Those criteria are passed down by developers to tenants as obligations to share their employee data and those of its construction team and not to prejudice any BREEAM environmental ratings.

### **11.3 Money laundering**

There are no standard provisions in a lease relating to money laundering although landlords are required to comply with anti money laundering legislation to verify the identity of its tenant prior to entering into a lease.

### **11.4 Terrorism and security**

In a standard lease, a tenant will not expressly be obliged under the lease to support security exercises and/or to participate actively but these terms may be detailed and required under any landlord operational handbook.

### **11.5 HM Land Registry**

Many leases are now compulsorily registerable at HM Land Registry, and very precise lease plans as well as land registry particulars are required.

### **11.6 Procedures to recover the Premises**

A lease protected by the 1954 Act will continue indefinitely after the contractual expiry date of the lease, unless it is ended by one of the methods stated in the 1954 Act (forfeiture, a tenant's notice to quit etc). A landlord's ability to forfeit a lease is set out at paragraph 1.4 above.

A tenant has a statutory right to renew a lease which is protected by the 1954 Act. The landlord can only oppose this statutory right of renewal in very specific circumstances set out in the 1954 Act (e.g. it is intending to carry out significant development works to the shopping centre), and even then it may have to pay the tenant compensation.

A former tenant that remains in occupation of premises after its lease has ended (where it has not statutory right of renewal) will be a trespasser. Where occupation is not continuous, it is possible to evict such a trespasser by changing the locks to the premises. Where occupation is continuous (i.e. 24 hour) an order for possession will usually need to be obtained from the County Court and bailiffs can then be instructed to remove the tenant (forcibly if necessary).

English law is not applicable in Northern Ireland or Scotland.

### 11.7 Variations for Northern Ireland

Regarding paragraph 1.3, the 1954 Act does not apply in Northern Ireland. Leasing arrangements are controlled by the Business Tenancies (Northern Ireland) Order 1996.

In Northern Ireland there is no ability for the parties to opt to exclude the statutory renewal rights acquired by a tenant, and contracting out is expressly prohibited under the 1996 Order: Note that the parties can, under the 1996 Order, but only in respect of leases dated after 1 April 1997, enter into enforceable agreements to surrender leases subject to the agreement being entered into at a time when the tenant is in possession and the agreement being formally approved by the Lands Tribunal (which in practice is a relatively straightforward process)..

Regarding paragraph 1.4, there is no right to distress in Northern Ireland. The remedy has been replaced by making an application to the Enforcement of Judgments Office, on foot of a court judgment, for full enforcement. The EJO has broadly similar powers to seize the property of debtors as under the old remedy of distraint.

Regarding paragraph 4.1, restrictions on underletting at the beginning of the term are still relatively uncommon in Northern Ireland.

The Covenants Act does not apply in Northern Ireland. There is no equivalent of an "authorised guarantee". The legislative provisions in Northern Ireland are to the effect that once a tenant assigns his lease with the consent of the landlord, the tenant is released from any further liability in respect of any future breach by his assignee or subsequent assignees, although in major lettings and other specific circumstances it is not uncommon in Northern Ireland for specific alienation provisions to be incorporated to mirror so far as possible the position under the 1996 Covenants Act. However, this is not the norm in Northern Ireland. The Landlord endorses their consent on the assignment deed itself thus negating the requirement for a separate licence to assign.

Pre-emption clauses are not the norm in Northern Ireland and have questionable validity.

Regarding paragraph 4.2, underletting of part only is generally prohibited in leases in Northern Ireland, given the statutory right to a renewal of the lease.

Regarding paragraph 7.2, insurance for properly in Northern Ireland will not cover loss or damage resulting from terrorism where there is a statutory scheme for compensation under the Criminal Damage (Compensation) (Northern Ireland) Order of 1977. Specific lease obligations are generally imposed on the tenants requiring them to comply with requirements and recommendations of the Police Service for Northern Ireland and the statutory Compensation Agency. Several issues often arise in negotiations between the landlord and tenant, including whether rent suspension applies also to terrorist damage and the responsibility for/contribution to making up any shortfall in Criminal Damage Compensation resulting from "betterment." Certain insurers offer terrorist "top-up" insurance for properties in Northern Ireland, although this can be relatively expensive.

In Northern Ireland a lease is only registerable in the Land Registry if the term exceeds 21 years.

Green lease clauses are steadily progressing into leases in Northern Ireland but are not yet widespread in commercial leases. The property funds that are driving their inclusion are following the UK wide legislation around CRC Energy Efficiency and EPCs as per the commentary above.

### 11.8 Variations for Scotland

There are few statutory provisions dealing with the law of leases in Scotland. For example, there is no equivalent of the 1954 Act.

Whilst the Scottish courts have always interpreted leases strictly and according to their terms, there has been a move recently towards a more liberal and commercial approach.

There are no statutory provisions dictating the circumstances in which a landlord's consent may be given or withheld and, indeed, there is very little case law on the subject. Where a landlord's consent has to be obtained without any further qualification, the landlord can grant or withhold that consent as it sees fit. The position is not so well established where the landlord's consent is not to be unreasonably withheld; the general approach is to apply an objective "reasonable landlord" test, but it is settled that a landlord cannot, by demanding either money or a lease variation, seek a collateral benefit.

Only leases in excess of 20 years require to be registered in the Land Register in Scotland.

#### 11.8.1 Renewal rights

Although tenants of commercial property in Scotland do not normally have any statutory right to remain beyond the contractual period of their lease, so long as the correct Notice to Quit has been issued properly, limited protection is available to shop tenants under the Tenancy of Shops (Scotland) Act of 1949.

This Act is designed to give temporary relief to shop tenants who would suffer hardship if required to vacate at once, and it is instigated by application to the Sheriff Courts within 21 days after service of the Notice to Quit. While the court can dismiss the application where they consider it reasonable to do so, they may grant a renewal for up to 1 year at such rent and on such conditions as they consider reasonable. A further application can be made by the tenants at the expiry of the renewal. Applications under this Act are relatively infrequent.

Although there is no statutory right to renew leases in Scotland, it is an implied term of every lease that if the parties take no action to the contrary (i.e. the tenant does not leave the premises at the end of the lease), they are deemed to have agreed that following the end of the lease it will continue for a further year on the same terms and conditions, or for a period equivalent to the original period of the lease, if less than a year: In order to avoid this happening, a Notice to Quit must be served.

#### 11.8.2 Irritancy (known as forfeiture in England)

The position in Scotland on irritancy of leases is similar to that in England on forfeiture. The key differences are:

Where there is a monetary breach, the landlord has to serve a warning notice on the tenant specifying the amount due. That notice should give a minimum of 14 days for the tenant to pay, or a longer period if one is specified in the lease. Note that due to the Coronavirus (Scotland) Act 2020 and Coronavirus (Extension and Expiry) (Scotland) Act 2021, until 31 March 2022, the period of notice for a monetary breach is 14 weeks. A further notice needs to be served after the period in the warning notice has expired to bring the lease to an end.

Where there is a nonmonetary breach, the landlord also has to serve a warning notice, if the breach is remediable, but can only terminate on expiry of the notice period if a fair and reasonable landlord would do so in the circumstances. As such it is relatively uncommon for a landlord to take this step, as it is likely that there will also be a monetary breach to which the fair and reasonable landlord test does not apply. If the breach is not remediable, then the landlord can terminate immediately.

Unless the tenant voluntarily accepts that the lease has been irritated and leaves the property, it will be necessary for the landlord to obtain a court order before vacant possession can be obtained.

#### 11.8.3 Assignment

Generally, on an approved/authorised assignment, a tenant in Scotland will cease to have liability for the continuing lease obligations, which, in relation to the period following an assignment, pass on exclusively to the assignee.

#### 11.8.4 Keep open

Generally these clauses are enforceable in Scotland and the landlord is able to obtain an order from court requiring the tenant to open the premises. To be enforceable, the wording of the keep open clause must be sufficiently clear and precise. In Scotland, specific implement is the primary remedy for breach, rather than damages.

#### 11.8.5 Green Lease

The relevant regulations on energy performance are the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016. There is currently no restriction on letting property rated level E or below.

The Regulations apply to properties of more than 1,000 square metres, except where the property was built to comply with Scottish Building Standards 2002 or later. If the Regulations apply, the Landlord requires to commission an Action Plan before granting a lease, and measures have to be put in place to improve the energy efficiency.

## ESTONIA

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### Preliminary Remarks

In Estonia, lease agreements are mainly subject to the Law of Obligations Act (*võlaõiguseadus* in Estonian), which provides for, among other things, a general framework for residential and commercial lease agreements (such as Shopping Centre lease agreements). A lease agreement is defined in the Law of Obligations as one person (the Landlord) undertaking to grant the use of a thing to another person (the Tenant) and the Tenant undertakes to pay a fee (rent) for it to the Landlord. The regulation generally restricts deviations from the law which are less advantageous to the Tenant in case of residential leases, but this does not apply for commercial lease agreements. Therefore, the Landlords and Tenants of commercial property are generally free to contract their lease agreements as desired.

Lease agreements are also subject to the Law of Property Act (*asjaõiguseadus*). This act primarily regulates property rights, but may also apply to certain circumstances in ordinary lease relationships e.g. protection of the Tenant's possession of leased premises on the basis of a lease agreement. Certain property rights are registered leases or rent of land. Usufruct and personal right of use would grant the use of the property or parts of it to the beneficiary and the terms could be agreed to match an ordinary lease. Building title is a type of registered land lease where the tenant would own the building on Landlord's property. These types of registered leases are rarely used for shopping centres as they require notarised agreements, entry into the register and are thus cumbersome to use while offering no real benefits in the case of a typical shopping centre lease.

The law of lease agreements has remained almost static for twenty years. A relatively modest change was adopted and entered into force last year, but the changes did not have much of a practical impact on commercial leases. No major changes to the law are being planned or expected in the foreseeable future. The major challenges with implementing the law relate more to questions of enforcement and length of court procedures than the substance.

So far, most of the major shopping centres in Estonia have enjoyed near full occupancy allowing the Landlords considerable freedom to dictate terms of the lease. As a result the lease agreements for such premises tend to favour Landlords.

### 1. TERM

#### 1.1 1.1 Contractual Term

The law does not prescribe a specific term for lease agreements. The term of shopping lease agreements may be either for a specified or unspecified period.

The usual term for a shopping lease agreements ranges from 5 to 10 years often with some extension options for more major Tenants. Often the lease agreement is concluded during early development and years before the opening of the shopping centre. In such cases the term would usually begin from the opening of the centre and the landlord would typically have a lot of leeway on when that could happen.

#### 1.2 1.2 Break Rights

Break options, giving the Tenant the right to break the lease early, are sometimes agreed on, but are relatively rare. There is also the option to agree on the possibility of terminating a lease agreement by the Tenant after a certain amount of years (e.g. a 10 year lease agreement may be terminated after 5 years from start of the lease agreement with a notice of 6 months).

Shopping centres rarely conclude agreements for unspecified term. The agreement will however be considered and concluded for unspecified term if the term of the agreement expires, but the Tenant continues to use the premises and neither party has objected. By law unspecified term agreements may be terminated if one party

notifies the other party of such intent 3 months ahead. The parties can agree on a different notification term than provided by law.

If a lease agreement is entered into for a specific period, the agreement cannot be terminated before the term expires unless there are break options provided by the lease agreement or by law in case of breach of agreement or other extraordinary circumstances (e.g. the premises having been rendered unusable by some disaster).

Estonian law does not specify a maximum term for lease agreements. A building title (a type of registered land lease) can be concluded for a term up to 99 years, suggesting that there might also be a theoretical limit to other types of leases. This has not however been tested and there seems to be little interest by any party to conclude lease agreements with terms that would raise questions of this nature.

### 1.3 1.3 Renewal Rights

There are no mandatory renewal rights for leases under law. By law, if the lease agreement is entered into for a specific period, it will automatically be considered a lease agreement with an unspecified period unless one of the parties expresses its intention to the contrary to the other party within 2 weeks of the expiry of the lease term. However, this provision is often excluded with the lease agreement (e.g. by agreeing on that the agreement ends at the end of the lease term and will not become an agreement for indeterminate duration).

Often, lease agreements allow a renewal once or a limited number of times. In some cases these extension options are the unilateral right of the Tenant, in other cases, both parties have to agree to the extension. In the latter case, it sometimes happens that there are no limits to the number of times the agreement could be extended.

### 1.4 1.4. Disputes and Forfeiture

Lease agreements usually contain a provision stating that the agreement is governed by the laws of Estonia and often specifying the applicable jurisdiction. In practice the court jurisdiction is determined by the location of the property and contractual jurisdiction clauses can be disregarded. The venue could only be changed by inclusion of arbitration clause. Arbitration clauses are rare in lease agreements.

If the Tenant refuses to vacate the leased premises (e.g. due to the expiry of the lease agreement) the Landlord cannot take possession of the leased premises by force (e.g. it is not allowed to change locks, block the access) but can start legal proceedings (by filing a claim to court) against the Tenant to reclaim the premises from the Tenant's illegal possession. If the Tenant has overdue debts to the Landlord, the law provides that the movable property on the premises belonging to the tenant is subject to Landlord's lien and the landlord could take steps to secure this property including preventing their removal from the premises by force. In some cases it is agreed that the Landlord waives this right.

In practice shopping centres use cutting of electricity and other services and similar methods to force a delinquent tenant to vacate the premises. Some of these methods are clearly not permitted under law while others are in grey areas. If the eviction by a bailiff must be secured through ordinary court and enforcement processes, it can take several years to complete.

## 2. RENT

### 2.1 Principal rent

Both fixed amount rent and turnover-based rent are commonly used in relation to shopping centre lease agreements. A fixed amount of rent would then be based on the open market value as there are no rent limits. Turnover-based rents typically comprise of a fixed part floor of the rent with the turnover component added on top or used instead if higher than the agreed rent floor.

What costs are included in the rent and what is not is often subject of negotiations although certain common practices prevail. Usually, the additional expenses for utilities and building maintenance costs are paid separately by the Tenant and in addition to the payment of rent (please see section 8 "Service Charge"). Building improvements and CapEx repairs would usually be included in the rent. In some cases various sinking fund

arrangements have been used by Landlords trying to also recover these costs from the Tenants, but this is not the prevailing custom.

## 2.2 Turnover

Turnover-based rent is sometimes used and is calculated as a percentage of the gross turnover from the business conducted on the premises by the Tenant. The applicable percentage depends on the business of the Tenant. Please see section 2.1 “Principal rent” above.

## 2.3 Rent Review

The law provides for the ability to increase rent once every year in the case of lease agreements entered into for an unspecified period. In common market practice, annual rent increases are agreed in the lease agreements and are generally based on change of the Estonian consumer price index or the Euro area harmonised consumer price index. Often a floor (ranging from 0-1%) and a cap (ranging from 3-5%) is agreed. Due to the recent hike of the CPI, new agreements will probably see much increased caps. Sometimes instead of an index a fixed rate is set (typically ranging from 2-3%).

Other methods of rent adjustments are not really used for shopping centre premises. If there is no agreement on rent review, the law does provide the right for the Landlord to review the rent periodically by default. However as some type of rent review is always included in the agreement there has been no practical needs to test the functioning of the default right provided in law.

## 3. PREMISES

### 3.1 Extent of Demise

The Tenant will be let the premises agreed in the lease agreement. The area will usually be specified on a corresponding figure added as an appendix to the lease agreement. Repair and maintenance obligations typically differ in what are considered to be as the let premises and what are the common premises used by all occupants of the shopping centre.

### 3.2 Extent of the Shopping Centre

The definition of a shopping centre is sometimes included in lease agreements. Generally the shopping centre is defined as the whole building where the leased premises are located. Generally it is understood that the shopping centre also includes any future extensions and there are no and no need for additional language to that effect.

### 3.3 Common Parts

The common parts and common areas are not usually specifically described in the shopping centre lease agreements. They are often generally defined as areas located in the territory of the shopping centre not let to particular to tenant.

Generally it is agreed that the Tenant cannot hinder the use of common parts and store goods in common areas (especially in the escape routes). The Landlord usually has the right to remove goods from common area and dispose of or destroy them, if the goods have been in the common area a significant amount of time and the Tenant has not removed the goods following a written reminder of the Landlord. The costs of these procedures shall also be borne by the Tenant.

Additionally, common areas cannot be used for economic activities without the consent of the Landlord.

### 3.4 Rights Reserved by Landlord

The Landlord is usually responsible for maintaining the Shopping Centre (main construction of the building, the foundation, supporting structures and exterior walls of the building; the roof, facade, exterior doors and windows of the building, floor and wall surfaces of the common spaces of the building, technical systems of the building etc) in good condition. The Landlord can make improvements and alterations to the Shopping Centre and the Tenant has to tolerate these works, unless the works and/or effects are unfairly burdensome to the Tenant and/or hinder the economic activity of the Tenant on the leased premises. Generally, the Tenant has to

tolerate the works which are necessary to preserve the Shopping Centre in a suitable condition, remove defects, prevent damage and eliminate the consequences thereof. However, this does not preclude or restrict the right of the Tenant to reduce rent or demand compensation for damage due to the works or other effects.

Pursuant to law, if there is an obstacle to the use of the leased premises and for which the Tenant is not responsible and which does not have to be removed by the Tenant (e.g. the Landlord has not maintained the technical systems of the Shopping Centre in such suitable condition which allows the use of the leased premises) the Tenant may:

- Demand that the Landlord removes this defect or obstacle, and if it is not removed within a reasonable period, the Tenant has the right to terminate the agreement;
- remove the defect or obstacle and demand reimbursement of such expenses from the Landlord, if the Landlord has not removed the defect or obstacle within a reasonable period;
- Demand compensation for the damage from the Landlord;
- Reduce rent; or
- Deposit rent.

In practice, it is often agreed for how long the Tenant has to tolerate any maintenance, repair, alteration or improvement works of the Shopping Centre e.g. the Tenant has the right to demand reduction of rent or compensation of damage, if the leased premises cannot be used for their intended purpose for more than 7 consecutive days or 14 days per calendar year.

The Landlord also has the right to conduct maintenance works that the Tenant is contractually obligated to do, in case of the Tenant's failure to conduct these works. The Landlord can demand compensation for these maintenance works.

The Landlord also usually has the right to inspect the leased premises in order to ensure the purposeful and prudent use of the premises. Generally it is agreed that the Landlord has the right to enter the premises during normal working hours and upon notifying the Tenant thereof one day in advance. The inspection usually takes place with the presence of the representative of the Tenant. Pursuant to law, the Tenant has to allow the Landlord to examine the leased premises, if this is necessary to preserve the leased premises or to transfer or lease it to another person. In the case of extreme circumstances (e.g. accidents which need immediate attention) the Landlord can enter the Tenant's leased premises without notifying the Tenant in advance, however by notifying them of the circumstances and entrance to their premises as soon as reasonably possible.

Sometimes the Landlord also requires the right to move the Tenant to other equivalent premises within the shopping centre. This may be used to facilitate various works or for optimising foot traffic and increase overall sales in the centre.

## **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

### **4.1 Assignment**

Parties can agree whether the assignment of the lease agreement to another Tenant is allowed in the agreement. Pursuant to law, the Tenant is not able to assign the lease agreement without the prior consent of the Landlord. If the Landlord agrees to the assignment of the lease agreement, the initial Tenant shall usually be jointly and severally liable with the new tenant for the performance of the obligations to the Landlord under the lease agreement, unless stated otherwise in the consent and/or agreement. For this purpose, unless a waiver is secured, it would be more beneficial for the initial Tenant, if the Landlord concludes a new agreement with the new Tenant.

### **4.2 Underletting**

Although the parties can agree whether underletting is allowed under the lease agreement, the right to underlet is not often given to the Tenant. Usually it is agreed that the Tenant is not able to underlet the leased premises without the prior consent of the Landlord.

Pursuant by law, the Landlord can refuse to grant consent for the underletting only if the Landlord has good reason therefor, particularly if:

- the Tenant does not disclose the conditions for the underletting to the Landlord;
- the underletting would cause significant loss to the Landlord;
- the underletting would be unreasonably burdensome on the leased premises;
- the Landlord has good reason to refuse arising from the identity of the subtenant.

#### 4.3 Sharing occupation

In practice, sharing occupation is not common, but does happen, in the Estonian commercial lease (incl. shopping centre lease) market practice. However, this can be agreed in the lease agreement by implementing it on the same grounds as for assigning the lease agreement and/or underletting the leased premises (please see sections 4.2 and 4.3. above).

Landlords in shopping centres sometimes demand that the business concept and brands used by the Tenant in the centre is fixed in the agreement, whereby sharing occupation would often require a waiver or change of these provisions.

### 5. ALTERATIONS/REPAIR

The Tenant and the Landlord usually agree in the lease agreement the extent of the obligations regarding repair works and alterations by the parties.

The Landlord is usually responsible for maintaining the Shopping Centre (main construction of the building, the foundation, supporting structures and exterior walls of the building; the roof, facade, exterior doors and windows of the building, floor and wall surfaces of the common spaces of the building, technical systems of the building etc.) in good condition.

The Tenant is usually responsible for repair works and alterations inside the leased premises, but also for the maintenance and removal of deficiencies of the leased premises (doors and windows, floor and wall surfaces inside the leased premises, lighting, communication lines and technical devices inside the premises, furniture and fit-out of the premises). The Tenant can make alterations and improvements to the leased premises only with the prior consent of the Landlord. The costs of these alterations and improvements will usually be borne by the Tenant, unless agreed otherwise in the agreement. Alterations or improvements made without the Landlord's consent have to usually be eliminated by the Tenant at its own expense and on the Landlord's demand. Failure to comply with this obligation gives the Landlord the right to organise such works at the expense of the Tenant.

The Tenant can also install signs and other advertisement on the inside and outside of the Shopping Centre only with the prior consent of the Landlord, who usually demands that the designs are in accordance with the overall concept and design of the building, including in compliance with the legislation. Usually it is agreed that all costs related to manufacture, installation and removal of such signs and advertisement, incl. possible taxes, will be borne by the Tenant. In case the signs are installed without the prior consent of the Landlord, the Landlord can demand their removal within a reasonable period or remove them and demand compensation for the related costs from the Tenant.

### 6. TRADING

#### 6.1 Keep open

The Tenant is usually obliged to abide by the opening hours of the Shopping Centre, which usually includes Sundays and national holidays (unless it is otherwise agreed). Anchor Tenants (such as hypermarkets) are usually entitled to keep their own trading hours exceeding those of the Shopping Centre. Lease agreements can also

contain a provision, which provides the Landlord with the possibility to demand a contractual penalty in case of breach of the obligation to abide by the Shopping Centre's opening hours.

## 6.2 Trading names

There are usually no restrictions in the lease agreements regarding the trading name of the Tenant or the right to change the trading name. However some shopping centres take a more comprehensive view and require that both trade names, brands and business concept are fixed in the agreement.

## 7. INSURANCE

### 7.1 Insured risks

The building (and the structure of the Shopping Centre) is usually insured by the Landlord. The Tenant is usually obligated to insure the property belonging to the Tenant or any third persons located in the leased premises against certain risks defined in the lease agreement (usual risks such as theft, burglary, fire and water damage). The Tenant may also be obligated to insure against any damage caused to third persons at the leased premises. The insurance provider must usually be an insurance company operating under Estonian licence, or a branch of a foreign insurance company, or a provider the Landlord approves of.

### 7.2 Uninsured risks

Usually, there is no provision in the agreement regulating uninsured risks (e.g. terrorism).

Lease agreements contain *force majeure* provisions, which define such risks and the consequences of the emergence of circumstances defined as *force majeure*, which are usually uninsurable. The list of *force majeure* events is not complete in the lease agreements. Meaning that any circumstances which are beyond the control of the Landlord/Tenant and which, at the time of concluding the lease agreement, the Landlord/Tenant could not reasonably have been expected to take into account, avoid or overcome, can be considered as *force majeure* event.

## 8. SERVICE CHARGE

### 8.1 Typical regime

The Landlord is usually responsible for providing various services to the Tenant, such as electricity, heating, ventilation and cooling, water and sewerage supply, cleaning, maintenance and window washing of the territory of common areas of the Shopping Centre, waste management, maintenance of and handling of engineering systems and elevators, security services at the Shopping Centre. The Landlord will recover the cost of providing these services through collecting payments from the tenants of the Shopping Centre. In addition, costs for administrative services, land tax and building insurance are usually also covered by the Tenant. All such services are defined as accessory expenses which are usually paid monthly based on the Landlord's invoice in addition to the rent paid by the Tenant.

Depending on the service, the Tenant is liable to remunerate the provision of these services either (i) pursuant to meter readings (electricity, water and sewerage, heating, ventilation and cooling of the leased premises); (ii) proportionally to the lettable premises (ratio of the leased premises to the area of all premises suitable for renting in the Shopping Centre); or (iii) proportionally to the leased premises in use (the ratio of the leased premises to the area of the premises that have actually been let in the Shopping Centre).

### 8.2 Promotions and marketing

It is commonly agreed that there is a marketing fund which allows the Landlord to collect a marketing fee for financing the advertising of the Shopping Centre. This fee is usually divided by Tenants proportionally in accordance with the size of their leased premises and is calculated based on yearly budget of the Shopping Centre.

It is also not unusual that there may be provisions requiring the Tenants of the centre to participate in joint marketing campaigns, provide discounts, etc.

Some larger shopping centres also have their own gift card program which they would require all Tenants in the centre to honour.

### 8.3 Tenants associations.

Tenants associations are not common in Estonia.

## 9. GREEN LEASE

The concept of green leases is not that common in Estonia. Usually there are general provisions in lease agreements regarding the obligation of the Tenant (or the Landlord) to be environment-friendly in their business activities and comply with the applicable environmental legislation. Specific environmental provisions in lease agreements are not common. The obligations to take up energy efficiency measures such as participate in water/energy conservation, waste reduction and recycling, etc are usually established in the internal rules of the Shopping Centre, which regulate usual daily or technical matters related to the use of the Shopping Centre and apply to all users of it, including the tenants. If the Shopping Centre has been certified as a green building (e.g. having a LEED certification) the obligations arising from the certification may also be included as an appendix to the lease agreement.

## 10. OTHER POINTS TO NOTE

**Security.** It is common for the Landlord to demand security from the Tenant to ensure the fulfilment of the obligations arising from the lease agreement. The security can be in the form of a deposit or a first-demand guarantee (usually given by a credit institution or a parent company). The amount of security is agreed between the Landlord and the Tenant. By default, the amount of security has to correspond to three month's rent, but this can be changed by agreement. In practice, the three month deposits does tend to be the most common security. For large international retailers, the Landlord would usually also accept a parent company guarantee as security.

**Landlord's lien.** In addition to security given by the Tenant, by law the Landlord has a lien over the Tenant's movable property (i.e. all property located on the leased premises regardless of the ownership) located in the leased premises. The Landlord has the right to intercept and prevent the removal of such movables from the premises if the Tenant is in the process of abandoning the premises or is otherwise removing the movables without having secured the Landlord's claim. If the Tenant is indebted to the Landlord, the Landlord can sell the belongings in a public auction and satisfy their claims with the money that they receive from the auction. The Landlord may waive this right in the lease agreement

**Registration of the lease agreement with the Land Register.** The Law of Obligations Act provides for an option to enter the lease agreement into the Land Register, which is a national register which includes information about ownership, details of real estate and related encumbrances. The purpose of this entrance into the Land Register is to ensure the continuation of the lease agreement in case the Shopping Centre (the immovable property) is transferred to a new owner. This means that unless the lease is registered with the Land Register, the new owner (new Landlord) obtains the right to terminate the agreement upon becoming the owner, by terminating the lease within three months of becoming the owner, provided the new owner shows that they themselves have a pressing need to use the premises. Therefore, the intention to re-let the premises at a higher rent is not considered as sufficient grounds to terminate the lease agreement. However, if the leased property is transferred to a new owner during the course of bankruptcy or enforcement proceedings, the new owner has the right to terminate the lease agreement, without the necessity to prove an urgent need to use the leased premises. Therefore, the lease agreement will survive the change of ownership and are binding to the new owner, if registered with the Land Register. However, the option to enter the lease agreement into the Land Register is often excluded in the lease agreement.

## FINLAND

By

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### Preliminary Remarks

The Finnish legal system emphasises the principle of freedom of contract. Finland has a very brief Contracts Act (228/1929) and several special enactments and laws to regulate further specific types of contracts and legal acts. In regard to lease contracts, there are two special Acts governing dwellings and commercial premises. The relevant law (regarding commercial use of the premises) is the Act on Commercial Leases (482/1995) which stipulates the leasing of premises for commercial use.

The regulation in the Act on Commercial Leases is mostly non-mandatory in nature except for a few paragraphs e.g., provisions regarding termination and rescinding of a lease contract. The aim of the law is to regulate mainly situations and circumstances which the parties have failed to consider in the contract and thus the parties are entitled to deviate from many of the paragraphs set out in the Act on Commercial Leases. It is important to keep in mind that the Finnish Act on Commercial Leases is “tenant friendly” by nature, hence the lease contract is of key relevance and the landlord should take efforts to have the leasing contract as complete as possible.

It is worth noting that the Finnish legal system includes specific requirements regarding real estate companies. The real estate company can be structured as an ordinary real estate company (“REC”) or as a mutual real estate company (“MREC”). If the property/building is owned by a MREC, the shares of the MREC entitle the shareholder to possess specific premises of the building. This has significant relevance in relation to lease contracts due to the fact that rental income in a MREC is directed to the shareholder of the MREC. Whereas in REC, the rental income is directed to the REC and will be taxed as the REC’s income. Accordingly, in case of an MREC, the landlord of the lease agreement is the shareholder of the MREC instead of the MREC itself.

## 1. TERM OF LEASE

### 1.1 Contractual Term

According to the Finnish Act on Commercial Leases, the lease term is either fixed or indefinite. In general, the term is seen as indefinite if not agreed otherwise. Fixed term contracts may include options to extend or break the lease term.

### 1.2 Termination

According to the Act on Commercial Leases, the lease contract shall automatically terminate after the fixed lease term and cannot be terminated during the fixed term lease period (except in case of certain breaches of the lease contract). If the lease term is until further notice and the parties have not agreed on the termination period in the contract, the Act on Commercial Leases states a general termination period of three (3) months for the landlord and one (1) month for the tenant. According to the Act on Commercial Leases the notice period will commence from the last day of the month during which the notice of termination was served.

The landlord’s termination of a lease contract that is valid until further notice must be notified in writing including grounds for the termination and the termination date. The termination must be executed in a provable manner. The notification is mandatory and cannot be defined otherwise in the contract.

The Act on Commercial Leases stipulates protection for the tenant which is typical for the Nordic justice system. The tenant can demand the Court to nullify the landlord’s termination if it can be seen as unreasonable and no appropriate grounds for the termination exist. The tenant may have a right to compensation if the lease term has been terminated against the law or common practice of lease contracts.

In addition, the tenant may in some cases seek compensation for the value created by the tenant’s business activities. The right to seek compensation and protection from the Court is mandatory and cannot be agreed

otherwise in the contract. However, it is recommended to agree that the tenant is not entitled to any compensation for any value created by the tenant to the shopping centre. The argument is usually that any increase of value is the result of joint marketing measures.

### 1.3 Rescinding the contract

The landlord has the right to rescind the contract as stipulated in the Act on Commercial Leases. According to the Act the landlord can rescind the lease contract on the following grounds:

- If the tenant fails to pay rent when it is due
- The right to lease or the object of lease is transferred by the tenant to a third party unduly
- If the object of lease is used contrary to the purpose of use defined in the lease contract
- If the tenant acts in a disorderly manner in the leased premises
- If the tenant fails to take care of the leased premises accordingly
- If the tenant infringes what has been stipulated or governed to maintain order and health
- If the tenant infringes the lease contract essentially

The landlord must inform the grounds in a reasonable time and if the infringement causes only minor significance the landlord is not entitled to rescind the contract. A notification of the landlord's intention to rescind the contract must be sent to the tenant in writing. If the tenant rectifies its infringement after the notice, the landlord may not rescind the contract. These requirements are mandatory and thus, the parties cannot agree on any additional and/or other grounds for the possibility to rescind the contract.

The tenant has the right to rescind the lease contract according to the following grounds stated in the Act on Commercial Leases:

- Using the leased premises according to the purpose of the contract could cause imminent danger to the tenant's and its employees health
- If the object of lease is no longer in the tenant's possession
- If the landlord significantly infringes what has been defined in the contract

The infringement must be significant in order to constitute a valid ground for the tenant to rescind the contract. The tenant must notify the landlord of their intention to rescind the contract in writing.

### 1.4 Renewal Rights

In a fixed term lease contract the parties may agree on a renewal option in favour of the tenant. This provision typically includes a specific deadline for the tenant to notify the landlord and to execute this right.

### 1.5 Disputes and Forfeiture

It is a common practice to agree on the applicable Law and Court to settle disputes arising from the lease contract. Usually, it is the District Court of the landlord's domicile and the Finnish Law will be applied and/or in certain contracts arbitration is applied in accordance with the rules of the Finland Chamber of Commerce.

## 2. RENT

### 2.1 Basic rent

Generally, the rent is due on the second day of each month unless otherwise stipulated in the contract. The parties can agree on advance payments of rent for one or more months. The Act on Commercial Leases allows the tenant to pay rent in advance for several months. Late payments are subject to interest according to the Interest Act (633/1982).

## 2.2 Additional rent and maintenance rent

Tenants are typically subject to a maintenance rent which covers the landlord's / property company's costs of utilities and costs of operations on the property/building including but not limited to property use and maintenance and annual repairs, staffing, administration and accounting, security and security systems, cleaning, heating, water and wastewater, energy, sanitation, P&C and liability insurance, rents payable on facilities, land and equipment, property taxes, and costs arising from the upkeep and maintenance of any parking areas, grounds, roads, corridors and stairwells. The tenant's share of the costs of maintenance of the joint premises is often calculated based on the tenant's premises divided with all of the leasable premises in the building/property. Only capital renovations and landlord's cost for financing are usually left outside the maintenance rent. The maintenance rent is typically revised annually and the surplus or the deficit is taken into consideration in the next year's maintenance rent.

## 2.3 Value added tax ("VAT")

Lease payments are subject to VAT (except for certain business activities excluded from VAT) typically always when the nature of the tenant's operations in the leased premises are respectively subject to VAT. VAT refunds and neglect of VAT stipulations may have severe economic impact on the landlord; so the lease contract should include a VAT clause according to which the tenant is required to keep the premises at all times in a use allowing the landlord and the property company to deduct VAT. If the tenant neglects this requirement, the tenant shall be liable for all costs incurred to the landlord and/or the property company owning the property.

## 2.4 Rent adjustment

Rent is generally tied to the Cost-of-Living index. The rent is adjusted by comparing the review index to the base index and increasing the rent with an amount equal to the change in the base index to the review index. Rent is not typically decreased in the event that the value of the Cost-of-Living index decreases.

# 3. ABILITY TO TRANSFER THE LEASE OR SUB-LET

## 3.1 Assignment

The tenant is usually forbidden from assigning its rights and obligations under the lease contract without prior consent of the landlord. It is in the interest of the shopping centre to create a wider range of services to develop and emphasise the centre's brand and image. Thus, the right to assign the lease contract or sub-let the premises is strictly forbidden without the landlord's written consent.

According to the Act on Commercial Leases the tenant has the right to transfer the lease contract to a third party in connection with a transfer of business. Thus, it should be agreed in the contract that this right is restricted as well to prevent any form of transfer of the lease contract.

The Act on Commercial Leases does not stipulate a specific right for the landlord to assign the contract. Therefore, it is recommended that the contract includes a clause which entitles the landlord to assign the contract to a new owner, for instance in connection with a transfer of ownership of the shopping centre.

## 3.2 Subletting

As stated above, the tenant is usually forbidden from subletting all or part of the premises without prior consent of the landlord. However, if subletting is allowed, the tenant will be liable to pay rent to the landlord accordingly and individually collect rent from the sub-tenant. According to the Act on Commercial Leases, the tenant will be held liable for any damages and other obligations in relation to the leased premises caused by the sub-tenant. It should be noted that this restriction should be defined in the contract, as the Act on Commercial Leases allows the tenant to sublet part of the premises without the landlord's consent.

## 4. PREMISES

### 4.1 Extent of Premises

The leased premises should be defined extensively in the contract to avoid any disputes or misunderstandings. A floor plan of the leased premises should be included as appendix to the lease contract.

### 4.2 Extent of the Shopping Centre and Common Areas

The use of common facilities of the shopping centre should be agreed in the contract to avoid any misunderstandings. These could include use of parking facility, common areas, loading areas, corridors, and elevators. A clause allowing the landlord to alter and modify the common areas should be included in the contract to avoid any possible disputes.

## 5. ALTERATIONS/REPAIR

### 5.1 Alterations and Repairs

The Act on Commercial Leases does not stipulate a general right for the tenant to execute alterations to the leased premises without the landlord's consent. Generally, the lease contract defines the tenant's responsibilities and obligations in case the landlord gives consent to alteration work. These obligations could, for instance, be taking care that the work is done in accordance with good building practice, taking care that the work has received permission by the relevant authorities and that it is done in a resource efficient manner.

The Act on Commercial Leases states an obligation for the tenant to execute repairs to prevent any imminent damage to the leased premises.

According to the Act on Commercial Leases, the landlord is entitled to carry out in the building and the premises such upkeep measures as well as repairs and rebuilding which cannot be delayed without causing harm. The landlord has a right to execute repairs without notice if the work cannot be postponed without causing significant damage. The landlord may execute repair and alteration work which do not cause material inconvenience or disruption to the exercise of the leased premises by giving the tenant notification to this effect at least fourteen (14) days before the commencement of the works. If the works are carried out for reasons above, the tenant is not entitled to rescind the contract.

Repairs or rebuilding which causes material inconvenience or disruption to the exercise of the leased premises may be undertaken by the landlord after giving notification to that effect at least six (6) months in advance. In such an event, the tenant is entitled to rescind the lease contract no later than fourteen (14) days prior to the start of the work.

These provisions are not mandatory, and the parties are able to agree otherwise in the contract. Therefore, it is recommended that the contract allows the landlord to carry out repairs and alteration work with a shorter notice period and to prevent the tenant from rescinding the contract.

### 5.2 Condition of the Premises

The premises should be in a condition that is reasonable for the tenant to demand considering its age, similar premises on the area and other local conditions. If not, the tenant is entitled to rescind the contract if the defects are significant, and the landlord does not remove the defects without undue delay. Alternatively, the tenant is entitled to carry out repairs for these defects at the landlord's expense.

## 6. TRADING

### 6.1 Opening hours

It is in the best interest of the landlord to define opening hours and obligation to conduct business during these hours in the contract. For instance, it could be agreed that the tenant is obliged to keep the store open to customers during the shopping centre's opening hours and any deviation shall be agreed separately. However, section 5 of the Unfair Business Practices Act (1061/1978) allows a small business owner of no more than 5 employees to keep its business closed in a shopping centre for one (1) day of its choice during a calendar week.

## 6.2 Purpose of Use

The purpose of use clause is an important clause in commercial lease contracts. This clause will allow the landlord to define the tenant's business concept and to decide what kind of services the shopping centre should offer to its customers. Usually, the tenant is prohibited from changing its business concept without written consent of the landlord.

## 7. INSURANCE

### 7.1 Insured risks

The landlord should require the tenant to obtain an insurance policy for its own property at the lease object. Shopping centre naturally takes care of its own insurance policy. There are no regulations concerning insurance and liability to insure the leased premises. Thus, it is in the landlord's interest to agree on the insurance policy in the contract. If the contract sets an obligation for the tenant to insure the premises, it is recommended that the clause obligates the tenant to actively seek compensation from the insurance company if a possible damage occurs. This prevents the tenant acting passive in case of damage of the leased premises.

### 7.2 Uninsured risks

The Finnish legislation has a general principle that the one who has caused the accident is liable to pay damages to the victim in full. If it is seen as a pure accident, then the one who has suffered loss will not receive compensation.

Generally, the contract defines a general duty of care towards the leased premises. This means that the tenant is liable at all times to take reasonable care of the leased property. If the tenant neglects this duty the landlord could seek compensation from the Court based on the contract.

### 7.3 Business insurance

Any terms regarding business insurance are not common in Finnish commercial lease contracts.

## 8. SERVICE CHARGE

### 8.1 Typical regime

As stated above under section 2.2 a separate service charge is collected in addition to the basic rent to cover the costs of utilities and operations. The parties can define how and when this service charge is collected and how it can be adjusted.

### 8.2 Promotions and marketing

Typically, the tenant is obligated to participate in the common marketing activities organised by the shopping centre by paying separate marketing fees as agreed in the lease contract.

### 8.3 Tenants associations

There are no association for commercial tenants in Finland.

## 9. GREEN LEASE

Green Lease is becoming a widespread practice in Finnish shopping centres. However, Finland and other Nordic countries in general take environmental responsibility very seriously and it is nowadays typical to include green/sustainability practices in the lease contract. Usually, the Green Lease obligations are defined in a co-operative manner which highlights the joint responsibility of the parties what comes to sustainability matters. The tenant is often obliged to a duty of care towards its business activities and its sustainability, especially, if the tenant's business creates toxic waste or uses machines which consume large amounts of energy.

## 10. FORCE MAJEURE AND COVID-19

Prior to the COVID-19 pandemic general force majeure clauses were not that common in Finnish commercial lease contracts. There have been no temporary amendments to the legislation regulating commercial leases due to the pandemic (yet). There is a general principle of unfairness in the Act on Commercial Leases as well as in the Contracts Act. This means that a contract term may be adjusted or set aside if its application would lead to an unfair result. Thus, evaluation of force majeure and unfairness is always done on a case-by-case basis.

During the pandemic, the Finnish authorities have occasionally forced restaurants and gyms to close their doors for customers for a given time period. It could be argued that a situation such as this could possibly lead to an unfair situation and the tenant should be entitled to rent reduction and/or other rent relief. However, there are no such court decisions, and the interpretation of the Act on Commercial Leases is to this extent still unclear (assumingly court cases will follow). The Finnish courts have in general been very reluctant to apply these unfairness paragraphs in relation to commercial leases due to the justice system holding two commercial parties as equals in bargaining strength and thus in no need of protection. It can be argued that if the tenant may not use the leased premises due to authority requirements, the tenant should be entitled to some kind of rent reductions and/or have the right to rescind the lease contract.

## 11. OTHER POINTS TO NOTE

### 11.1 Lease security

It is very common for the landlords to require lease security (typically corresponding to at least three (3) months' rent) in order to secure the execution of the tenant's obligations under the lease contract. The typical forms of lease security are bank guarantee, bank account pledge and cash deposit. It is in the landlord's interest to define that interest shall not be paid for the lease security and that it should be paid prior to the commencement of the lease term. The security shall be returned to the tenant no earlier than at the end of the contract.

### 11.2 Tenant ESG data

The shopping centre lease contract may include an obligation for the tenant to report to the landlord the monthly taxable sales figures. In turn, the landlord may be obligated to report periodical information on the development of the shopping centre's sales.

### 11.3 Money laundering, terrorism, and security

Regardless of the terms of the lease contract, the landlord and the tenant shall comply with any applicable anti-terrorism and money laundering laws and take appropriate measures. However, specific terms may be included in the lease contract.

### 11.4 Movable property

It could be in the landlord's interest to include a clause in the contract which defines the ownership of movable property. Movable property could have a significant effect on the value of the property/premises and thus, it helps to prevent any disputes arising from movable property. It is recommended to include a clause in which the parties agree that any sort of valuable movable property (e.g., kitchen equipment/air-conditioning equipment), which are brought to the premises by the tenant, are transferred to the landlord/property company after the lease term, if the landlord does not request this property to be removed.

## FRANCE

By  
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### Preliminary Remarks

In France the commercial lease contract (for retail, offices and industry) whether or not located in shopping centres, is regulated by the French Code de commerce (articles L. 145-1 to L.145-60 and R. 145-1 to R. 145-38) which are aimed to protect the tenants. Some of the rules are mandatory. The main aim is to provide tenants with a statutory right of renewal at the end of the lease, not limited in time. A law n° 2014-626 of 18 June 2014, called “Loi Pinel” has substantially changed some mandatory rules.

In most cases shopping centres are under co-ownership. Co-owners are retailers (mainly hypermarkets) and landlords (mainly institutional investors).

Shopping centre contracts include: the lease contract itself, additional pre-established documents such as the technical specifications for tenant alterations, the Shopping Centre Settlement (which rules the use of common parts such as the opening hours etc), Shopkeepers Association Statutes (if applicable) and environmental information.

### 1. TERM

#### 1.1 Contractual term

As a mandatory rule (L. 145-12 Code de commerce) the term cannot be of less than 9 years. The shopping centre leases used to be for a 12 year contractual term. Now a 10 year term is usually used.

#### 1.2 Break rights

If the contract is for 9 years, the tenant must be able to break at the end of each period of 3 years.

If the contract is for more than 9 years, it can provide otherwise (e.g. no break for the 6 first years or no break during the whole lease duration).

Leases for offices or for “monovalent” premises, meaning those that cannot be affected to another use without very important works (theatres, cinemas, hotels etc) can be for 9 years with a fixed period of more than 3 years.

Leases for “residences de tourisme” must have a fixed period of at least 9 years (mandatory).

Tenants can break the lease by giving the landlord a minimum 6 months’ notice (L. 145-4, mandatory).

The landlord has the same right to break the lease every 3 years but only in specific cases such as when the landlord intends to demolish and rebuild the building.

At the end of the contract each party can break by giving the other party a minimum of 6 months’ notice, otherwise the contract becomes a lease with an indefinite term that each party can break at any time by 6 months’ notice (L. 145-9, mandatory).

If the lease is for more than 9 years, the tenant may be allowed to terminate the lease after 3 years but with the obligation to reimburse all or part of the discounts given on either the rent, the capex given or an indemnity.

#### 1.3 Renewal rights

The tenant has a statutory right to renew the lease. Renewed leases are of 9 years (judicial mandatory rule).

As a consequence of this statutory right, if the landlord refuses the renewal or breaks the contract to rebuild the building, it must pay to the tenant the tenant’s entire estimated loss (L. 145-14, “indemnité d’éviction”). This is calculated by the judges, after an expertise process. Usually, this is the higher of the whole value of the

business, or the price of the lease (if it had been sold) and all other proven expenses or losses such as moving costs, layoff costs, etc.

#### 1.4 Disputes and forfeiture

- Contracts always provide for the automatic termination of the lease in case of breach of conditions by the tenant. By law, before enforcing such a right, the landlord must serve on the tenant a statutory notice granting the tenant a month to comply or stop the breach.

The Judge is obliged to enforce the contract but can give up to 2 years of delay to the tenant to conform (L. 145-41 mandatory). If the tenant does not abide within the 2 years, the lease is then automatically terminated.

- The landlord may also bring an action for breach of covenant without using the termination clause. The tribunal has to decide whether the breach is serious enough to terminate the lease.
- The contracts also usually provide for pecuniary sanction (10% of the amount due + interests, daily penalty to do something, damages to cover the loss caused by the breach, performance bond given to the landlord as first damages). The judge can always reduce these penalties. Pecuniary sanction by an increase of rent is not used.

## 2. RENT

### 2.1 Principal rent

The principal rent is freely established between the contractors. It is based on the market value and constitutes the minimum rent. A rent-free period can be granted of one or more months for the period of the tenant carrying out works. The only rule regulating this is given by the Civil code which states that if there is no rent, there is no lease (article 1709).

Tenants can also agree to pay a settled amount of money to enter the premises, mostly in existing shopping centres. This is much less frequent nowadays. Key money can be defined in the lease as an additional rent paid at the beginning of the lease or as an indemnity for the existing commerciality of the area. The difference is only at the fiscal level.

Key money gives no special right to the tenant.

### 2.2 Turnover

An additional variable rent is paid if the difference between a given percentage of the gross turnover (excluding VAT) at the premises and the minimum rent is positive. The percentage is set up according to the tenant's activity.

Major retailers try to ask for turnover rent only, without a minimum fixed rent. Landlords usually refuse. If accepted, it is for 3 years only (the amount paid on the 3<sup>rd</sup> year then becomes the fixed rent) or for the first lease and not its renewals.

### 2.3 Rent deposit - Guarantee

The tenant must usually provide to the landlord a guarantee for the payment of the rent. It is freely decided. It can be given in the form of a cash deposit and/or a first demand bank guarantee.

If the form of the guarantee is a cash deposit, it is freely defined. But if the cash deposit is higher than what is defined by article L. 145-40 (mandatory), the tenant can ask interests on the exceeding amount. The maximum possible amount without interest is not more than 2 terms of rent in advance. Thus, if the rent is paid quarterly in advance, the cash deposit cannot be of more than 3 months. If rent is paid monthly at the end of month, the cash deposit can be of two months. Practice market is usually a 3 month deposit with rent paid on a quarterly in advance basis.

If the form of the guarantee is a bank guarantee, the amount guaranteed is free and is given for the duration of the lease, a new guarantee being asked when the lease is renewed. Big retailers tend to refuse cash deposit and offer a bank guarantee or more often nowadays guarantee by the holding company, of 3 months of rent.

Both cash deposit and guarantees can cover rent, charges and any amounts owed by the tenant by the lease.

## 2.4 Rent review

- The principal rent is usually adjusted each year on a base equal to 100% of the variation of the INSEE construction cost index or ILC INSEE index, created in 2008. ILC is now the common use.
- Rent can be freely changed by the parties during the lease.
- When there is no additional turnover rent, each contractor has a statutory right to claim for an adjustment of the rent as soon as the rent has been fixed (by contract or by Court), more than three years ago (L. 145-38). Rent is then fixed by the judge if the demander can prove that since the last fixation of the rent there has been a modification of the nearby commerciality that led to a variation of more than 10% of the “valeur locative”.  
The rent can also be reviewed when, by effect of the index revision, it was increased or diminished of more than 25% (L. 145-39).  
The supreme court decided in 1987 and again recently that these mandatory rules could not be applied to the fixed rent if there is a turnover rent (“loyer binaire”). This is the case in shopping centres.
- When the lease is renewed, the rent is fixed freely by the parties. If no agreement is reached the judge fix the fixed rent and the turnover rent will remain unchanged. When there is an additional turnover rent, this is only possible if the lease provides for it, otherwise the fixed and turnover rents will remain unchanged.  
If the lease duration is of 9 years, the rent can be upgraded only if the landlord proves a positive change of the environmental commerciality for the lessee. The lessee can ask for a lowering of the rent if the current rent is above market rent.
- VAT at the current rate in respect of the rent and all other sums due by the lease will be payable to the landlord if it has opted to charge VAT at the property.

## 3. PREMISES

### 3.1 Extent of demise

Only the private internal surface is leased to the tenant, although some bars and restaurants can be entitled to the exclusive use of part of the common areas to display tables and chairs.

### 3.2 Extent of the shopping centre

The shopping centre is defined in the lease. The lease provides the landlord with the opportunity to extend or restructure it.

### 3.3 Rights reserved by Landlord

Leases usually give the landlord the right to:

- Extend or restructure the shopping centre;
- Use part of the common areas for specialty leasing and non-rental incomes;
- Enter the premises to check the maintenance and the compliance with the shopping centre rules; and
- Check the accounting data of the tenant, in relation with the additional turnover rent.

### 3.4 Common parts

The landlord is responsible for the maintenance of the common parts and recovers the cost through the service charge on a floor basis.

## 4. ABILITY TO TRANSFER THE LEASE OR SUBLET

### 4.1 Assignment

- It is mandatory that assignment of the business must remain possible (L. 145-16). Tenants are usually not entitled to assign the lease unless they sell their whole business with the landlord's consent, which cannot be unreasonably withheld.
- Outgoing tenants were usually required to guarantee the payment of the rent for the remaining period of the lease. This is now prohibited (L. 145-16). The guarantee cannot be given for more than 3 years after the assignment.
- Landlords have a right of first refusal and can choose to buy the unit for themselves or any other retailer they choose, by matching the terms offered.
- Some leases also provide the landlord with control over modifications in the corporate tenant share capital, notably in the majority shareholders, or in the controllership of the company. It is assumed that this is an assignment of the business. The price is checked by an arbitrator and the landlord has a right of first refusal and can choose to buy the business (not the shares) at the price fixed by the experts for himself or any other retailer he chooses.

### 4.2 Underletting

Underletting is usually not allowed except for subsidiaries. If the entire premises are sublet to one company, this company has the right of renewal lost by the tenant, since the right of renewal is allotted to the one who owns the business (L. 145-1, L. 145-8 and L. 145-32).

### 4.3 Sharing occupation

Sharing occupation is usually prohibited.

## 5. ALTERATIONS/REPAIR

### 5.1 Restrictions affecting alterations

Structural and non-structural alterations of the premises are subject to the consent of the landlord, which cannot be unreasonably withheld. At the end of the lease, before renewal or in some cases when the tenant leaves the premises, all works done by the tenant become the property of the landlord.

### 5.2 Tenant's fitting out

The fitting out works must be done by the tenant according to:

- Security and health regulations;
- Technical prescriptions of the shopping centre (linked to the lease contract);
- Environmental requisites;

And must be completed within a defined period (2 or 3 months) prior to the shopping centre opening date when the shopping centre is in its development phase or in an extension phase.

### 5.3 Signage

Tenants are allowed to use their own signage on the premises but the size is defined by the technical shopping centre provisions.

### 5.4 Repair and decoration

The tenant is under an obligation to keep the premises in good repair.

## **6. TRADING**

### **6.1 Keep open**

The tenants are obliged to keep the premises open and trading during the shopping centre opening hours. The opening days and opening hours are defined in the shopping centre settlement. Exceptional opening days (Sundays and Bank Holidays) can be decided by the general assembly of the retailer's association or by the landlord. These exceptional opening days are also regulated by law, such as Sundays.

### **6.2 Trading names**

Tenants can freely change their trading names if the new one is as well-known as the previous.

By mandatory rule, tenants can also change the commercial activity restrictively defined by contract, under certain conditions (L. 145-47 to L. 145-55).

## **7. INSURANCE**

### **7.1 Insured risks**

Risks relating to the building and the common parts are insured by the owners and recovered through service charge.

Risks relating to the premises, the tenant's business and the tenant's alterations are insured by the tenant.

### **7.2 Uninsured risks**

According to the French Code civil (art. 1722) if the entire building is demolished by accident (usually fire) the lease is terminated. In case of partial destruction, the tenant may ask for a diminished rent or the ability to break the lease.

The lease can provide otherwise.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

The landlord provides services to the centre such as cleaning, maintenance, HVAC, security, repair and technical management of common parts. The landlord recovers the costs of these services through the service charge. Provisional payments by tenants are required in advance according to an annual budget.

Since November 2014, the law makes it mandatory (i) to list all charges and taxes that the tenant will have to reimburse to the landlord and (ii) to provide the tenant with a balance sheet of the budget each year (L. 145-40-2).

If this is not done, the Supreme court held that the landlord must reimburse all provisional amounts previously paid by the tenant (5 years' time limit for action) and cannot ask for any provision for the future until the landlord produces these documents.

Since 2014 structural works must be borne by the landlord (R. 145-35).

### **8.2 Promotions and marketing**

Promotions and marketing are usually now provided by the landlord, who recovers the costs as an additional common charge.

### **8.3 Tenant's Associations**

When promotions and marketing are not provided by the landlord, there is a tenants' association with the only purpose of marketing and promotions.

## 9. COMPETITION

Usually, the landlord gives no guarantees over competition and has thus full discretion as to the level of competition present in the shopping centre at a time.

Usually, tenants are not allowed to open a similar shop around the shopping centre (3 to 5 kms).

Provisions on protection from competition are subject to European rules (article 101 TFUE).

## 10. LITIGATION

Certain procedures are available to recover the premises in case of termination of the contract either by lapse of the term or by resolution after a breach, however there are only 2 ways:

- A quick procedure (référé) but the judge can only judge what is obvious. Tenants usually argue that the demands can seriously be contested.
- The classic procedure (procédure au fond) is longer (a duration of 2 years at least, 4 years with appeal). However, provisional payments can be asked.

Mediation is often proposed by the judges, but cannot be imposed.

## 11. GREEN LEASE

Sustainability and ecological aspects are becoming more and more important for both landlords and tenants.

A chart is usually annexed to the leases.

## 12. COVID 19 IMPACTS ON LEASES

During the Covid 19 pandemic, the Government has imposed three lockdowns (from March 17 to May 10, 2020, from 30 October 30 to December 15 2020 and from April 3 to May 3, 2021) and has granted massive financial aids to the retailers, restaurants, cultural activities, etc.

Leases do not provide for special rules for the pandemic situation, nor did the law.

Some special decrees and laws imposed a temporary moratorium on the termination of a lease by forfeiture for arrears of rent, until the end of state of urgency (June 30<sup>th</sup>, 2021) plus 2 months for some smaller retailers and those businesses which were particularly hit by the pandemic. No law suggested that the rent is not due.

Many negotiations took place during the lockdowns and pandemic.

For the cases which became contentious, the tribunals and courts of appeal mainly judged that there was no principle that could entitle a tenant not to pay what is due by the lease. But two judgments and a court of appeal decision stated that the lockdown was similar to a temporary destruction of the premises, allowing the tenant not to pay during this period. The Supreme Court has not yet judged on this matter.

# GERMANY

By

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## Preliminary Remarks

German tenancy law is extensively codified by the rules of sec. 535 et seq. of the German Civil Code (“Bürgerliches Gesetzbuch”), which relate to residential leases only. According to sec. 578 of the German Civil Code many of the statutory provisions for residential leases are also applicable to commercial leases. Unlike the binding rules for residential leases, which in general protect the Tenant, the parties of a commercial lease are in a wide range able to vary the statutory rules through contractual provisions.

Leases are also reviewed under the Rules on General Terms and Conditions (“Allgemeine Geschäftsbedingungen”, see sec. 305 et seq. German Civil Code) if they include standard contractual conditions that were prepared for repeated use (i. e. at least 2 or 3 times) in different contracts. These Rules render provisions void if they are found to be unreasonably disadvantageous to the party contracting with the party imposing its general terms and conditions (which mostly will be the Landlord). In this case and in any case of doubt, statutory provisions favoring the Tenant apply.

Leases under German law constitute a mere contractual relationship between Landlord and Tenant. A lease does not constitute an encumbrance on real estate, therefore, leases cannot be registered at the land register (“Grundbuch”).

## 1. TERM

### 1.1 Contractual term

A typical contractual term is between 5-15 years. Tenants are increasingly pushing for 5 year terms as opposed to 15 year terms.

### 1.2 Break rights

It is unusual for Landlords or Tenants to agree on the right to break the Lease agreement within the contractual lease term.

Lease contracts with a term exceeding one year are required to be in written form. If a lease contract and any of its annexes, separate parts and supplements are not in writing, the lease is deemed to have been entered into for an undetermined term and may as a result be terminated by either party by serving between 6 to 9 months’ notice on the other party (even though parties agreed a longer lease term). This is important under German law and parties should avoid any agreements by fax, email, orally etc. Any lease related agreements (which include the initial lease and any later arrangements) should be made by way of formal addendum to the lease to be signed in wet ink.

### 1.3 Renewal rights

Renewal rights are regularly agreed in lease agreements in favour of the Tenant in the form of one or several options to prolong the lease term for a defined period. For example, a renewal right might include 3 options for the Tenant to prolong the lease term by 5 years each.

Under German law Tenants have no statutory right to renew the lease on expiry of the contractual term. If the parties continue the lease after the expiry date, the lease is treated as a lease with an indefinite term. As a consequence, either party then has the statutory right to break the lease by serving on to the other party six months’ notice.

#### 1.4 Disputes and forfeiture

Either party of a lease has a statutory (and very often additionally contractual) right of extraordinary cancellation if the other party is in breach of an essential duty or does not perform its covenants / conditions. A lease cannot be cancelled if the Tenant becomes insolvent.

Before enforcing an extraordinary cancellation (excluding non-payment of rent) the party that wants to cancel the lease must serve on the other party a statutory notice in a prescribed form to give the Tenant the opportunity to meet duties.

Typically, leases will not contain a general dispute resolution clause. Depending on the negotiating strength of a particular Tenant, it may persuade the Landlord to include a clause for resolving disputes by arbitration or to agree the legal venue.

## 2. RENT

### 2.1 Principal rent

Rent will generally be based on the open market value and will usually be fixed for the whole lease term (although see below on turnover and rent adjustment clauses). Tenants are sometimes granted a rent free period of between 3 to 9 months at the beginning of the lease term.

### 2.2 Turnover

Turnover provisions are becoming increasingly used. The Tenant will agree to pay a rent linked to its turnover e.g. the Tenant pays rent equalling 8% of the Tenant's gross turnover at the premises combined with a fixed amount as "Minimum Rent".

### 2.3 Rent review

The principal rent will not usually be reviewed by the parties themselves but rent adjustment clauses ("Wertsicherungsklauseln") are applicable if the lease term is for at least 10 years. During the lease term, the rent will be adjusted in accordance with an alteration of the official price index issued by the Federal Office of Statistics ("Statistisches Bundesamt") in Wiesbaden, usually the consumer price index ("Verbraucherpreisindex"). A typical example: If the consumer price index alters by more than 10% the rent will be adjusted by 65% of this alteration. Rent adjustments can and must go up and down.

## 3. PREMISES

### 3.1 Extent of demise

The Tenant will let the internal parts of the unit only so that the building structure of the unit and of the Shopping Centre remains with the Landlord.

### 3.2 Common parts

The Tenant will be given rights to use common parts in the Centre (e.g. the malls, refuse areas and other common areas). The Landlord will be responsible for the maintenance of those common parts and will recover this cost through the service charges as far as permissible.

### 3.3 Rights Reserved by Landlord

Landlords will always require a number of rights to enable them to maintain the condition of the centre. Such rights include the right to close certain areas for repair and rights to extend or alter the centre. However, there are general laws and contractual provisions which will limit the Landlords' ability to exercise those rights where they are seen to have an unduly adverse impact on the Tenant's business.

## **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

### **4.1 Assignment**

Unless otherwise expressly agreed, neither party will be allowed to assign the lease without the other parties consent.

Major Tenants that belong to nationwide chains will often insist on the right to assign the lease to its subsidiaries or franchising partners. Landlords usually agree to such provisions if the assigning Tenant remains liable for the new Tenants' liabilities during the remaining lease term or if the new Tenant has sufficient credit standing.

### **4.2 Subletting**

Generally subletting is not allowed without the Landlord's consent. The Landlord is allowed to withhold its consent only for material matters relating to the ability of the subtenant to perform the lease obligations. If the Landlord unreasonably withholds consent, the Tenant may terminate the lease agreement by giving the Landlord six months' notice.

The principle Tenant is liable for any damage to the premises caused by the subtenant during the subtenant's period of occupation.

If subletting is contractually permitted, the Landlord may ask for an additional security e.g. 10% of the principal net rent.

### **4.3 Sharing occupation**

Sharing of occupation is treated in the same way as subletting (see above).

## **5. ALTERATIONS/REPAIR**

### **5.1 Nature of permitted alterations**

Non-structural alterations to the premises are usually permitted subject to the consent of the Landlord, such consent not to be unreasonably withheld or delayed. Structural alterations are prohibited.

### **5.2 Tenant's fitting out**

The Tenant's fitting out of the premises is usually to be completed prior to the Shopping Centre opening date when the Shopping Centre is in its development phase e.g. the premises will be handed to the Tenant 12 weeks prior to the anticipated Shopping Centre opening date and the Tenant is then obliged to complete its shop fitting during that period. Landlords will generally want to approve the nature and extent of the fit out.

### **5.3 Signage**

Tenants are usually allowed to use their own signage subject to the Landlord's approval. Restrictions on the extent of the sale signs and in-store signage which a Tenant can display on shop front windows usually apply.

### **5.4 Repair and decoration**

The Tenant will be under an obligation to keep the premises in good repair and to redecorate the Premises in regular intervals. The Landlord will be responsible for external redecoration and repairing the structure and common parts of the Shopping Centre. According to a judgement of the Federal Court of Justice ("Bundesgerichtshof") the Landlord can recover such cost through the service charge however this is limited to a certain amount (e.g. 10% of the annual net rent).

## 6. TRADING

### 6.1 Keep open

Most leases contain a clause which requires the Tenant to keep the premises open and trading during the Shopping Centre's trading hours. Trading hours are specified in the lease. If the Tenant fails to comply with its keep open obligation, the Landlords may seek a remedy for performance, a contractual penalty or damages.

### 6.2 Trading names

The Tenant is usually required to trade under a specified trading name.

## 7. INSURANCE

### 7.1 Insured risks

The Landlord usually insures the Shopping Centre (including the premises let to Tenants) against a standard set of insured risks, including insurance for loss of rent, in the event of damage to the Shopping Centre. The Landlord will recover that cost from the Tenant on a fair proportional basis, which is usually on a floor space basis. If the Shopping Centre or premises are damaged by an insured risk, the rent will be suspended during such period as the Landlord has insurance cover for loss of rent income. If the lease agreement is silent on whether costs for insurance for damages resulting from terrorism can be allocated to the Tenant, the Federal Court of Justice ("Bundesgerichtshof") decided that such costs can be allocated to the Tenant if such insurance is appropriate for the Shopping Centre (e.g. if this is exposed to a terror risk) and if the insurance premium is reasonable. Parties can agree to a particular cost allocation for the terror insurance in the lease agreement.

### 7.2 Uninsured risks

In the event of an uninsured risk, the Tenant may request the right to break the lease or require the Landlord to reinstate the Shopping Centre at its own cost. Some Landlords agree to reinstate but may also require a right to break.

## 8. SERVICE CHARGE

### 8.1 Typical regime

The Landlord will be responsible for providing various services to the Shopping Centre. These can vary depending on the nature of the Shopping Centre, but standard items include repair, cleaning, insurance, heating and hot water, air-conditioning, maintenance of common parts and the provision of staff to service the Shopping Centre.

The Landlord will recover the costs of providing these services through the service charge regime, under which the Tenant will be required to pay a service charge in advance based on budgeted expenditure with reconciliation at the end of the service charge year.

The service charge will usually give the Landlord the ability to employ centre managers and contract out services, and recover the costs of doing so through the service charge.

The usual method of apportionment of service charge is on a floor space basis.

It is important to note that pursuant to German law a Landlord can only recover any of such costs through the service charges if this is expressly agreed and the service charges are specified in detail in the lease contract (e.g. detailed scope of services provided by the centre management).

### 8.2 Promotions and marketing

The cost of promotions and marketing of the Shopping Centre is usually included in the service charge if not provided by a Tenant's association (see below).

### 8.3 Tenants Associations

Shopping Centre leases very often still contain provisions which require the Tenants to establish a Tenants association with the aim of introducing common sales promotion and marketing measures (“Werbe-gemeinschaft”). Such associations are usually established as partnerships under the German Civil Code (“Gesellschaft bürgerlichen Rechts”) or more rarely as registered associations (“eingetragener Verein”).

Usually, the members of a Tenants association are obliged to effect the regular payment of fixed monthly contributions on a floor space basis. If provided for in the partnership agreement, special charges may be levied for special or unforeseen promotion measures arising from certain events (e.g. bank holidays, opening or anniversaries).

However, Shopping Centres are increasingly operating without Tenants associations and often organise promotions and marketing by themselves through their centre management (see above).

## 9. GREEN LEASE

Sustainability and ecological aspects are becoming increasingly important in German lease agreements. Delivery specifications often include aspects of energy and water saving mechanisms, solar panels, smart buildings, insulation standards and garbage separation. Many Tenants have their own codes for corporate and social responsibility which require buildings to comply with specific standards (e.g. LEED platinum or DGNB gold). Compliance with such standards can be included in a lease as an agreement on quality (“Beschaffensvereinbarung”) which could trigger Tenant’s right to reduce the rent, damage claims or even termination rights in case of non-compliance.

## 10. COVID 19 IMPACTS ON LEASES

During the Covid 19 pandemic, the Government has imposed two lockdowns for most of the retail shops, the second lockdown running from December 2020 to June 2021. Despite these massive interventions by the State into private businesses, the legislator has mostly abstained from creating special legal rules on how the parts of the lease shall deal with these impacts.

The German lease law as set forth in the Bürgerliches Gesetzbuch does not provide special provisions for this situation. Also, most of the running leases do not contain any special clauses for such unusual events. As a consequence, the industry – represented by the German Council of Shopping Places – has developed a Code of Conduct which provides guidelines to Landlords and Tenants on how to deal with the present situation. In the majority of the cases, the parties have agreed on addendums to the current leases which grant a reduction of rent and / or a deferment of payment. For cases which become contentious, the Courts (District Courts (“Landgerichte”) and Courts of Appeal (“Oberlandesgerichte”)) have, during the last two years, developed case law in regards to the question of whether the Tenant is entitled to a reduction of rent during the lockdown periods. These court instances have mainly applied the doctrine of frustration (“Störung der Geschäftsgrundlage”, clausula rebus sic stantibus) which allows them to deal with the consequences of the lockdowns on a case by case basis. All factual circumstances of a case must be taken into account by both parties. Meanwhile, on 12 January 2022, the German Supreme Court (“Bundesgerichtshof”) has rendered a decision of principle in respect of this topic (docket no. XII ZR 8/21). In this decision, the Court has confirmed the application of the doctrine of frustration to the aforesaid legal problem.

# GEORGIA

By  
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## Preliminary Remarks

The Civil Code of Georgia (the “**Civil Code**”) regulates the relationship of parties in rental and lease agreements, including real estate rentals. As a general rule, the contracts concluded with the Shopping Centres on rental of the property would qualify as lease agreements under the Civil Code.

Many issues discussed hereinbelow are not regulated by the Civil Code or other laws and therefore, the content of this document is based not only on legal requirements but also on common practices which have developed over the past years in Georgia (the latter is not based on empirical evidence but our own experience which may not be completely accurate).

According to the Civil Code, the owner (landlord) holds the right to transfer the specified property to the temporary use of the lessee (tenant). During the term of the lease, the lessee should be able to profit from the proper management of the leased property.

Notably, if the lease agreements are made for more than 1-year term (including the case where the term of the agreement is extended beyond one year), it shall be registered with the National Agency of Public Registry of Georgia (the “**Public Registry**”). Considering that the Shopping Centre lease agreements are mostly concluded for more than 1-year period, they are usually subject to mandatory registration with the Public Registry.

For the purposes of this overview, parties to the Shopping Centre lease agreement (the “**Lease Agreement**”) will be referred to as the “**Landlord**” and the “**Tenant**”, respectively.

## 1. TERM

### 1.1 Contractual Term

As the lease term is not limited by Georgian law, the parties are free to stipulate the term of the lease as desired. If the period of lease is not defined by the agreement, the Lease Agreement is deemed to be concluded for an indefinite period. In addition, if the Tenant continues to use the leased premises after the expiration of the Lease Agreement and the Landlord does not object to it, then the agreement shall be deemed to have been extended for an indefinite term.

In practice, individual entrepreneurs and small businesses prefer conclusion of the short-term Lease Agreements. On the other hand, the term of the Lease Agreements involving large businesses (including international retail companies and food markets) typically exceeds 5 years.

If the term of the Lease Agreement exceeds 10 years, then once the term expires, either party may terminate the agreement within three months’ notice, unless the parties agree otherwise, or it otherwise follows from the circumstances of the case.

### 1.2 Termination and Break Rights

The Lease Agreement is generally terminated upon the expiration of its term. However, under the Civil Code, in case the term of the contract is not defined by the agreement and therefore it is deemed to be concluded for indefinite term, the Lease Agreement may be terminated once the agreement is declared terminated by either party.

The Civil Code also stipulates several instances during which parties may terminate the agreement, namely:

The Landlord is entitled to unilaterally and prematurely terminate the Lease Agreement if:

- the Tenant has not paid the rent for 3 months;
- the Tenant significantly damages the leased premises or creates an apparent danger of such damage despite a warning given by the Landlord.

On the other hand, the Tenant is entitled to unilaterally and prematurely terminate the Lease Agreement, if the transfer of the leased premises to the Tenant, in whole or in part, is delayed, or if afterwards the Tenant is deprived of the right to use the leased premises. Termination of the Lease Agreement shall be allowed only if the Landlord does not eliminate the circumstances hindering the use of the leased premises within the period of time fixed by the Tenant. At the same time, the period of time need not be fixed if the Tenant has lost interest in the contract as a result of the circumstances providing grounds for terminating the contract;

Further, in the event that the lessee Tenant returns the property before the termination of the agreement, it will be liable for further lease payments until the end of the contract term, unless it is able to propose a new solvent Tenant, acceptable to the Landlord.

Notably, the Lease Agreements may stipulate other termination rights (*e.g.*, optional exit, termination due to insolvency, default, etc.), as agreed between the parties.

### 1.3 Renewal Rights

No specific provisions are provided under the Civil Code in relation to the renewal rights. However, if the Tenant continues to use the leased premises after expiration of the term of the Lease Agreement and the Landlord does not object to it, then the agreement shall be deemed to have been extended for an indefinite term. At the same time, it is common practice in Georgia that the parties include the renewal provisions in the Lease Agreement (including automatic renewal if neither party terminates the contract prior to its expiry).

### 1.4 Disputes

The parties are entitled to choose the forum for dispute resolution at their sole discretion (unless particular disputes fall under exclusive international jurisdiction of Georgian courts).

In practice, the parties to the Lease Agreement often chose to subject their disputes either to Georgian courts or to arbitration (in the latter case, the parties have to specify particular arbitral institution to avoid the risk of the arbitration agreement being invalidated).

## 2. RENT

### 2.1 Basic rent

Under the Civil Code, the rent shall be paid once the Lease Agreement term expires. However, if the parties specify that rent shall be paid periodically, then it must be paid at the end of each period.

In practice, the rent is usually paid on a monthly or quarterly basis. However, under long-term Lease Agreements, a fixed part of the rent may also be paid annually. In addition, the Landlords often grant grace periods to the Tenants for completion of the fit-out works, until the pre-trading conditions are met at the leased premises.

In addition, according to the Civil Code, if the leased premises are found to be materially defective, then the amount of rent shall be reduced *pro rata* to the amount by which the fitness of the leased premises is diminished due to such defect. This right shall be valid until elimination of the material defect. Notably, the minor defect shall not be taken into account.

#### Additional Rent

Inclusion of the fees for services on maintaining and cleaning the common areas in the basic rent is subject to the agreement between the parties. In particular, the charges in relation to the maintenance of the common area as well as facility charges may be included in the rent. However, there are cases where the Tenants are obligated to additionally pay such costs, as variable part of the rent, to the Landlord together with the utility charges (such as water, gas, electricity, maintaining security, *etc.*).

According to the Civil Code, payment of additional expenses may be required only if the parties agree to that matter. In addition, if the Tenant fails to return the leased property at the end of the term, the Landlord may claim payment and other damages for the period of such delay.

#### **VAT**

In case of the lease of a premises for commercial purposes, the rent shall be subject to VAT (assuming that the 12-month turnover of the landlord exceeds GEL 100,000). According to the Georgian legislation, VAT rate is 18%. The rent amount generally includes VAT, unless otherwise agreed between the parties.

### **2.2 Turnover**

Together with the basic rents, the Tenants in the large Shopping Centre may also be obligated to pay to the Landlord certain percentage of their turnover. However, this is not a very common practice in Georgia.

### **2.3 Rent Review**

In certain cases, the Lease Agreements (especially, with participation of large companies) stipulate that the rent must be indexed by the official CPI (Consumer Price Index) rate of the previous year published by the National Bank of Georgia. Mostly, such indexation applies to the second or third lease year and onwards.

### **2.4 Procedures to Recover Unpaid Rent**

The lessor of a track of land, house or apartment may secure any claim arising out of the renting relationship with a lien on those things that the lessee brings to the place. In line with this requirement, the Landlord and the Tenant sometimes agree on similar arrangements under the Lease Agreement.

The Landlord may apply to the courts (or arbitration, as the case may be) to claim unpaid rent, in case of non-payment of the rent by the Tenant in a timely manner. Notably, the court may terminate the Lease Agreement in accordance with the Civil Code, in case the Tenant fails to pay the rent within three months.

## **3. PREMISES**

### **3.1 Extent of Demise**

The Tenants are typically prohibited under the Lease Agreements from displaying goods in the common area of the Shopping Centre or installing exterior lighting, shades, amplifiers and other devices on the exterior of the demised premises, unless it is necessary for the proper operation of the leased premises.

### **3.2 Extent of the Shopping Centre**

The Shopping Centre usually comprises all premises, common areas and any external areas adjacent to it. The entire area of the Shopping Centre may be leased out, except for the premises already leased to other Tenants and the common areas needed for proper functioning of the Shopping Centre.

### **3.3 Common Parts**

The common areas of Shopping Centres including the halls, elevators, parking lots, etc. can be freely used by the Tenants and the customers. The service charged for common areas are usually allocated among the Tenants. However, parking fees are usually paid by the customers themselves. Certain spaces of the common areas in the Shopping Centres may be rented for different purposes, such as installation of vending machines, coffee/water stations, advertising structures, small shops, etc.

### **3.4 Rights Reserved by Landlord**

Under the Lease Agreements, the Landlords are often entitled to:

- Enter the leased premises at reasonable times for the purposes of inspection of the condition of such premises and for carrying out necessary repair/renovation works;
- Enter the leased premises during reasonable hours after giving notice to the Tenant for the purposes of showing the leased premises to the potential buyers of the Centre;

- Assign the Landlord's rights and obligations under the Lease Agreement, unless otherwise agreed between the parties.
- Mortgage, charge, create any lien or otherwise encumber the Centre.

Notably, any rights reserved by the Landlord under the Lease Agreement shall be exercised in such a manner as to not adversely impact the Tenant's business activities.

#### **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

##### **4.1 Assignment**

Assignment of the rights under the Lease Agreement are usually subject to the agreement between the parties. It is common practice that the Tenant is forbidden from assigning the lease/premises without prior written consent of the Landlord, unless the lease is being assigned to the affiliates of the Tenant. Notably, in the event that the Tenant returns the property before the termination of the agreement, the latter will be liable for further rent payments until the end of the contract term, unless it is able to propose a new Tenant, which is solvent and acceptable to the Landlord.

##### **4.2 Sublease**

Under the Civil Code, the Tenant may not sublease the property without prior consent of the Landlord, who may refuse to allow the sublease of individual parts of the leased premises, only if by doing so, the Landlord will sustain significant loss. If sublease is approved by the Landlord, the Tenant is liable for any unauthorized use by a subtenant and the Landlord has the right to directly terminate such unauthorized use by a subtenant.

##### **4.3 Sharing Occupation**

Sharing occupation is not specifically regulated under the Civil Code. In practice, occupation sharing may take place in the form of sublease which requires prior consent of the Landlord.

##### **4.4 Change of Control**

Provisions restricting change of control are rarely included in the Lease Agreements in Georgia. However, the parties may agree to impose certain obligations upon the party concerned in case of occurrence of change of control (*e.g.*, obligation to notify the other party). In addition, the parties may establish penalties for non-compliance with the 'change of control' provisions, including termination right of the other party.

#### **5. ALTERATIONS/REPAIR**

##### **5.1 Alterations**

The Tenants are usually not allowed to carry out any reconstructions involving any structural alterations of the leased premises. The Tenants are normally entitled to carry out substantial alterations of the interior of the leased premises after obtaining consent of the Landlord, provided that such alterations are not harmful to the structure of the electrical, plumbing or air-conditioning and other similar systems.

##### **5.2 Tenant's fitting out**

Under the Civil Code, the Tenant is obligated to carry out repair works of the leased premises at its own expense. At the same time, it is not clear whether this provision applies to the dwelling places only or to all leased premises. However, in practice, repair and fit-out works at the leased premises are usually carried out by the Tenant under the supervision of the Landlord. After termination of the lease, the premises must be returned in the same condition as at the time of conclusion of the agreement, subject to normal wear and tear.

Notably, the Tenant is entitled to keep/retain the things with which it has equipped the leased premises, unless otherwise agreed between the parties.

### 5.3 Signage

Parties typically agree that using any signage by the Tenant requires prior consent of the Landlord. After displaying the approved signage, any further variation may also be subject to the prior approval of the Landlord.

### 5.4 Repair and decoration

The obligation to carry out repair and maintenance works of the non-structural parts of the leased premises generally rests upon the Tenant. As for the decoration, the Tenants are usually allowed to decorate the interior of the leased premises, provided that specific requirements under the Lease Agreement with respect to proper maintenance of the premises are met.

## 6. TRADING

6.1 The Lease Agreements usually provide for the obligations of the Tenants regarding opening of the store for trading and conduct of business. In particular, Tenants are typically required to open the stores for the public on the opening date of the Shopping Centre (if the agreement is concluded prior to opening the Centre). In addition, they are normally obligated to be open for trade within the shopping centre's working hours. Notably, food markets may be entitled to operate 24/7 and the Landlord in turn will be obligated to provide access to the food store to the customers. Violation of these obligations may lead to imposition of the fines and/or termination of the agreement, as stipulated in respective Lease Agreement.

6.2 It is a common practice to establish, amend and vary from time to time the internal regulations by the Landlord for the proper and efficient operation of the Shopping Centre. Such internal regulations normally include the rules for the maintenance of the common areas and facilities ensuring proper functioning of the shopping centre which are binding upon all Tenants in the Shopping Centre.

6.3 The Lease Agreements may include 'Radius Restriction' clauses in Georgia. In particular, the Landlord may be obligated not to lease the premises to the competitors of the Tenant inside or outside of the shopping centre within a certain distance. At the same time, the Tenants may undertake not to operate the store for conducting the same business within the same distance throughout the lease period. Notably, these provisions should be carefully construed to avoid violation of the antitrust laws.

## 7. INSURANCE

### 7.1 Insured risks

Insurance is not a statutory requirement but depends on the parties' agreement. Usually, the Tenants are required to obtain and maintain a valid insurance policy to cover damages in relation to carrying out the fit-out works as well as for keeping insured the leased premises and third parties from loss or damage against the insured risks. In addition, the Landlords are typically obligated under the Lease Agreements to keep insured the entire building (the Shopping Centre) and also maintain third-party liability insurances.

### 7.2 Uninsured risks

In case of occurrence of the uninsured events, the parties may claim damages in accordance with the Civil Code. Notably, the pandemic may be deemed as force-majeure circumstance, releasing the breaching party from the liability for non-fulfilment of the obligations under the Lease Agreement. However, this should be assessed on case-by-case basis by the courts.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

For the maintenance and operation of the Centre including services for the common areas (cleaning, maintaining security, operating the facilities), the Tenants usually pay the fixed price. Notably, in certain cases, the rent may be inclusive of the charges for servicing the common areas.

### **8.2 Promotions and marketing**

The Tenants usually participate in the marketing activities organized by either the Landlord or themselves, at their own expense. The Landlords in turn undertake to allow the Tenants to carry out activities in the Shopping Centre for the promotion and/or advertising of the Tenant, subject to the internal regulations of the Landlord and applicable law.

### **8.3 Tenants' associations**

The Tenants associations may be created within the shopping centres, however, it is not a common practice in Georgia.

## **9. GREEN LEASE**

Responsibilities of the parties with respect to the sustainable operation/use of the leased premises are rarely stipulated in the Lease Agreements. However, in most cases, the Lease Agreements determine obligations of the parties regarding cleaning of the leased premises/the building, organizing garbage collection, etc.

## **10. FORCE MAJEURE AND COVID**

No specific Covid-19 regulations have been adopted in Georgia in relation to the leases. However, the pandemic should not qualify as a force majeure in every case, unless this is included in the respective Lease Agreement. In particular, whether it excuses performance of the obligation under the agreement should be assessed on case-by-case basis. When assessing the case, impact of the pandemic on the ability of the breaching party to perform the obligation should be taken into account together with all other factual circumstances related to the case. In addition, it is relevant whether the breaching party could have foreseen the circumstances and provided some remedies to avoid breaching the contract.

## **11. OTHER POINTS TO NOTE**

### **11.1 Security Deposit**

It is common practice in Georgia to request advance payment from the Tenant in the amount of at least one-month rent. In exchange for the advance payments the Tenants may request provision of the bank guarantee with the guaranteed amount equal to the advance payment. Requiring security deposit by the Landlords is a rare practice in Georgia.

### **11.2 Tenant ESG data**

The Landlord has no statutory right to request handover of the financial or commercial information of the Tenant. However, where the parties agree for the percentage rents (calculated in accordance with the Tenant's turnover), the parties normally also agree on the respective mechanisms for safeguarding proper calculation and monitoring of rent payments (for example, the parties may agree on disclosure of the data related to business operations of the Tenant).

### **11.3 Money Laundering / Terrorism**

Anti-corruption and counterterrorism clauses are rarely included in the Lease Agreements in Georgia. However, regardless of the terms of the agreements, anti-terrorism and anti-money laundering laws shall be observed by the parties.

#### 11.4 Prescribed form

The Civil Code provides for the mandatory form of the lease agreement only in relation to the land plot. However, considering that the Lease Agreement concluded by the legal entity of private law for more than 1-year term is subject to registration with the Public Registry, such agreements cannot be concluded verbally by the parties.

## GREECE

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### Preliminary Remarks

In Greece, the most common type of contract used for retail and/or catering units in shopping centres are commercial cooperation agreements (the “CCA”).

A shopping centre is an independent and autonomous commercial establishment which includes all supporting infrastructures and services and is aimed at ensuring an integrated operation of interacted commercial activities whilst following the rules and instructions of a centralised management. A shopping centre contract combines the grant of the use of space within a shopping centre and the provision of numerous services to the shopkeepers. Therefore, shopping centre contracts do not fall within the ambit of a commercial lease agreement, which is strictly regulated by Presidential Decree 34/1995 as amended and in force.

According to the Greek legal theory, a CCA is considered to be a mixed contract, containing both the elements of a lease agreement and elements of a commercial agreement. Where the elements of a commercial agreement prevail (or even absorb the elements of a lease agreement) determining the legal nature and form of the agreement as a CCA is regulated by the general provisions of the Greek Civil Code.

For the purposes of this overview, the word “Shopkeeper(s)” will be used instead of “Tenant(s)”, “Shopping Centre(s)” instead of “Landlord(s)” and “fee(s)” instead of “rent” as the most relevant for the CCA regime.

## 1. TERM

### 1.1 Contractual Term

According to the typical market practice, CCAs are concluded for a term of five (5) years starting from the opening date of a retail unit/shop within the Shopping Centre and are automatically renewed for an additional term of another five (5) years, unless Shopkeepers notify to the contrary at least six (6) months prior to the expiration of the fifth year of the original five-year term of the CCA, hence, the maximum aggregate duration of a CCA is ten (10) years. Anchor shops usually have longer agreements of ten (10) or fifteen (15) years.

### 1.2 Break Rights

Early termination rights in favour of Shopping Centres are exercisable on the breach of substantial terms of a CCA. As per the most common terms adopted in CCAs, Shopping Centres are entitled to terminate a CCA if (i) a change of control or unauthorised assignment takes place (ii) active trade of a shop ceases (iii) Shopkeepers do not comply with the rules of operation of the Shopping Centre and (iv) Shopkeepers lose the right to operate under their initial brand name. Furthermore, early termination rights in favour of Shopkeepers do not constitute the standard terms of CCAs and are mainly agreed in case of anchor shops or other Shopkeepers with serious bargaining power. The most common early break right is the right of a Shopkeeper to not renew a CCA following the lapse of the initial five (5) years term, and the right of the Shopkeeper to terminate a CCA if a shop’s turnover for any 12-month consecutive period falls under a specific threshold.

### 1.3 Renewal Rights

Shopkeepers are generally not provided with any renewal rights besides what has already been discussed in section 1.1. above.

### 1.4 Disputes and Forfeiture

It is agreed between the parties that disputes arising from and in connection with the CCAs (including the disputes relating to the validity, interpretation, execution and termination of the CCAs) are submitted to the exclusive jurisdiction of the courts of a specific region usually of the registered seat of the Shopping Centre.

Court disputes mainly arise in cases of unpaid fees or in cases of improper delivery of a shop back to the Shopping Centre. In case of non-payment of amounts due or in case of delayed and improper renewal of the guarantee paid upon execution of a CCA, the latter forfeits at the Shopping Centre's favour. In practice, the Shopping Centres notify the Shopkeepers (either by a letter/e-mail or through an extrajudicial notice served by court bailiff) before any forfeiture takes place in order to give them the opportunity to remedy any breach.

## **2. RENT**

### **2.1 Principal rent**

As per the standard practice followed in CCAs, a minimum base fee is agreed by the parties which is equal to a specific amount multiplied by the square meters of the area of a shop within a Shopping Centre (net of VAT). Such minimum base fee may increase annually on the basis of 100% of the consumer price index (CPI) of the previous year. Furthermore, the minimum fee may be annually ratcheted at the level being the higher of the minimum fee as annually indexed and an agreed percentage (e.g., 85% or 90%) of the annual fee paid in the previous year. The monthly fee payable by the Shopkeepers is equal to the greater of the minimum base fee, calculated as above, or an agreed percentage of the annual/monthly turnover of a shop within a Shopping Centre (net of VAT) generated by the operation of the shop during that year/month. The parties may agree that such turnover percentage shall remain stable or gradually decrease according to the turnover amount. It is noted that the fee is paid on a monthly basis commencing on the opening date of the shop within the Shopping Centre.

### **2.2 Turnover**

Please refer to section 2.1. above.

### **2.3 Rent Review**

The minimum base fee may be indexed or ratcheted as presented in section 2.1. above.

### **2.4 Procedures to recover unpaid rent**

Upon execution of the CCA, Shopping Centres receive a first demand guarantee issued in their favour from the Shopkeeper. This is a guarantee from the Shopkeeper for the due and timely performance of its obligations stemming from the CCA which may forfeit against the Shopkeeper in case of unpaid fees. Such guarantee remains in effect for the entire term of the CCA. The exact amount of the guarantee varies according to the CCA and is proportionate to the actual fees owed by the Shopkeeper. Finally, there is also the option of judicial actions against the Shopkeepers i.e., Shopping Centre filing a legal action in order to claim the amount due by the Shopkeeper.

## **3. PREMISES**

### **3.1 Extent of Demise**

Shopkeepers will normally let the interior of a shop only, so that the structure of the leased premises and of the Centre remains with Shopping Centres. Shopkeepers shall run a shop using only the sign(s) agreed under the CCA and for the retail sale of goods permitted under the CCA bearing previously agreed brand name(s) and are expressly prohibited from selling other goods. Some Shopkeepers who operate catering units are usually entitled to the exclusive use of common parts of a Shopping Centre as seating areas (tables and seats for customers).

### **3.2 Extent of the Shopping Centre**

Shopping Centres are defined as all the premises let to Shopkeepers, the common areas (including areas accessible by the public, parking areas and technical areas) and the administration offices. The extent of the Shopping Centres include the structure and any external areas adjacent to them and integrating Shopping Centres, as they may be from time to time.

### 3.3 Common Parts

There are common parts of a Shopping Centre which can be used and enjoyed by all Shopkeepers, occupants and clients of the Shopping Centres, according to the rules set by the Shopping Centres. The latter are responsible for the maintenance of such areas, and the related costs are recovered through the service charges burdening the Shopkeepers. In addition, the Shopkeepers are entitled to use any conducting media serving the Shopping Centre i.e. drains, sewers, conduits, air-ducts, gutters, gullies, channels, ducts, shafts, watercourses, pipes, cables, wires, mains (subject to temporary interruption for inspection, repair, alteration or replacement) for the purpose of necessary supplies required for the operation of a shop. Furthermore, the Shopkeepers are entitled to have access to the roof of the building where their shop is located in order to maintain and repair the air handling equipment (if any) exclusively serving their shop but shall be restricted to those parts of the roof designated by the Shopping Centre. The Shopkeeper shall promptly carry out any maintenance and repair work in order to cause minimal inconvenience to the Shopping Centre, Shopkeepers and the customers of the Shopping Centre and shall also repair any damage caused.

### 3.4 Rights Reserved by Landlord

The Shopping Centre is entitled to make alterations or additions to the Shopping Centre, including to the shops adjoining another shop operated by a Shopkeeper and the common parts of the Shopping Centre. This includes the right to build new units, buildings or other structures inside and outside the Shopping Centre.

In addition, Shopping Centres usually reserve the right to be provided with the accounting data and the VAT output register related to the turnover made on the premises, and directly supervise the turnover made, in order to verify compliance with the obligation to pay the turnover rent. Finally, the Shopping Centre has the right to access all the premises in order to verify the compliance with CCA and Shopping Centre's rules and conduct any essential and discretionary services it considers necessary.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

As per the standard terms of CCAs a Shopkeeper is not entitled to transfer, contribute, assign or sub-let the CCA or the shop (either in whole or in part, directly or indirectly, either by merger or hive down, contribution, shareholder majority transfer) without the Shopping Centre's prior written consent, with such consent not to be unreasonably withheld. In such a case, the initial Shopkeeper usually remains jointly liable for all obligations arising from the agreement. As an exception to the above common standard, only Shopkeepers with strong bargaining power are permitted to assign the agreement to third companies or companies controlled by the same Shopkeeper and/or by the parent company of the Shopkeeper.

Furthermore, the Shopping Centre is entitled to assign a CCA and/or the receivables owed thereunder to any third party by virtue of a notification of the Shopkeeper.

### 4.2 Underletting

Shopkeepers are not entitled to underlet the premises without the Shopping Centre's express consent. It is possible to agree special provisions in order to enable the Shopkeeper to sublet the premises, but again, only Shopkeepers with a strong bargaining power would obtain such right and usually under strict conditions.

### 4.3 Sharing occupation

It is not common practice for Shopkeepers to share occupation of their premises with a subsidiary or associated company and for this reason no such clause is included in the CCAs. However, if such provision is to be included in the CCA it shall certainly require the Shopping Centre's express consent.

### 4.4 Change of control

The change of control restrictions are included in the CCAs as a standard provision. In particular, the Shopping Centre has the principal right to immediately terminate the agreement in case of direct or indirect change of control of the Shopkeeper in any way and for any reason whatsoever. In such a way, the Shopping Centre can always have knowledge of and control the Shopkeeper for its structure and creditworthiness.

## 5. ALTERATIONS/REPAIR

As a general rule no works to a shop (alterations or additions) are permitted without the prior written consent of the Shopping Centre, the consent of which shall not be unreasonably withheld, provided that such proposed alterations and additions comply with the requirements set forth in the CCA.

At all times during the term of the CCA the Shopkeeper should keep the shop in good decorative condition, at its own cost and expense.

Finally, with regard to signage, Shopkeepers are commonly authorised by the Shopping Centre to use their signage on the façade of their premises which cannot change without the Shopping Centre's prior consent. Shopkeepers with strong bargaining power or with a strong presence in the Shopping Centre may require a specific area in the common areas of the Shopping Centre (façade, totems etc) in order to further emphasize their presence in the Shopping Centre.

## 6. TRADING

### 6.1 Keep open for trade

The Shopkeeper cannot suspend its retail activity without the Shopping Centre's previous written consent, with the exception of force majeure events, applicable law provisions and/or possible competent authorities' measures. Shopkeepers are required to keep the premises open during the trading hours arranged by the Shopping Centre to the extent that comply with any applicable legal regulations including Sundays and public holidays in certain cases.

The Shopkeeper should always comply with the internal regulations of the Shopping Centre. If the Shopkeeper does not comply with the above regulations, it may be obliged to pay a penalty (usually of a significant amount) pursuant to article 404 of the Greek Civil Code and the Shopping Centre may terminate the CCA.

### 6.2 Trading names

The Shopkeeper shall run the going concern/shop using only the signage agreed under the CCA and only for the retail sale of the permitted goods bearing the brand name(s) also agreed under the CCA. The Shopkeeper is expressly prohibited from selling other goods. Should the Shopkeeper fail to comply with this obligation, the Shopping Centre shall have the right to order the Shopkeeper to immediately remove the unauthorised sign or to immediately stop the sale of unauthorised products or of the permitted goods bearing an unauthorised trademark or brand name(s). It is agreed that if the Shopkeeper does not comply with such orders, it may be obliged to pay a penalty (usually of a significant amount) pursuant to article 404 of the Greek Civil Code and the Shopping Centre may terminate the CCA.

### 6.3 Opening Hours

The Shopkeeper shall comply with the opening hours of the Shopping Centre as stipulated in the Internal Regulations. Please refer to section 6.1 above.

### 6.4 Competition rules

The Shopkeeper usually waives in advance any right to claim exclusivity and expressly acknowledges the right of the Shopping Centre to grant to third parties, the right to carry out in the Shopping Centre the retail sale of products equal or similar to the ones marketed by the Shopkeeper.

Furthermore, CCA's of mainly outlet shopping centres includes conditions where the Shopping Centre can restrict the business activity of the Shopkeeper. Specifically, a radius restriction can be imposed, meaning that if the Shopkeeper opens a competing store within a specific radius from the Shopping Centre, the Shopkeeper will be obliged to pay an increased minimum fee (30% or 50% according to the scenario in question).

## 7. INSURANCE

### 7.1 Insured risks

With regards to insurance, it is important to state that insurance is not a requirement imposed by law, but a condition (clause) included in the CCA. It is common practice for the Shopping Centre to have insured the shops and any other material or objects of an insurable nature, such sums as shall be determined to be appropriate from time to time. The insurance policy will cover any contingency against (but without limitation): fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks apparatus or pipes, earthquake, impact aircraft (but not hostile aircraft) and other aerial devices or other articles dropped from them as well as riot, civil commotion, malicious damage and such other risks, perils and contingencies against which the Shopping Centre may consider it expedient to insure (the "Insured Risks"). This includes the cost of demolition, shoring up and site clearance, professional advisers' fees in relation to the reinstatement of the Shopping Centre, loss of fees in respect of the going concerns and of the units forming part of the Shopping Centre, for any period as the Shopping Centre reasonably requires, and liability vis-à-vis third parties. Should the Shopping Centre or any part thereof be destroyed or damaged by any of the Insured Risks, and subject to obtaining all necessary authorisations and subject to there not being any act or event that shall be beyond the control of the Shopping Centre, the Shopping Centre shall rebuild, repair and reinstate with reasonable diligence the Shopping Centre or any part thereof as soon as practicable.

Insurance costs are included in the service charges to which all Shopkeepers contribute to by paying a due proportion of them.

Furthermore, the Shopkeeper will undertake to enter into an agreement before the shop's hand-over date to obtain adequate insurance coverage from a primary insurance company: (i) covering any and all damage caused to third parties (including but not limited to customers, the Shopping Centre, the other Shopkeepers and their employees) with an adequate minimum limit of liability; (ii) covering all damage to the shop caused by fire with an adequate minimum limit of liability; (iii) covering all damage suffered by the owners of goods and furnishings in the shops with an adequate minimum limit of liability; (iv) covering all damages caused to various equipment, as well as its furniture and goods, against theft, fire, explosions and damage caused by water main leaks and water damage or penetrations in general, with a minimum limit of liability equal to their capital value. The surveillance of the Shopping Centre is commonly agreed by the parties to not imply any derogations, amendments or limitations to the Shopkeeper's liability and obligations.

### 7.2 Uninsured risks

There is no specific provision in the CCA regulating uninsured risks.

However, in case of an uninsured risk or a force majeure event resulting to any kind of damage to the Shopping Centre, the parties may claim a suspension of their contractual obligations, or either party may terminate the CCA.

### 7.3 Business Insurance

The Shopping Centres do not usually require the Shopkeepers to maintain a business insurance and specifically a business interruption insurance which covers loss of income during periods when business cannot be carried out due to an unexpected event. It is at the discretion of the Shopkeepers and/or the Shopping Centre to maintain more advanced business insurances which, however, do not constitute standard practice for the companies of any industry (in general) in Greece.

## 8. SERVICE CHARGE

### 8.1 Typical regime

A Shopping Centre provides various services to the Shopkeepers such as ordinary maintenance, repair of constructional parts of the building, surveillance, lighting and cleaning of the common areas, provision of hot and cold water to the retail units, and various other support, marketing and management services. The costs and expenses arising from such services are borne by the Shopkeepers via the payment of the service charge and promotion charge paid in addition to the fees agreed under the CCA as analysed in section 2 of the present. Such service and promotion charges are calculated on the basis of a fixed amount multiplied by the surface of the

shop of each Shopkeeper and paid monthly in advance according to an annual budget reasonably estimated by the Shopping Centre in accordance with the costs incurred by the Shopping Centre for any promotion activities. The proportion of the service and promotion charge on the account of each Shopkeeper of the Shopping Centre is established in proportion to the area used by a Shopkeeper compared to the overall area of all the retail units/shops from time to time forming part of the Shopping Centre (including the vacant units).

## 8.2 Promotions and marketing

The Shopping Centre provides for various promotion activities. The nature, the timing and the terms of the promotion activities is established by the Shopping Centre. General promotion and marketing expenses are normally included in a separate budget than every day operational and technical expenses, which are ultimately borne by the Shopkeepers.

## 8.3 Tenants' Associations

The Shopkeepers may join a relevant Shopkeepers' Association. Such associations represent Shopkeepers and are the method through which the Shopping Centre and/or their managers share information on matters that are relevant to the operation of the Shopping Centre, such as marketing plans, service charges, annual budgets and annual accounts etc.

## 9. GREEN LEASE

The CCA in Greece usually requires the Shopkeeper to operate its shop in full compliance with the applicable laws and regulations including – but not limited to – environmental laws.

Furthermore, as of January 9th, 2012, an Energy Performance Certificate must be submitted to the Greek authorities for each lease agreement and real property purchase agreement signed after that date, but not in case of a CCA. Such Energy Performance Certificate is intended to record the energy efficiency of the property (properties are categorized in accordance with their energy efficiency). Improvements for the reduction of the buildings' energy consumption are recommended by the Building Energy Inspector in accordance with EU Directive no. 2010/31/EC and articles 1 - 12 of Greek Law no. 3661/2008.

## 10. FORCE MAJEURE AND COVID

According to Greek case law, the Covid-19 pandemic has been considered as a force majeure event meaning that any commercial agreement that has been directly or indirectly affected by Covid-19 may be varied or renegotiated. In particular, CCAs provide that in case of a force majeure event, the Shopkeeper may suspend retail activity and provide that neither party will be liable for any delay in performing its obligations nor for failure to perform its obligations under the CCA if and to the extent that the delay or failure resulted from a force majeure event.

In the context of the Covid-19 pandemic and the subsequent imposition of special measures of suspension or prohibition of operation on all retail and catering units (including shops of Shopping Centres) the Greek State legislated the full or partial release (by 40%) from the payment of any due rent/fees. On the basis of such release and the consequent loss of income, the Shopping Centres were compensated by the Greek State by an amount equal to 60% or 80% (for legal or natural persons accordingly) of the initial amount of rent/fees due. The amount of rent/fees not collected by Shopping Centre due to the abovementioned measures do not count as income and are not subject to income tax, nor is Shopping Centre obliged to pay the special solidarity contribution for the months during which the measures of reduced payment remains in force.

## 11. OTHER POINTS TO NOTE

Guarantee – It is usual practice for the Shopkeeper to provide to the Shopping Centre a guarantee, either in the form of a cash deposit or in the form of a first demand bank guarantee. Upon execution of the CCA, the Shopping Centre will receive a guarantee issued in its favour by the Shopkeeper, as a guarantee for the due and timely performance of its obligations stemming from the CCA which may forfeit against the Shopkeeper in case of unpaid fees. Such guarantees remain in effect for the entire term of the CCA. The exact amount of such guarantee varies according to the CCA and is proportionate to the actual fees owed by the Shopkeeper.

Tax treatment - CCAs, as typical contracts combining in their largest part the provision of a large number of services, are subject to VAT. This gives the Shopping Centre the advantage of setting off the VAT paid on the construction/maintenance cost of the Shopping Centre, against the VAT collected under the CCAs.

# HUNGARY

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## Preliminary Remarks

This section aims to provide a legal framework of the legal platform applied to lease contracts in the jurisdiction covered. To such end, this contribution concerns solely legal provisions and general practice, and does not refer to any particular practical situation that can be identified as a particular commercial relationship.

*Lease related legal relationships are governed by Act V of 2013 on the Civil Code of Hungary and Act LXXVIII of 1993 on the lease and alienation of flats and other premises.*

## 1. TERM

### 1.1 Contractual Term

In some jurisdictions, for example England and Wales, the contractual term could theoretically be of almost any length but the intention here is to indicate what is typical market practice in a Shopping Centre.

*Commercial leases in Hungary are entered into for a definite term, usually for a term of approx. 5 years, however, shorter or longer definite term leases are also common (approx. 3-10 years).*

### 1.2 Break Rights

Where contractual lease terms are substantial, it is quite common in a number of jurisdictions for one party or the other or both to have a right to terminate early. Again each report will summarise typical arrangements for the particular jurisdiction.

*In the case of long-term leases, the tenants (or both parties) might have a unilateral break option, usually with effect from the expiry of half of the lease term. The exercise of such break option by the tenant might be linked to certain conditions, such as the compliance with all terms of the lease or the failure to meet certain turnover figures.*

### 1.3 Renewal Rights

Statutory rights of renewal exist in different forms in a number of jurisdictions and these will be summarised. Occasionally leases will also have rights of renewal or a right of pre-emption which have been negotiated on a contractual basis, especially where statutory rights do not exist.

*Under Hungarian law, none of the parties to a lease have a statutory right to renew the lease. However, it is customary in commercial leases that the lease is automatically renewed for an additional term (usually for the same term as the original lease term, or, in the case of a longer lease term, for an additional term of 3-5 years), unless either party notifies the other party that it does not wish to continue the lease relationship. In other cases (especially under anchor leases) the tenants may have renewal options. Landlords might be entitled to reject such renewal if the tenant committed a material breach of contract during the lease term.*

### 1.4 Disputes and Forfeiture

*Legal disputes arising from lease agreements are usually settled by the ordinary courts of Hungary. Nevertheless, arbitration clauses are also common in major leases. We note that, in accordance with Hungarian mandatory law, landlords are not entitled to vacate the leased premises without the tenant's consent or switch off utilities on the basis that there is a dispute between the parties, since, in such cases, tenants may seek for the protection of possession.*

## 2. RENT

- 2.1 The law and practice relating to rents payable by a Tenant to a Landlord vary considerably from jurisdiction to jurisdiction. In England and Wales, it is common for leases to separate a net rent payable to the landlord from other "rents" intended to reimburse the Landlord for expenditure relating to repairs of common parts, provision of services to the Centre and insurances. In other jurisdictions, the Landlord is obliged by statute to bear some [or all] of these costs within the rental charged and contractual provisions to the contrary will be invalid. Also rents may in some cases be linked to open market values, while in other cases rent is related to the sales turnover of the shop in question. Are there any VAT considerations on rent e.g. Germany and Belgium?

*In general, tenants perform the following regular payments under retail leases: (i) base rent payable on a sqm basis, (ii) turnover rent calculated on the basis of the turnover percentage determined in the lease, (iii) service charge, being the proportionate ratio of the expenses incurred by the landlord in respect of the operation of the shopping centre, (iv) marketing fee and (v) utility charges. Tenants shall also pay the applicable VAT in respect of the above payments. Payments are usually made monthly/quarterly. The rent is normally subject to annual indexation.*

- 2.2 Because of these wide variations in practice this topic has been divided into subjects entitled "Principal Rent" and "Turnover" but it is also relevant to refer to section 8 "Service Charge". What is the market position on including online sales within turnover?

*Online sales are usually considered part of the turnover, provided that the customer takes over the goods in the leased premises and such sales go through the cash register of the tenant in the leased premises and generates a VAT payment obligation on the tenant's side.*

### 2.3 Rent Review

In this section, each report seeks to deal with the mechanisms by which rents may become adjusted during the term of the lease, whether through indexation, market revaluation or adjustment of the base rents applicable in turnover rent leases.

*The rent payable by the tenants under the leases is subject to annual indexation, which is usually based on the Monetary Union Index for Consumer Prices.*

### 2.4 Procedures to recover unpaid rent

This section should consider how Landlord's can recover unpaid rent? Are there any alternative approaches to court process permitted or required by a market lease agreement e.g. ceasure of tenant goods or termination provisions? Are there any guarentees or rent deposits available for recovering arrears?

*Tenants shall provide a security for their payment obligations under the lease agreements, usually in the form of a bank guarantee or a cash deposit in the amount equal to approx. 3-6 months' rent and other charges. If the tenant fails to perform its payment obligations under the lease, the landlord may use such security to recover the debts. In addition, landlords may also terminate the lease agreements with immediate effect if the tenant is in delay with its payment obligations.*

*In accordance with the Civil Code of Hungary, the landlord has a statutory lien over the tenant's movables located within the leased premises in order to secure the tenant's payment obligations. On the basis of such statutory lien, the landlord may satisfy its claim from the lien objects, if the tenant does not fulfil its payment obligations under the lease.*

## 3. PREMISES

### 3.1 Extent of Demise

The definition of the shop premises to be let is not just a matter of identifying which unit a tenant may occupy. It can also determine the extent and cost of various contractual obligations, such as obligations to repair, maintain and insure, which may be tied very closely to the definition of the premises. Market practice differs considerably from jurisdiction to jurisdiction, and may even vary significantly from Centre to Centre within a given jurisdiction.

*The leased premises usually cover the given unit of the shopping centre, provided that the rent is payable by the tenant on the basis of the gross internal area of such unit. The gross internal area is calculated in accordance with the measurement standards detailed in the lease agreements.*

### 3.2 Extent of the Shopping Centre

Again, a description of what constitutes a Shopping Centre may well have a significant impact on the financial obligations of the parties, either in terms of a primary obligation to repair and maintain, or in terms of the cost of service charge or other reimbursements to a Landlord. In many jurisdictions, it has become common practice to define the Centre as including any future extension, subject to appropriate formulas for adjusting the calculation of service charge as and when an extension is created.

*The definition of the shopping centre frequently includes the centre itself and each and every part thereof together with all additions, alterations, improvements or reinstatements thereof or buildings substituting such. Alternatively, or in addition to such extensive definition of the shopping centre, leases usually include the landlord's right to alter, vary or otherwise amend the currently proposed scheme for the shopping centre whether by way of constructing, altering, extending, refurbishing, renovating, developing or amending the same and also the tenant's related express acknowledgement. In general, the service charge is calculated on the basis of the lettable areas of the shopping centre, meaning those parts of the shopping centre which are leased or can be leased by tenants. In addition, leases usually cover the scenario when the area of the total premises capable of enjoying the services increases or decreases or the proportion of the leased properties increases or decreases, in which cases the landlord may take such matters into account in relation to the establishment of the service charge.*

### 3.3 Common Parts

Quite apart from defining the extent of obligations to repair and maintain a Centre, it is important to establish the extent to which Tenants of a unit (and their customers) can use other parts of the Centre. Some common parts may need to be reserved exclusively for centre management purposes. Can Landlord's use the common parts for commercialisation?

*Common areas mean all areas that may from time to time be available for use by the public or which are provided or designated for the benefit of some or all of the tenants, excluding the lettable areas. In general, landlords may use the common areas for commercialisation purposes and may place kiosks and similar mobile sales units or pursue any promotional activity on such areas. However, the lease agreements entered into with certain anchor tenants in the shopping centre may limit the landlord's right to do so or prohibit the placement of any signages or kiosks on the common areas that might affect the visibility of the premises leased by such anchor tenants.*

### 3.4 Rights Reserved by Landlord

Landlords will always require a number of rights to enable them to maintain a centre in good order over time, including the right to close certain areas for repair and some rights to extend or alter the centre. On the other hand, there are generally laws or contractual provisions which will limit the exercise of those rights where they are seen to have an unduly adverse impact on the Tenant's business. Landlord's may have rights to enter in certain scenarios, for example, checking the tenant complying with tenant covenants.

*As indicated above, lease agreements usually include the landlord's various rights to alter, vary or otherwise amend the current scheme for the shopping centre whether by way of constructing, altering, extending, refurbishing, renovating, developing or amending the same and also the tenants' related acknowledgement and waiver of any claims they might have in this regard. In addition, the landlord is also usually entitled to regulate and control the general use of the common areas in a reasonable manner, including but not limited to changing or limiting the use of the common areas during repair or maintenance works. Since the leases usually include the tenants' express acknowledgement in relation to such works or other restrictions, tenants are not entitled to any compensation in this regard. Nevertheless, it is also market practice that tenants negotiate to prescribe that if any such works have a material and permanent effect on their business operation within the leased premises, they are not obliged to pay rent for such period.*

#### 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

The fluctuations in the retail market make it increasingly desirable for individual Tenants to be able to dispose of or sub-let all or part of their premises. On the other hand, the identity of tenants and the maintenance of a good retail mix in a Centre, is important in maintaining the attractiveness of the Centre as a whole and the value of Landlord's investment. Achieving a balance between the interests of the respective parties is dealt with in a wide variety of ways, even within a single jurisdiction, and there is even greater divergence when one compares the market practices in different jurisdictions. This section is divided for ease into three sub sections:

##### 4.1 **Assignment**, that is the ability to dispose entirely of the lease to another Tenant;

*Tenants are not entitled to assign any of their rights and obligations under the lease agreement to third parties without the landlord's prior written consent.*

##### 4.2 **Underletting**, which means the Tenant does not escape the terms of the lease but is able to pass on the obligations relating to all or part of the premises to a sub-tenant;

*Tenants are not entitled to sublease the leased premises to third parties without the landlord's prior written consent.*

##### 4.3 **Sharing occupation**, which may arise in a variety of circumstances; for example, a corporate Tenant may wish to allow a subsidiary or associated company to trade from the same premises; a department store may wish to allow an independent fashion retailer to use a designated area in the department store under an independent brand name; or a book shop may wish to licence an independent coffee shop to operate within its premises. Such circumstances are dealt with in a variety of ways in different jurisdictions.

*Tenants are not entitled to share occupation of the leased premises with third parties without the landlord's prior written consent.*

##### 4.4 **Change of control**, whether restrictions on change of control are usual in a market lease agreement and what are the benefits?

*Change of control provisions usually require the tenants to notify the landlord of any change in the tenant's ownership structure, company form, or any other significant issues in connection with the tenant's company. In such cases (or in the absence of the tenant's notification), the landlord may terminate the lease agreement unilaterally. Such provision might not be included in the lease agreements of major tenants and intragroup restructurings are also usual exceptions. By applying such change of control provisions, landlords can ensure that the stores are operated by Hungarian subsidiaries of entities owning a given brand instead of small Hungarian businesses only having distribution rights over such brand.*

#### 5. ALTERATIONS/REPAIR

Tenants have a variety of practical or promotional reasons why they may wish to make alterations in any given shop, including simply to adhere to a new brand image adopted by a multiple retailer in all its outlets. At the same time, the Landlord is concerned to control alterations for a variety of estate management reasons, including minimising nuisance to other Tenants, protecting the structural integrity of the centre and seeing that all works are properly insured. This section deals with alterations, fitting out, signage and repair and decoration. Who is responsible for statutory requirements to carry out alterations e.g. energy efficiency improvements, entry for disabled persons (e.g.DDA) ? Are there any standard contractual arrangements in relation to who owns the tenant's fit out works

*Usually the leased premises are handed over to tenants in a shell and core condition, and the fit-out of the premises is the tenant's responsibility. Such fit-out is completed by the tenant at its own costs and liability on the basis of plans previously approved by the landlord, subject to any fit-out contribution that might be provided by the landlord. Upon completion, the result of the fit-out works usually becomes the landlord's property if the given items are inseparably attached to the leased premises. The fit-out is usually subject to the tenant's reinstatement*

*obligation under the lease (unless otherwise agreed by the parties), which usually requires the tenant to reinstate the leased premises to its original condition as at the handover of the premises to the tenant, subject to normal wear and tear. Alterations are also subject to the landlord's prior written consent and shall be carried out at the tenant's costs, provided that the costs of any alteration works prescribed by laws shall typically be borne by the landlord.*

## 6. TRADING

- 6.1 This section deals with the issue of whether a Tenant can be obliged to keep open for trade, which the Landlord will regard as being important for maintaining the Centre's image as a lively retail destination. Does the landlord have a right of enforcement and/or are there any financial penalties or incentives on the tenant to comply?

*Lease agreements set out the tenant's obligation to keep open for trade at all times during opening hours. If the tenant fails to keep open and breaches the relevant provision of the lease, it shall pay a penalty for each day when the tenant does not pursue trading activity within the leased premises.*

- 6.2 The use of trading names, given that major Tenant's frequently re-brand and rename themselves.

*Lease agreements usually determine the tenant's trading name, and any change thereof is subject to the landlord's prior written consent.*

- 6.3 Can the landlord control the Tenant's opening hours? Does the tenant have to comply with any Tenant handbooks or house rules?

*It is market standard to set out that the landlord may unilaterally determine the opening hours within the shopping centre and the tenant is not entitled to any reduction of rent or indemnification from the landlord for such determination of the opening hours. Tenant handbooks and house rules are usually attached to the lease agreements and the tenants shall comply with the terms of such regulations. The landlords may also unilaterally amend such regulations without the approval of the tenants in accordance with the principles of good estate management.*

- 6.4 Competition rules – is it usual for there to be prohibitions on the Landlord letting to competitors? To what extent can the Landlord restrict the business activity of the Tenant (for example user restrictions or radius)?

*Restrictions on competitors are usually granted to certain major tenants on an exceptional basis. Radius restrictions are more common in outlet centres, but not in the case of regular shopping centres.*

## 7. INSURANCE

The ability to insure buildings against various risks will vary not only from country to country but from region to region and this section is split into two sub sections:

### 7.1 Insured risks

Risks that can or should be insured

*Landlords usually maintain the following insurances: (i) all risk insurance (covering e.g. fire lightning, earthquake, explosion, aircraft (other than hostile aircraft) and other aerial devices or articles dropped therefrom, riot and civil commotion and malicious damage, storm, or tempest, bursting or overflowing of water tanks, apparatus or pipes, flood and impact by road vehicles (to the extent that insurance against such risks may ordinarily be arranged with a first loss insurer) and such other risks or insurance as may from time to time be reasonably required by the landlord) and (ii) loss of rent insurance.*

### 7.2 Uninsured risks

This summarises the treatment of risks which are uninsurable. Provisions on this topic has become more common in locations where terrorism is an issue. Would this extend to pandemics?

*It is the landlord's obligation to ensure that the leased premises are suitable for proper use. If, as a result of any uninsured risk, the leased premises are no longer suitable for proper use, landlord shall reinstate the premises,*

*unless the leased premises are destroyed, in which case no reinstatement obligation apply and the lease agreement terminates, since the services thereunder become impossible to perform. The above shall not apply to the pandemics, which does not render the services under a lease agreement impossible to perform in accordance with the applicable judicial practice.*

### 7.3 Business insurance

What other insurance policies would a landlord and/or tenant take out in the context of its occupation (e.g. business interruption insurance)? What circumstances do they pay out in?

*Tenants are usually required to maintain all risk property insurance, third party liability insurance and construction-installation insurance in respect of the fit-out works to be carried out by them, but it is not common to require tenants to conclude a business interruption insurance. However, the lease agreements tend to guide tenants to maintain such business interruption insurance anyway (e.g. the tenant's payment obligations apply even if the tenant does not use the leased premises).*

## 8. SERVICE CHARGE

As mentioned above, service charge arrangements may need to be considered in conjunction with provisions for rent. For example, certain elements of expenditure on a Shopping Centre which an English Landlord would typically seek to recover by way of service charge will not be recoverable by a Landlord in Germany, who will be expected to meet those expenses out of the rental reserved by the lease. In this section, service charges are dealt with under three sub headings:

### 8.1 Typical regime;

*In general, the service charge is calculated on the basis of the lettable areas of the shopping centre, meaning those parts of the shopping centre which are leased or can be leased currently or in the future by tenants. Tenants are required to pay a monthly/quarterly advance payment of the service charge, which payment is subject to annual reconciliation by the landlord, i.e. any overpayment by the tenant compared to the proportionate ratio of the actually incurred service charge expenses is set-off against the tenant's payment obligations under the lease and any underpayment is payable by the tenant within a short deadline. The landlord is entitled to unilaterally determine and to change the amount of the advance payment payable by the tenants.*

### 8.2 Promotions and marketing; and

*Tenants are usually required to pay a monthly/quarterly marketing fee that is a sqm based amount. The marketing fee is subject to annual indexation on annual reconciliation (similarly to the service charge).*

### 8.3 Tenants associations.

From the Tenant's point of view, it is important that services are carried out on an economical and efficient basis and, from the Landlord's point of view, services should be carried out to a standard which maintains an attractive and high quality environment throughout the Centre.

## 9. GREEN LEASE

Does the market lease in the jurisdiction include provisions requiring the parties to share of data on the consumption of utilities, energy performance etc. and are these on the landlord's terms?

*Provisions in relation to energy efficiency are becoming more common in commercial lease agreements, mainly in the aspect of enabling the landlord to have regard to environmental good practice and energy and water efficiency in repairing or replacing any item of fabric, plant or equipment, when performing the services covered by the service charge. In addition, the parties shall enter into an electricity forwarding agreement in relation to the electricity supply of the leased premises, the contents of which agreement is prescribed by law.*

## 10. FORCE MAJEURE AND COVID

This section should consider the changes in the standard lease or lease interpretation as a result of Covid events. Is there a legal concept of hardship? Is Covid-19 a force majeure event under the lease – does rent continue to be payable? Does the law allow the lease agreement to be varied or renegotiated? Are there any existing or new pandemic laws arising e.g. Austria.

*In general, according to the law of Hungary, tenants shall not be obliged to pay rent for the period during which they are unable to use the premises for any reason that falls outside of their sphere of interest. However, reasonable arguments can be raised by the landlords under most standard commercial leases and the applicable laws that the restrictions introduced by the government of Hungary should still not trigger the application of the above provision of the Civil Code, given that the relevant restrictions primarily regulate the tenants' business activity within the leased premises, and therefore, they are not actually occurring with respect to the condition of or otherwise the particular property. Nevertheless, we note that there is still no relevant judicial practice that would provide a clear guidance as to the application of the above provision of the Civil Code with respect to the current pandemic situation and temporary restrictive measures introduced in respect to such a pandemic situation (and hence, the outcome of any court procedure in this regard would be very difficult to be predicted at this stage), there is a change that tenants could successfully challenge their rent payment obligation under the leases.*

*It is also common – and it is getting even more frequent in our experience within the current circumstances – that lease agreements include force majeure clauses, on the basis of which such a pandemic situation and the related restrictions would qualify as a force majeure event that would trigger the suspension of the respective tenants' rent payment obligations under such leases.*

## 11. OTHER POINTS TO NOTE

- 11.1 In this section, the author of each chapter draws attention to special points which have not been addressed elsewhere and may also give an overview on whether government policy tends to favour the Landlord or the Tenant. It may also draw attention to codes of practice which have been promulgated by national trade bodies concerned with shopping centres.

*Lease agreements usually require the tenants to sign and provide the landlord with a vacation deed signed in front of a notary public, which includes the tenant's declaration that it will return the leased premises to the landlord in the case of a termination of the lease in accordance with the terms of the lease. Such declaration enables the landlord to enforce the vacation of the premises without having to initiate a lawsuit against the tenant.*

- 11.2 Tenant ESG data: can a Landlord require a Tenant to provide data information related to business operations and the products sold.

- 11.3 Money laundering: does money laundering legislation impose duties on the landlord to provide information, and should the tenant's duties to provide information be regulated in the lease?

*There are no such legal requirements to include such provisions in lease agreements.*

- 11.4 Terrorism and security: Is it necessary to oblige the tenant under the lease to support security exercises and to participate actively?

*This is not market practice in Hungary.*

- 11.5 Prescribed form: Are there any form of lease requirements? For example, in the UK there are land registry prescribed form requirements for registerable leases.

*Real estate lease agreements shall be concluded in a written form; however, no further special formalities apply.*

## IRELAND

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### **Preliminary Remarks**

This section aims to provide a legal framework of the legal platform applied to leases of units in shopping centres in Ireland.

#### **1. TERM**

##### **1.1 Contractual Term**

In Ireland the contractual term of the lease could theoretically be of almost any length but typically retail leases will have a term of between 5 and 15 years. Anchor store leases may have a longer term. Terms of 30 years or longer are no longer very common in Ireland.

##### **1.2 Break Rights**

Tenants negotiating leases for terms in excess of five years will often seek to negotiate a break option break or options on an agreed date or dates or to coincide with rent review dates. A landlord may seek a break penalty from its tenant on exercising a break option and a notice period (with time generally of the essence) will be agreed. Landlords may also seek to negotiate landlord break options.

##### **1.3 Renewal Rights**

Irish landlord and tenant legislation provides that a tenant will accrue statutory renewal rights after it has been in continuous occupation of a business premises for five years. The legislation allows for tenants to renounce such renewal rights by signing a deed of renunciation either at the commencement of a lease or during its term. This is usually agreed by the parties at the outset during the negotiations of an overall lease deal and it is in the landlord’s interest to do so. Tenants must take independent legal advice before signing a deed of renunciation. If a tenant does not sign a deed of renunciation and seeks to exercise its renewal rights after a period of occupation of five years or longer, it can request a renewed lease on the same terms as its existing lease for a term of 5-20 years at open market rent. If the terms of such renewed lease cannot be agreed between the parties, including the rent, the matter can be referred to a court for determination. There are a limited number of grounds on which a landlord may seek to defeat a tenant’s claim for a renewed lease, namely (i) the tenant has breached its covenants during the term of the lease, (ii) the landlord intends to redevelop/rebuild the building and has planning permission for such work, (iii) the landlord requires the premises for the purposes of carrying out a scheme of development and has planning permission for this, or (iv) the creation of a new tenancy would not be consistent with good estate management. The tenant may however be entitled to compensation in such circumstances.

It is very unusual for a tenant to have a contractual right (i.e. option) to renew a commercial lease.

Occasionally leases might contain pre-emption rights. The terms of such pre-emption rights will be commercially negotiated by the parties to the lease.

##### **1.4 Disputes and Forfeiture**

The ability to forfeit a lease provides the landlord with its most powerful sanction for breaches of covenant/condition by the tenant. The forfeiture provisions of a lease will provide a landlord with a right to re-enter a unit if the basic rent or any additional rents are in arrears or are unpaid for a specified period (usually between 14 and 28 days) or the tenant is in breach of a covenant under the lease or the tenant (either an individual or corporate entity) becomes insolvent. Often a tenant may seek to negotiate a forfeiture clause so that it is given a certain period within which to remedy a breach before the landlord can seek to re-enter.

If the tenant breaches the lease terms, the landlord may seek to bring an action for specific performance or damages for breach of covenant, although in order to claim damages the landlord would have to prove loss caused by the breach and any monetary award generally seeks to reinstate the landlord to the position it would have otherwise been in but for the breach.

In certain other cases (e.g. third party property damage, death or injury) the tenant may be liable to the landlord pursuant to an indemnity. This may be the case notwithstanding that there may not be a breach by the tenant and in these circumstances, the landlord's loss (remote or otherwise) will usually be compensated without penalty.

Traditionally leases did not contain a general dispute resolution clause (although there often were clauses that provided for dispute resolution mechanisms for certain elements like rent review, turnover rent and service charge). More modern leases tend to include a general dispute resolution clause, these clauses tend to require disputes arising from the content of the lease to be resolved by a formal arbitration process or expert determination process, more detailed clauses may include a pre-condition to require the parties to enter principal to principal negotiations to seek to resolve any dispute prior to a formal process (such as arbitration/expert determination) being initiated.

## **2. RENT**

### **2.1 Principal Rent**

In retail leases the basic rent is usually a fixed sum based on open market value. Often tenants will be granted a rent free period which can range from two to three months to a year in some cases, at the beginning of the term of the lease (or spread across the first year to three years of a term).

It is common for leases to separate out the principal rent from other "rents" intended to reimburse the landlord for expenditure relating to repairs of common parts, provision of services to the centre and insurances.

Specialist VAT advice should be taken in relation to the VAT treatment of the sums payable under the lease.

It is unusual to require a tenant to pay a premium on the grant of a lease in a centre.

### **2.2 Turnover Rent**

Turnover rent provisions are more popular than ever before. Traditionally these took the form of the tenant agreeing to pay a base rent plus top-up rent linked to the turnover generated at the unit, e.g. to pay turnover rent at, say, 8% of the tenant's gross receipts at the unit exceeding the base rent, but turnover rents based purely on a percentage of the tenant's gross receipts and turnover rents payable only once a minimum gross receipts threshold is met are becoming more common in the market i.e. with no minimum guaranteed income for the landlord. Recently we have encountered tenants seeking (as a personal concession) to include service charges in the turnover rent or service/insurance charge as their base rent.

Calculating the gross receipts of the business at the unit for the purposes of turnover is increasingly tricky with the rise of online sales. The position adopted will depend on the strength of the negotiating parties but a few of the possible range of options include: deducting all online sales collected from the unit; including those online sales satisfied using store stock; including those online sales made using in-store devices or with the assistance of store staff; including any online sales credited to the business at the unit as opposed to the online business; not deducting online sale returns.

Landlord's previously sought to inspect copy till documentation in order to verify gross turnover, however, the collation of data is becoming far more sophisticated and centralised. In circumstances where the storage and sharing of data is becoming more regulated, it is expected that the auditing and inspection clauses will become the subject of increased negotiation resulting in further cost considerations for both parties.

### **2.3 Rent Review**

The basic rent is subject to review every five years on an open market basis. Upwards only rent reviews were abolished in Ireland in 2010 meaning, for all leases entered into after 28 February 2010 that were not the subject of a binding agreement for lease entered into before that date, the rent can be reviewed upwards or

downwards. However older leases entered into before that date will often contain upwards only rent review clauses and these clauses remain valid in such leases. Rent free periods and other tenant concessions are disregarded for rent review purposes as is the goodwill and business of the tenant. If the parties cannot agree a reviewed rent, it will be determined by an independent surveyor.

## 2.4 2.4 Procedures to recover unpaid rent

### Court process

#### Court proceedings seeking payment of rent arrears

It is possible for a landlord to issue court proceedings and claim rent arrears due from a tenant as a debt. Generally, a landlord will issue summary proceedings against the tenant for the rent arrears due on the basis that the tenant has no defence to the claim, if successful the landlord will obtain a judgment against the tenant for the amount owed (and possibly guarantor if there is one), at that stage the landlord can consider methods of enforcement. If the proceedings are defended by the tenant, the proceedings are likely to take longer to concluded, if the landlord is successful against the tenant, the landlord will obtain a judgment against the tenant for the amount owed.

#### Statutory demands

Where the tenant has failed to pay rent or other sums due under the lease, the landlord may wish to consider commencing insolvency proceedings. A landlord (or creditor) who is owed a debt can issue a statutory demand against the tenant (or debtor). A statutory demand is a written warning to the debtor stating that if the debtor does not pay the debt, the creditor will initiate court proceedings for the bankruptcy or liquidation of the debtor. The content and time limits of the letter will depend on whether the debtor is a company or an individual.

Where the debtor is an individual, a creditor can issue a statutory demand if they are owed more than €20,000. Under the current Covid-19 measures (which are in place until 31 December 2021), where the debtor is a company, a creditor can issue a statutory demand if they are owed more than €50,000. After the 31 December 2021 (if Covid-19 measures have not been extended) then a creditor can issue a statutory demand if they are owed more than €10,000.

#### Guarantors / rent deposits

Some tenants may have provided a guarantor or rent deposit which the landlord may seek to use in the event of breach.

There is no statutory limit on the amount of rent deposit which the landlord may require and this is determined by negotiation between the parties. Rent deposits usually secure the payment of all sums owed by the tenant to the landlord, such as rent, insurance rent, service charge, interest and damages and can also secure all of the tenant's lease obligations. The rent deposit is usually only released when the lease ends or the tenant transfers the lease to another tenant, but it may be agreed that the rent deposit will be returned to the tenant when the tenant meets a profit rating test.

## 3. PREMISES

### 3.1 Extent of Demise

The demise will normally comprise the interior of the shop unit only and the shop front. Structural elements are usually excluded from the demise and remain under the control of the landlord.

### 3.2 Extent of the Shopping Centre

The centre will normally be defined in the lease as the actual shopping centre on the date of the lease and any additions or extensions to the shopping centre. A plan or map will generally be annexed to the lease for identification purposes.

### 3.3 Common Parts

The tenant will usually be granted rights in its lease to use the common parts of the centre (e.g. the malls, car parking for customers, washrooms, refuse areas, other communal areas). The landlord will be responsible for the management and upkeep of the common parts and will recover its cost through the service charge. Tenants can sometimes seek to take additional areas such as storage space or roof space for plant under an additional lease or, more commonly, under a licence. Other areas like storage areas or roof space are sometimes made available to the tenant under a separate lease or licence.

Landlords may conduct commercialisation activity from the common parts like malls and car parks. In such circumstances, the tenant would usually agree to this on the basis that the upkeep of these areas are excluded from service charge expenditure (or if included, any income generated should be credited to the service charge pot).

### 3.4 Rights Reserved by Landlord

The landlord will typically reserve rights to extend or otherwise change the extent or layout of the centre, to run services, to build into boundaries etc. and the lease will usually record that neither the enjoyment of light and air will prevent the exercise of the landlord's rights.

The landlord will reserve rights in the lease to enable it to properly manage and maintain the centre, including rights to run services, to enter unit to inspect and to carry out repairs (if the tenant fails to do so) and to recover its costs and to extend or alter the layout of the centre. A tenant may seek to limit the landlord's rights contractually.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

The tenant will be permitted to assign its lease subject to obtaining the landlord's prior written consent, not to be unreasonably withheld. The lease usually obliges the landlord not to unreasonably delay consent. The tenant will be required to provide the landlord with all information as the landlord may reasonably require in respect of a proposed assignee to allow the landlord to assess the financial covenant strength of that proposed assignee. The lease will usually allow the landlord to seek a guarantee or surety from the proposed assignee, this may be limited to where the assignee is of unproven financial standing. The lease may also provide that it would be reasonable for a landlord to refuse consent to an assignment where such an assignment would breach an exclusivity granted to another tenant in the centre or is not in keeping with the principles of good estate management. Institutional landlords often require a pre-emption/right of first refusal on an assignment so that they have the option of taking a unit back by matching the terms offered by an incoming tenant.

### 4.2 Underletting

Save in the case of a large anchor/department store where it can sometimes be allowed, an underletting of part of a unit is generally not permitted. Underletting of an entire unit would be subject to the landlord's prior written consent, not to be unreasonably withheld. The lease usually obliges the landlord not to unreasonably delay consent. Again, the lease would usually provide that the landlord may refuse consent where an underletting would breach an exclusivity granted to another tenant in the centre or is not in keeping with the principles of good estate management.

### 4.3 Sharing occupation

A landlord will often permit a tenant to share occupation of a unit with a group company provided the tenant indemnifies the landlord against any loss or damage caused by such group company and the tenant ensures that the group company complies with the tenant obligations under the lease. It is advisable, where a landlord permits a tenant to share possession or occupation with a group company, to require that the tenant deliver to the landlord a properly executed deed of renunciation from such group company prior to it taking occupation or possession of the shop. This prevents a group company from possibly inadvertently obtaining statutory renewal rights if it is in continuous occupation for five years or longer.

Some tenants negotiate the right to share a unit with franchisees or trading concessions, but even where this right is granted, it is usually limited to a percentage of the trading floor area of the unit and provided that the unit appears as one trading unit.

#### 4.4 Change of control

Restrictions on changes of control of tenant share capital, voting rights or ownership are not usually found in retail leases in Ireland.

### 5. ALTERATIONS/REPAIR

#### 5.1 Alterations

Structural alterations are usually prohibited. The tenant will normally require the landlord's prior written consent for any alterations it proposes carrying out to its unit. The lease usually provides that such consent cannot be unreasonably withheld or delayed for non-structural alterations. In some circumstances a landlord may agree that a tenant can carry out internal non-structural works without its consent. The landlord will require the tenant to provide such reasonable detail as the landlord may require in assessing an application for consent, including plans, method statements and copies of statutory consents (if applicable) such as planning permission and fire safety certificates.

The tenant usually takes on the liability to carry out any alterations that are required during the term of the lease to ensure that the unit complies with statute.

#### 5.2 Tenant's fitting out

The tenant's fitting out of the unit is usually to be completed prior to the centre opening date when the centre is in its development phase, e.g., the unit will be handed to the tenant a certain number of weeks prior to the anticipated centre opening date and the tenant is then obliged to complete its fitting out works during that period (with penalties to apply for failing to do so such as erosion of any rent free period). Landlords will generally want to approve the fit out.

A tenant's obligations at the end of the lease (or sooner determination) will generally include a requirement to remove all alterations, its trade fixtures and contents and to reinstate the unit and return them in the state of repair required by the lease unless the landlord notifies otherwise or the tenant has negotiated at the outset of the lease that particular items (such as lifts and escalators) can remain in situ if in good working order. To the extent that the tenant fails to comply with these types of obligations at the end of the term, the landlord may seek to recover the costs it incurs instead by way of a dilapidations claim against the tenant, subject to statutory conditions and limits.

The lease usually provides that at the expiry of the lease term, the unit should be returned with vacant possession.

#### 5.3 Signage

Tenants are usually allowed to use (and change in line with corporate branding) their own signage subject to the landlord's approval. There are also usually prohibitions on affixing signs to glazing as well as restrictions on the extent to which a tenant can obscure shop front windows and/or use sale signs and in store signage.

#### 5.4 Repair and redecoration

The tenant will be obliged to keep and to yield up the unit in good and substantial repair, order and condition. The parties may agree to attach a schedule of condition to a lease evidencing the condition of the unit at the commencement of the lease and the condition in which the unit should be returned to the landlord at the end of the term. The lease will also place an obligation on the tenant to redecorate the unit, usually every three to five years and in the final year of the term (the style of such redecoration to be approved by the landlord in the last year of the term).

For new centres, the landlord may agree to allow the tenant to carve out liability for inherent defects, say for the first 3 – 6 years of the term. It is also usual to limit the tenants' repairing obligations to exclude damage caused by any insured risk damage and uninsured risk damage. The landlord will usually be responsible for

external redecoration and repairing the structure and common parts of the centre, and will recover that cost through the service charge.

## **6. TRADING**

### **6.1 Keep Open**

A landlord will typically seek to include in each centre lease a covenant to keep the unit open for trade during specified minimum trading hours, usually typical retail trading hours in Ireland. Hours will be specified in the lease and may be varied as directed by the landlord. The parties may agree exceptions to this obligation, including where the unit cannot be kept open due to damage by insured risks.

### **6.2 Trading Names and User**

It is not usual to require a tenant to trade under a specified trading name.

A change of use usually requires landlord's consent. This consent cannot, under statute, be unreasonably withheld.

### **6.3 Tenant's handbooks**

Tenants are likely to be obliged to comply with the reasonable provisions and regulations of any handbook published by the landlord from time to time, to the extent it does not conflict with the terms of the lease. The lease will contain a specific provision to this effect.

### **6.4 Exclusivities**

A landlord can agree to grant a tenant exclusivity in respect of a certain use within the centre, e.g. a landlord may covenant with a tenant that the tenant shall be the only ladies hairdressing salon within the centre. The exclusivity may be granted for the benefit of the tenant for a limited period or for the entire of its lease.

## **7. INSURANCE**

### **7.1 Insured risks**

A landlord will insure the centre against the standard insured risks in the Irish market and against three to four years loss of rent. The landlord will recover the insurance costs on a due proportion basis from its tenants.

### **7.2 Uninsured risks**

Both landlords and tenants are becoming increasingly aware of the risk of damage by uninsured risks and a tenant may request the right to break a lease if the landlord does not elect to reinstate the centre or the unit in question at the landlord's cost due to damage by an uninsured risk and the landlord may seek the right to allow for it to terminate the lease or to reinstate.

### **7.3 Business insurance**

Under the terms of the lease, the tenant will be required to maintain its own public liability insurance, employers liability insurance and contents insurance. It is open to the parties to decide to take out business interruption insurance. The terms of any policy will determine whether an insurance company will pay out in the event of a claim.

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

The landlord will be responsible for providing various services to the centre. These can vary depending on the nature of the centre, but standard items include repair, replacement in the nature of repair, cleaning, heating and hot water, air conditioning, maintenance of common parts, security and the provision of staff to service the centre. The landlord will recover the cost of providing these services through the service charge regime, under

which the tenant will be required to pay a service charge in advance based on budgeted expenditure with a reconciliation at the end of the service charge year.

The service charge will usually give the landlord the ability to employ managing agents and contract out services, and recover the costs of doing so through the service charge. If maintenance of the car park is recoverable as a service charge expenditure, revenues generated by the car park will usually be offset against such expenditure. Alternatively, the landlord may operate the car park under a separate regime so that the car park operator will contribute towards the service charge in the same way as other tenants but all income generated then remains with the car park operator.

Tenants will generally not allow the landlord to recover through the service charge the costs of repairing any inherent defects, reinstating insured or uninsured risk damage, or improving or refurbishing the centre.

The usual method of apportionment of service charge is on a floor space basis.

The tenant will be directly responsible for the payment of outgoings and rates.

## 8.2 Promotions and marketing

The cost of promotions and marketing of the centre is usually included as a head of cost in the service charge.

## 8.3 Tenants associations

Tenants associations are not usually consulted in relation to proposed service charge expenditure.

## 9. GREEN LEASE

Before offering a unit or shop as available for lease, a landlord is obliged by law to obtain a building energy rating certificate (and an advisory report in relation to such certificate) for the unit in question. This certificate confirms the energy efficiency rating of the unit. Often a lease will provide that the tenant is required to maintain the building energy rating of the unit for the term of the lease. There is usually no requirement to share information about energy consumption at the unit.

## 10. FORCE MAJEURE AND COVID

There have been no interventions by the Irish government to assist parties to commercial leases adversely affected by Covid. There is no obligation on either party to renegotiate the lease due to Covid.

## 11. OTHER POINTS TO NOTE

### 11.1 Electronic signature

In light of the provision of the section 10 of the Electronic Commerce Act 2000, leases should be executed by wet signature.

### 11.2 ESG Data

It is not usually for leases to contain obligations to share environmental criteria, social, operational or governance information.

### 11.3 Money laundering

There are no standard provisions in a lease relating to money laundering.

### 11.4 Terrorism and security

In a standard lease, a tenant will not expressly be obliged under the lease to support security exercises and/or to participate actively but these terms may be detailed and required under any landlord operational handbook.

### 11.5 Land Registry

Leases for terms in excess of 21 years are compulsorily registerable in the Land Registry, and must be in a specific form with specific maps.

## ITALY

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### Preliminary Remarks

In Italy the lease of premises located in shopping centres can be achieved by two alternative contracts:

#### 1. SIMPLE LEASE (“SL”)

SL (in Italian “contratto di locazione”) is a contract subject to the binding rules provided by Law 392/78 (“**Lease Law**”). The object of such contracts are merely the premises, which tenant is entitled to utilize for commercial purposes, fitting out the shopping point with its equipment. The tenant obtains directly the administrative commercial authorization to trade.

The Lease Law provides for a set of mandatory rules like, among others, the following:

- (i) no rent review is permitted. However, parties can agree an annual adjustment;
- (ii) the duration cannot be for less than 6 years;
- (iii) at the first expiry date of the lease, the lease term is subject to an automatic renewal of additional six years. The renewal will continue at the end of each of the following six-year term, unless one of the parties notifies the other in writing of its intention not to renew the lease at least 12 months before the expiration date.
- (iv) the increase in the rent may not exceed 75 per cent of the increase in the consumer price index for blue and white-collar households as ascertained by ISTAT.
- (v) at the end of the lease, landlords have to pay to tenants an indemnity as consideration for the loss of goodwill equal to 18 months of the lease rent. This provision does not apply in case the lease agreement is terminated due to a tenants’ breach and in case of tenants’ withdrawal; this provision does not apply as well in the case that the tenant carries out an activity which does not involve a contact with the public. Furthermore, if within one year from the end of the lease a new activity in competition with the activity is carried out by the former tenants in the premises, an additional indemnity equal to 18 months of the lease rent is to be paid to the former tenant: the legislator has made this provision because it presumes that a tenant who opens a competing business within one year of the end of the previous contract “takes advantage” from the goodwill of the previous tenant.
- (vi) at the end of the lease tenants have a right of pre-emption in case landlords intend to let the premises to new potential tenants. In order to grant to the tenants the effectiveness of their pre-emption right, landlords dealing with new potential tenants lease have to notify the present tenants with all the terms and conditions of such new lease contracts. In case tenants intend to exercise their right of pre-emption, they have to notify landlords their will to enter into the new lease according to the notified terms and conditions within 60 days from the above landlords’ notification.
- (vii) during the lease period, tenants have a right of pre-emption in case landlords intend to sell the premises to third parties. In order to grant to the tenants the effectiveness of their pre-emption right, landlords dealing with third parties regarding the sale of the premises, have to notify the tenants of all the terms and conditions of such sale. In case current tenants intend to exercise their right of pre-emption, they have to notify landlords of their will to enter into the sale and purchase agreement according to the notified terms and conditions within 60 days from the above landlords’ notification.

All the above provisions are intended to protect the tenant, whom the legislator classifies as the weaker party to the contract: therefore, any contrary agreement shall be considered as null and void.

With Law no. 164/2014, the legislator introduced the possibility for the parties to derogate the above-mentioned provisions, giving to the parties the possibility to agree less advantageous rules for the tenant: this is possible though only in case the annual rent is higher than Euros 250.000,00. Obviously, the legislator's thinking is that a tenant who can afford a high rent - in excess of 250.000,00 - can also bear the derogation of the mandatory protections afforded by law.

## 2. GOING CONCERN LEASE (“GCL”)

GCL (in Italian “contratto di affitto d’azienda”) is entered into assuming that the premises, in addition to the administrative commercial authorization and other assets (for ex. furniture and service contracts like the electric power supply) can be considered as an entity, which meets the requirements of a going concern (in Italian “Azienda”) set forth under art. 2555 of the Italian Civil Code.

According to Italian law, going concern is a group of assets (for ex. buildings, contracts, administrative authorizations, IP) considered as a whole to the extent that entrepreneurs (companies and individuals carrying out commercial activities) own and use them to perform their business. In light of the above, such group of assets can be considered like a single asset which is the result of their use for the common purposes of the entrepreneurs’ business.

Since Going Concern Lease is not subject to mandatory provisions aimed at protecting the tenants, it is widely used and preferred to SL, especially in case of rents lower than Euros 250.000,00: otherwise, if the rent is higher of such threshold, the parties are free – also in SL – to derogate mandatory provisions protecting tenants.

It is to be underlined that it is controversial whether or not the premises of a shop, with some assets like the trade licenses and furniture, can be legally considered GCL. This is why there is a risk related to the application by Courts of the Lease Law (very strict if compared with GCL regulation) to GCL. Indeed, should the Court find that the leased going concern is in fact fictitious and has no real substance, then it may reconvert the contract and apply the rules of the Lease Law.

In addition, according to Italian law, in case of GCL, all the contracts and the administrative commercial authorizations related to the going concern business are automatically assigned to tenants.

In light of the above, it is recommended great care and diligence in the drafting of a GCL. GCL drafting needs special legal care not only to meet the requirements set forth by the law, but also to provide a reduction of the risks related to the Lease Law application in case of litigation with tenants so that in this event an effective defence is possible.

## 1. TERM

### 1.1 Contractual Term

Typically between 6/12 years.

SL: According to Lease Law, the minimum validity of the contract is equal to 6 years.

At the expiry date of the lease the same is subject to an automatic renewal of six years, and so again at the end of each of the following six-year period, unless one of the parties notifies to the other its intention not to renew the lease at least 12 months before the expiration date.

Please note that at the first expiry date the landlords are entitled to prevent the automatic renewal of the contract only if one of the following circumstances is met:

- (i) intention of landlords or landlords’ relatives to use the premises as their home or to carry out commercial activities;
- (ii) intention to demolish the building in order to rebuild it;
- (iii) intention to refurbish in compliance with the law.

However, tenants with a strong bargaining power usually agree with the landlords the waive of their right not to renew the lease at the end of the first lease term: therefore, it is very common for landlords to bind themselves in contract with minimum duration of 12 years.

GCL: In case of going concern lease, parties are free to agree whatever term.

## 1.2 Break Rights

The Lease Law establishes that the parties can contractually provide for a free withdrawal right for the tenant.

Only tenants with a good bargaining power are able to obtain such right during the negotiation with the landlord.

Tenants entitled by the contract to break can typically break after three/five years from the starting date: more commonly, landlords grant to tenants the right to break after the first expiry date, namely from the end of the first six years onwards. In some cases, tenants agree with landlords an additional right to break in case of turnover decrease under a certain fixed figure.

According to the Lease Law, a tenant can always withdraw from the contract in case of severe reasons. According to judicial cases, a reason is severe when it:

(i) is beyond the tenant's control;

(ii) has occurred after the conclusion of the contract;

(iii) makes the continuation of the lease excessively burdensome (in economic, material or psychological terms).

It is unusual for landlords to have the right to break.

## 1.3 Renewal Rights

### SL

An automatic renewal of six years is provided by the Lease Law at the expiry date. The automatic renewal then applies at the end of each of the following six-year terms, unless one of the parties notifies the other its intention not to renew the lease at least 12 months before the expiration date.

As already underlined in the above paragraph 1.1, at the first lease term the landlords are entitled not to renew the lease only if certain circumstances are met. Furthermore, tenants can obtain from the landlords the waive of the right not to renew the lease at the end of the first lease term.

Lastly, as clarified in preliminary remarks, tenants have a right of pre-emption in case landlords intend to let the premises to new potential tenants.

### GCL

Tenants are not provided with any renewal option if this is not expressly provided for in the lease contract.

## 1.4 Disputes and Forfeiture

### SL and GCL

Landlords' standard agreements usually provide for the automatic termination of the agreement in case of breach of each of the tenants' obligations.

Tenants with a good bargaining power are likely to agree with the tenants the termination of the contract only after 15/30 days from the receipt by tenants of a notice from the landlord.

Many retailers, with a complex administration of their international business, consider the above provision essential, since it provides them with the time necessary in order to overcome the causes of such a breach, which are often related to delays due to lack of information among the employees. Furthermore, having a grace period is a good way for tenants to be sure that the termination is not used speciously by the landlords.

Most of the commercial centres insert in their standard agreements an arbitration clause.

## 2. RENT

### 2.1 Principal rent

Tenants with a strong bargaining power are usually granted a "grace period" of 40/120 days either from the starting date or before the opening date, in order to carry out the fitting and the restocking of the store.

Usually a rent divided in minimum rent and turnover rent is more common in commercial centres, while a fixed rent is more common in the other cases.

## 2.2 Turnover

### SL

In light of the strict Lease Law regulation, it has been debated whether or not a variable rent can be set forth by SL. However, since Italian Courts in some cases have declared such provisions valid, tenants and landlords insert the variable rent in their lease agreements.

### GCL

Usually tenants are required to pay a fixed rent and an additional variable rent equal to the difference between a certain percentage of the gross turnover and the fixed rent, in case the result is positive.

Usually in GCL – mostly used inside commercial centres – it is more common to find provisions concerning the inclusion of online sales in the turnover: only retailers with strong bargaining power are able to exclude such sales from the turnover. In any case, this kind of clause have become very common in the negotiations and the tenants are mostly concerned in finding a reasonable criterion to understand what online sales shall be included in the turnover (for ex. only sales invoiced directly by the shop? Only sales of products which are physically in the shop?)

## 2.3 Rent Review

### SL

According to the Lease Law only an adjustment of the rent is permitted, upon landlord's request on an annual base, in order to link its value with the Euro's inflation rate. The adjustment cannot be more than 75% of the increase of the Italian ISTAT index of consumption prices for workers' and employees' families.

Please note the possibility to derogate to such mandatory rule in case of rent higher than Euro 250.000,00, as better described in preliminary remarks.

### GCL

Usually parties agree an adjustment on an annual base equal to 100% of the increase of the ISTAT index of consumption prices for workers' and employees' families.

It is more common in GCL to find a clause providing for an increasing rent year by year (for ex. Y1 Euro 200.000,00; Y2 Euro 250.000,00; Y3 Euro 300.000,00).

## 2.4 Procedures to recover unpaid rent

As already clarified above, both GCL and SL usually provide automatic termination of the contract in case of non-payment by the tenant of the rent.

It is normal and common that the tenant provides to the landlord a bank guarantee that the latter can enforce in case of breach to the obligation of payment of the rent. Only tenant with a strong bargaining power are able to obtain more favourable agreement from the landlords (e.g. clauses establishing that before enforcing the bank guarantee the landlord shall inform the tenant and request it to fulfil the obligation).

## 3. PREMISES

### 3.1 Extent of Demise

Usually, only the internal surface is leased to tenants.

Some tenants (e.g. bars and restaurants) are entitled to the exclusive use of common areas for the consumption of food and drink by customers.

### 3.2 Extent of the Shopping Centre

Usually, all the shopping centres' area with the only exception of the premises let to tenants.

### 3.3 Common Parts

Tenants are entitled to use common parts of the centres (e.g. malls and parking areas).

Landlords usually take care of the maintenance of common areas and systems (e.g. heating, air conditioning). In special cases (e.g. use of open spaces for the consumption of food and drink) maintenance to be performed by the restaurant/bar tenants.

Landlords are free to make use of the common parts to develop and increase the synergies and the goodwill of the centre, making advertising or particular promotion.

It is common that landlords grant some spaces of the common area to specific tenants for specific purposes (e.g. promotion of a new product). Except for these cases, the landlord does not usually use the common area for commercialisation.

The cost and expenses related to the maintenance of common parts by the landlords are recovered through the service charges on tenants.

### 3.4 Rights Reserved by Landlord

Landlords usually have the exclusive right to manage and to execute works related to the common areas' maintenance.

In addition, landlords have usually the right to:

(i) access to the premises, in order to verify the maintenance and the compliance with the shopping centres' rules: it is common though that the parties agree some corrective measures, like a minimum advance notice.

(ii) be provided with accounting data relating to the activities carried out on the premises, in order to verify the compliance with the obligation to pay the variable rent;

(iii) close the shopping centres and/or the store in case it is necessary to execute extraordinary maintenance or refurbish the building.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment

Tenants are not entitled to assign SL and GCL without the landlords' authorization or unless otherwise specified in the contract.

Indeed it is possible to agree special provisions in order to entitle the tenants to assign the SL or the GCL without the landlords' authorizations. Usually only retailers with a strong bargaining power enter into clauses providing the right to assign the SL or the GCL, and in most of these cases the SL or the GCL can be assigned only to companies controlled by tenants itself and/or by the mother companies of tenants.

According to the Lease Law, in case of sale or lease of the going concern activated in the premises, the SL is automatically assigned to the tenant or purchaser of the going concern. Please note that in the sale and purchase of shops assumed as going concern, the above controversial issues in the introduction are met and special legal advice is strongly recommended. In fact, landlords can oppose the transfer assuming that the shop is not to be considered as a going concern and the consequent assignment is to be considered void. In any case, even if the validity of sale or lease of going concern is not opposed, landlords can oppose for serious reason. Furthermore, in case landlords do not exempt the seller from liabilities, the latter maintains its liability *vis-à-vis* the assignee non-compliance with the lease covenants and terms.

### 4.2 Underletting

Tenants are not entitled to underlet the premises or to let the going concern without the landlords' authorization or unless otherwise agreed in the contract.

Indeed, it is possible to agree special provisions in order to entitle the tenants to underlet the premises or to let the going concern without the landlords' authorizations. Usually only retailers with a strong bargaining power obtain to enter into clauses providing the right to underlet the premises or to let the going concern, and in most

of these cases the premises can be underlet and the going concern let only to companies controlled by tenants itself and/or by the mother companies of tenants.

According to the Lease Law the SL is automatically and temporary assigned to the tenant in case of going concern lease. In such case, landlords can oppose in some circumstances:

(i) in case of going concern lease the above controversial issues, mentioned in the introduction are met, and landlords can oppose the lease assuming that the shop is not to be considered as a going concern and that the consequent lease is to be considered void;

(ii) according to Lease Law, even if the validity of the lease of going concern is not opposed, landlords can oppose for “*serious reason*” related to the lessee. Such opposition is admitted only in few and rare cases (among others: lessee insolvent, bankrupted or convicted of crimes related to the use of similar premises).

Furthermore, in case landlords do not exempt leaser from liabilities, the latter maintains its liability *vis-à-vis* the lessee non-compliance with the lease covenants and terms.

#### 4.3 Sharing occupation

Tenants with a strong bargaining power are allowed by landlords to let part of the premises (“*reparto*”) by a GCL to other companies.

#### 4.4 Change of control

It is quite common that landlords – especially in commercial centres – asks for the introduction of this kind of clauses in the contract, usually providing for them the right to withdraw from the contract in case of change of control; it is not unusual to find also clauses which forbid in general the change of control.

Only tenants with a strong bargaining power are able to obtain the removal of such clause from the standard draft of the landlords.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions affecting alterations

Structural and non-structural alteration of the premises are permitted only with the landlords’ authorizations.

Usually, retailers with a strong bargaining power agree with the landlords the permission to execute non-structural works without the landlords’ permission or provision according to which the landlords shall not unreasonably deny its authorizations.

According to Italian Civil Code, the landlord has the right to request to the tenant – at the expiry date of the contract – to return the premises to their original state. It is common that the parties agree that such right is excluded, unless for modifications that tenants did without landlords’ consent.

Please note that in general the parties agree that any addition or modification made by the tenant will be retained by the landlord free of charge, by way of derogation from the provisions of the Italian Civil Code, under which the landlord should pay to the tenant an indemnity.

#### 5.2 Tenant’s fitting out

Usually, tenants fitting out is to be completed within the centres’ opening date, when the centres are in its development phase, or within the date for the shops opening when the centres are already open.

In any case, the premises are usually handed to tenants 6/8 weeks before the opening and fitting out term.

As underlined in paragraph 2.1, tenants with a strong bargaining power are usually allowed not to pay the lease rent for a “*grace period*” of 6/8 weeks, during the fitting of the store.

#### 5.3 Signage

Tenants are usually authorized by landlords to use their signage in the SL or in the GCL.

Retailers with a strong bargaining power agree with landlords the authorizations to use also signage of companies controlled by tenants itself and/or by the mother companies of tenants.

#### 5.4 **Repair and decoration**

Tenants are usually in charge of (i) the ordinary premises repair and of extraordinary repairs of the machinery and systems installed by them (ii) keeping the premises clean and decorated according to the quality standards of the centres.

Landlords are in charge of ordinary and extraordinary repairs of common parts and of extraordinary repairs of the premises. The costs of such repairs are charged on tenants through the service charges.

Mere decoration and redecoration – provided they do not determine structural works – are usually allowed without landlord's consent: nonetheless, landlord usually requires – especially for high standing retailers – that redecoration is coherent with the other Italian shops of the retailers.

#### 5.5 **Modifications required by statutory provisions**

Unless otherwise agreed, modifications required by statutory provisions are borne by the landlord.

### 6. **TRADING**

#### 6.1 **Keep open**

Tenants are required to keep the shops open during the trading hours fixed by the landlords and/or the manager entities of the centres.

Trading hours can be varied and include Sundays and Holidays.

In any event, trading hours must comply with the Local Authority regulation.

Landlords often provide contractual remedies in case of non-compliance of tenants, like daily penalties or possibility to terminate the contract.

#### 6.2 **Trading names**

Tenants are usually required to trade under a specific trading name for the duration of the lease. Tenants with a strong bargaining power sometime agree with landlords the authorizations to trade also with trade names of controlled companies or of companies hold by the groups which the tenants belong to.

#### 6.3 **Competition**

Landlords often request to tenants not to open other shops in a radius of certain kilometres from the centre.

Only tenants with strong bargaining power are able to obtain a specular obligation for landlords, according to which landlords cannot lease to specific competitors: it is more common that such clause is granted to retailers which carries out a non-core activity for the centre.

### 7. **INSURANCE**

#### 7.1 **Insured risks**

Landlords usually insure the centres against risks generally related to the premises and provide coverage for third parties which have access to the common areas.

Tenants are usually required to enter into an insurance policy against: (i) risks related the tenants' equipment, furniture and merchandise (e.g. in case of fire); (ii) risks of damages to third parties as a consequence of the activities carried out in the premises; (ii) risks of damages arising from the negligent maintenance of the premises and/or from neighbours' claims.

#### 7.2 **Uninsured risks**

Usually both SL and GCL do not have any particular provision as regard unsecured risks.

Tenants with a strong bargaining power agree a reduction or a free rent period in case of extraordinary work to be carried out at the premises which force the tenants to suspend its activity for a fixed time.

Furthermore, it is becoming always more common to see parties which require an insurance against Covid, though are still more common contractual provisions which expressly regulate such case.

### 7.3 Business insurance

There are no specific business insurances which landlords request.

## 8. SERVICE CHARGE

### 8.1 Typical regime

Landlords and/or the centres' managers are usually in charge of common parts' maintenance and cleaning, general implants' maintenance and centres' security.

These services are usually charged on tenants on a weighted floor basis through the service charge. Payments are required in advance according to an annual budget and with a reconciliation at the end of the service charge year.

### 8.2 Promotions and marketing

Landlords and/or centres' managers often provide services of marketing, charged to tenants through the service charge.

### 8.3 Tenants associations

In many cases tenants are required to join a tenants' association or coop and are charged for this.

Usually, the tenants' association or coop supply marketing activities, represent tenants and coordinate tenants' activities.

## 9. GREEN LEASE

It is not common to find contracts which include provisions requiring the parties to share data on the consumption of utilities, energy performance etc.

## 10. FORCE MAJEURE AND COVID

Due to Covid, the force majeure clause has become one of the most negotiated by the parties. The reason is that both laws and court decisions did not provide for a clear and objective answer concerning whether the rent is payable or not during a closure imposed by the authorities.

Since March 2020, there have been several court decisions which established the right for the tenants to a reduction of the rent for the period of closure. In particular, Covid can be considered as a force majeure event under the lease, since it makes it partially impossible for the landlord to perform its obligation of granting to the tenant the free and full use of the premises leased: as a consequence, such courts have established that the counter obligation of the tenant (i.e. the payment of the rent) shall be reduced.

On the contrary, there have been also some judicial decisions establishing that the rent shall be entirely payable, considering that the possibility for the tenant to perform its activity is something which does not pertain to the landlord, but only to the entrepreneurial risk of the tenant.

A distinguished voice has spoken in favour of the obligation to renegotiate the contract. The Italian Supreme Court ("Corte di Cassazione") has in fact ruled that the parties have a real obligation to enter into negotiations in good faith to renegotiate the terms of the contract, in accordance with the principle of good faith governing the performance of contracts.

In general, given the above, the parties have mostly preferred not to start litigations and to negotiate in good faith reductions or suspensions of the rent for the periods of closure of the shop and/or the centre. It is not unusual to find parties which renegotiate the rent in a long-term view, also until the end of year 2022.

With regards to new contracts, the parties are negotiating with success the most various force majeure clauses, in order to establish possible consequences in case of new closure or restrictions.

## **11. OTHER POINTS TO NOTE**

### **11.1 Tenant ESG data**

Landlords usually require information on the turnover and on the products sold, in order to verify the correct amount of turnover rent: in any case, this landlords' right shall be established by the contract.

### **11.2 Money laundering**

According to D. Lgs. 231/2007, lawyers and real estate broker have to put in place customers due diligence measures in case the periodic rent provided by the lease contract is higher than Euro 15.000,00.

There are no specific clauses which shall be inserted in the contract.

### **11.3 Terrorism and security**

There are no specific provisions to be inserted in the contract: Landlords and Tenants shall comply with anti-terrorism law as anybody else.

### **11.4 Prescribed form**

SL does not have to be necessarily in writing: such form is only required by law in the case of a duration of more than nine years. Notwithstanding that, in practice, the written form is used regardless of the duration of the contract, considering that it is necessary for the purposes of registration towards the Revenue Office, which must take place within 30 days of the signing of the agreement.

The GCL must be in the form of a public deed (or a notarial authenticated private deed) and shall be registered within 30 days of the signing of the agreement.

# LITHUANIA

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## Preliminary Remarks

Lease agreements in Lithuania are governed by the Chapter XXVIII of the Civil Code of the Republic of Lithuania (“the Civil Code”). According to the general principle of freedom of agreement established in the Civil Code, the parties may agree on non-application of non-mandatory rules of law or they may agree to apply a provision of their choice. However, if a certain subject is not regulated within the agreement, the provisions of the Civil Code shall apply.

## 1. TERM

### 1.1 Contractual term

To begin with, the lease agreements may be concluded for a fixed or indefinite term. However, fixed-term lease agreements are the most common in the retail market. The term is agreed by the parties, but the maximum term, in any case, cannot exceed one hundred years. According to the Lithuanian legislation, if the Tenant continues to use the leased property for more than ten days after the expiry of the term and the Landlord does not object, the lease agreement is deemed to have become of an indefinite term.

With regard to the typical lease agreement term, one may say that 3-5 year lease agreements are common. However, often the term of the lease agreement depends on the leased premises and the Tenant itself. For example, in the case of anchor Tenants, a lease term of 10 (or 15) years is often applied, with the possibility of extending such a lease for additional 5 years (or even more). On the contrary, if the leased premises or area in the Shopping Centre are relatively small or designed for seasonal activities, the lease term can often be up to 1 year.

### 1.2 Break Rights

In most cases, the parties do not have the right to terminate the fixed-term lease agreement if neither of them commits a material breach.

Most commonly lease agreement foresees that the Landlord has the right to terminate the lease agreement out of court in cases where the Tenant uses the premises not in accordance with the contract or purpose, intentionally or through negligence worsens the condition of the premises, does not pay rent, service charge and other payments, does not make repairs when it is mandatory or on the other grounds provided in the lease agreement. While the Tenant usually has the right to terminate the lease agreement out of court in cases where the Landlord does not make the repairs it is obliged to do, as well as when the premises become unusable due to circumstances beyond the Tenant's responsibility, when the Landlord obstructs the use of the premises, or when due to defects not specified before the handover of the premises the latter cannot be used for the lease purpose, etc.

To be noted, Lithuanian law establishes that the Tenant may terminate a lease agreement following a change in the real estate owner. However, in most cases lease agreements contain provisions on the basis of which the Tenant waives the aforementioned right.

### 1.3 Renewal Rights

Renewal rights are typically agreed upon in lease agreements. The Tenant who has duly performed obligations under a lease agreement has a right of first refusal to renew the lease agreement on its expiry. When concluding a lease agreement for a new term, its terms may be changed by agreement of the parties. Contracts are usually renewed on market terms.

#### 1.4 Disputes and Forfeiture

Disputes are usually settled by negotiation. Failure to settle disputes amicably shall be subject to apply to the court.

### 2. RENT

#### 2.1 Principal rent

Rent will generally be based on the open market value. The Tenants are not typically granted a rent-free period. Generally, the Tenant pays the rent monthly in advance. Usually, it is agreed that the Tenant compensates expenses incurred by the Landlord for maintaining leased premises (utility costs and service charge). A guarantee, deposit or other similar security ensuring payment of rent and other costs is usually required.

#### 2.2 Turnover

Turnover rent is rather usual. Turnover rent usually depends on the Tenant's leased space, retail specifics and other reasons. The Tenant will agree to pay a base rent plus a top-up rent linked to its turnover, e.g., to pay rent at say 4 - 8% of the Tenant's gross turnover at the premises exceeding the base rent.

#### 2.3 Rent Review

It is standard to have index-linked rent reviews in Shopping Centre leases. Either the Lithuanian Harmonised Index of Consumer Prices or one of the EU-based Harmonised Index of Consumer Prices is applied (HICP).

### 3. PREMISES

#### 3.1 Extent of Demise

The Tenant leases clearly defined premises for its business activity. The Premises have a defined area in square meters and their location is shown on the floor plan attached to the contract.

#### 3.2 Extent of the Shopping Centre

The Landlord usually reserves the right to expand or restructure the Shopping Centre without the obligation to obtain a prior consent from the Tenant, including temporary closure for refurbishment.

The Landlord is responsible for maintenance and repairs of Common Parts and capital repairs of the Shopping Centre, while Tenant is responsible for daily maintenance and current repairs of the Premises.

#### 3.3 Common Parts

The Tenant will be given rights to use common areas and infrastructure of the Shopping Centre (e.g., the malls, car park, washrooms, rest areas, other common areas). The Landlord will be responsible for the maintenance of those common parts and will recover its cost through the service charge.

#### 3.4 Rights Reserved by Landlord

The Landlord will typically reserve rights to extend or otherwise change the extent of the Shopping Centre, to run services, to enter the premises to carry out inspections and to carry out current repairs to the premises and recharge the Tenant if the Tenant fails to do so.

### 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

#### 4.1 Assignment

Usually, the Tenant has the right upon the written consent of the Landlord obtained in advance to assign his rights and duties under the lease agreement, pledge the right of lease or transfer it, or effectuate any other encumbrance thereof unless otherwise provided for by the lease agreement.

#### 4.2 Underletting

In most cases, the Tenant has the right to sublease the leased premises only with a prior written consent of the Landlord unless otherwise provided for by the main lease agreement. The sublease agreement may not be concluded for a period exceeding the period of the main lease agreement. In addition, it can be noted that the Tenant shall be liable for actions of other persons he entitles with the right or possibility to use the leased premises.

#### 4.3 Sharing occupation

As to sharing occupation the same rules apply as to a sublease.

### 5. ALTERATIONS/REPAIR

Usually, the Tenant has the right to make changes to the premises at his own expense, provided that such changes do not reduce the value of the premises or cause damage to the property. The Tenant is at its own cost responsible for any repairs, renovations and renewals which during the term or any extended term may be necessary in order for the premises to remain usable for the Tenants purpose, i.e. the current repair. The Tenant will be under an obligation to keep the premises in good condition and to perform current repairs in order to maintain them properly.

### 6. TRADING

#### 6.1 Keep open

Standard leases agreements contain a clause requiring the Tenant to keep the premises open for trading during the Shopping Centre's trading hours. Hours are specified (as may be varied) in the lease agreement or in the internal rules of the Shopping Centre. Failure to comply with this condition will result in a fine or termination of the agreement.

#### 6.2 Trading names

Usually, the Tenant may only operate in the premises under the trademark initially approved by the Landlord on the signing of the lease agreement. It is common that the Tenant's trademark used for the activities in the leased premises may only be changed with the prior written approval of the Landlord. It can also be mentioned that in some cases lease agreements contain provisions stating that the range of goods or services must be the same as in other Tenant shops/places of service provision.

### 7. INSURANCE

It is common that the Landlord should at the cost of the Tenant obtain property insurance of the building from a reliable insurance company authorised to operate in Lithuania. Typically, the Landlord acquires the insurance for the premises against fire, flood, natural forces and illegal action of third parties while the Tenant insures its property located at the leased premises and Tenant's third party civil liability.

### 8. SERVICE CHARGE

#### 8.1 Typical regime

The Landlord will be responsible for providing various services to the Shopping Centre. These can vary depending on the concept of a Shopping Centre, but standard items include repair, cleaning, insurance, heating and hot water, air-conditioning, maintenance of common parts, security and the provision of staff to service the Shopping Centre. The Landlord will recover the cost of providing these services through the service charge regime, under which the Tenant will be required to pay a service charge *pro rata* to the leased area in the lease area of the Shopping Centre. In some cases, the Tenant, shall in its own name enter into the agreements with

the providers of electricity, heat, gas, water and waste management of its choice and pay all charges and related taxes arising out of such agreements (especially in case of restaurants and other catering facilities).

## 8.2 Promotions and marketing

The Tenant shall obtain any necessary permits for any outside advertising at its own cost. Advertising devices or sales machines shall not be installed by the Tenant outside of the leased premises unless in mutual agreement with the Landlord. A common condition is that Tenants must participate in joint promotions of the Shopping Centre and carry out specific activities of such promotions or provide other incentives to the customers (i.e. apply discounts).

## 8.3 Tenants associations

Tenant associations are not common in Lithuania. In exceptional cases, lease agreements can provide an obligation to the Tenant to participate at the meetings of the Shopping Centre tenants.

## 9. GREEN LEASE

Many Landlords try to attract valuable anchor Tenants by offering “green lease”, which means the building is more environmentally friendly, resulting in cheaper operation of the building. In Lithuania, the BREEAM or LEED certificates are most frequently requested.

## 10. OTHER POINTS TO NOTE

It can be noted that lease agreement for a period of more than one year must be concluded in written form. As for registration, lease agreement concerning real estate concluded for a period of more than one year may be invoked against third persons only if it is registered within the Real Estate Register.

# KAZAKHSTAN

## LEGAL OVERVIEW OF LEASE CONTRACTS IN SHOPPING CENTRES IN KAZAKHSTAN

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The Civil Code of the Republic of Kazakhstan (hereinafter - the “Civil Code”), the Laws of the Republic of Kazakhstan, and the respective lease contract govern the relations whereby a lessor provides an immovable property to a lessee for a temporary possession and use for a fee.

Individuals may verbally enter into immovable property lease contract for a 1-year term. However, if the lease contract is concluded for a term exceeding one year, or if at least one of the parties to the contract is a legal entity, regardless of the term, the lease contract must be concluded in writing. The legislation does not provide for any specific form of a lease contract, however, the following essential terms must be specified in the lease contract: the subject (cadastral number, address, area) and the Lease fee amount.

Pursuant to the Immovable Property State Registration Law in accordance with subparagraph 1) of Article 5 of the Law of the Republic of Kazakhstan “On state registration of rights to immovable property” (hereinafter – the “Law”) dated July 26, 2007, No. 310-III, the immovable property lease contracts concluded for a period exceeding one year (long-term contracts) are subject to statutory public registration in legal cadastre. The legal cadastre is maintained by the registration authorities and contains information on existing and terminated rights (title encumbrances) to immovable property and other registration objects.

Any contractual changes that would otherwise change the information in the registration sheet and the scope of rights to the property are subject to state registration in legal cadaster.

Hence, extension of the immovable property short-term lease contract for more than 1 year will result in mandatory registration of such contract and its addendum in the legal cadaster.

### 1. LEASE TERM

#### 1.1 Contract term

The duration term of the immovable property lease contract is not restricted by the legislation of the Republic of Kazakhstan; thus, the parties can agree on any term suitable for their needs, or not specify it at all (open-ended contract). If the lease duration term is not specified in the contract, the lease contract is considered concluded for an indefinite term.

In practice, the lease term depends on the type of Lessee’s business form. If the Lessee is a sole proprietor or a small retail company, the parties usually enter into a short-term lease for 11 months and then renew it at the end of the term. If the Lessee is a large international retail company or grocery store, the lease term is usually from 10 to 25 years.

#### 1.2 Contract extension

Pursuant to the Civil Code, when the lease contract expires the Lessee who properly fulfilled its contractual obligations, has a preference right over other persons to conclude a lease for a new term, unless otherwise provided by laws or the contract. If the Lessor refuses to conclude the lease contract with the former Lessee and Leases out the premises to another company, the former Lessee is entitled to demand through the court that the rights under the new contract be assigned to him and any losses be compensated. The above pre-emptive right can be explicitly excluded from the lease contract.

In practice, short-term leases (concluded for less than 1 year) indicate that upon expiry they are automatically renewed under the same terms for the same period unless one of the parties explicitly declares its desire to terminate the lease.

If the Lessee continues to use the premises after expiry of the contract without any objections from the Lessor, the lease is considered renewed on the same terms for an indefinite period, and either party has the right to terminate the contract with a three months' notice unless otherwise provided by the contract.

### 1.3 Termination of contract

The Civil Code provides for several options for terminating the contract for the Lessor and the Lessee in court. For example, at the request of the Lessor, the lease contract may be terminated and the property returned to the Lessor in the following cases: 1) if the Lessee uses the property with a material violation of the contract terms or the property designation purpose, despite the Lessor's written warning on such actions; 2) if the Lessee willfully or negligently causes significant damage to the property; 3) if the Lessee fails to pay a fee for the property more than two times after the expiry of the payment term set forth by the contract; 4) if the Lessee does not carry out major repairs of the property within the timeline set by the lease contract, or within a reasonable time if there is no timeline set in the contract, in the event where the obligation for major repairs lies with the Lessee in accordance with the contract.

Alternately, the court may terminate the lease contract at the request of the Lessee if: 1) the Lessor does not provide the property for use to the lessee or obstructs the use of the property in accordance with contract terms or the property designation purpose; 2) the Lessor does not fulfill its obligations on major repairs of the property within the timeline set by the contract, or within a reasonable time absent any timeline set in the contract; 3) the property transferred to the Lessee has shortcomings that prevent its use, which were not mentioned by the Lessor when concluding the contract, were not known to the Lessee in advance and could not be discovered by him during the inspection of the property or checking its serviceability when concluding the contract; 4) if the property becomes unfit for its purpose due to circumstances for which the Lessee is not responsible.

Also the parties may set the right of each party to refuse to execute the contract unilaterally, and to provide for events when such right arises for one or another party in addition to the cases provided for by law (recognition of the other party as bankrupt, the impossibility of fulfilling an obligation, etc.). Also, the parties have the right to indicate the provisions on terminating the contract in the event of a unilateral refusal to perform the contract.

## 2. LEASE PAYMENT

### 2.1 Basic lease

The fee for Leased property use is paid by the Lessee in the manner, terms and in the form provided for by the contract, and is usually paid in advance on a monthly or quarterly basis, and, very rarely, annually. In practice the Lessors often provide Lessees with a brief Lease payment grace period for the time required to complete fit-out or renovation work.

The lease fee may be changed no more than once a year, unless otherwise provided by the contract.

### 2.2 Additional fee

The Lessee is usually charged additional fees for maintenance of common areas, cleaning of the Shopping Centre, maintaining security, marketing activities, etc. Lessees' consumption of utilities is measured by individual meters and paid as a variable portion of the Lease.

The Lessee participates in general marketing activities organized by the Lessor at the expense of the marketing fees paid by the Lessee. Any additional marketing activities carried out by the Lessee within the Shopping Centre or using its name usually require the prior consent of the Lessor.

In addition to the fixed part of the Lease, the large Shopping Centre the Lessor may provide the Lessee with an obligation to pay a certain turnover percentage for a specified period. Large anchor Lessees usually insist on paying only a certain percentage of their profits or income and on the elimination of a fixed portion of the Lease.

### **3. PREMISES AND LESSOR'S RIGHTS**

#### **3.1 Lease area**

A Shopping Centre consists of all premises, common areas and any adjacent external areas, which are usually occupied by parking spaces. The entire area of the Shopping Centre may be leased, with the exception of premises already leased to other Lessees and common areas necessary for the functioning of the Shopping Centre.

#### **3.2 Lessor's Rights**

The Lessor usually requires that the Lessee keeps the Shopping Centre in good condition, which includes the following obligations:

- any work or repairs supervision inside the Leased premises;
- access to the premises to monitor compliance with the lease terms, technical, environmental and other mandatory requirements, as well as to carry out necessary repair work inside the premises, affecting the entire Shopping Centre;
- certain services suspension (e.g. utilities), if the Lessee breaches the payment obligations;
- reviewing an accounting data on turnover in the premises;
- assignment of the rights and obligations of the Lessor under the lease contract.

On the other hand, the Lessor generally undertakes to exercise these rights in a manner that does not adversely affect the Lessee's business.

### **4. ASSIGNMENT AND SUB-LEASE**

The Lessee has the right, with the consent of the Lessor, to sublet the leased premises (sublease), transfer his rights and obligations under the lease contract to another person (transfer of lease) and provide the leased property for free use. The regulations of the lease contract are applicable to the sublease contract, the latter cannot be concluded for a period exceeding the term of the lease contract.

### **5. REPAIR AND FIT-OUT WORKS**

#### **5.1 Changes to the premises**

Lessees are prohibited from making any design changes, which may include any changes to the load-bearing elements of the premises or the Shopping Centre, including changes in security or energy efficiency. Generally, the Lessor is responsible for changes in accordance with the law, unless otherwise provided by the lease.

In addition, leases usually stipulate an approval procedure for the Lessee in order to obtain the Lessor's consent for the planned changes.

#### **5.2 Arrangements of the Lessee**

Lessees usually carry out their fit-out works under the Lessor's supervision and with Lessor's prior approval of the fit-out project. Lessees are often given a grace period for the time it takes to complete fit-out work. Most leases provide that upon the lease contract termination, the Lessee must remove any changes and return the premises to the same condition as at the beginning of the lease, or that any integral improvements made to the premises become the Lessor's property without compensation.

#### **5.3 Advertising and sign-plates**

Placing information signs is usually carried out by the Lessor free of charge for anchor Lessees, as this increases the consumer attractiveness of the Shopping Centre.

## 6. TRADE

According to the lease contract, the Lessee may be obliged to open trade exclusively during the opening hours of the Shopping Centre, with some exceptions, which usually entail the closure of the Shopping Centre at the initiative of government agencies or in cases of any accidents (for example: disruption of engineering systems, etc.). The Lessee may be fined for breach of such contractual obligation, and if the trade suspension period lasts for a long time, the Lessor may even try to terminate the lease.

The Lessee must operate under a certain trade name as specified in the lease. Any rebranding usually requires the Lessor's approval, unless otherwise provided by the contract.

It is a common practice among the Lessors to control the Lessee's opening hours, as all stores in the Shopping Centre must be open to the public during normal business hours. The lease usually contains a special clause, according to which the Lessee undertakes to comply with the rules of the Shopping Centre and the special rules of the lease. These documents describe in detail the rules for using premises in the Shopping Centre and the procedure for conducting retail activities. Lessee's breach may result in a fine or termination of the lease.

## 7. INSURANCE

### 7.1 Insurance

A common practice is Lessees' insurance of their civil liability in connection with the risk of harm to third parties (the Lessor, other Lessees, customers, visitors) during the operation of the leased premises or territory. The parties also insure their property (Shopping Centre and the Lessee's goods) against damage or theft.

### 7.2 Uninsured cases

Any uninsured cases are governed by the provisions of the Civil Code. In this case, the guilty party must compensate the damage and loss to the other party. Depending on the restrictive measures taken by the government authorities, a pandemic may be recognized as a force majeure circumstance. As a result the Lessee may be released from civil liability in the form of payment of penalties or compensation for losses.

## 8. FORCE MAJEURE AND COVID

A person who has not fulfilled or improperly fulfilled an obligation in the course of entrepreneurial activity shall bear property liability, unless he/she proves that proper performance was impossible due to force majeure, i.e. extraordinary and unavoidable circumstances under the given conditions (Acts of God, military actions, a state of emergency, etc.).

As for the situation related to COVID, in this case, the circumstances of force majeure do not refer to the quarantine or pandemic per se, but specific restrictive measures established by the government authorities that prevent or make it impossible to properly fulfill the obligation.

Therefore, in order to confirm the force majeure circumstances one must obtain the evidence of force majeure circumstances (force majeure), "Hardship" circumstances from the Foreign Trade Chamber of Kazakhstan.

At the same time, according to the Resolution of Kazakhstan's Supreme Court plenary session, the introduction and operation of a state of emergency has all the elements of force majeure.

## 9. OTHER TERMS

In the retail market, it is very common for the Lessor to post a bond (usually two monthly lease payments) to secure the fulfillment of the Lessee's obligations under the lease. Anchor Lessees usually agree to replace the security deposit with a bank guarantee with the maximum coverage of the same amount. The amount of such collateral is subject to annual indexation.

In new Shopping Centres, Lessors usually require Lessees to start fit-out works before the Shopping Centre goes live and impose severe fines on Lessees if they do not complete such works and open the premises to the public on the Shopping Centre's opening day.

### 9.1 **Data and privacy**

Generally, the Lessor is not entitled to oblige the Lessee to provide information regarding business transactions and products sold, unless otherwise provided by the lease contract. For example, a lease may require the Lessee to provide the Lessor with monthly receipts for calculating the payment for turnover.

### 9.2 **Anti-corruption clause**

Often, lease contracts include a standard anti-corruption clause as a separate annex, which prohibits the parties from taking action on the legalization / laundering illegal proceeds and other corruption offenses both between the parties to the contract and / or lease contract, and in relations with third parties, and government agencies.

## 10. **DISPUTE RESOLUTION**

### 10.1 **Dispute Resolution**

According to the law, a pre-trial dispute resolution procedure is provided only when the contract is changed or terminated. Disputes on other matters are resolved out of court only if it is provided for in the contract and legislation.

If the dispute is not resolved out of court, it must be addressed and resolved in the appropriate court of the Republic of Kazakhstan. The inclusion of arbitration clauses in a lease is extremely rare in practice.

According to the norms of the Civil procedure legislation of the Republic of Kazakhstan, if the plaintiff has not demonstrated his pre-trial proceedings to the court, the judge returns the claim, and if accepted at the stage of preparing the case for trial or at the stage of trial, the statement of claim remains without consideration.

### 10.2 **The recovery procedure for the unpaid Lease amount**

In case of non-payment of the Lease amount, the Lessor usually goes to court; however, prior to this, the Lessor shall comply with the pre-trial dispute resolution procedure and send the Lessee an appropriate notification demanding the debt payment. Furthermore, as stated above, if the Lessee fails to pay lease fee more than two times in a row, the lease may be terminated through the court. As an alternative to the court proceedings, the Lessor often writes off the lease arrears from the security deposit provided by the Lessee, or requires the payment of a surety or guarantee, if such methods of securing the Lessee's obligations are agreed by the parties in the lease contract in advance. There are also more practical, but rather harsh measures, such as disconnecting utilities in the Lessee's premises (water, heat and electricity).

Based on the foregoing, in order to conclude long-term lease contracts, with the establishment of the most favorable conditions both on the part of the Lessor and on the part of the Lessee, it is necessary to take into account judicial practice, business customs, and legal provisions and implement them accordingly in your contracts. In this regard, the preferred option for entrepreneurs is to attract qualified lawyers for the legal assessment and preparation of full-fledged lease contracts that fully protect their interests in order to minimize potential risks and avoid any shortcomings.

## LUXEMBOURG

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### Preliminary remarks

In Luxembourg, the law of 3 February 2018 on commercial lease and modifying certain provisions of the Luxembourg Civil Code (the “Law”) has significantly amended the regime applicable to such leases, namely leases of a building intended for the use as a commercial, industrial or craft activity – including shopping centre leases. The Law, reforming articles 1762-3 to 1762-13 of the Luxembourg Civil Code, came into effect on 1 March 2018 and was immediately applicable to all existing commercial leases.

### 1. TERM

#### 1.1 Contractual Term

Shopping centre leases may have a duration for a limited or an unlimited term. When no duration is specified in the contract, the lease is deemed to be granted for an unlimited period. There is no requirement for a minimum duration (article 1762-4(4) of the Civil Code).

In practice, the contractual term of shopping centre leases is usually for a period of 9 years for the majority of tenants and such leases are tacitly renewable for 3-year periods.

However, smaller businesses may lease their units for shorter terms, which are typically 3 years. Big anchor stores typically grant longer lease terms, which range between 15 and 20 years.

Leases granted with a term of one year or less (e.g. pop-up stores) are not governed by the Law and therefore are not considered to be commercial leases (article 1762-4(4) al. 4 of the Civil Code).

#### 1.2 Break Rights

The landlord’s right to break a lease is strictly restricted by the Law.

Leases with an unlimited term, and before or on nine years of occupation of the leased premises by the tenant may be terminated by the landlord at any time by serving notice on the tenant and without indemnity, subject to one of the following reasons (article 1762-11 of the Civil Code):

- for personal occupation of the leased premises by himself or his first-degree descendants (which will in practice probably never be the case with a shopping centre lease due to the fact that most tenants are corporate entities);
- in the event of abandonment of any rental of the premises for the same activity;
- in the event of reconstruction or renovation of the rented building.

After the tenant has been in occupation of the premises for a minimum of nine years, the landlord is also entitled to terminate the agreement at any time by serving notice on the tenant, subject to an eviction compensation being paid to the latter by the landlord himself or by a third party (article 1762-12 of the Civil Code).

Notice of termination must be sent by registered letter with acknowledgement of receipt to the other party at least 6 months prior to the termination of the lease (article 1762-7 of the Civil Code). The contract can provide for a longer notice period.

Without prejudice to judicial termination of the lease contract for breach by one of the parties, the parties are in principle bound by the term of the agreement when the term is for a limited period of time.

In the event that the tenant remains in the leased premises after the end of the lease, the landlord may request eviction (*déguerpissement*) of the tenant before the competent Court (*Justice de Paix*). Even when eviction is granted by the latter, the tenant/sub-tenant (when a sublet is permitted) may request suspension of eviction (*sursis à déguerpissement*) for a period maximum of 9 months (article 1762-9 of the Civil Code) if:

- all rents and advances on accrued charges have been paid in full on the day the application for suspension of eviction is submitted; and
- the aim of the suspension is to enable the applicant to find another building in order to continue his activity and to meet his obligations under employment contracts with the employees.

Once granted, the decision of suspension of eviction cannot be opposed or appealed.

Judicial evictions (*sursis à déguerpissement*) were suspended for a limited period in 2020-2021 due to Covid-19 crisis. This measure has now come to an end.

### 1.3 Renewal Rights

The right to request the renewal of a lease is granted to the tenant by the law (article 1762-10 of the Civil Code) and may not be suppressed by the terms of the lease. Any clause to the contrary is considered to be null and void.

The renewal request must be sent by registered letter with acknowledgement of receipt addressed to the landlord at least six months before the termination date of the lease. The landlord will then have 3 months to give its answer. The landlord may only refuse to grant the renewal of the lease under the conditions provided for by article 1762-11 and after nine years of occupation by the tenant as per article 1762-12 of the Civil Code (see 1.2. above on Break Rights).

### 1.4 Disputes and Forfeiture

Both parties are bound by the terms of the lease. Notwithstanding the comments under 1.2 above, the lease may only be terminated before the end of its term by mutual agreement or if one of the parties is in breach of the terms of the agreement in a way that the lease cannot continue.

A request for termination of the lease has to be submitted to the competent Court (*Justice de Paix*) and the facts are considered by the Court on a case-by-case basis. Case law considers the following facts to be sufficient to justify termination of the contract: failure to pay the rent or continuous late payment of the rent, refusal to provide a bank guarantee despite a contractual obligation to do so, subletting without the required approval and a change in the type of activity exercised by the tenant in the premises without the required approval.

## 2. RENT

### 2.1 Principal Rent

Rent is freely negotiated between the parties and is usually based on open market value. If both parties are subject to VAT, the latter can be payable on top of rent (currently 17%).

In the absence of any contractual provisions varying the standard position, the rent has to be paid in advance at the beginning of each month. Commercial leases may often require the rent to be paid quarterly. They may also include a period during which no rent has to be paid, for instance because the tenant has to undertake works on the rented premises before the commencement of its activity.

In case of subletting, rent paid by the sub-tenant must not exceed the rent paid by the tenant, unless the latter has made specific investments in the leased premises (article 1762-6(4) of the Civil Code).

It is also usual for the landlord to ask for a rental guarantee, either in the form of a first demand bank guarantee or in the form of a deposit. The amount of the rental guarantee must not exceed six months' rent (article 1762-2 (3) of the Civil Code).

In order to enable the landlord to recover unpaid rents, the tenant must furnish the leased premises with sufficient furniture (article 1752 of the Civil Code). The landlord has a lien (*privilège*) on the furniture and may seize and sell the furniture in order to recover the rent(s).

## 2.2 Turnover

There is usually no link between the tenant's turnover and rent. However, large shopping centres may impose a supplement to the rent, based on the tenants (mostly big brands) turnover.

## 2.3 Rent Review

Rent is usually linked to the national consumer price index and is reviewed on a yearly basis. Most leases state that rent reviews are upward only.

## 3. PREMISES

### 3.1 Extent of Demise

The rented premises are usually identified by means of cadastral numbers as traced on the official cadastral plan. Furthermore, the lease specifies the size and configuration of the rented premises and the surface area of the rented space measured from the centre to the walls (reference to BACS or RICS). A plan of the leased premises is often annexed to the lease.

The recitals of the lease or its first clause usually describes the building i.e. the shopping centre in which the leased premises is located (address, number of parking spaces etc.).

### 3.2 Common Parts

Tenants have access to the common parts of the shopping centre, such as the stairs, the elevator, the hallway, the parking etc. However, the commercial activity of the tenants may only be carried out in the leased premises. Any costs relating to the common parts are usually invoiced indirectly to the tenants by way of service charges.

### 3.3 Rights Reserved by the Landlord

In the event of any alterations to the premises by the tenant, the landlord usually reserves the right to have the premises returned to their original condition (except for normal wear and tear) at the end of the lease term. Alternatively, the landlord may choose to accept the modifications, but without any compensation to the benefit of the tenant.

Furthermore, the landlord usually reserves the right to visit the leased premises for inspection once or twice a year and to arrange for the premises to be visited by interested prospective tenants if the lease is coming to an end and is not being renewed with the current tenant.

## 4. RIGHT TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment and Subletting

Unless provided for otherwise in the lease, the tenant is allowed to assign and sublet the leased premises, in whole or in part (article 1717 of the Civil Code). If the landlord's prior approval is required, the tenant must notify the landlord of the proposed assignment or the sublet of the leased premise with a copy of the entire assignment or subletting agreement (article 1762-6 (2) of the Civil Code). Within 30 days of notification, the landlord may prohibit the assignment or the subletting if (i) the landlord has reasonable grounds to do so (*justes motifs*) or (ii) when the landlord or his family intends to live in a part of the leased premises. The decision by the landlord to refuse the assignment or the subletting may be challenged by the tenant before the competent Court (*Justice de Paix*) within 8 days of the tenant receiving the landlord's notification of refusal (article 1762-6 (3) of the Civil Code).

As per article 1762-6 (1) of the Civil Code, any provision prohibiting assignment or subletting is deemed to be null and void if the assignment or subletting is made together with the assignment of the tenant's good will (*fonds de commerce*) and if the new tenant will continue a similar business in the premises.

The tenant must be a joint and severable guarantor (*caution solidaire*) of the assignee or the sub-tenant for all of its obligations in the lease (article 1762-6 (3) of the Civil Code).

The landlord usually reserves the right to assign the lease (e.g. in the case of a sale of the property) while the tenant is authorised to sublet the leased premises in whole or in part to any corporate entity being part of the same corporate group as the tenant.

#### 4.2 Shared Occupation

It is unusual for a tenant to share occupation of the rented premises.

#### 4.3 Pre-emption Right

A tenant of a lease that has been running for at least 18 years enjoys a legal right of pre-emption in the event of sale of the leased premises. However, this right of pre-emption does not apply if the premises is given away for free, is the subject of a sale by public auction or is transferred to a member of the family of the landlord up to the third degree inclusively (article 1762-13 al. 1 of the Civil Code).

This right of pre-emption can be exercised on the condition that the tenant rents the entire building in which the leased premises are located or that the latter is placed under a co-ownership regime (article 1762-13 al. 3 of the Civil Code).

If the landlord sells the leased premises to a third party buyer without notifying the tenant of the sale pursuant to the procedure in the Civil Code, the tenant may claim damages from the landlord, which must be a figure of at least one year's rent (article 1762-13 al. 4 of the Civil Code).

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions Affecting Alterations

Any alterations to the premises are usually subject to the landlord's prior consent, not to be unreasonably withheld.

#### 5.2 Tenant's Fitting Out

The tenant may fit out the rented premises as long as such fit out works do not diminish the value of the premises or endanger its structural safety or aesthetics. The landlords prior approval of fitting out plans is usually required.

#### 5.3 Signage

The tenant may usually place signs at the front of the premises as long as such signs do not endanger the safety of customers and fits in with the general concept and design of the shopping centre. Some landlords allow the tenant to rent additional signage space (e.g. at the entrance of or outside the shopping centre).

#### 5.4 Repair and Decoration

The landlord is required to carry out major repairs such as to the structure of the premises.

The tenant is required to carry out maintenance repairs and has a general obligation to keep the premises in a good condition.

The landlord is authorised to perform all types of urgent repair works in the leased premises with no compensation being payable to the tenant unless the duration of such works exceeds 40 days. However, leases often provide that no compensation is due even if the works exceed 40 days.

### 6. TRADING

#### 6.1 Opening Hours

The tenant is usually required to keep the premises open during the shopping centre's opening hours, which may include Sundays. The landlord then grants the tenant access to the shopping centre and the leased premises during the shopping centre's opening hours.

## 6.2 Competition Rules

The business activity carried out by the tenant in the leased premises must correspond to the activity that is allowed by the landlord under the lease. The lease may prevent the landlord from letting other units in the same shopping centre to direct competitors of the tenant. However, the validity of such clauses is not guaranteed with regards to the landlord's contractual freedom rights and European competition rules.

## 7. INSURANCE

### 7.1 Insured Risks

The structure of the shopping centre is to be insured by the landlord, while the various tenants are to insure the contents of the leased premises (including furniture, goods, etc).

Insured risks include fire and related risks, terrorist attacks, work conflicts, accidental pollution, storm, hail, snow, theft and vandalism, damage caused by water and frost, breaking of glass and the costs, losses and liabilities linked to these insured risks.

### 7.2 Uninsured Risks

Risks that are typically excluded from insurance coverage are earthquakes, floods and loss of profit.

### 7.3 Business Insurance

Tenants are often required to have liability insurance, in order to cover the risks linked to their commercial activities in the leased premises.

## 8. SERVICE CHARGES

### 8.1 Typical Regime

In addition to rent, the tenant pays advances on services charges on a monthly basis.

The actual cost of service charges is calculated once a year and the necessary adaptations with regard to the advances already paid by the tenant will be accounted either to its credit or debit.

Furthermore, any taxes in relation to the rented premises are the tenant's contractual responsibility. Landlords usually try to achieve, as far as legally possible, a zero cost operation of the shopping centre with all the financial charges resting directly or indirectly upon the tenants.

### 8.2 Advertising and Marketing

Advertising and marketing costs incurred to the benefit of the whole shopping centre are typically invoiced to the tenants via service charges.

### 8.3 Tenants' Associations

Although they are not mandatory, shopping centre leases may provide that the tenant should join the tenants' association. However, the validity of such a clause in a lease is not guaranteed given the right to freedom of association.

## 9. FORCE MAJEURE AND COVID-19

As a result of the Covid-19 crisis, strict measures such as prohibition of certain commercial activities open to the public and the forced closure of some establishments were adopted by the Luxembourg government for several weeks in 2020. Luxembourg case law has established solutions to some of the issues created by these measures. In addition, most of the new leases entered into since mid-2020 include special force majeure provisions aiming to cover the consequences as a result of any future crisis similar to Covid-19.

In terms of payment of the rent, a decision dated 29 July 2020 (one of the first decisions on this issue) by the Luxembourg District Court ruled that "the administrative closure of the premises operated by the defendant

following the Covid-19 pandemic constitutes force majeure which is not attributable to the lessor". Here, the tenant was therefore bound to payment of rent.

In January 2021, additional case law then added that outside a period of compulsory closure of shops and even though the pandemic may have negative effects on the activity of the tenant in the leased premises, rents and charges are due in full from the latter due to the fact that the leased premises are available for the tenant's commercial activity.

Three decisions dated 28 June 2021 (TAL-2021-02457, TAL-2021-02480 et TAL-2021-00994) followed by subsequent decisions dated 12 July 2021 (TAL-2021-02935, TAL-2021-03029 et TAL-2021-04656) by the Luxembourg District Court, in its capacity to hear appeals, held that whilst applying the principle of execution of contracts in good faith, a reduction of the rent should be granted by the landlord to the tenant in the case of governmental restrictions that dramatically alter the contractual balance between the parties. The percentage of reduction was assessed by the Court by taking into account whether or not there was a prohibition to welcome the public, a lock-down, a curfew and/or a maximum number of customers allowed in the premises.

## 10. OTHER POINTS TO NOTE

A lease with a maximum duration of 9 years may be registered with the tax administration and a registration duty of 0.6% of the aggregate amount of rent paid during the term of the lease is payable. If the term is tacitly renewable, the aggregate amount is calculated on the basis of the first term and the length of the renewal term (e.g. for a lease of 9 years with 3 year tacit renewal periods, the duty is calculated on basis of 9+3=12 years).

The duty is reduced to a fixed cap of € 12 for the contract and € 12 for the annexes if both the tenant and the landlord are subject to VAT and choose to apply VAT to the rent. This fixed cap usually applies for shopping centre leases, provided that registration of the lease agreement is granted by the tax administration by the entry into force of the contract at the latest. When the tenant and the landlord decide to apply VAT to the rent, the lease agreement is only eligible for registration once the VAT option statement is approved by the administration.

The advantage of such a registration is that the tenant is protected against termination of the lease in the event of a change of ownership of the leased premises.

For a lease with a duration of more than 9 years, registration is mandatory. As a supplemental formality, the lease must be concluded in the form of a notarial deed and then transcribed at the mortgage office (*Bureau de la Conservation des Hypothèques*) at the place where the leased premises are located in order for the lease to have effect against third parties.

When a special layout plan (*plan d'aménagement particulier*) applies to the location of the building in which the leased premises are located, the lease must refer to the date of approval of the layout plan by the Ministry. Failure to do so enables the tenant to ask for cancellation of the lease before the competent Court.

Landlords are required to provide the tenants with a certified copy of the energy performance certificate (referred to in Luxembourg as an energy passport) for the building in which the leased premises is located. This must be provided at the latest of the completion of the lease. Energy passports are valid for ten years and are established by a certified body at the expense of the landlord. Failure of the landlord to provide an energy passport could result in the landlord facing imprisonment for a period between 8 days to 2 months and/or a fine of € 61 to € 24,789 (in accordance with the Grand-Ducal regulation of 9 June 2021 on energy performance of buildings).

# MOLDOVA

*Submitted by Turcan Cazac Law Firm*

## Preliminary Remarks

Lease agreements and the legal relationships that derive from them are regulated by the Civil Code of the Republic of Moldova. The recent amendments to the Code as introduced on 1 March 2019 further developed the law on leases. The Code regulates leases of movable and immovable goods and adds special rules for leases of agricultural lands.

Anyone is entitled to lease out a specific piece of property for a temporary use and/or possession. The lease agreement has to be made in writing. The lease may also be noted in the Registry of Immovable Property (Registrul bunurilor imobile) if the lessor wants better protection of the lease against any future owners of the property.

## 1. TERM

### 1.1 Contractual Term

Parties are free to determine the period of the lease provided that the term does not exceed 99 years. If the term of the lease is not set out in the agreement, the lease agreement is deemed to be concluded for an indefinite period, but not more than 99 years.

In practice, the lease term is usually around 1-3 years following which it is renewed as long as the parties agree to.

### 1.2 Break Rights

In business to business contracts Moldovan law is liberal and provides the parties with a large freedom to agree the terms of the lease, including any expended or discretionary termination rights or any restrictions on the statutory right to terminate.

Absent terms to the contrary in the lease, Moldovan law provides the following reasons for termination of a term-lease:

1. The Landlord is entitled to request the termination of the lease agreement if the Tenant does not use the leased premises pursuant to its intended use (“the destination”) or in accordance with the terms of the agreement.
2. The Landlord may also terminate the lease agreement if the lessee intentionally or negligently allows the condition of the premises to worsen or creates a real danger for such a worsening.
3. The Landlord may terminate the lease agreement if the Tenant’s fails to pay rent which is 3 months overdue
4. The Landlord is entitled to request the termination of the lease agreement if the Tenant concludes a sublease contract without the consent of the Landlord.
5. The Tenant is entitled to terminate the lease in certain cases. For Example, the Tenant is entitled to request the resolution of the lease agreement if he/she has lost his/her work capacity and cannot use the leased premises or he/she is arrested and cannot perform his/her contractual obligations. The Civil Code makes specific references to the fact that there can be other justified reasons detailed within the contract or in the law which allow the Tenant to terminate the agreement.

A lease of premises for an indefinite period may be terminated by either party by giving three months’ notice; the terms of the lease may change this default position.

### 1.3 Renewal Rights

The lease agreement may be renewed after its expiration. If the contractual relationship continues tacitly after the expiry of the term of the lease, it shall be deemed to be extended for an indefinite period of time.

At the expiration of the lease, the Tenant has the priority right to renew the contract for another term provided three conditions are met: (1) the Tenant has previously fulfilled its contractual obligations (2) the Landlord intends to lease the premises for a new term, and (3) the Tenant agrees with the new contractual terms set by the Landlord, such as an increase in the rent. Any security granted by a third party for the performance of the Tenant's obligations is transferred to a renewed lease.

### 1.4 Disputes and Forfeiture

The parties to a lease agreement may provide for alternative dispute resolution, such as arbitration. There are no tenancy courts in Moldova, instead the courts of common jurisdiction resolve tenancy cases.

## 2. RENT

### 2.1 Basic rent

Rent is usually paid on a monthly basis. Rent can be set in EUR or USD however a Moldovan Tenant must pay rent to a Moldovan Landlord in MDL at the exchange rate agreed in the contract. If the exchange rate isn't agreed in the contract, the rate will be at the official rate of the National Bank of Moldova on the payment date. The Tenant also has the right to request a reduction in rent if the conditions stipulated in the agreement for the use of the leased premises or its condition have worsened.

#### Additional rent

The payment of additional expenses is mandatory only if it is agreed between the parties. If during the use of the leased premises there have been obstacles due to the Tenant's fault, he/she will not be exempt from paying the rent.

It is customary to provide that Tenant will contract utilities by itself, but if it uses utilities via the Landlord, it shall reimburse the Landlord on a monthly basis, based on the invoices of the utility companies.

#### VAT

Leased property is subject to income tax. Pursuant to the Fiscal Code of the Republic of Moldova, natural persons or legal entities that carry out entrepreneurship activities have to pay 12% tax on their leasing income, while those that do not carry out entrepreneurship activities have to pay only 7% income tax.

### 2.2 Turnover

More complex commercial leases (such as leases of premises in shopping malls) allow for a portion of the rent to be based on the Tenant's turnover.

### 2.3 Rent Review

The rent may be reviewed by agreement of the parties. The Landlord can ask the court to adjust the rent by way of judgment only once a year and only if the economic conditions make the non-adjustment unfair, unless the Landlord has assumed the risk of changing economic conditions.

The Tenant has the right to request a reduction in rent if the conditions stipulated in the contract for the use of the leased premises or its conditions have become worse.

Moldovan law also enforces the doctrine of hardship, whereby a party may apply to a court to amend the terms of a contract or terminate it in case of exceptional circumstances which affects the equilibrium of the contract and if such party is not legally or contractually required to bear such a risk.

### 2.4 Procedures to recover unpaid rent

In case of non-payment of the rent, the Landlord may file a lawsuit to the court. It is recommended by the Civil Procedure Code that before the Landlord files such a lawsuit, the parties are encouraged to solve their conflict through the means of mediation. Before commencing court proceedings, the judge will ask both parties if they

tried mediation before coming to the court. On the other hand, if the court proceedings are preferred then the Tenant will pay for the missed rent, court proceedings and other penalties if it loses the case.

### **3. PREMISES**

#### **3.1 Extent**

The extent of the leased premises is described in the Register of Immovable Property. If the lease covers only a part of the immovable good, a cadastral plan of that part will be drawn up and attached to the lease agreement. The “part” can be a certain surface of a room, roof, etc. as long as it does not contravene with the essence of the lease. The parties may also stipulate in lease agreements that certain parts of the common area directly outside the shop front (usually not exceeding a width of 2 meters) are included or excluded in the lease. As a general rule, the building structure and the common areas remain with the Landlord.

#### **3.2 Extent of the Shopping Centre**

The Tenant may lease all the premises, common areas and any external areas adjacent to the Shopping Centre, except for the premises already leased by other Tenants and the common areas necessary for the functioning of the Shopping Centre.

#### **3.3 Common Parts**

All of the common parts of a Shopping Centre (such as halls, elevators, parking lots and atriums) can be used freely by the Tenant and its customers. The service charges for common parts of a Shopping Centre are agreed with the Landlord. Sometimes, additional fees may be collected from the customers, for example for the use of parking spaces. The Landlord usually provides parts of the common parts for rent, for instance, for installation of vending machines, ATMs, coffee stations, small shops, advertising structures or seasonal fairs.

#### **3.4 Rights Reserved by Landlord**

The Landlord has the right to verify the rented property, to perform necessary works on it and to present it to the eventual buyers or Tenants subject to the Landlord carrying out these rights reasonably.

The Landlord may also request damages for losses incurred on the leased property by the fault of the Tenant.

If the non-performance of an obligation provided in the lease agreement causes substantial damage to the Landlord or other Tenants, the Landlord may terminate the agreement.

### **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

#### **4.1 Assignment**

The Tenant is entitled to assign the leased premises or to transfer the lease subject to the Landlord’s consent. In order to obtain consent, the Tenant is obliged to inform the Landlord if its intention to assign and to indicate the name and the address of the person to whom he/she intends to sublet the premises or transfer the lease to.

#### **4.2 Underletting**

The Tenant has to obtain Landlord’s consent in order to sublet a leased premises. The Landlord cannot withhold consent to the sublease or assignment of whole or part of the lease if after the conclusion of the lease contract, a legitimate interest arises which allows the Tenant to give the property to a third party. This provision does not apply if the third-party person constitutes an impediment, the leased premises thus becoming overloaded or if, for other good reasons the Landlord cannot be required to allow the sublease or assignment of the lease.

#### **4.3 Sharing occupation**

Sharing occupation is not common practice and is typically carried out in the form of sublease, which is generally forbidden without the Landlord’s prior consent.

#### 4.4 Change of control

There is no implied change of control provision (i.e. change in majority shareholders etc.) in Moldovan law. The parties may include such a clause into the lease.

### 5. ALTERATIONS/REPAIR

#### 5.1 Alterations

Alterations are prohibited unless the Landlord gives his/her consent. Thus, the Tenant has to:

- Use the lease premises pursuant to the clauses of the lease agreement;
- Keep and assure the integrity of the lease premises;
- Cover the expenses for the use and maintenance of the lease premises;
- Carry out current repair to the lease premises shall it be necessary.

The current repair involves the necessary interventions as a result of the use according to the destination of the good and which, in a fair way, can be attributed to the Tenant, considering in particular the nature of the leased premises, the destination for which the term of the lease is used.

#### 5.2 Tenant's fitting out

Fitting out is to be carried out by the Tenant with the Landlord's consent and usually takes place under the Landlord's supervision. Upon termination of the lease agreement the Tenant has to remove any alternations it has made and return the premises in the same condition as it was at the beginning of the lease or that any inseparable improvements made to the premises become the property of the Landlord without compensation.

#### 5.3 Signage

Placement of informational signage is usually carried out by the Landlord free of charge for anchor Tenants, since it increases the consumer appeal of the Shopping Centre.

#### 5.4 Repair and decoration

The current repair is carried out by the Tenant as he/she uses the leased premises the most. However, general repair is carried out by the Landlord, except in circumstances where the damages are caused by the Tenant.

Decorations are generally allowed.

### 6. TRADING

According to the conditions agreed by the Landlord and Tenant in the lease agreement, the Tenant should remain open for trade during the Shopping Centre's working hours subject to certain exceptions such as the closing down of a Centre by the state authorities or malfunctioning of the utility systems. The lease agreement usually contains a special provision where the Tenant undertakes to comply with the rules of the Shopping Centre and special lease rules. Such documents describe the rules for using premises in a Shopping Centre and the procedure for carrying out retail activities in more detail. If a Tenant is in breach of its obligations, they make be penalized with fines or the lease may be terminated.

The Tenant is required to operate under a specific trading name stipulated in the lease agreement. Any re-branding is usually subject to the Landlord's approval.

### 7. INSURANCE

#### 7.1 Insured risks

As a general rule, both the Landlord and the Tenant obtain a third-party liability insurance. In addition, the Tenant will typically insure its property inside the premises during its fit out works, whilst the Landlord will insure the Shopping Centre.

## 7.2 Uninsured risks

Uninsured risks are subject to the provisions of the Civil Code of the Republic of Moldova. The provisions of the Civil Code stipulate that the party at fault will have to compensate the damages and losses of the other party.

However, this depends on the type of risk in question. For instance, a pandemic can be recognized as a force majeure circumstance whereby the Tenant can be released from civil liability in the form of paying penalties or compensation for losses, obligations under a lease agreement can be terminated, a lease agreement can be terminated or changed by court, although it is difficult to apply the last two pandemic consequences in practice as the court would investigate every particular case very closely.

## 7.3 Business insurance

It is a common practice for the Tenants to insure their civil liability against the risk of causing harm to third parties during the operation of the leased premises or territory. The parties may also insure their property from damage or theft. Business interruption insurance is not typically used in the Republic of Moldova.

## 8. SERVICE CHARGE

### 8.1 Typical regime

Tenants pay a fixed contribution for servicing the common areas, cleaning, maintaining security, marketing activities etc.

### 8.2 Promotions and marketing

Tenants can undertake common marketing activities at their own expense. Any additional marketing activities carried by the Tenants inside the Shopping Centre or using its name usually require prior consent from the Landlord.

### 8.3 Tenants associations

There is no such practice in the Republic of Moldova.

## 9. GREEN LEASE

Green leases are not yet a widespread practice in the Republic of Moldova. Waste recycling utilities are usually put at the disposal of the Shopping Centre, however it is not an important part of the lease agreement. The lease agreements may include provisions on organizing garbage collection, cleaning of the leased premises and overseeing compliance with technical requirements when operating hazardous production facilities and equipment.

## 10. FORCE MAJEURE AND COVID

COVID-19 is not viewed as a force majeure as it is an unpredictable and unexpected situation which disrupted the activities of both the Landlord and the Tenant.

The legal provisions of the Civil Code provide binary solutions to situations such as COVID-19:

1. Shall either one of the contracting parties be prevented from performing its contractual obligation (which means not performing its specific obligation under the specific lease agreement) then the non-performance of its obligation is justified if it is caused by an impediment beyond that party's control and if the party could not reasonably be required to avoid or overcome the impediment or its consequences;

2. If the contract becomes too detrimental (for example the economic value of rent has dropped sharply) the Tenant may argue that the rent is no longer justified and the contract is no longer useful. In this case, however, the Civil Code grants the right to the affected contracting party to request the renegotiation of the amount of the rent due to the exceptional change of circumstances.

## 11. OTHER POINTS TO NOTE

- 11.1 It is very widespread within the retail market for the Landlords to require a security deposit (typically being an amount equal to one month's rent) in order to secure the execution of the Tenant's obligations under the lease agreement.

In new Shopping Centres, it is usual for Landlords to require the Tenants to commence their fit-out works prior to the commissioning of the Centre and to impose strict penalties on the Tenants if they fail to finish such works and open the premises to the public at the opening day of the Shopping Centre opening day.

### 11.2 Tenant ESG data

The Landlord has no general right to oblige the Tenant to provide information related to business operations and the products sold, unless otherwise provided by the lease agreement. For example, the lease agreement may oblige the Tenant to provide the Landlord with trading data on monthly receipts for the purpose of calculating the turnover fee.

### 11.3 Money laundering

New provisions of Anti-Money Laundering Law have entered into force as of December 2020 and they cover all the business activities, including leases. The provision prohibits the parties from taking actions to legalize/laundry the proceeds of crime and other corruption violations both in relations between the parties to the agreement and in relations with third parties and state bodies.

### 11.4 Terrorism and security

The Landlord and the Tenant must comply with anti-terrorism laws and take any appropriate measures to do so. If the provisions of a lease agreement contrast the anti-terrorism and security legal provisions, then the former ones are void.

### 11.5 Prescribed form

A lease of a premises may be made in any form. If there is no written contract, the lease cannot be proved by witnesses. Most leases are in written form (signed by the parties). A lease may be noted (*notare*) by both parties in the Register of Immovable Property to ensure its enforceability against any subsequent owner of the premises. However, this is not a requirement for the lease to be valid.

There are no special forms of lease agreements to follow. As a minimum, a lease should define the premises and the amount of rent.

## THE NETHERLANDS

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### Preliminary Remarks

This section aims to provide a legal framework of the legal platform applied to lease contracts in the jurisdiction covered.

#### 1. TERM

##### 1.1 Contractual Term

Retail leases are usually entered into for an initial period of five or ten years, however parties can also agree to a longer term taking into account the minimum lease period as mentioned under paragraph 1.3 below.

##### 1.2 Break Rights

If a lease is entered into for an initial period of ten years or longer, a tenant is sometimes given a break option, for example, after the fifth or the tenth year. It is unusual for a landlord to have a break option. See under paragraph 1.3 below.

##### 1.3 Renewal Rights

A basic principle in Dutch leasing law is that retail leases are entered into for a period of "five plus five" years. This means that even if a lease is entered into for a period of less than five years, the lease is automatically - by operation of law - valid for a period of five years. If a lease period between five and ten years is agreed upon, the lease is valid for the agreed period.

Upon expiry of the five year term, the lease will automatically, by operation of law, be extended for another five years unless the lease is duly terminated at the end of the initial five year term. Unless the lease is duly terminated at the end of the initial lease term, a lease that is entered into for an initial term between five and ten years will automatically - by operation of law - be extended for a second term so that the total term of the lease (the initial term and the extension) will amount to ten years.

A lease which is entered into for a fixed period does not automatically end at the end of the agreed term. For the lease to end, a termination by one of the parties or the mutual agreement of parties is required. Naturally, this also applies to an indefinite lease. A notice period of at least 12 months applies.

A tenant may terminate a lease as per the end of the lease term without having any reason for termination. The termination options of a landlord are more limited. If the tenant does not agree with termination of the lease, the landlord must request the court to terminate the lease. If the lease is to be terminated before the first ten-year period has lapsed, the landlord may only successfully base the termination on one of the grounds listed in article 296, section 1, of Book 7 of the Dutch Civil Code (DCC). Those grounds are as follows:

- i. the tenant has not been operating his business in a manner befitting a good tenant; or
- ii. the landlord urgently needs the leased property for the landlord's own personal use.

After the first ten year period, or any time after that, the landlord has additional grounds on which the lease may be ended:

- iii. the landlord wishes to put the leased property to a use permitted under an applicable zoning plan;
- iv. the tenant does not agree with a reasonable offer to enter into a new agreement for the leased property; or
- v. the interests of the landlord in terminating the lease outweigh the interests of the tenant extending the lease.

Sometimes the tenant is given the option of extending the lease for one or more extension periods (usually of five years each) after the expiry of the initial term of the lease. If the tenant exercises this option, the landlord cannot terminate the lease.

If a lease is not duly terminated at the end of a current lease term, and if the lease does not provide for any further lease terms or for optional extensions for specific periods, the lease will consequently be extended for an indefinite period of time, but still be subject to termination by one of the parties.

The system described above does not apply to leases entered into for a period of two years or less. Furthermore, parties may agree to contract out of the system described above, but only for the benefit of the tenant or with the approval of the court. See also under 11 below.

## Disputes and Forfeiture

### 2. RENT

2.1 The initial rent will generally be based on the open market value. At the beginning of a lease term, a tenant will sometimes be granted a rent-free period (of for example three months) or a capital contribution in lieu.

2.2 Turnover tax provisions are common in Dutch leases. The leasing of immovable property is in principle not subject to turnover tax in the Netherlands. It is however beneficial for both parties if the leased property is indeed subject to turnover tax. This option is available to the parties if the leased property is continuously used by the tenant for at least ninety per cent for activities that entitle deduction of turnover tax. The landlord and the tenant either declare in writing in the lease agreement that they elect for VAT to be charged on the rent (in which case the lease agreement should then include specific details) or otherwise are required to make a joint application to the tax authorities indicating that they elect for VAT to be charged on the rent. Opting for VAT in the lease is of course easier for both parties.

2.3 It is common to include a clause dealing with the situation of the leased property - for whatever reason - no longer being subject to turnover tax which clause usually contains a full compensation of the landlord and its successors for the non-deductibility of VAT charged over exploitation costs and investments.

#### 2.4 Rent Review

According to article 7:303 DCC, either party may apply to the court for adjustment of the rent. Under Dutch law, rent adjustment is allowed (i) upon expiry of the agreed term if the agreement is valid for a fixed period of time and (ii) in all other cases, whenever at least five years have expired since the day on which the rent last determined by parties or by the court took effect.

This is a mandatory condition that cannot be contracted out of to the disadvantage of the tenant without the permission of the court. However, the parties may at any time agree on a rent adjustment based on the open market value or on another basis.

A court claim for rent adjustment can only be allowed if the claim is accompanied by an expert opinion prepared by one or more experts appointed by both parties (article 7:304 DCC). When adjusting the rent, the court will consider the average rents for comparable business accommodations in the area in the five-year period prior to the day on which the claim was made. Therefore, the court's decision will not be based on open market value.

Furthermore, a Dutch retail lease ordinarily states that the rent will be indexed each year.

#### 2.5 Procedures to recover unpaid rent

If a party breaches the contract, the other party may terminate the lease unless the breach of contract is not serious enough or the nature of the breach is such that dissolution of the lease is not justified (article 6:265 DCC). Before enforcing a right of forfeiture for any breach, a party must serve a notice on the other party in which the other party is given (if still possible) a reasonable time to fulfil its obligations. Notice is not necessary if a fatal term is not kept.

A tenant can dissolve a lease without involving the court, but a landlord cannot. Case law shows that non-payment of the rent for three months, or being frequently in arrears, will usually be sufficient for the court to find a serious breach and hence allow dissolution of the lease.

If one party breaches any term of the lease, the other party may be entitled to compensation or (if still possible) specific performance.

Leases ordinarily do not contain a dispute resolution clause; but if they do, the clause usually states that the competent Dutch civil court has jurisdiction over a dispute. The consensus is that Dutch law does not permit leasing matters to be resolved by arbitration.

### **3. PREMISES**

#### **3.1 Extent of Demise**

A tenant ordinarily leases the whole unit (including both the interior and exterior of the unit). The landlord usually is responsible for the maintenance of the structural parts of the leased property (e.g. maintenance of the roofs, walls, floors etc.), while the tenant usually is responsible for non-structural repair and maintenance, such as the maintenance, repair and renewal of door and window furniture, glazing, roller shutters, switches, power sockets, bell systems, light-bulbs, lighting (including fittings), internal paintwork, sinks, kitchen equipment and sanitary ware, pipe-work and valves for gas, water and electricity, and fire-prevention, burglary-prevention and theft-prevention measures and everything pertaining thereto, and the regular maintenance and testing of all technical systems pertaining to the leased property, including the replacement of any small components.

#### **3.2 Extent of the Shopping Centre**

The Shopping Centre will usually be the actual centre including common areas as it is on the date of the lease, plus any future extensions the landlord may add during the term of the lease.

#### **3.3 Common Parts**

The tenant will be given the right to use common parts in the centre (e.g. the mall area, communal washrooms, and other communal areas). The landlord will be responsible for the maintenance of these common parts and will recover most of the costs through the service charges.

The landlord may use the common parts for (other) commercial activities (such as advertising and/or any other use) unless the landlord has the contractual obligations with (any of) the tenant(s) not to do so.

#### **3.4 Rights Reserved by landlord**

The landlord will as a rule reserve the right to extend or otherwise make alterations to the leased property and the Shopping Centre. Often parties agree that in that case the tenant will not be entitled to a reduction of the rent, dissolution of the lease or damages. The landlord also usually reserves the right to change the packet of services provided by the landlord and to enter the leased property to carry out inspections.

Most leases also have a provision pursuant to which the landlord has the right to enter the leased property in case of emergency, but also to check whether the tenant is compliant with the lease agreement.

### **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

#### **4.1 Assignment**

A tenant has the right to assign all rights and obligations under the lease if the conditions referred to in article 7:307 DCC are fulfilled. This right cannot be contracted out, not even with the permission of the court. If a landlord is not willing to cooperate with an assignment, the tenant may apply to the court for leave to make the assignment.

Article 7:307 DCC provides that if the tenant wishes to transfer the business carried out in the leased property, the tenant may apply to the court for leave to be substituted by a third party as tenant. The court will take into account the circumstances of the particular case. The court can only award the claim if the tenant has a

substantial interest in the transfer of his business. The court will reject the claim if the proposed tenant does not offer sufficient safeguards to ensure performance of the agreement in full and to ensure sound management.

#### 4.2 Underletting

Under article 7:221 DCC, sublease of a leased property is in principle permitted. This is not a mandatory provision, which means the parties can contract otherwise. In most leases, the tenant is prohibited from subleasing the leased property without the prior written consent of the landlord. Sometimes, however, a tenant is entitled to freely sublease the leased property to an affiliated company.

Some leases include a stipulation that the landlord may not refuse to give its permission to a sublease if the proposed subtenant is of the same creditworthiness and standing as the tenant.

#### 4.3 Sharing occupation

When there are two or more tenants of the same leased property, the lease generally stipulates that all tenants will be jointly and severally liable for the obligations under the lease.

#### 4.4 Change of control

Most of the recent lease agreements for retail space in the Netherlands (based on the ROZ model) include a change of control provision in the general terms and conditions pursuant to which the parties are obliged to timely inform each other about any changes in their organisation. The change of control provision does not include a consequence of not complying with the obligation to inform about a relevant change, however article 6:265 DCC as described in paragraph 2.4 above applies to such breach.

### 5. ALTERATIONS/REPAIR

Alterations to the leased property that can be undone at the end of the lease without noticeable costs are permitted without the prior written consent of the landlord. The landlord also must allow alterations that are necessary for the efficient use of the leased property if the interests of the landlord are not seriously harmed by the alterations.

Unless agreed otherwise landlord is responsible for statutory requirements to carry out alterations e.g. energy efficiency improvements and entry for disabled persons etc.

The tenant's fitting out of the leased property usually has to be completed prior to the centre opening date, when the centre is in its development phase. The landlord will generally want the right to approve how the lease property is fitted out.

Parties have the freedom to agree as they wish, however in most of the Dutch leases the tenant remains the owner of tenant's fit out works. If the parties would agree that the tenant's fit out can be left behind by the tenant, the lease will in almost all cases include a provision that the landlord is not obliged pay any compensation for the fit out works.

### 6. TRADING

6.1 Most leases contain a clause requiring the tenant to keep the premises open and trade during the centre's trading hours, which could include Sundays and holidays.

6.2 Landlords of shopping centres usually have a handbook with house rules in place in which - amongst others - the tenant is obliged to adhere with the opening hours set by the landlord, but also rules about shop replenishment.

6.3 Other than in case of office space it is very uncommon that in Dutch leases for retail space the landlord is prohibited to let to competitors. Radius clauses are more common and are mostly seen in leases for factory outlets centres.

## 7. INSURANCE

### 7.1 Insured risks

The landlord will insure the centre (including the premises let to the tenant) against a standard set of insured risks. If the insurance premium is higher than the normal premium because of the use the tenant makes of the leased property, the extra premium will have to be paid by the tenant.

### 7.2 Uninsured risks

The risk of damage by an uninsured risk (e.g. terrorism) is not an issue in the Netherlands in a leasing context.

### 7.3 Business insurance

Although most leases remain silent on this point a tenant will take out a business interruption insurance and will insure against damage to its fixtures fittings and stock.

## 8. SERVICE CHARGE

8.1 The landlord will ordinarily - but not always, because the parties have to agree on

this - be responsible for providing various services for the benefit of the tenants in the centre. The services can vary depending on the nature of the centre, but standard items include amongst other things the following: cleaning, heating and hot water, air conditioning, security and provision of staff to service the centre. The landlord will recover the costs of providing these services through the service charge. The tenant will be required to pay a service charge in advance based on budgeted expenditure, with a reconciliation at the end of the service-charge year.

The service charge will usually be enough to give the landlord the ability to employ managing agents and contract out services. The costs of doing so will be recovered through the service charge.

The usual method of determining the amount of the service charge is on a weighted floor space basis.

### 8.2 Promotions and marketing

The costs of promotion and marketing of the centre are usually charged to the tenants.

### 8.3 Tenants associations.

Usually a tenant's association is active in Shopping Centres, particularly large Shopping Centres. Tenants are often required under the lease to become members of this association, but can't be obliged to be maintain membership. The constitutional right of association implies that nobody can be forced to stay a member of any association. Furthermore, a (tenant) member can terminate its membership based on article 2:36 paragraph 3 DCC 'after a member becomes aware of a decision that aggravates the member's obligations.

## 9. GREEN LEASE

The ROZ retail lease model of 2012 contains a green lease provision in which landlord and tenant acknowledge the importance of sustainability and agree to support each other to achieve their jointly formulated green lease targets. Usually professional landlords have their own standard of green lease conditions which are implemented in the lease. From the (European) government there are regulations that oblige property owners, including landlords, to take measures to promote sustainability. Under these regulations, the owners of buildings must assess their building for energy performance (Energy Performance Certificate), but some owners or landlords are also obliged to take energy-saving measures or periodically carry out a so-called 'energy audit' (on the basis of the Environmental Management Activities Decree or Article 8 of the European Energy Efficiency Directive 2012/27 / EU).

The EED directive applies to member states, but also contains provisions that apply to companies and possibly to landlords of shopping centres. In the Netherlands, part of the provisions of the EED Directive, including the energy audit obligation, is laid down in the so-called 'Temporary Regulation Implementation Art. 8 and Art. 14

EED Directive'. On the basis of the Temporary Regulation, the person who runs a large enterprise must carry out an energy audit every four years and prepare a report of such audit. The intention is that this audit leads to measures that lead to maximum energy savings. Compliance with the Temporary Regulation is supervised by the competent authority and enforcement action can be taken by imposing an order subject to a penalty or an administrative fine.

## 10. FORCE MAJEURE AND COVID

In almost all Dutch leases (since these are based on the so called ROZ model) (i) the tenant is obliged to trade from the leased property and (ii) the right to rent reduction and rent deferral rights are excluded. It follows from Dutch case law that the courts consider the loss of revenue due to COVID as unforeseen circumstance in the sense of article 6:258 DCC. If the loss of revenue as a result of an unforeseen circumstance (such as COVID) has not been taken into account for the rent amount, this constitutes a fundamental imbalance in the lease. In that case the landlord may not expect an unaltered continuation of the lease. The courts have decided depending on the specific circumstances of the case that (i) the duty to operate from the store can be cancelled and (ii) a rent reduction of approximately 50% can be granted if as a result of measures imposed by the government only limited use of the store is possible and/or if the store has to close completely. The exact rent reduction depends on the specific circumstances of the case. The tenant will have to provide evidence of the loss of revenue.

## 11. OTHER POINTS TO NOTE

From a landlord's point of view, it is advisable to add a detailed description of the condition of the leased property (delivery report) as an annex to the lease. According to article 7:224 DCC, the tenant has to deliver the leased property at the end of the lease in accordance with the delivery report unless otherwise agreed upon, and save for the consequences of normal wear and tear. If there is no delivery report, the tenant is allowed at the end of the lease to deliver the leased property in the state in which it is in at that time, unless the landlord proves this is not the state that it was originally in or is not in accordance with other agreements.

In general, Dutch leasing law with regard to retail space is favourable to the tenant. Most of the applicable law is semi-mandatory, meaning that parties can only deviate from the statutory provisions in favour of the tenant. It is however still possible with the approval of the court to depart from the statutory provisions even if this departure is not in favour of the tenant. The approval will only be given by the court if the proposed clause does not affect the tenant's rights under the applicable law or if the social position of the tenant, in comparison to that of the landlord, is such that the tenant does not reasonably need the protection of the applicable law.

For leases in the Netherlands model retail leases and model general terms and conditions have been issued by the Dutch Real Estate Council (*Raad voor Onroerende Zaken*) and are often used. These ROZ models are landlord friendly, parties can however negotiate and agree deviations from the aforementioned general terms and conditions.

## POLAND

By

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### Preliminary remarks

Set out below is a statutory framework of a lease agreement in a typical shopping center signed between two entrepreneurs. This contribution concerns solely legal provisions and the general practice in Poland. It does not refer to any particular practical situation that can be identified as a particular commercial relationship.

## 1. TERM

### 1.1 Contractual term

Under the statutory provisions, a lease in a shopping centre can be signed for a maximum fixed term of 30-years, or for an indefinite term. In the latter case, the lease can be terminated at any time upon 3 months' termination notice which will be effective at the end of the calendar month.

### 1.2 Break rights

According to the Civil Code, the parties are free to agree the break options. For example, the parties may provide the tenant with a right to withdraw from the lease after an agreed term of, e.g., 5 years. This right may be subject to various conditions i.e., agreed sales thresholds not being met.

### 1.3 Renewal rights

Under Polish law none of the parties to a lease have a statutory right to renew the lease on expiry. If the parties continue the lease after the expiry date it is considered that the lease has been extended for an indefinite period of time. The parties may include various renewal options in the lease.

### 1.4 Disputes and forfeiture

Under Polish law, either party to a lease has a contractual right to terminate the lease in the event of the counterparty's breach of its contractual and essential obligations.

It is prohibited to terminate a lease if a court declares the bankruptcy of one of the parties to the lease.

A party to a lease may terminate the lease in the event of the other party's failure to comply with any of its material obligations under the lease and its failure to remedy such non-compliance within an appropriate period of time after receipt of written notice of such failure from the terminating party.

If one of the parties breaches the lease terms, the other party may bring an action for damages for breach of the covenant, although it would have to prove its loss in those circumstances. For arrears of rent (and additional amounts such as service charges and insurance), the landlord may also put a statutory lien on any of the tenant's property remaining on the premises.

Typically, leases do not contain a general dispute mechanism clause. However, some leases do include a clause for resolving disputes by arbitration.

## 2. RENT

### 2.1 Principal rent

According to the statutory provisions, the parties may freely agree the amount of the rent. They may also agree reimbursement of the landlord's costs pertaining to the shopping centre.

## 2.2 Turnover

Turnover is not regulated in the statutory provisions. However, the parties are free to agree provisions in this regard. For example, the tenant agrees to pay the base rent as the minimum rent, plus top-up rent linked to the turnover in excess of the base rent- that is, turnover rent is paid only if the tenant's turnover exceeds the base rent, and only in the amount of the difference between the turnover rent and the base rent.

## 2.3 Rent review

There are no statutory provisions involving any rent indexation. However, under the Civil Code, it is permissible to agree indexation in an agreement. It is also worth mentioning that, according to the Civil Code, the landlord may increase the rent by terminating the current amount of rent at the latest, one month in advance, at the end of a calendar month. This right may, however, be excluded by agreement.

## 2.4 Procedures to recover unpaid rent

Landlords have a statutory lien on the tenant's movables in the leased premises to secure the rent and other dues for which the tenant is in arrears for more than one year. The Civil Procedure Code also foresees that the tenant may provide a special statement that allows the landlord to start legal enforcement proceedings without lengthy court proceedings. This statement only requires the court's immediate approval in simplified proceedings that usually take only a few weeks. The statutory provisions also allow for a lease agreement to contain additional securities such as a cash deposit or bank guarantee securing the tenant's dues. Finally, according to the Civil Code, the landlord is authorised to terminate the lease agreement in the case of arrears that were not settled with the bank guarantee/deposit and which exceed two months' rent, where such payments were not settled after the landlord's notice.

# 3. PREMISES

## 3.1 Extent of premises

A lease agreement refers to defined premises.

## 3.2 Extent of the shopping centre

Under the statutory regulations, the tenant shall have access to its leased premises. The premises must also be free of defects that could hinder their proper use. There are no statutory provisions on extensions of the shopping centre. Obviously, any such extension shall have no adverse effect on the tenant's rights and obligations under the lease.

## 3.3 Common parts

The statutory provisions do not refer to any use by a tenant of common parts of the shopping centre (e.g. pavements, car park, washrooms, refuse areas, other communal areas). However, it is obvious that, at least to certain extent, the tenant must possess such a right to properly use its premises. The landlord is responsible for maintaining those common parts, and recovers its costs through the service charges. The landlord has a right to use the common parts for commercialisation, i.e. locating stands or temporary sales points.

# 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

## 4.1 Assignment

The tenant is not allowed to assign the lease to any third party without the prior written consent of the landlord, though it may be agreed otherwise in the agreement.

The landlord usually has the right, without the tenant's consent, to assign any or all of its duties under the lease, though it may be agreed otherwise in the agreement.

#### 4.2 Subletting

Under the Polish law, the tenant cannot grant any sublease, management, use or franchise with respect to the premises to any third party without the prior written consent of the landlord in each instance. It may be agreed otherwise in the agreement.

#### 4.3 Sharing occupation

The same rules apply as to a subletting.

#### 4.4 Change of control

This is not covered by any statutory provisions. A lease agreement may contain provisions on a change of control and assignment.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions affecting alterations

Alterations to the premises are usually forbidden.

#### 5.2 Tenant's fit-out

There are no statutory provisions involving the tenants' fit-out. The parties to a lease agreement are allowed to contain such provisions in the agreement.

Upon the expiry of the lease, the tenant is responsible for restoring the premises to their original state, i.e., as they were at the time of the handover to the tenant after the landlord's fit-out works.

#### 5.3 Signage

Under the law, tenants are generally allowed to use their own signage. The lease agreement may provide terms and conditions.

#### 5.4 Repairs and decoration

According to the law, the Tenant is obliged to keep the premises in good repair. The landlord is responsible for repairs to the structure and common parts of the shopping centre. The parties may agree that the landlord recovers those costs through the service charges. The parties may also agree other rules concerning repairs and decoration.

### 6. TRADING

#### 6.1 Keeping open

There are no statutory provisions involving any requirement to keep the premises open and trading during the shopping centre's trading hours. The parties are free to include any such provisions in the lease agreement.

#### 6.2 Trade names

The statutory provisions do not limit the tenant to operating only in the premises under the shop sign initially approved by the Landlord at the signing of the lease. However, the parties may agree otherwise in a lease agreement.

#### 6.3 Competition rules

Provisions restricting the landlord from leasing other premises in the shopping centre to direct competitors of the tenant or restricting the tenant from running competitive activities within a certain distance from the shopping centre may be deemed as limiting the fair market competition and therefore this may not be legally possible.

## 7. INSURANCE

There are no statutory provisions imposing any insurance obligations. The parties may agree otherwise.

## 8. SERVICE CHARGE

### 8.1 Typical regime

There are no statutory provisions concerning service charges. However, the parties may agree that, e.g., the landlord is responsible for providing various services to the shopping centre. These can vary depending on the nature of the shopping centre, but may, for example, include repairs, cleaning, insurance, heating and hot water, air-conditioning, maintenance of common parts, security, and the provision of staff to service the shopping centre. The landlord then recovers the costs of providing these services through the service charge regime, under which the tenant is required to pay a service charge in advance, based on the budgeted expenditures and reconciled at the end of each service charge year.

### 8.2 Promotions and marketing

There are no statutory provisions concerning promotions or marketing. The parties to the lease agreement may agree such services and the costs thereof.

### 8.3 Tenant's associations

There are no statutory provisions on tenant's associations.

## 9. GREEN LEASE

This scope is not governed by any statutory provisions.

## 10. FORCE MAJEURE AND COVID

In principle, Covid events are perceived as force majeure. However, they normally do not directly impact the parties' ability to perform the lease, and so the provisions on force majeure usually do not apply.

However, the Civil Code foresees the institution of an extraordinary change of circumstances, which may allow a common court to amend or even terminate a contract. This right is vested only in the courts, and only if, due to such an extraordinary change of circumstances, the performance of the agreement would be associated with excessive difficulties or would result in a gross loss to one of the parties that the parties did not envisage when concluding the contract. As a result of the Covid-19 pandemic and the imposition of various restrictions by the Polish government (including the closure of shopping centres whose sales area exceeds 2000 sqm), many tenants saw a severe reduction in sales income while still being obliged to pay rent and other dues under their lease. This caused massive renegotiations of lease conditions on the market. Renegotiations are not required under the law, and lease agreements rarely provide for such an option. The vast majority of these renegotiations were successful. In other cases, tenants brought civil court actions against their landlords, demanding a reduction in the rent based on an extraordinary change of circumstances. We can expect the outcome of such cases in the future.

There were also new legislative acts adopted which either - temporarily during the full lockdown - suspended both parties' obligations under the lease agreements in shopping centres (with a sales area exceeding 2000 sqm), or substantially decreased those obligations during the lockdown and in the months that followed. Initially, such a decrease was subject to the tenant making an offer to the landlord for an extension of lease term by 6 months + the duration of the lockdown.

At present, a rent decrease is not conditional on such an extension. Under the law, during the lockdown (involving the closure of shopping centres whose sales area exceeds 2000 sqm), rent and other tenants' payments stemming from lease agreements concluded before 14 March 2020 are reduced by 80% and by 50% for the following 3 months. It must be noted that it is not clear whether this reduction also applies to service charges. At the same time, there are additional provisions giving parties the right to request that the court decide differently as to the reduction. After considering the interests of the parties, the court may set the

amount of the reduction, the manner of performance, or change the period in which the tenant is entitled to benefits in the reduced amount.

The Covid-19 regulations on leases are changing. There are still many loopholes, and almost no jurisprudence or decisions of higher instance courts in similar cases that can be relied on.

## **11. OTHER POINTS TO NOTE**

- 11.1 Tenant ESG data: There are no statutory provisions concerning this.
- 11.2 Money laundering: under the Anti-Money Laundering Act, landlords do not have any specific obligations with regard to lease agreements in shopping centres.
- 11.3 Terrorism and security: There are no statutory specific obligations for tenants.
- 11.4 Prescribed form: lease agreements involving premises for a period longer than one year should be concluded in writing. Otherwise, the agreement is deemed as being concluded for an indefinite period and can be terminated by notice of termination.

## PORTUGAL

By

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### **Preliminary Remarks**

In Portugal, Shopping Centre promoters and developers steered away from the lease contracts regulated by the Portuguese Lease Law and developed an atypical contract regulating extensively the relationship between the owner of the Shopping Centre and the party whom a right to use a unit of the same is granted, as well as the rights and obligations of the parties.

In contrast, landlords and tenants, the Courts and subsequent case law have adhered to the concept of the Shopping Centre as an establishment in its own right. The tenants therefore understand they are participating in an integrated retail environment and they are being granted the right (and obligation) to use the premises for the operation of a business with a clearly defined use, with the benefit of an ambient shopping environment with all appropriate services duly established, managed and provided by the entity promoting or managing the Shopping Centre (the landlord).

This utilisation agreement is clearly accepted to be an atypical contract and therefore not subordinate to the usual statutory provisions relating to Lease Law and where the parties are free to determine the rules of their relationship within the principles of the civil law.

It should be noted that the use in this document of expressions such as lease, landlord, tenant and rent, does neither imply the application of the Portuguese Lease Law nor invokes the context of a lease.

### **1. TERM**

#### **1.1 Contractual term.**

There is no mandatory minimum/maximum duration although typically the agreements are set for a duration of six (6) years; nevertheless, usually anchor/key tenant contracts may contain a duration clause of ten (10) to twenty-five (25) years.

#### **1.2 Break rights.**

Usually neither landlord or tenant have the right to break the contract although an exception is made in cases of anchor stores and/or key tenants where it is not unusual for the tenant to have the right to break the contract after a minimum number of years and/or on pre-fixed dates.

#### **1.3 Renewal rights.**

There is neither any right of renewal for the tenant nor an eviction indemnity payable by the landlord. It is not market practice to grant preference rights and/or pre-emption rights.

#### **1.4 Disputes and penalties.**

As per market practice, utilisation agreements stipulate the tenant's material obligations and if any of these material obligations is breached, the landlord is entitled to terminate the contract. Normally, such breaches lead to termination upon prior notice, the owner must serve on the shopkeeper a termination notice, usually granting the tenant eight (8) to thirty (30) days to comply or remedy the breach). Only the tenant's failure to remedy the breach in a given period will entitle the landlord to terminate the contract effectively.

The utilisation agreement also stipulates that the landlord does not need to obtain a court decision to regain possession of the shop if the tenant does not voluntarily surrender the unit upon the expiry of the lease term, or upon the exercise of a contractual break option, and in other cases upon termination i.e., because of a tenant's breach of contract.

Disputes are by default and generally, subject to the Courts and not to arbitration or mediation. However, it is possible to agree in writing alternative methods of settlement for specific disputes but this is not extended as market practice. Therefore, the court is often, and usually by default, the method of remediation elected by the parties in the contract.

Penalties are usually pre-fixed in the contract, usually for the purpose of deterring rather than a real punishment. Contracts usually provide that the application of penalties does not affect the right to compensation for excess damages. It is also common to establish in the contract the amount of compensation to be paid in an event of termination of the contract due to a breach by the tenant.

## 2. RENT

The usual retribution payable by a tenant for premises leased within a shopping centre is a scheme of base (fixed) rent and turnover rent (related to sales).

### 2.1 Base rent.

Tenants are required to pay monthly a base rent freely agreed on by the parties.

### 2.2 Turnover rent.

Turnover rent is market practice in the Portuguese Shopping Centre Contracts context and is calculated on a monthly basis, determined by the positive difference between a certain percentage of the tenant's monthly gross sales (VAT excluded) and the base rent due for the same month. Declaration of turnover is made on a daily basis although in some anchor stores/key tenants it can be agreed on a weekly or monthly basis. The turnover rent usually includes the online sales that are linked in any manner to the premises.

### 2.3 Rent review.

The general rule is that the base rent is reviewed yearly according to the CPI Index.

In some cases, parties use alternative criteria for rent review, notably by incorporating part of the value of the previous year's turnover rent into next year's base rent, where by way of this method the rent increase is higher than if reviewed by the CPI index. The application of this alternative criteria is only applied for some of the contractual anniversaries and not as a method of annual review.

### 2.4 Procedures to recover unpaid rent.

Tenants are usually required to provide a performance bond, either a security deposit or a bank guarantee covering a certain number of months of base rent and common expenses (including promotion costs) plus VAT. The guarantee usually covers not only the payment of rent and other charges, but it is a security for the good performance by the tenant of all the terms, covenants, obligations and conditions of the lease, including penalties, compensations, etc.

The utilisation agreements provide the landlord's right to terminate the contract in the event that the tenant fails to comply with its payment obligations. Usually, a customary remedy term is granted to the tenant before such termination of the contract is enforced.

## 3. PREMISES

### 3.1 Extent of demise.

The tenant will normally be let the interior of the unit only so that the structure of the unit and Shopping Centre remains with the landlord. The surface is calculated following technical criteria included in the lease agreement or in its annexes, also including the layout.

When contracting stores that have already been definitively built after the opening of the Shopping Centre, the parties accept that any difference between the area mentioned in the contract and the real area is irrelevant. When contracting stores in a Shopping Centre that is under construction or when contracting new stores resulting from a change in the Shopping Centre layout, it is customary for contracts to set the criteria for

measuring the store area and the consequences of area differences that are considered relevant (usually greater than 5%).

If any other area is let (storages, façade spaces for signages, loading docks or terraces) it shall be complementary or subject to an autonomous agreement.

### 3.2 **Extent of the Shopping Centre.**

The Shopping Centre is defined as a whole comprising all the premises let to tenants, the common areas (including areas accessible by the public, parking areas and technical areas) and the administration offices. It includes the building(s) and any external areas adjacent to it and integrating the property as they may be from time to time.

### 3.3 **Common parts.**

The landlord manages the Shopping Centre common parts and grants to the tenants access to such common parts, namely the mall, food court, service passages, sanitary facilities and loading docks. The landlord is responsible for the maintenance of such areas, recovering the related cost through the service charges.

The ground rules governing the use of the common areas are usually included in the internal regulations of the Shopping Centre and their related costs are usually recovered through the common expenses contribution in the utilisation agreements.

There are no restrictions on the landlord's right to use part of the common areas for commercialisation i.e., for operations of kiosks and others. Although in some anchor store and/or key tenant contracts there are limitations to the implementation of such structures in front of the units but which can be agreed.

### 3.4 **Rights reserved by landlord.**

The Landlord has the exclusive right to manage and to execute works related to the common areas. In addition, the landlord, usually has the right namely to: (i) access to the demised premises, in order to verify their maintenance and the compliance with the Shopping Centres' rules; (ii) be provided with accounting and fiscal data related to the turnover made in the premises and directly supervise turnover made, in order to verify the compliance with the obligation to pay the turnover rent; (iii) decide to exploit the parking as a paid-parking.

## 4. **ABILITY TO TRANSFER THE LEASE OR SUBLET**

### 4.1 **Assignment.**

Tenants are not entitled to assign their contractual position without the landlord's express consent. Usually only tenants with a strong negotiating power obtain the right to assign their contractual position in the utilisation agreement, and in most of these cases it can be assigned only to companies controlled by the same tenant and/or by the parent company of the tenant.

### 4.2 **4.2 Under letting.**

Tenants are not entitled to underlet the premises without the landlord express consent.

### 4.3 **Sharing occupation.**

Tenants are not entitled to share the occupation of the premises without the landlord's express consent. Tenants with a strong negotiating power may obtain the right to assign the exploitation of the unit as long as the assignee previously agrees with the terms of the contract and the tenant maintains the full responsibility for complying with all contractual obligations.

### 4.4 **Change of control.**

The utilisation agreements prohibit the direct or indirect change of control over the company being the tenant without the landlord's consent and only anchor tenants obtain the right to freely change their control. In most cases, such change of control are limited to those within the group to which the tenant belongs to.

## 5. ALTERATIONS/REPAIR

### 5.1 Restrictions affecting alterations.

Any alterations to the unit to be made by the tenant in the store require the landlord's prior approval following submission by the tenant of a detailed specification.

### 5.2 Fit-out of the premises.

Tenants are carrying out the fit-out of the premises after receiving landlord's approval on the projects and designs.

### 5.3 Signage.

Tenants are usually allowed to place their trade name on the store facade. Change of such signage is subject to landlord consent. Some anchor stores and/or key tenants are also entitled to place signage on the Shopping Centre's façade.

### 5.4 Repair and decoration.

The landlord is usually responsible to perform the structural repairs to the leased premises and all the repairs related to common areas.

Tenants have an obligation to keep and maintain the store and all its assets in perfect operational condition. This includes the water pipes, sewage, electrical and security installations, telephones and air conditioning, and to bear the costs of any repair works deemed necessary at the expiry date of the contract.

### 5.5 Fit-out works/improvements made by the tenant in the store and their regime

All works carried out at the premises by the tenant, as well as all improvements thereto, including any equipment installation, are an integral part of the store and property of the landlord, and the tenant is not entitled to any compensation.

## 6. TRADING

### 6.1 Trading Hours.

It is mandatory for tenants to continue an uninterrupted exercise of their trade activities during the time in which the Shopping Centre is open to public and such operating hours that are established for each Shopping Centre by its manager and/or the owner. Usually landlords reserve the right of modifying the trading hours, temporarily or permanently.

### 6.2 Trading names.

Tenants usually operate under a specific brand name. Multi-brand stores are not very usual in Portugal. Change of trade name requires landlord consent. It is usually accepted that anchor stores and/or key tenants are authorised to change the trading name of the premises provided that it pertains to the group of companies to which they belong, with prior notice.

### 6.3 Control of trading hours.

The landlord usually controls the trading hours of tenants via the security services supplier i.e., by operating opening and closing schedules.

### 6.4 Competition rules.

Generally, lease agreements contain an express clause making clear that the tenant was not granted any exclusive right to sell merchandise or services of any type within the Shopping Centre and that the landlord shall have the right to lease other spaces in Shopping Centre to tenants selling merchandise and services that is similar to the merchandise and services to be sold by the tenant.

Also, when it comes to restrictive clauses and their review of legality, the market share of the particular tenant and landlord, the geographical area, and other circumstances should always be taken into consideration and analysed on a case-by-case basis.

## **7. INSURANCE**

### **7.1 Insured risks.**

Tenants assume the responsibility for all the risks relating to the use and operation of the store, as well as the risks which may arise from there, including being compelled to take a multi-risk insurance covering an amount as may be deemed reasonable by the landlord. Also before a tenant starts to execute work in the store, a work insurance policy must be presented to the landlord.

Landlords, on the other side, usually enter an all risks property insurance on the exterior and structure of the building, on common areas, common installations and facilities within the Shopping Centre and a third-party liability insurance.

### **7.2 Uninsured risks.**

It is market practice for risks derived from terrorism, pollution, fraud, etc to be excluded.

### **7.3 Business insurance.**

Landlords and tenants can also take out business interruption insurances (covering a decrease in turnover, an increase in operating costs or the net profit) with different coverages in nature and intensity.

## **8. SERVICE CHARGE**

### **8.1 Typical regime.**

The landlord is responsible for providing common services to the Shopping Centre, including security, cleaning and maintenance of common parts and common equipment. The costs of these common services are recovered through service charges. Each tenant is required to pay its share of the service charge or pay a fixed contribution to the same (pre-determined and agreed at the time of entering into the contract and which is subject to indexation, same as rent). The administration of the service charges (and of the promotion charges) is done by the landlord.

### **8.2 Promotions and marketing.**

The landlord is responsible for the promotion of the Shopping Centre and each tenant is required to pay its share of the promotions cost (usually a fixed percentage of the annual Common Expenses Budget). With regard to the expenses of promotion and advertising, anchor stores often do not contribute or contribute in a very small percentage, given their own power of attraction and investment in promotion.

### **8.3 Tenant's Associations.**

Some Shopping Centres promote the constitution and participation of tenants in an internal organisation, reserved for those currently operating, as a forum to inform them of the relevant operational aspects; no legal entity is attributed and there is no membership costs or budget derived from these meetings.

## **9. GREEN LEASE**

According to law, the Shopping Centre has to hold an energy efficiency certificate. In addition, utilisation agreements identify general commitments (tied to compliance with regulations, e.g. in waste management or sustainability) and technical appendix and internal regulations detail specific requirements (such as those derived from BRERAM, etc.)

## 10. FORCE MAJEURE AND COVID-19

### 10.1 Force Majeure.

According to law, force majeure is any external, unpredictable, absolutely invincible and inevitable event. In the case of a force majeure event (i) the debtor is released from performing its obligation when such obligation can no longer be executed due to a force majeure event, and (ii) the liability of a party shall be removed in case the prejudice/damage is caused by a force majeure event. The law does not provide examples of events qualifying as force majeure and it was the case law determining the circumstances generally accepted as force majeure. The provisions of the law on force majeure are not imperative and the parties may agree differently in the contract (e.g. indicating expressly the events which shall be considered as force majeure, maintaining the liability for performance even in case of force majeure, etc).

Before the outbreak of the pandemic, almost all the utilisation agreements either (i) were not dealing with force majeure, given the general applicable legal provisions or (ii) were including force majeure provisions (mainly replicating the legal provisions) in specific points related to obligations of the tenant.

Due to impact of the pandemic, the decisions made by the authorities and in particular some legislative interventions have allowed negotiations between landlords and tenants to start creating a structure of solutions to mitigate the effects of such events.

### 10.2 Hardship.

The legal concept of hardship is applicable to all types of contracts thus including utilisation agreements. According to such legal concept, if the performance of a contract has become excessively onerous due to an exceptional event beyond the party's reasonable control, thus rendering the obligation of that party clearly unjust, it may determine the amendment of the agreement, or its termination. Therefore, the hardship does not apply automatically; it can only be applied by the court, in the case of an exceptional change of circumstances which could not reasonably have been foreseen. In the context of Covid-19 pandemic, courts have received a number of claims from tenants invoking the hardship but no final general ruling has yet been issued.

## 11. OTHER POINTS TO NOTE.

### 11.1 Prescribed form.

The principle of freedom of form can be applied, provided that the essential elements of the contractual relationship are observed (consent, object and grounds). The utilisation agreement does not require a certain form i.e., private deed or notarized deed and the written form is required by law only for evidence in order to prove the parties' understanding on the different topics.

### 11.2 11.2 Termination of the contract in case of insolvency.

In various countries' legislative systems, it is largely accepted that if one of the parties becomes insolvent, the other party is entitled to terminate the lease agreement. However, under Portuguese insolvency law, this is not a valid ground for termination of the lease by either landlord or tenant.

### 11.3 11.3 Money Laundering.

In Portugal, the European Anti Money Laundry Directives 6<sup>th</sup> (EU Directive n<sup>o</sup> 2018/1673) has already been transposed through Law n<sup>o</sup> 58/2020, of August 31<sup>st</sup>. The concept of Obligated Entities was extended including, among others, entities operating in the field of promotion, agency, commission or intermediation activities in the sale and purchase of real estate, inasmuch as the leases preview a monthly rent in excess of €10,000 or €120,000 on an annual basis.

Utilisation agreements for the use of a shop in Shopping Centres are not included in the scope of the above mentioned contracts and therefore Shopping Centre owners' are not considered to be obliged entities.

#### 11.4 **Terrorism and security.**

Generally, utilisation agreements do not impose specific obligations for tenants with regard to prevention of terrorism and security, but only some general commitments (tied to compliance with regulations). Shopping Centre administration and security service providers are under the duty of collaboration with law enforcement to coordinate the preventive or corrective actions to be applied in the Shopping Centre, this may vary from time to time.

# REPUBLIC OF ARMENIA

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## 1. PRELIMINARY REMARKS

The Civil Code of the Republic of Armenia mostly regulates the relationship of the parties in a Lease contract. It consists of common provisions applied to any lease and there are special provisions applied particularly to the contract on an immovable property lease.

Under Armenian law, the owner holds the right to lease an object. Under a Lease contract, the Lessor is obliged to transfer a property to the Lessee at a charge for temporary possession and/or use. The Lessor must hand over to Lessee the area, which is the object of the Lease contract and the parties to the Lease must sign a bilateral handover act. The contract on an immovable property lease must be certified by a notary and the rights deriving from it are subject to state registration.

In practice, some trade organisers do not register their Lease contract and/or request verification by a notary by concluding those based on an a template approved by the government decree as per the requirements of the Law of the Republic of Armenia on Trade and Services. Nevertheless, the developed practice requires that the general requirements stated herein to validate the leases are to be complied with (i.e., notary verification and state registration of the rights to the lease).

## 2. TERM

### 2.1 Contractual term

The term for lease is not limited by the law; hence, the parties are free to stipulate any period of time suitable for their needs. When the term for a lease is not provided by for the Lease contract, it is deemed to be concluded for an indefinite term. In this case, each of the parties shall have the right to renounce at any time the Lease contract by notifying the other party thereof one month before. In case of a contract on an immovable property lease the party who intends to renounce the contract must notify the other party three months before, unless law states otherwise.

It is also accepted to insert a clause into the Lease contract, which allows the parties to continue the lease until the Lease contract automatically expires when there is no notification from either the Lessor or the Lessee, or both of them about the termination of the Lease contract.

### 2.2 Violation of the Rights

1. The Lessor shall be held liable for any defects within the leased property, which fully or partially hinder the use of the property, even if while concluding the Lease contract the Lessor was not aware of these defects.

When detecting such defects, the Lessee shall, upon his or her choice, have the right to:

- a) Require from the Lessor to gratuitously eliminate the defects of the property or proportionately reduce the lease payment or compensate the expenses made, thereby for eliminating the defects of property;
  - b) by providing the Lessor with prior notice of deducting from the lease payment the sum of expenses made thereby for eliminating the defects;
  - c) require early rescission of the contract.
2. The Lessor, if notified of any claims made by the Lessee or of their intention to eliminate the defects of the property at the expense of the Lessor, may immediately replace the property transferred to the Lessee by another identical property in a proper condition or gratuitously eliminate the defects of the property.

3. Where the claims of the Lessee are fulfilled or a deduction of the expenses are made for eliminating the defects from the lease payment, this would not cover the damages caused to the Lessee, he or she shall have the right to require compensation for the damages as of the part not covered.
4. The Lessor shall not be held liable for the defects of the leased property, which he or she has mentioned when concluding the contract or which the Lessee had prior knowledge of or ought to have been detected by the Lessee when examining the property or concluding the contract, or checking the working order of the property when transferring it for lease.

In case of an essential breach by the Lessee of the terms for making a lease payment, the Landlord shall have the right to require from them an early lease payment, unless otherwise provided for by the Lease contract.

The Lease contract may be rescinded early at the court upon the request of the Lessor, where the Lessee:

1. has used the property with essential and multiple violations in respect of the conditions of the contract or of the intended purpose of the property;
2. has substantially aggravated the condition of the property;
3. has not made a Lease payment more than twice upon the expiry of the term for payment provided for by the contract;
4. has not, within the terms defined by the Lease contract, whereas in case of non-availability thereof in the contract within reasonable term, made capital repair in cases when, in accordance with law, legal acts or the contract, making capital repair is considered as the obligation of the Lessee.

In accordance with point 2 of Article 466 of this Code, other grounds for early rescission of the contract upon the request of the Lessor may be provided for by the Lease contract.

If there arise any disputes concerning the Lease contract, the disputes shall get resolved through judicial proceedings.

In practice, the Lessee is responsible for damages made by him/her, by his/her contractors, employees and other people under his/her supervision.

Both parties gain the right to terminate the Lease contract when the other party does not fulfill its obligations in the proper way. When the Lease contract is terminated earlier than it was stipulated by the contract, the Lessee must pay for the time he/she actually used the premises.

### 2.3 Renewal Rights

While concluding a Lease contract for a new term, the conditions thereof may, upon the consent of the parties, be changed. Where, upon the expiry of the term of the contract the Lessee, in case there are no objections from the Lessor, continues to avail of the property, the contract shall be considered as resumed under the same conditions for an indefinite term.

In practice, Lessee in case of equal conditions has the right to sign Lease contract for the same object (area) and has a pre-emptive right over third parties. For using the pre-emptive right to renew the Lease contract, the Lessee must notify the Lessor 6 months before the end of the expiration of the Lease contract. In the Republic of Armenia, it is also a common practice to add a clause, which allows the parties to extend the term of the contract automatically after the main term provided in the contract comes to an end and the parties do not terminate the Lease contract by a settlement agreement.

### 2.4 Disputes and Forfeiture

Disputes if not resolved through negotiations must be settled through the court. The Civil Code of the Republic of Armenia provides the opportunity of early rescission of the contract upon the request of Lessee or the Lessor through judicial proceedings in a competent court of the Republic of Armenia.

The Lease contract may be rescinded early at the court upon the request of Lessee, where:

1. the Lessor has not provided the property for use to the Lessee or has created obstacles for using the property in accordance with the conditions of the contract or the intended purpose thereof;

2. the property transferred to the Lessee has defects impeding the use thereof, which have not been mentioned by the Lessor while concluding the contract, and which were not known to the Lessee beforehand and the latter should not have detected while concluding the contract, examining the property or checking the working order thereof;
3. the Lessor has not, within the terms provided for by the Lease contract, in case of non-availability — within a reasonable term, fulfilled his or her obligation of making capital repair of the property;
4. by virtue of circumstances, for which the Lessee is not responsible, the property has become unfit for use.

In accordance with point 2 of Article 466 of the Civil Code, other grounds for early rescission of the contract upon the request of Lessee may be established by the Lease contract.

The Lease contract may be rescinded early at court upon the request of the Lessor, where the Lessee:

1. has used the property with essential and multiple breaches in respect of the conditions of the contract or of the intended purpose of the property;
2. has substantially aggravated the condition of the property;
3. has not made a lease payment more than twice upon the expiry of the term for the payment provided for by the contract;
4. has not, within the terms defined by the Lease contract, in case of non-availability in the contract — within a reasonable term, made capital repair in the cases when, in accordance with law, legal acts or the contract, making capital repair is considered as the obligation of the Lessee.

In accordance with point 2 of Article 466 of the Civil Code, other grounds for early rescission of the contract upon the request of the Lessor may be provided for by the Lease contract.

### **3. RENT**

#### **3.1 Basic rent**

1. The Lessee shall be obliged to make a payment for the use of the property (lease payment) on time.  
The procedure, conditions and terms for making lease payments shall be determined by the Lease contract. Where these are not determined by the contract, the usual procedure, conditions and terms existing at the time of leasing, an identical property under comparable circumstances shall apply.
2. The lease payment shall be defined for the whole leased property or for each component thereof:
  - 1) by a certain fixed amount paid regularly or simultaneously;
  - 2) by a share defined for fruits, products or income received as a result of using the leased property;
  - 3) by rendering certain services by the Lessee;
  - 4) by transferring the property, provided for in the contract, by the Lessee to the ownership or lease of the Lessor;
  - 5) by encumbering the Lessee with the expenses for improving the leased property provided for in the contract.

The parties may envisage by the Lease contract a combination of mentioned forms of lease payment or other types thereof.

3. The amount of lease payment may be changed by the consent of parties under the terms provided for by the contract, unless otherwise provided for by the contract. Minimum terms for revision of the amount of lease payment for individual types of lease as well as for lease of individual types of property, may be envisaged by law.
4. Unless otherwise provided for by the law, the Lessee shall have the right to require reduction of the amount of the lease payment, where by virtue of circumstances, for which he or she does not bear

responsibility, the conditions for use provided for by the Lease contract or the condition of property have substantially deteriorated.

In case of essential breach by the Lessee of the terms for making a lease payment, the Lessor shall have the right to require from an early lease payment, unless otherwise provided for by the Lease contract.

### 3.2 Additional rent

In shopping centers, separate rent is charged for the areas of common usage and a separate fee may be charged for services provided by the relevant shopping center such as cleaning, marketing, advertisement etc. There might be arrangement that Lessee receives additional rent compensation from turnover of the relevant Lessor. It shall be noted that there is a requirement under the Law of the Republic of Armenia on Trade and Services that no more than 1.5% from turnover shall be charged by the Lessee from Lessor but this is not applied for shopping centers and as a rule, it is used by other trade organisers (such as open air markets etc).

### 3.3 VAT

Leasing out property is generally subject to VAT. Generally, to calculate the tax, the Lessor multiplies the rent amount (excluding VAT) by 20 %.

### 3.4 Rent review

Rent review system must be stipulated by the Lease contract and in majority of cases, there is indexation based on foreign currency exchange rates changes and/or general inflation rules.

## 4. RIGHTS RESERVED BY LESSOR

Generally, Lease contract provides the right for the Lessor to demand from the Lessee to stop any kind of action, if the Lessor finds that the action may damage the shopping center (including the life or health of the shopping center staff or their property) or the area provided to Lessee. The Lessor has the right to supervise the proper usage of the area and the shopping center structures by the Lessee. The rights for both parties must be stipulated by Lease contract and as long as it does not violate the regulations of the Legislation of the Republic of Armenia, the rights stipulated by the contract, can be applied.

## 5. ABILITY TO TRANSFER THE LEASE OR SUB-LET

In most of the shopping centers, it is prohibited for the Lessee to assign its rights and obligations under the Lease contract without prior consent of the Lessor. In addition, the Lessee is usually forbidden from subleasing the premises without prior consent of the Lessor.

## 6. ALTERATIONS/REPAIR

### 6.1 Alterations

Lessee is prohibited from making any structural alterations without the consent of the Lessor. Generally, the Lessor is responsible for carrying out alterations under the statute, unless otherwise provided by the Lease contract.

Generally, the Lease contract usually stipulates an approval procedure that the Lessee has to undergo in order to obtain the Lessor's consent to the planned alterations.

### 6.2 Lessee's transportation works

Lessees typically conduct their own transportation works under supervision of the Lessor and with prior approval by the Lessor of the transportation project. Most Lease contracts stipulate that upon termination of the Lease contract, the Lessee has to remove any alterations and return the premises in the same condition as they were at the beginning of the lease or that any inseparable improvements made to the premises become the property of the Lessor without compensation.

### 6.3 Signage

Mostly, Lease contracts stipulate the Lessee's right to place informational signage and it must be carried out at the expense of Lessee and the placement of informational signage can only be done when the Lessee has the prior approval of the Lessor.

### 6.4 Repair and decoration

It is a widespread practice for the Lessors to supervise any repairs inside the premises. The necessary repairs, unless their need arose due to the Lessor's fault, are performed by the Lessee at its own expense.

Decorations are generally allowed without any limitations and even may be mandatory during festive seasons.

## 7. TRADING

7.1 Under the lease, the Lessee can be obliged to be open for trade within the shopping center's working hours with certain exceptions, which usually include the closing down of the center by the state authorities or the malfunctioning of the utility systems. For breach of this obligation, the Lessee may be subject to a penalty and, if the trade suspension period lasts for a long time, the Lessor may even try to terminate the Lease contract.

7.2 The Lessee is required to operate under a specific trading name stipulated in the Lease contract. Any rebranding is usually subject to the Lessor's approval.

7.3 It is a widespread practice for Lessors to control the Lessee's opening hours, as all shops in the shopping center should be open for public during normal business hours. The Lease contract usually contains a special provision that the Lessee undertakes to comply with the rules of the shopping center and special lease rules. Such documents describe in detail the rules for using premises in a shopping center and the procedure for carrying out retail activities. Their breach by the Lessee may lead to fines or termination of the Lease contract.

7.4 Generally, the parties do not normally include a clause stating that the Lessor undertakes not to lease the premises out in the same building to other Lessees if they sell the same goods/provide the same services as the Lessee under a Lease contract.

## 8. INSURANCE

### 8.1 Insured risks

No common practice is established but in majority cases the issues of insurance are resolved under the Lease contract in a way that Lessee is responsible for insurance of the building etc., while Lessor undertakes contractual obligation to have third party insurance coverage as well as insurance of its equipment etc., in the leased areas.

### 8.2 Uninsured risks

Any uninsured events are subject to the provisions of the Civil Code of the Republic of Armenia. In such a case, the party at fault will have to compensate the damages and losses of the other party, unless otherwise defined under the lease.

## 9. SERVICE CHARGE

### 9.1 Typical regime

Lessees as general practice pay a fixed contribution for servicing the common areas, cleaning, maintaining security, marketing activities, etc.

## 9.2 Promotions and marketing

Lessees participate in common marketing activities organized by the Lessor at the expense of the payable marketing fees. Any additional marketing activities carried by the Lessees inside the shopping center or using its name usually require prior consent from the Lessor.

## 9.3 Lessees associations

There is no such established union in the Republic of Armenia.

## 10. GREEN LEASE

Such practice is not yet a strong market trend in the Republic of Armenia. The Lessees usually provide data on consumed utilities to the Lessor for the purpose of making payments for such consumed utilities. At the same time, Lease contracts often include provisions on organising garbage collection, cleaning of the leased premises and overseeing compliance with technical requirements when operating hazardous production facilities and equipment.

## 11. FORCE MAJEURE AND COVID

Generally, parties do not carry liability for breach of Lease contracts, if the breach is a result of force majeure and the parties could not expect such circumstances to happen and they could not prevent those circumstances and their fault is excluded. Such circumstances are earthquakes, flood, fire, war, declaration of martial law (or) state, political unrest, strikes, cessation of communication, acts of state and local authorities and other circumstances which makes completing the obligations stipulated by Lease contract impossible.

The obligations that were not fulfilled, still exist and the fulfillment is only postponed for a term stipulated by Lease contract. When the obligations are not fulfilled for more than 6 months, it gives the parties the right for unilateral termination of the contract.

In practice, the parties to lease agree to discounts on lease payments or certain delays for lease payment without penalties.

## 12. OTHER POINTS TO NOTE

12.1 Very often the Lessor require the provision of a security deposit (typically in the amount of 2 monthly rent payments) in order to secure the execution of the Lessee's obligations under the Lease contract.

### 12.2 Lessee ESG (Environmental, Social, and Governance) data

The Lessor has no right to oblige the Lessee to provide information related to business operations and the products sold, unless otherwise provided by the Lease contract.

### 12.3 Money laundering

Generally, such regulation is not envisaged under the Lease contract but the general and specific legislation of the Republic of Armenia duly governs such relations, so there is no specific need to include such clauses into Leases contracts.

### 12.4 Terrorism and security

Just like the regulation concerning money laundering, the Lessor and the Lessee shall comply with anti- terrorism laws and to take the appropriate measures.

### 12.5 Prescribed form

A Contract on Immovable Property Lease shall be concluded in writing and be notarised and registered by the State Authority. In the most cases, the expenses of registration of the rights derived from the Lease contract are borne by the Lessee. The Lease contract is valid and enters into force only after registration by state authority.

## 12.6 Covid-19 rules

There is also the decision of government of the Republic of Armenia (Decision of Government of the Republic of Armenia N 1514-Ն and Decision of Government of the Republic of Armenia N 1127-N) setting quarantine regime, so the shopping center must obey the rules that are being updated due to the pandemic situation in the Republic of Armenia. Such rules are wearing masks, maintaining social distance, hand disinfection with an alcohol-based disinfectant when entering the shopping center and other sanitary rules stated in regulations of the Republic of Armenia.

## REPUBLIC OF TURKEY

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### Preliminary Remarks

This section aims to provide a legal framework of the legal platform applied to lease contracts in the jurisdiction covered.

## 1. TERM

### 1.1 Contractual Term

In some jurisdictions, for example England and Wales, the contractual term can be of any length, with the intention of reflecting the typical market practice in a Shopping Centre:

In Turkey, the contractual term of lease agreements can be determined freely with no term limitations by the parties. As per market practice, Shopping Centre lease agreements are typically executed with a term of five years or ten years. Anchor tenants may prefer to execute leases with a term of up to twenty years. At the end of the lease term, the lease is automatically extended for one-year intervals unless the Tenant terminates the lease at least fifteen days prior to the annual expiry date. The Landlord can ask the Tenant to vacate the leased unit after the ten-year extension period has passed (on top on the original lease term).

### 1.2 Break Rights

Where contractual lease terms are substantial, it is quite common in a number of jurisdictions for either or both parties to have a right to terminate the lease before the term expiry date. Again, each report will summarise typical arrangements for the particular jurisdiction:

Parties are free to determine break options in favour of the Tenant. Break options can be on a fixed or rolling basis. Break options are usually exercisable after a certain lease term (e.g. three years) and require a prior notification term (e.g. three to six months). As per Turkish market practice, parties negotiate break options based on the negotiation power of the Tenant.

### 1.3 Renewal Rights

Statutory rights of renewal vary in a number of different jurisdictions. Occasionally leases will also include rights of renewal or a right of pre-emption which will be negotiated on a contractual basis, especially where statutory rights do not exist:

Tenants can benefit from statutory renewal rights for a period of ten years upon expiry of the original lease term. This renewal right is used as an automatic extension of the lease term for one-year intervals, unless the Tenant terminates the lease. The renewal right of the Tenant in the form of an automatic extension exists for total of ten years upon expiry of the original lease term.

### 1.4 Disputes and Forfeiture

## 2. RENT

2.1 The law and practice relating to rents payable by a Tenant to a Landlord vary between jurisdictions. In England and Wales, it is common for leases to distinguish between a net rent payable to the landlord and other "rents" that are intended to reimburse the Landlord for expenditure relating to repairs of common parts, provision of

services to the Centre and insurances. In other jurisdictions, the Landlord is obliged by statute to bear some (or all) of these costs within the rent and any contractual provisions to the contrary will be invalid. Also, rents may in some cases be linked to open market values or to the Tenants turnover sales at the premises. It is also important to consider if there are any VAT considerations on rent e.g. applicable in Germany and Belgium.

In Turkey, Tenants pay (i) rent, (ii) common expense (service charge) and usually (iii) an additional marketing fee. Due to the statutory rules contained in the Turkish Code of Obligations (which regulates rent in general) Landlords can't request sums in addition to rent from the Tenant. Furthermore, common expenses and marketing fees are collected as per specific regulations on Shopping Centres. As per Turkish market practice, Shopping Centre rent is usually calculated using two methods: (i) base rent and (ii) turnover rent. Here, the Tenant pays the base rent for the relevant month in advance as a minimum payment, and if the turnover percentage (which depends on the tenants sector and the location of the Shopping Centre) as determined under the lease agreement for the relevant month exceeds the base rent that was paid, the Tenant then tops up the difference. As per the changes in Turkey's foreign exchange regulations in 2018, only tenants with 50% or more foreign capital can enter into lease agreement with a foreign currency other than Turkish Lira. VAT is also applicable over the rent amount.

- 2.2 Because of these wide variations in practice this topic has been divided into subsections labelled as "Principal Rent" and "Turnover" but it is also relevant to refer to section 8 "Service Charge". We will now discuss the market position on including online sales within turnover:

In Turkey, as market practice, rent consists of both the Principle Rent (i.e. base rent) which consists of a monthly minimum amount and a Turnover Rent which is a percentage of the Tenants turnover. Turnover Rent is usually calculated at the end of the month however the frequency of calculations can be negotiated otherwise. If the Turnover Rent exceeds the Principle Rent, the Tenant must make an additional payment to the Landlord in order to fulfil the Turnover Rent payment. Negotiations between Tenants and Landlords on whether or not to include online sales and/or click and collect sales in the Turnover Rent calculation is a hot topic in the Turkish market, especially with the effect of the COVID-19 pandemic. Even though there is no clear market practice on this issue, most of the time online sales are partially included in the Turnover calculations (e.g. 50% of the online sales amount) if the goods are shipped or handed to customers from the Shopping Centre in question.

### 2.3 Rent Review

In this section, each report seeks to deal with the mechanisms by which rents may be adjusted during the term of the lease, whether through indexation, market revaluation or adjustment of the base rents applicable in turnover rent leases.

The rent review mechanism differs based on whether the rent amount is determined in Turkish Lira or in foreign currency. Turkish Lira rents can be increased annually as per the lease agreement, with a maximum cap equal to the change ratio of the consumer price index in the previous 12 months. As per Turkish market practice, rents in Turkish Lira denominated leases are increased at the maximum allowed rate. Foreign exchange rents remain fixed for a period of five years, following which they can be increased upon the agreement of parties. Regardless of the rent being determined in Turkish Lira or foreign exchange, as per the Turkish Code of Obligations both Tenants and Landlords have the right to file a lawsuit for the determination of a just rent amount every five years. The judge will determine the rent amount by taking into consideration the status of the leased unit, the rent amount of similar properties and changes in the consumer price index during the relevant term.

### 2.4 Procedures to recover unpaid rent

This section will discuss the method in which Landlord's can recover unpaid rent. Questions which this section will cover include: Are there any alternative approaches to court process permitted or required by a market lease agreement e.g. ceasure of tenant goods or termination provisions? Are there any guarentees or rent deposits available for recovering arrears:

It is common in Turkey for the Landlord to obtain a security deposit from the Tenant. The Code of Obligations introduced a cap for the amount of the security deposit being three months rent, as of July 2020. However, most Shopping Centres still obtain a guarantee amount to cover the three-months' rent amount and also to cover the three-monts' service and advertisement charges.

Guarantee amounts provided by Tenants to Landlords in cash must be deposited in a fixed-term savings bank deposit account and such guarantee can only be enchased upon either (i) both the Tenant and the Landlord's

consent, (ii) finalization of the enforcement proceedings, or (iii) with a finalized court decision. However bank letter of guarantee is not deemed as “cash” and therefore does not fall within the scope of the said requirement. Thus, it is market practice in Turkey to accept only a bank letter of guarantee format as the security deposit. Parties usually agree that the security deposit can be used for any payment obligations of the Tenant towards the Landlord.

Landlords can file execution proceedings with or without an eviction claim and can file a lawsuit for collection of arrears and motion for eviction if rent is not paid.

### **3. PREMISES**

#### **3.1 Extent of Demise**

The definition of the shop premises to be let is not just a matter of identifying which unit a tenant may occupy. It can also determine the extent and cost of various contractual obligations, such as obligations to repair, maintain and insure, which may be tied very closely to the definition of the premises. Market practice differs considerably between jurisdictions and may even vary significantly between Centres within a given jurisdiction.

The Turkish Code of Obligations requires Landlords to provide and keep the leased unit in compliance with the intended use as defined within the lease agreement. Landlords are also under the obligation to maintain and repair unless otherwise agreed in the lease agreement. Tenants must use the leased unit with due care. On the other hand, the costs of insuring the units (not the Shopping Centre itself) are borne by Tenants unless determined otherwise under the lease agreement, as per market practice. Landlords cannot force Tenants to execute agreements in addition to the lease agreement or assume additional obligations that are not related to the use of the leased unit.

#### **3.2 Extent of the Shopping Centre**

Again, a description of what constitutes a Shopping Centre may well have a significant impact on the financial obligations of the parties, either in terms of a primary obligation to repair and maintain, or in terms of the cost of service charge or other reimbursements to a Landlord. In many jurisdictions, it has become common practice to define the Centre as including any future extension, subject to appropriate formulas for adjusting the calculation of service charge as and when an extension is created.

According to the Regulation on Shopping Centres, a Shopping Centre must be composed of at least a 5,000 sq. meters sales area, run by a professional management team, contained within a building or a unity of area, consist of common areas, big stores and/or other businesses providing services of food, textile, entertainment etc.

#### **3.3 Common Parts**

In contrast to defining the extent of obligations to repair and maintain a Centre, it is important to establish the extent to which Tenants of a unit (and their customers) can use other parts of the Centre. Some common parts may need to be reserved exclusively for centre management purposes. This section will discuss whether the Landlord can use the common parts for commercialisation.

As per the Regulation on Shopping Centres, each Shopping Centre must set aside (free of charge) common areas to function as social and cultural activity spaces, as well as spaces for emergency medical intervention units, prayer rooms, baby care rooms, children’s playground, resting areas, and other areas that are necessary for common use, benefit or safety reasons. Common areas must be organized by taking into consideration the needs of handicapped persons, senior citizens and children.

The collection of expenses for common areas (i.e. common expenses) must be proportionate to the Tenants sale area and the Landlords must top up any amounts that are not collected from the Tenants (regardless of the ground such as being unable to collect, vacancy, capped common expense agreements etc.) on a basis which is proportionate to their sale areas.

Other common areas such as corridors can be commercialized and can be operated as commercial units for sale stands, kiosks, promotion stands, and totems on the condition that they are shown as commercial areas in the approved architectural project of the building which is basis for the occupancy permit of the Shopping Center.

### 3.4 Rights Reserved by Landlord

Landlords will require a number of rights to enable them to maintain a centre in good order over time, including the right to close certain areas for repair and rights to extend or alter the centre. On the other hand, there are general laws and contractual provisions which will limit the Landlords ability to exercise those rights where they are seen to have an unduly adverse impact on the Tenants business. Landlords may have rights to enter in certain situations, for example, checking if the tenant is complying with its covenants.

Landlords must consider the rights of Tenants during renovations to the Shopping Centre and leased units. It is market practice for Landlords to reserve their right to make any renovations (especially in common areas) without obtaining consent from Tenants or obtaining approval from Tenants for any minor renovation work within units that does not have a material impact on the business of the Tenant. As per the Code of Obligations, Landlords are under the obligation to ensure that the leased unit is defect free and in conformity with the intended use as determined by the lease agreement. Accordingly, Tenants must endure the hardship caused by these maintenance works; however, the Tenant reserves the right to seek losses. Additionally, in cases where the reconstruction, fundamental repair for zoning, or renovation is required on the Shopping Centre, Landlords can terminate the lease agreement at the end of lease period through litigation.

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

Fluctuations in the retail market are increasing the desirability for individual Tenants to be able to dispose of or sub-let all or part of their premises. However, the identity of tenants and the maintenance of a good retail mix in a Centre must be taken into consideration as they are important in maintaining the attractiveness of the Centre as a whole and the value of Landlord's investment. Achieving a balance between the interests of the respective parties is dealt with in a wide variety of ways within a single jurisdiction or multiple jurisdictions. This section is divided into three subsections.

### 4.1 **Assignment** is the Tenants ability to dispose the entirety of a lease to another Tenant:

Tenants cannot assign lease agreements without obtaining prior written consent from the Landlords. As per a rule enacted on 1<sup>st</sup> of July 2020, Landlords cannot abstain from providing such consent without a just reason. As this is a fairly new rule, its application in practice has not been widely tested and it is the market practice to determine a list of grounds that would be considered as unjust reasons to assign the agreement under the lease agreements.

### 4.2 **Underletting** is the Tenants ability to pass on its obligations relating to all or part of the premises to a sub-tenant, without escaping the terms of the lease:

Underletting is only permitted with the written consent of the Landlord.

### 4.3 **Sharing occupation** may arise in a variety of circumstances; for example, a corporate Tenant may wish to allow a subsidiary or associated company to trade from the same premises; a department store may wish to allow an independent fashion retailer to use a designated area in the department store under an independent brand name; or a book shop may wish to licence an independent coffee shop to operate within its premises. Such circumstances are dealt with in a variety of ways in different jurisdictions.

Sharing occupation is only permitted with the written consent of the Landlord.

### 4.4 **Change of control** whether restrictions on change of control are usual in a market lease agreement and what are the benefits:

Certain Landlords, especially Landlords of major Shopping Centres, require their prior approval for a Tenants change of control because a change of control can be regarded as a change of the party or assignment of the lease agreement. Based on the negotiation power of the Landlord, lease agreements may include change of control provisions.

## 5. ALTERATIONS/REPAIR

Tenants have a variety of practical or promotional reasons as to why they may wish to carry out alterations in any given shop, such as to adhere to a new brand image adopted by a multiple retailer in all its outlets. At the same time, Landlords may limit alterations for a variety of estate management reasons, including minimising nuisance to other Tenants, protecting the structural integrity of the centre and seeing that all works are properly insured. This section deals with alterations, fitting out, signage and repair and decoration. Questions discussed in this section include: who is responsible for statutory requirements to carry out alterations e.g. energy efficiency improvements, entry for disabled persons (e.g.DDA)? Are there any standard contractual arrangements in relation to who owns the tenant's fit out works?

Tenants can only carry out alterations in the leased unit with the consent of the Landlord. It is general Turkish market practice for the Landlords to closely monitor the Tenants renovation plans and to provide consent accordingly. Usually Shopping Centres only allow for renovation works to be carried out when the Shopping Centre is closed for visitors. Tenants are usually responsible for fit-out works of units, subject to the Landlords approval. However, parties are free to make other arrangements and anchor Tenants occupying large areas may ask for certain fit-out works from Landlords. Statutory requirements such as alterations for disabled persons have been introduced under the Regulation on Shopping Centres for common areas, which are the responsibility of the Landlord.

## 6. TRADING

- 6.1 This section deals with the issue of whether a Tenant can be obliged to keep open for trade, which the Landlord regards as being important for maintaining the Centre's image as a lively retail destination. This section will discuss whether the Landlord has a right of enforcement and/or are there any financial penalties or incentives that the Tenant must comply with.

It is the common market practice for the Tenant to be under an obligation to keep their stores open and operating during the Shopping Centre opening times. In Turkey, the typical Shopping Center operating hours are between 10:00 – 22:00 seven days a week. Under Turkish law, specific performance is not an available remedy however Landlords can request a penalty payment or indemnity.

- 6.2 The use of trading names, given that major Tenant's frequently re-brand and rename themselves:

It is common market practice for the lease to determine the brand name and the mix of products that can be traded in the leased property. Any amendments to these are subject to the Landlords consent.

- 6.3 Can the landlord control the Tenant's opening hours? Does the tenant have to comply with any Tenant handbooks or house rules:

Yes, it is the common market practice that all Tenants open and operate their stores during the Shopping Centres operational hours (excluding businesses whose operational hours are restricted by laws, such as pharmacies). Most Shopping Centres have guides/handbooks in addition to the lease agreement itself which set out the details of the general operation rules in the Shopping Centre.

- 6.4 Competition rules – is it usual for there to be prohibitions on the Landlord letting to competitors? To what extent can the Landlord restrict the business activity of the Tenant (for example user restrictions or radius):

It is possible to restrict the Landlords ability to let to competitors. Generally, Tenants occupying large areas (such as supermarkets, DIY stores, consumer electronics retailers) would like to limit the Landlords ability to let to its competitors and this is agreed depending on the negotiation power of the parties. Top Shopping Centres usually do not accept such restrictions. On the other hand, an evaluation from a competition law point of view should be made independently for each case since the Competition Authority's evaluation on abuse of dominant position in the market can differ from sector to sector. It is not common in Turkey to apply user and/or radius restrictions on Tenants; however, the product mix (list of goods and services to be traded in a specific unit) can be determined which limits the Tenants use of the Premises.

## 7. INSURANCE

The obligation to insure buildings against various risks will vary between countries and regions, therefore this section is split into two sub sections:

### 7.1 Insured risks

Risks that can or should be insured:

In Turkish market practice, Landlords usually request Tenants to provide “all-risks” insurance policies for units coverage which is subject to the approval of the Landlord. This is usually set as a condition for delivery of the leased property to the Tenant, whereas the Landlords insure the entire Shopping Centre alongside the mandatory catastrophe insurance (DASK). However, the ability of certain risks that can be subject to insurance or not should be confirmed with insurance experts.

### 7.2 Uninsured risks

This summarises the treatment of risks which are uninsurable. Provisions on this topic have become increasingly common in locations where terrorism is an issue. Would this extend to pandemics?

Standard form all-risk insurance policies do not include terrorism or pandemic clauses as these are viewed as unconventional risks. However, such risks can also be included in the insurance policies and insured in return for an additional premium payment, although this is not in line with the existing market practice. With the effects of the COVID-19 pandemic, we may see changes in insurance practices in the future market.

### 7.3 Business insurance

What other insurance policies would a Landlord and/or Tenant take out in the context of its occupation (e.g. business interruption insurance)? What circumstances do they pay out in?

In Turkey, it is not market practice to have business insurance.

## 8. SERVICE CHARGE

As mentioned above, service charge arrangements may need to be considered in conjunction with provisions for rent. For example, certain elements of expenditure in a Shopping Centre which a Landlord in England would typically seek to recover by way of service charge will not be recoverable by a Landlord in Germany as they will be expected to meet those expenses out of the rental reserved by the lease. In this section, service charges are dealt with under three sub headings:

### 8.1 Typical regime:

Service charges are regulated under the Regulation on Shopping Centres. Service charges include expenses relating to common areas of the Shopping Centre such as electricity, water, heating, maintenance-repair, security, and cleaning, which are not in the nature of renewal of the main property. Tenants are responsible for the amount of the service charge calculated by dividing the sales area by the Shopping Centre’s total sales area. If certain Tenants are paying less than they should pay as per the calculations due to a service charge cap or if there is no payment from certain units due to arrears or vacancy, the Landlord has to top up / pay for the service charge amount that has not been collected from certain Tenants / vacant units. The Ministry of Customs and Trade runs audits (ex officio or upon complaint of Tenants) on Shopping Centers in order to check conformity and apply monetary penalties in cases of breaches.

### 8.2 Promotions and marketing:

Landlords can ask for additional payments for promotions / advertising if this is regulated under the lease agreement. It is the common practice to have a marketing fee arrangement under Shopping Centre leases.

### 8.3 Tenants associations.

From the Tenants point of view, it is important that services are carried out on an economical and efficient basis. From the Landlord's point of view, services should be carried out to a standard which maintains an attractive and high quality environment throughout the Centre:

In Turkey, Birleşik Mağazalar Derneği (United Trademarks Association) is an active association which allows Shopping Centre Tenants to review actions made by Landlords in a collective manner, including conformity of Shopping Centre managements to rules regarding services charges. Shopping Centre investors have a similar association namely Alışveriş Merkezleri ve Yatırımcıları Derneği (Council of Shopping Centre – Turkey)

## 9. GREEN LEASE

Does the market lease in the jurisdiction include provisions requiring the parties to share of data on the consumption of utilities, energy performance etc and are these on the Landlords terms?

In Turkish market practice, Landlords have the Tenants utility use data because in most cases these services are usually provided to Tenants by service providers through the Landlords.

## 10. FORCE MAJEURE AND COVID-19

This section considers the changes in the standard lease or lease interpretation as a result of COVID-19. Questions which this section will cover include: Is there a legal concept of hardship? Is Covid-19 a force majeure event under the lease – does rent continue to be payable? Does the law allow the lease agreement to be varied or renegotiated? Are there any existing or new pandemic laws arising e.g. as in Austria?

The effect of COVID-19 to lease agreements in Turkey can be dealt with in two ways: (i) the pandemic can be defined as a force major event under the lease agreement, the results of which are also defined under the lease agreement, or (ii) hardship situation as per the Turkish Code of Obligations according to which “should an extraordinary situation that has not been foreseen or cannot be expected to have been foreseen by the parties at the time of the execution of the contract comes into effect without any reason attributable to the debtor (i.e. Tenant), and such situation changes the state of the facts at the time of execution of the contract to the detriment of the debtor in a manner in which the debtor cannot be expected to perform its obligation(s) under the contract, the debtor may request adaptation of the contract to the new conditions from the judge or, if adaptation is not possible use its termination right”. Due to the pandemic, certain restrictions such as curfew and the temporary closure of certain businesses have been applied in Turkey which has affected Tenants of Shopping Centres. Most Shopping Centre Landlords applied and continue to apply discounts to the rent amounts by taking into consideration the turnover figures in order to avoid litigation for rent adaptation (based on the above-mentioned hardship rule) and also to keep the Shopping Centres alive with most of the Tenants operating in it. Currently, there are no specific COVID-19 laws in place other than the guide of the Ministry of Health on measures to be taken by workplaces against COVID-19, such as the use of a masks, social distancing rules, cleaning and ventilation criteria etc.

## 11. OTHER POINTS TO NOTE

11.1 In this section, the author of each chapter draws attention to special points which have not been addressed elsewhere and may also give an overview on whether government policy tends to favour the Landlord or the Tenant. It may also draw attention to codes of practice which have been promulgated by national trade bodies concerned with shopping centres.

11.2 Tenant esg data: can a Landlord require a Tenant to provide data information related to business operations and the products sold:

There are no rules preventing Landlords from requesting information relating to the business operations and products sold by Tenants. Since most Shopping Centre leases include the minimum rent amount and turnover rent amount, data on business operations and products sold are received as turnover notifications. The Law on the Protection of Personal Data rules must be complied with whilst collecting and using Tenant information.

- 11.3 Money laundering: does money laundering legislation impose duties on the Landlord to provide information, and should the Tenant's duties to provide information be regulated in the lease:

No. The money laundering legislation mainly imposes obligations on businesses where high amounts of cash is exchanged *via* banks, financial services businesses, exchange offices, notaries, jewellers, antique traders etc.

- 11.4 Terrorism and security: is it necessary for the Tenant to be under an obligation to support security exercises and to participate actively:

Shopping Centres (i.e. Landlords or Shopping Centre managements) are under the obligation to provide private security services within all areas of the Shopping Centres, including car parks, entries, exits and connection roads. Tenants are not obliged to provide security services under the legislation and it is not common practice to oblige Tenants to do so.

- 11.5 Prescribed form: are there any form of lease requirements? For example, in the UK there are land registry prescribed form requirements for registerable leases:

Lease agreements are not subject to formal requirements, unless it is intended that the lease will be registered at the land registry. However, lease agreements are executed in writing for evidential purposes. The inclusion of Shopping Centre lease agreements in title deeds is not a common market practice in Turkey.

## ROMANIA

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### Preliminary Remarks

Romanian legislation has no specific provisions to regulate the commercial lease, other than the provisions of art. 1777-1824 and art. 1828-1831 of the Civil Code (the law) which refer to the civil lease agreement and which are extended by analogy to the commercial lease.

The provisions of the law are not mandatory, and the parties have the freedom to agree upon the terms and the conditions of the lease.

The market usually follows the triple-net institutional standards of lease agreements for shopping centres, whereby all expenses incurred by the landlord (e.g. insurance, property tax, costs for maintenance of the common areas, etc.) are recovered from the tenants through the service charges.

### 1. TERM

#### 1.1 Contractual Term.

There is no statutory minimum duration; the maximum duration admitted by law is 49 years (any lease concluded for more than 49 years is automatically reduced to 49 years).

In practice, typically the contractual term is 5 years, although anchor store contracts might have terms ranging from 10 to 25 years.

#### 1.2 Break Rights.

Usually, neither the landlord or the tenant have the right to break the contract. An exception is made in the case of anchor stores and/or key tenants, where it is not unusual for the tenant to have the right to break the contract after a minimum number of years.

#### 1.3 Renewal Rights.

Renewal right: There is neither any right of renewal for the tenant (unless otherwise agreed in the lease agreement) nor an eviction indemnity payable by the landlord.

Preference right: The law establishes a preference right in favour of the current tenant, at the expiry of the contractual term, in the same terms and conditions as those offered to new prospective tenants. Nonetheless, such provisions are not imperative and are usually waived in the lease.

#### 1.4 Disputes and Penalties.

As per market practice, lease agreements stipulate the tenant's material obligations. If any of these material obligations are breached, the landlord is entitled to terminate the lease. Usually, such breaches lead to termination upon simple notice, without the intervention of the courts or any other formality. However, in most cases, the lease agreements also provide for a remedy period in favour of the tenant. Only the tenant's failure to cure the breach in a given period would finally entitle the landlord to terminate effectively.

Similar to the landlord's termination rights, as described above, the tenant's right to terminate and the conditions in which it can be exerted are subject to contractual negotiations between the parties.

Disputes arising from a lease agreement are, by default and generally, subject to the court, not to either arbitration or mediation (it is possible to otherwise agree in writing for specific disputes, but not extended as market practice).

Eviction: As a rule, the eviction of the tenant can only be done by court decision. However, if the lease agreement is an enforceable title, the landlord does not need to obtain a court decision for eviction and can proceed with the enforcement of the lease (subject to an expedite approval from the court of law).

The law provides that the lease agreement has the force of an “enforceable title”, if it is concluded either (i) as a private deed but registered with the fiscal authorities or (ii) as an agreement authenticated by the public notary.

The enforcement of the lease can be used in case the tenant does not voluntarily surrender the store upon the expiry of the lease term or upon the exercise of a contractual break option, but it is arguable that it can also be used for recovering the store in other cases of termination (e.g. termination because of the tenant’s breach).

Penalties: usually these are pre-fixed in the contract; they act more like a deterrent than as a real punishment. Contracts usually provide that the application of penalties do not affect the right to compensation for excess damages. It is also common to establish in the contract the amount of compensation that is to be paid in the event of termination of the contract due to non-compliance by the tenant. Nonetheless, according to legal provisions, the courts are entitled to reduce the value of the penalties and/or of the compensation.

## 2. RENT

The usual contribution payable by a tenant for the premises leased within a shopping centre is a scheme of base (fixed) rent and turnover rent (related to sales).

### 2.1 Base Rent.

Tenants are required to pay a monthly base rent freely agreed on by the parties. Usually, the rent is agreed in EUR, but given the fiscal restrictions according to which all payments between Romanian residents on the Romanian territory are to be made in RON (Romanian national currency), the lease agreements provide that payment of the rent agreed in EUR is done in RON using the exchange rate of the National Bank of Romania at the date of issuance of the relevant invoice (or any other exchange rate agreed by the parties).

### 2.2 Turnover Rent.

Turnover Rent is calculated on a monthly basis (in some cases on a quarterly or yearly basis) by the positive difference between a certain percentage of the tenant monthly (or quarterly or yearly, as the case may be) gross sales (VAT excluded) and the base rent due for the same month (or the relevant period of reference).

Declaration of turnover is made in RON and then converted into EUR.

The turnover should include, for the landlord, the online sales linked in any manner to the leased premises, but there is no unitary market practice, this topic being one of the most currently discussed between landlords and tenants.

### 2.3 Rent Review.

The law does not set yearly (or any other fixed period ) reviews of the base rent.

Usually, the leases for shopping centres are providing for the indexation of rent by reference to HICP (given that the rents are established in Eur). Some landlords use alternative criteria for rent reviews, notably by incorporating part of the value of the previous year’s turnover rent into next year’s base rent. By incorporating this method the rent increase is higher than if reviewed by the HICP index.

### 2.4 Procedures to recover unpaid rent.

Guarantees: tenants are usually required to provide a performance bond, either a security deposit or a bank guarantee covering a certain number of months of rent and common expenses (including promotion costs), plus VAT. The guarantee usually covers not only the payment of rent and other charges, but it is a security for the good performance by the tenant of all the terms, covenants, obligations and conditions of the lease, including penalties, compensations, etc.

Termination right: Usually the leases provide the landlord's with a right to terminate the contract in the case that the tenant fails to fulfil its payments obligations (Often, a remedy term is granted before such termination can enter into force).

Expedite procedure for the recovery of rent: The lease agreement duly registered with Fiscal Authorities or authenticated is also an enforceable title with regard to payment of rent (only the fixed base rent, not turnover rent, common expenses or other amounts).

### 3. PREMISES

#### 3.1 Extent of Demise.

Tenants will normally let the interior of the store only so that the structure of the store and shopping centre remains with the landlord (the surface of the store is calculated following a technical criteria included in the lease agreement or in its annexes).

When contracting stores have already been definitively built (after the opening of the shopping centre), the parties accept that any difference between the area mentioned in the contract and the real area is irrelevant. When contracting stores in a shopping centre are under construction or there are new stores resulting from a change in the shopping centre layout, it is customary for contracts to set the criteria for measuring the store area and the consequences of any area differences.

If any area other than the store is leased (often storages, façade spaces for signages, loading docks or terraces) such areas shall be considered complementary and sometimes subject to a separate rent.

#### 3.2 Extent of the Shopping Centre.

The shopping centre is defined as a whole and comprises of all of the stores let to the tenants, the common areas (including areas accessible by the public, parking areas and technical areas) and the administration offices; it includes the building(s) and any external areas adjacent to it and integrating the property, as they may be from time to time.

#### 3.3 Common Parts.

The landlord manages the shopping centre common parts and grants access to the tenants to such common parts, namely the mall, food court, service passages, sanitary facilities and loading docks. Some common parts may be reserved exclusively for centre management purposes.

The ground rules governing the use of the common areas are usually included in the internal regulations of the shopping centre and their related costs (such as maintenance) are usually recovered through the common charges contribution in the lease agreements.

There are no restrictions in regards to the landlord's right to use part of the common parts for commercialisation (for operations of kiosks and others alike) and it is market practice to have temporary lettings on the common parts in shopping centres (nonetheless, some anchor stores and/or key tenants may request limitations to the implementation of kiosks or similar structures in front of their stores).

#### 3.4 Rights Reserved by Landlord.

The landlord has the exclusive right to manage and to execute works related to the common areas. In addition, the landlord usually has the right to:

- access the leased premises, in order to verify their maintenance and their compliance with the shopping centre's rules;
- be provided with data related to the turnover made in the premises, and directly supervise turnover made in order to verify the compliance with the obligation to pay the turnover rent; and
- decide to include a charge for the parking.

## **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

### **4.1 4.1 Assignment.**

According to the law, subletting and assignment are permitted unless they are specifically excluded in the lease contract; as such, the leases for stores within shopping centres usually contain an express prohibition to assign or sublet, without the landlord's consent.

Usually only tenants with strong bargaining power obtain the right to assign the agreement, and in most of these cases it can be assigned only to companies controlled by the same tenant and/or by the parent company of the tenant.

### **4.2 Underletting**

Same as for assignment.

### **4.3 Sharing occupation.**

Same as for assignment and subletting.

### **4.4 4.4 Change of control.**

There are no statutory provisions in this regard.

Some landlords prohibit the direct or indirect change of control over the company being the tenant under the lease without the landlord's consent and only anchor tenants obtain the right to freely change their control. In most of these cases, such changes of control are limited to the group in which the tenant pertains to.

## **5. ALTERATIONS/REPAIR**

### **5.1 Alteration.**

Any alterations to be made by the tenant in the leased premises require the landlord's prior approval following submission by the tenant of a detailed project.

### **5.2 Fit-out of the premises.**

There are no statutory provisions in this regard. The tenants are permitted to carry out the fit-out of the premises, after receiving the landlord's approval on the projects and designs.

### **5.3 Signage.**

The tenants are allowed to place their trade name on the store facade. Any change of such signage is subject to the landlord's consent (anchor tenants may have different rights). Some anchor/key tenants are also entitled to place signage on the shopping centre's façade.

### **5.4 Repair and decoration.**

The landlord is usually responsible for the structural repairs to the leased premises and all repairs relating to the common areas.

The tenant must carry out the repairs necessary to keep and maintain the leased premises and all its assets in good operational condition.

Usually, the leases do not contain details relating to which of the parties will execute the works necessary to adapt the premises to new legal regulations that are introduced from time to time and the responsibility to carry such may be determined depending on if there are structural or non-structural works.

## 5.5. Fit-out works/improvements made by the tenant in the store and their regime.

All works carried out at the premises by the tenant, as well as all improvements thereto, including any equipment installation, are an integral part of the store and property of the landlord and the tenant is not entitled to any compensation.

## 6. TRADING

### 6.1 Trading hours.

The tenants are obliged to comply with the opening hours in respect of each relevant activity either in their lease agreement or in the internal regulations. Usually, the landlords reserve the right to modify the trade hours (temporary or definitively).

### 6.2 Trading names.

The tenants usually operate under a specific brand name which is expressly mentioned in the lease and changes of the brand names require the landlord's consent. Often, anchor tenants and/or key tenants are authorised to change the trading name of the premises, with prior notice, provided that it pertains to the group of companies to which they belong.

### 6.3 Control of trading hours.

The landlords control the trading hours of the tenants through the security service suppliers (opening and closing schedules).

### 6.4 Competition rules.

Generally, the lease agreements contain a clause that expressly states that the tenant was not granted any exclusive rights to sell particular merchandise or services of any type within the shopping centre and that the landlord shall have the right to lease other spaces within the shopping centre to tenants selling merchandise and services similar to the merchandise and services to be sold by the tenant.

When it comes to restrictive clauses in the lease agreements and reviewing their legality, certain circumstances such as the market share of the respective tenant and the landlord, the geographical area, and other circumstances should always be taken into consideration and analysed on a case-by-case basis.

## 7. INSURANCE

### 7.1 Insured risks.

Usually, in the lease contracts the tenants assume the responsibility for all of the risks relating to the use and operation of the store, as well as the risks that may arise, therefore being compelled to take a multirisk insurance (goods and civil liability) covering an amount as may be deemed reasonable by the landlord. Also, before a tenant starts to execute works in their store, they must present to the landlord a works insurance policy.

Landlords, on the other side, usually take out an all risks property insurance in respect of the exterior and the structure of the building, common areas, common installations and facilities within the shopping centre as well as third party liability insurance.

### 7.2 Uninsured risks.

It is market practice to exclude risks derived from terrorism, pollution, fraud, etc.

### 7.3 Business insurance.

The landlords and the tenants can also take out business interruption insurance (covering a decrease in turnover, an increase in operating costs or the net profit) with different coverages in nature and intensity.

## 8. SERVICE CHARGES

### 8.1 Typical regime.

Usually, the leases provide that the landlord is responsible for providing common services to the shopping centre, including security, cleaning and maintenance of common parts and common equipment, with the costs being recovered through the service charge. Each tenant is required to pay its share of the service charge or they pay a fixed contribution in respect of the same (pre-determined and agreed at the time of entering the contract and which is subject to indexation, same as the rent). The administration of the service charges (and of the promotion charges) is done by the landlord.

### 8.2 Promotions and marketing.

The landlord is responsible for the promotion of the shopping centre, and each tenant is required to pay its share of the promotion costs or pay a fixed contribution to the same (pre-determined and agreed at the time of entering the contract). In the last case, the fix contribution is usually subject to indexation, same as the rent.

It is not infrequent that anchor/key tenants waive any/all of the contribution because of their own traffic attraction.

### 8.3 Tenants associations.

Some shopping centres promote the constitution and participation of the tenants in an internal organization, reserved for those currently operating, as a forum to inform of the relevant operational aspects; no legal entity is attributed and there is no membership cost for tenants.

## 9. GREEN LEASE

As per the current legal provisions, the shopping centre has to hold an energy efficiency certificate; this certificate is attached to each lease contract.

In addition, it is common for the lease agreements to identify general commitments (tied to compliance with regulations, e.g. in waste management or sustainability) and technical appendix and internal regulations detail specific requirements (such as those derived from BREEAM, etc.)

## 10. FORCE MAJEURE AND COVID

### 10.1 Force Majeure.

As per the law, force majeure is any external, unpredictable, absolutely invincible and inevitable event. In the case of the occurrence of a force majeure event (i) the debtor is released from performing its obligation when such obligation can no longer be executed due to a force majeure event, and (ii) the liability of a party shall be removed in the case that the prejudice/damage is caused by a force majeure event.

The law does not provide examples of events qualifying as force majeure and case law determines the circumstances generally accepted as force majeure. The provisions of the law on force majeure are not imperative and the parties may agree differently in the contract (e.g. indicating expressly the events which shall be considered as force majeure, maintaining the liability for performance even in case of force majeure, etc).

Before the outbreak of the pandemic, most leases either (i) were not dealing with force majeure, given the general applicable legal provisions or (ii) were including force majeure provisions (mainly replicating the legal provisions) in the boilerplate provisions at the end of the contract.

The Covid\_19 pandemic and the restrictions imposed by the authorities to contain the spread of the virus have caused vivid discussions between landlords and tenants on the impact of such events upon the performance of contracts and the liability of the parties in the case of non-fulfilment. The legislator did not intervene and there was no law enacted in order to establish the consequences of the pandemic and related authorities' restrictions upon the commercial relationships, nor a code of ethics to establish some guidelines to be considered.

Due to a lack of intervention by the legislator, the market did not reach a consensus in this regard and in the end, it came up to the particular negotiations between landlords and tenants on the solutions to mitigate the effects of such events.

## 10.2 Hardship.

The law expressly regulates the legal concept of hardship, which is applicable to all types of contracts (including leases). According to such legal concepts, if the performance has become excessively burdensome due to an exceptional event beyond the party's reasonable control, thus rendering the obligation of that party clearly unjust, the court can decide to amend the agreement, or terminate.

Therefore, the concept of hardship does not apply automatically; it can only be applied by the court in the case of an exceptional change of circumstances which could not reasonably have been foreseen. Moreover, the hardship does not apply if the debtor undertook the hardship risk in the lease agreement. Usually, the lease agreements contain the tenant's waiver of the right to claim hardship in court.

In the context of the Covid\_19 pandemic, the courts received a number of claims from tenants invoking the hardship, but no final decision has been issued.

## 11. OTHER POINTS TO NOTE

### 11.1 Prescribed form.

As per the law, the lease contract is considered as validly concluded the moment the parties have reached an agreement regarding the leased goods and the value of the rent; the written form is required by law only for evidence - in order to prove the parties' understanding on the different topics.

Even though the validity of the lease contract does not require a certain form (private deed or notarized deed), there are certain requirements to be observed in order for the lease agreement (i) to become an enforceable title (with regard to the payment of rent and recovery of the store by the landlord at the expiry of the lease) and/or (ii) for notation of the lease agreement with the land book (for the purpose of the lease to be binding upon the third party acquirer of the leased asset).

In order for a lease to become an enforceable title, it has to be concluded under the form of a (i) private deed registered with the Fiscal Authorities or (ii) a notarized deed. In order for a lease to be registered with the Land Book, it has to be concluded in written form (either as a private or a notarized deed).

### 11.2 Standard agreements, standard clauses, and unusual clauses.

The law regulates the concept of "standard /adhesion agreement" (the contract or at least its essential provisions being imposed or drafted by/for/according to the instructions of one of the parties) and "standard clauses" (clauses pre-determined, used generally and repeatedly, and which are included in an agreement without prior negotiation with the other party). Clauses that are negotiated are stated to prevail over standard clauses.

Standard clauses which cover certain topics (e.g. limitation of liability, rights to unilaterally terminate the contract, rights to suspend the fulfilment of the obligations, amendments to the statute of limitations, automatic renewal, applicable law, arbitral clauses) are deemed as "unusual clauses", and it is required that such clauses are expressly accepted in writing by the other party or otherwise it can be declared as void.

### 11.3 Termination of the lease in case of insolvency.

In various countries' legislative systems, it is largely accepted that if one of the parties becomes insolvent, the other party is entitled to terminate the lease agreement. However, under Romanian insolvency law, this is not a valid ground for termination of the lease by either the landlord or the tenant.

### 11.4 Money Laundering.

In Romania, the European Anti Money Laundry Directives 4<sup>th</sup> (EU Directive no. 2015/849) and 5<sup>th</sup> (EU Directive no.2018/843) were implemented through national laws. The 6<sup>th</sup> Directive (EU Directive no. 2018/1673) has not yet been transposed.

The concept of Obligated Entities was extended including, among others, entities operating in the field of promotion, agency, commission or intermediation activities in the sale and purchase of real estate, inasmuch as the leases preview a monthly rent in excess of €10,000 or €120,000 on an annual basis.

The Obligated Entities have a set of due diligence obligations (formal identification, real ownership, business purpose, monitoring, etc.), as well as the obligation to notify the National Office for Prevention and Control of Money Laundering the transactions with indicators or relationship to money laundering or financing of terrorism.

### 11.5 **Terrorism and security.**

Generally, the leases do not impose specific obligations for tenants with regard to prevention of terrorism and security, but only some general commitments (tied to compliance with regulations). Shopping centre administration and security services providers, under the duty of collaboration with law enforcement, coordinate the preventive or corrective actions to be applied in the shopping centre that may vary from time to time.

# RUSSIA

By  
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## Preliminary Remarks

The relationship between parties in a lease agreement is mainly regulated by the Civil Code of the Russian Federation. This code consists of common provisions applied to any lease and also includes special provisions applied particularly to real estate leases.

Under Russian law, the owner holds the right to lease out a premises. However, within the commercial lease market it is very common for parties to sign preliminary agreements or so called “usage agreements” prior to signing the actual lease agreement. This allows the parties to conduct fit-out works and use the premises whilst the shopping centre is still under construction and has not been commissioned, hence the ownership title of its legal possessor has not yet been entered into the Unified State Register of Immovable Property.

It is also usual for the Landlord to delegate the management of all activities, including tenant relations, inside the Shopping Centre to its management companies.

Long-term lease agreements (where the term exceeds 1 year) require registration in the Unified State Register of Immovable Property; therefore, such leases will constitute an encumbrance on real estate.

## 1. TERM

### 1.1 Contractual Term

The lease term is not limited by the law and the parties are free to stipulate any period of time suitable for their needs. If the period of lease is not defined in the agreement, the lease agreement is deemed to be concluded for an indefinite period.

In practice, the lease term depends on the type of Tenant. If the Tenant is an individual entrepreneur or a small retail company, the parties will usually execute a short-term lease agreement with a term of 11 months and then renew the lease upon its expiration. If the Tenant is a large international retail company or a food store, then the lease term will typically be between 10 and 25 years. This is due to the fact that large companies tend to spend more on fit-out works and have long-term investment commitments and the fact that food retailers will not be able to obtain a licence to sell alcohol unless they have a lease agreement for the respective premises with a term exceeding 1 year.

### 1.2 Break Rights

The Civil Code of the Russian Federation sets out several termination options available to the Landlord and Tenant through a judicial procedure. For example, at the request of the Landlord the court may dissolve the lease agreement if the Tenant fails to pay rent more than two consecutive times. On the other hand, the court may dissolve the lease agreement upon the Tenant’s request if the Landlord fails to conduct major repairs at the leased premises. The parties may also stipulate other termination provisions through non-judicial procedure. Typically, anchor Tenants will be granted the right to unilaterally terminate the lease agreement upon the expiration of half of the contractual term provided that they serve prior notification on the Landlord. The Landlords normally insist on making this a mutual right.

### 1.3 Renewal Rights

Under the Civil Code of the Russian Federation, Tenants have a pre-emptive right to execute the lease agreement for a new term on the terms and conditions proposed by the Landlord. If the Landlord refuses to execute the lease agreement with the former Tenant and subsequently leases the premises to another company, the former Tenant is entitled to require the rights under the newly executed agreement be transferred to it and any losses be compensated through the courts.

The above stated pre-emptive right can be excluded from the lease agreement and Landlords often do so.

Short-term lease agreements (with a term of less than 1 year) normally state that upon their expiration they are automatically renewed on the same terms for the same period unless one of the parties expressly declares its wish to terminate the lease.

If the parties continue the lease after its expiration, the lease is deemed to be resumed on the same conditions for an indefinite term and either party has the right to terminate such agreement by serving three months' notice on to the other party.

### 1.4 Disputes and Forfeiture

It is a statutory requirement for the parties to a lease agreement to go through a mandatory pre-trial procedure for dispute resolution. If the dispute is not resolved through a pre-trial procedure, it should be addressed to and settled by a competent court of the Russian Federation. Inclusion of arbitration clauses in a lease is extremely rare in practice.

## 2. RENT

### 2.1 Basic rent

Rent is generally paid in advance on a monthly or quarterly basis ("fixed part of the rent"). Landlords often grant a short grace period free of rent charges to Tenant for the period required to complete fit-out works or conduct renovation works.

#### Additional rent

Tenants are typically charged additional fees for the services of maintaining common areas, cleaning the territory of the Shopping Centre, maintaining security, marketing activities etc ("variable part of the rent").

Tenants' consumption of utilities is measured by separate meters and is paid in addition to the rent.

#### VAT

Leased property is usually subject to VAT. To calculate the tax, the Landlord multiplies the rent amount (excluding VAT) by 20%. However, if the Landlord uses the simplified tax system, the leased property will not be subject to VAT. If there is no information on VAT within the lease agreement, VAT can be calculated at the estimated rate according to the formula 20/120% (i.e. multiplying the rent by 20/120). If the state acts as the Landlord, then VAT is paid by the tax agent (the Tenant). Also, if the security payment under the lease agreement is counted toward the rent, then it is also subject to VAT, since this is considered as an advance payment. If, according to the terms of the lease agreement, the security payment serves purely as security and is subject to return, then the issue of VAT taxation does not arise.

### 2.2 Turnover

In addition to the fixed part of the rent, Tenants in large Shopping Centres usually pay the Landlord a percentage of their turnover. This sum is usually calculated as a sum equal to the difference between the Tenant's turnover in the leased premises for the respective period multiplied by the turnover percentage (rarely exceeding 9%) and the annual rent for each year of lease for the respective quarter. Large anchor Tenants usually insist on paying only a certain percentage of their profit or revenue and also insist on excluding the fixed part of the rent. Currently, the owners of large Shopping Centres are actively promoting the idea of securing the need to include income from online sales in the turnover at a legislative level. However, Tenants strongly oppose this proposal and insist that Shopping Centres play no role in their online sales. Tenants may argue that online sales relate to

the Internet traffic of a particular online store, for which the Tenant may also be charged. In practice, majority of lease agreements do not contain terms requiring the inclusion of online sales in the turnover figure.

### 2.3 Rent Review

It is common market practice to stipulate a yearly indexation of rent payments. Such indexation in most cases is tied to the Consumer Price Index for the previous year and is done automatically without signing an addendum to the lease.

### 2.4 Procedures to recover unpaid rent

In case of non-payment of the rent, the Landlord usually goes to court; however, before doing so the Landlord is obliged to comply with the pre-trial procedure for resolving the dispute and send the Tenant an appropriate notice demanding that the debt be paid. Moreover, if the Tenant fails to pay rent more than two consecutive times, the lease agreement may be terminated by court. As an alternative to the court procedure, the Landlord often writes off rent arrears from the security deposit provided by the Tenant or requests that a guarantor or a surety pays if such methods of securing the Tenant's obligations are agreed by the parties in advance. There are also more practical, but rather severe measures such as disconnecting the utilities in the Tenant's premises (water, heat and electricity) or seizing the Tenant's goods until the debt is paid in full. It should be noted that the latter case is only legal when such goods appear to be in the landlord's possession lawfully, for instance, when the Tenant leaves its goods in the premises after termination of the lease.

## 3. PREMISES

### 3.1 Extent of Demise

The Tenant will be provided the internal proportion of the premises measured using either the BOMA or the Technical Inventory Bureau standard. It is also typical for parties to stipulate in lease agreements that certain parts of the common area directly outside the shop front (usually not exceeding a width of 2 meters) will not be leased to other Tenants and will be free of any decorative furniture, so that they remain visible to potential customers. The building structure and the common areas remain with the Landlord.

### 3.2 Extent of the Shopping Centre

The Shopping Centre comprises of all premises, common areas and any external areas adjacent to it, which are usually occupied by parking spaces. The entire area of the Shopping Centre may be leased out, except for premises already leased to other Tenants and the common areas required for the functioning of the Shopping Centre.

### 3.3 Common Parts

The common parts of Shopping Centres, such as halls, elevators, parking lots and atriums can be used freely by the Tenants and their customers. The service charges for common parts of a Shopping Centre are typically allocated amongst the Tenants. Additional fees may sometimes be collected from the customers, for example for the use of parking spaces. However, the Landlord usually provides parts of the common parts for rent, such as the installation of vending machines, ATMs, coffee stations, small shops, advertising structures or seasonal fairs.

### 3.4 Rights Reserved by Landlord

Landlords typically reserve a number of rights to enable them to maintain the Centre in a good order. These include:

- Supervision of any works or repairs inside the leased premises;
- Access to the premises to check the compliance with the terms of the lease, technical, ecological, other mandatory requirements, as well as to carry out needed repair works inside the premises that effect the functioning of the entire Centre;

- Suspension of certain services (such as utilities) if the Tenant breaches its payment obligations;
- Review of the accounting data related to the turnover in the premises;
- Assigning of the Landlord's rights and obligations under the lease agreement.

On the other hand, the Landlord may undertake to exercise these rights in such a manner as to not adversely impact the Tenant's business.

## **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

### **4.1 Assignment**

The Tenant is usually prohibited from assigning its rights and obligations under the lease agreement without prior consent of the Landlord. Assignments between affiliated companies are usually allowed.

### **4.2 Underletting**

The Tenant is usually prohibited from subleasing all or part of the premises without prior consent of the Landlord. If Landlords consent is obtained, the Tenant will be held liable for any damages to the premises caused by the subtenant.

### **4.3 Sharing occupation**

Sharing occupation is not common practice and is typically carried out in the form of sublease, which is generally forbidden without prior consent of the Landlord.

### **4.4 Change of control**

Stipulating restrictions on change of control is not a widespread practice in Russia, and the parties to the lease agreement are normally obliged to notify the other party within a reasonable period of time when change of control occurs. But the parties may decide to include provisions on termination of the lease or collecting a penalty if either party fails to follow the agreed procedure.

## **5. ALTERATIONS/REPAIR**

### **5.1 Alterations**

Tenants are prohibited from making any structural alternations that may involve any change to the load-bearing elements of the premises or the Shopping Centre, including alterations of security or energy efficiency improvement nature. Generally, the Landlord is responsible for carrying out alterations under statute, unless otherwise provided by the lease agreement.

In addition, leases usually stipulate an approval procedure that the Tenant has to follow in order to obtain the Landlord's consent for the planned alternations.

### **5.2 Tenant's fitting out**

Tenants typically conduct their own fit-out works under the supervision of the Landlord and with prior approval by the Landlord. Tenants are often granted a grace period for the time needed to complete fit-out works. Most lease agreements stipulate that upon termination of the lease agreement, the Tenant has to remove any alternations and return the premises in the same condition as they were at the beginning of the lease or that any inseparable improvements made to the premises become the property of the Landlord without compensation.

### 5.3 Signage

Placement of information signs are usually carried out by the Landlord free of charge for the anchor Tenants, since it increases the consumer appeal of the Shopping Centre.

### 5.4 Repair and decoration

It is widespread practice for the Landlords to supervise any repairs inside the premises. The necessary repairs are performed by the Tenant at its own expense, unless the need for repair arose due to the Landlords fault.

Decorations are generally allowed without any limitations and even may be mandatory during festive seasons.

## 6. TRADING

6.1 Under the lease, the Tenant can be obliged to be open for trade within the Shopping Centre's working hours subject to certain exceptions which usually entail the closing down of a Centre by the state authorities or malfunctioning of the utility systems. If the Tenant is in breach of this obligation, it may be subject to a penalty and if the trade suspension period lasts for a long time the Landlord may terminate the lease agreement.

6.2 The Tenant is required to operate under a specific trading name as stipulated in the lease agreement. Any re-branding is usually subject to the Landlord's approval.

6.3 It is widespread practice for Landlords to control the Tenant's opening hours, as all shops in the Shopping Centre should be open for public during the normal business hours. The lease agreement usually contains a special provision where the Tenant undertakes to comply with the rules of the Shopping Centre and special lease rules. Such documents describe the rules for using premises in a Shopping Centre and the procedure for carrying out retail activities in more detail. If the Tenant is in breach of this obligation they may be liable to fines or termination of the lease agreement.

6.4 In practice, the parties do not usually include a clause stating that the Landlord undertakes not to lease the premises out in the same building to other Tenants if they sell the same goods / provide the same services as the Tenant under a lease agreement due to potential breach of antitrust laws. However, certain agreements may prohibit the Landlord from leasing the premises out to the Tenant's competitors within a certain distance from the Tenant's shop. Similarly, the Tenant may be prohibited from placing a similar store within a certain radius from the Shopping Centre (normally up to 5 km). In certain circumstances the latter two cases can be construed to be in breach of competition laws and should be used carefully.

## 7. INSURANCE

### 7.1 Insured risks

Both parties to a lease are usually required to obtain third-party liability insurance. In addition, the Tenant will typically insure its liability during fit-out works and its property inside the premises, while the Landlord will insure the Shopping Centre.

### 7.2 Uninsured risks

Any uninsured events are subject to the provisions of the Civil Code of the Russian Federation. In such cases, the party at fault will have to compensate the damages and losses caused to the other party. Depending on the restriction measures adopted by state bodies, a pandemic can be recognized as a force majeure circumstance. Here the Tenant can be released from any civil liability in the form of paying penalties or compensation for losses, obligations under a lease agreement can be terminated and a lease agreement can be terminated or changed by court(although it is difficult to apply the last two pandemic consequences in practice as the court investigates every particular case very closely).

### 7.3 Business insurance

It is widespread practice for the Tenants to insure their civil liability in connection with the risk of causing harm to third parties (Landlord, other Tenants, customers, visitors) during the operation of the leased premises or territory. The parties also insure their property (the Shopping Centre and the Tenant's goods) from damage or theft. As for the business interruption insurance, it is not so popular in Russia due to its cost.

## 8. SERVICE CHARGE

### 8.1 Typical regime

Tenants pay a fixed contribution for servicing the common areas, cleaning, maintaining security and marketing activities etc. Some Landlords may charge operational expenses on an open book basis, although this is not very widespread.

### 8.2 Promotions and marketing

Tenants participate in common marketing activities organised by the Landlord at the expense of the payable marketing fees. Any additional marketing activities carried by the Tenants inside the Shopping Centre or using its name usually require prior consent from the Landlord.

### 8.3 Tenants associations

There is no such practice in Russia.

## 9. GREEN LEASE

Green Leases are not a strong market trend in Russia. The Tenants usually provide data relating to their consumed utilities to the Landlord for the purpose of making payments for such consumed utilities. At the same time, lease agreements often include provisions on organizing garbage collection, cleaning of the leased premises and overseeing compliance with technical requirements when operating hazardous production facilities and equipment.

## 10. FORCE MAJEURE AND COVID

During the COVID pandemic, government agencies passed a number of laws regulating the legal relationships in leases. COVID is not recognized as a force majeure circumstance in every case per se. When deciding whether a pandemic is a force majeure, the courts assess in aggregate all the factual circumstances of the case, as well as the consequences of the restrictions adopted by state bodies for each entity. If COVID is recognized as a force majeure circumstance, the Tenant is released from paying penalties or incurred losses, although rent is to be paid.

The following rules have been introduced by the government to support Tenants: Tenants operating in the sectors of the Russian economy that were affected by the deterioration of the situation due to the spread of COVID could apply for deferral of the rental fee; Tenants that are small or medium-sized businesses and operate in the sectors of the Russian economy that were affected by the deterioration of the situation due to the spread of COVID could apply for rent reduction for up to one year and if the Landlord refuses to change the rent, the Tenants could unilaterally terminate the lease agreement without compensation for losses or any penalties. Security payment was not subject to return as it was effective until 1 October 2020.

## 11. OTHER POINTS TO NOTE

11.1 It is very widespread on the retail market for Landlords to require a security deposit from the Tenant (typically in the amount of 2 monthly rent payments) in order to secure the execution of the Tenant's obligations under the lease agreement. Anchor Tenants usually negotiate to substitute the security deposit with a bank guarantee which has a maximum coverage in the same amount. The amount of such collateral is subject to annual indexation.

In new Shopping Centres, it is usual for Landlords to require the Tenants to start fit-out works prior to the commissioning of the Centre and to impose strict penalties for Tenants if they fail to finish such works and open the premises to the public at the opening day of the Shopping Centre opening day.

### 11.2 Tenant ESG data

The Landlord has no presumed right to oblige the Tenant to provide information related to business operations and the products sold, unless otherwise provided by the lease agreement. For example, the lease agreement may stipulate the obligation of the Tenant to provide the Landlord with data on monthly receipts for the purpose of calculating the turnover fee.

### 11.3 Money laundering

A standard anti-corruption clause is included in lease agreements as a separate annex, which prohibits the parties from taking actions to legalize/laundry the proceeds of crime and other corruption violations both in relations between the parties to the Agreement and in relations with third parties and state bodies.

### 11.4 Terrorism and security

Regardless of the terms of the lease agreement, the Landlord and the Tenant shall comply with anti-terrorism laws and take appropriate measures to .

### 11.5 Prescribed form

A lease agreement entered into for a period exceeding one year, and lease agreements where at least one of the parties to the agreement is a legal entity (regardless of the term) shall be in written format and registered with the state authority. There are no special forms of a lease agreement to follow, however the lease agreement must indicate the subject (cadastral number, address, floor area) and the amount of the rent.

## SERBIA

By

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### Preliminary Remarks

Leases are regulated by the Contracts and Torts Law (*Official Gazette of Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 45/89 - Decision of the Constitutional Court of Yugoslavia and 57/89, Official Gazette of the Federal Republic of Yugoslavia, no. 31/93 and Official Gazette of Serbia and Montenegro, no. 1/2003 – Constitutional Charter*) (hereinafter referred to as the „**Contracts and Torts Law**” or the „**Law**”). However, in case the landlord is public authority (e.g. the State, an autonomous province, a municipality, or a public entity), the Law on Public Assets (*Official Gazette of the Republic of Serbia, no. 72/2011, 88/2013, 105/2014, 104/2016, 108/2016, 113/2017, 95/2018 and 153/2020*) shall also be applied – in addition to the Contracts and Torts Law.

## 1. TERM

### 1.1 1.1 Contractual Term

Minimal and maximal duration of the lease term are not prescribed by law. The lease agreement may be concluded for either a definite or an indefinite term.

### 1.2 1.2 Break Rights

The Law stipulates that lease agreements concluded for an indefinite term may be terminated at any time (except an inopportune time), while definite-term lease agreements may only be terminated on statutory grounds, or under specifically agreed conditions provided in the lease agreement.

Statutory grounds for termination of the lease agreement are the following:

- The landlord is entitled to terminate the lease agreement in the following cases: 1) if the tenant does not use the leased premises in an appropriate manner; 2) if the tenant does not pay the rent within 15 days after receiving the landlord’s notice in that regards; 3) if the tenant sublets the property without the landlord’s consent, 4) in case the lease premises is demolished due to event of force majeure.
- The tenant is entitled to terminate the lease agreement in the following cases: 1) If repair of the leased premises is necessary and if such state of the leased premises interfere with its use to a significant extent and for a longer period of time; 2) if at the moment of delivery, the leased premises has a defect that cannot be remedied (instead, tenant may opt to ask for a rent reduction); 3) in case the lease premises is demolished due to event of force majeure.

If a third party has a right that completely excludes the tenant's right to use the leased premises, the lease agreement shall be terminated by force of the law, and the landlord is obliged to compensate the tenant for the damage.

### 1.3 Renewal Rights

The contractual parties may agree on conditions for prolongation of the lease term (automatic prolongation for additional definite term, prolongation which is conditioned by fulfilment of certain requirements etc.).

However, according to the Law, lease agreements concluded for a definite term are considered to be converted into a lease for an indefinite term if the tenant continues to use the leased premises after the expiry of the initially agreed definite term, and the landlord does not object to such use.

#### 1.4 Disputes and Forfeiture

Disputes related to leases shall be governed by the competent court with territorial jurisdiction covering the territory where the leased premises is situated.

## 2. RENT

### 2.1 Basic Rent

The amount of the Basic Rent may be freely agreed between the parties, as well as the payment method.

### 2.2 Turnover Rent

In addition to the Basic Rent, the Parties may also agree on the Turnover Rent (i.e. percentage of achieved, relevant period for calculation of the Turnover Rent and payment method).

### 2.3 Rent Review

The Law does not prescribe reviews of the Basic Rent, but it can be agreed between the Parties.

### 2.4 Procedures to recover unpaid rent

Default in payment of the Rent (and Service Charges) constitutes a statutory termination reason under the Law.

In case the landlord does not recover due contractual receivables using contractual collaterals (if such collaterals are agreed between the Parties), it can start enforcement proceedings in front of the competent court on the basis of issued invoices.

## 3. PREMISES

### 3.1 Extent of Demise

The premises which is subject of the lease should be clearly designated, as well as its surface

### 3.2 Extent of the Shopping Centre

The Shopping Centre should be described along with the Leased Premises (for the purpose of detailed description of the Leased Premises).

### 3.3 Common Parts

The use of Common Parts, representing interior areas (areas inside of the Shopping Center) and exterior areas (outside areas pertaining to the Shopping Center), are not specifically regulated by the Law.

### 3.4 Rights Reserved by Landlord

According to the Law, the Landlord has the following rights:

- to terminate the lease agreement in case the tenant use the premises contrary to the purpose designated in the lease agreement;
- to terminate the lease agreement in case the Tenant fails to pay the rent within terms prescribed in the lease agreement, or within 15 days after sending notification to the tenant (if not agreed otherwise between the parties).

#### 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

- 4.1 **Assignment** - According to the Law, either party may assign its rights and obligations under the lease agreement if the other party agrees to such transfer.
- 4.2 **Underletting** - The Tenant may sublet the Leased Premises to a third party, except it is agreed between the parties that subletting is allowed only with the Landlord's consent;
- 4.3 **Sharing occupation** – shared occupation of the Leased Premises is allowed only upon receiving the Landlord's prior consent;
- 4.4 **Change of control** – change of control does not have any impact to the lease relationship, except otherwise agreed in the lease agreement.

#### 5. ALTERATIONS/REPAIR

##### 5.1 Alteration:

The Tenant may make alteration of the Premises only upon receiving the Landlord's approval.

##### 5.2 Fit-out of the premises:

The Law does not specifically regulate rights and obligations of the parties with respect to fit-out of the premises, it can be freely agreed between the Parties.

##### 5.3 Signage:

The Law does not specifically regulate rights and obligations of the parties with respect to placing the signage, but the Parties may freely agree on this matter.

##### 5.4 Repair and decoration:

According to the Law, the Landlord is liable for all maintenance and repairs of the Shopping Centre including the Premises (if not agreed otherwise in the lease agreement), save for ordinary maintenance of and minor repairs to the Premises to be carried out by the Tenant.

#### 6. TRADING

##### 6.1 Trading hours

There are no general operating hours established by the authorities/legislation for specific activities.

##### 6.2 Trading names

The Law does not specifically regulate use of the trading names in the leased premises. However, the tenant is obliged to respect general IP regulations.

##### 6.3 Competition rules

Any agreement that may object or has effect the restriction, prevent or distort competition on the relevant market is not allowed under the competition regulation, unless there is an exemption issued by the Competition Council regarding the respective agreement.

## **7. INSURANCE**

### **7.1 Insured risks**

The Law does not specifically regulate insurance related to leases, but it can be agreed and regulated between the Parties.

### **7.2 Uninsured risks**

The Law does not specifically regulate insurance related to leases, but it can be agreed and regulated between the Parties.

### **7.3 Business insurance**

The Law does not specifically regulate insurance related to leases, but it can be agreed and regulated between the Parties

## **8. SERVICE CHARGE**

### **8.1 Typical regime**

The Law does not specifically regulate right of the Landlord to charge Service Charges from tenants, but it can be agreed and regulated between the Parties

### **8.2 Promotions and marketing**

The Law does not specifically regulate right of the Landlord to charge Marketing Fees from tenants, but it can be agreed and regulated between the Parties.

### **8.3 Tenants associations**

There is no legal obstacle for tenants to establish Tenants associations, while respecting, first of all, relevant competition regulations.

## **9. GREEN LEASE**

There is no specific regulation in Serbia which regulates green lease for leases in Shopping Centres.

## **10. FORCE MAJEURE AND COVID**

In Serbia there is a legal concept of hardship, expressly regulated in the Law, and applicable to all types of agreement (including leases).

According to such legal concept, if events have hindered performance by one party more onerous, after conclusion of the agreement, than would reasonably have been anticipated when the agreement was concluded, i.e. if its performance has become excessively burdensome due to an event beyond the party's reasonable control which it could not reasonably have been expected to have taken into account, the relevant party may ask the courts to grant termination or renegotiation of the agreement.

Therefore, the hardship does not apply automatically; it can only be applied by the court, in case of an exceptional change of circumstances which could not reasonably have been foreseen.

In the context of Covid 19 pandemic, courts received a number of claims from tenants invoking the hardship, but clear court practice is still not established.

## 11. OTHER POINTS TO NOTE

**Destruction of the Premises** – according to the Law, if the Premises as the subject of lease cease to exist (e.g. due to their destruction), the lease shall terminate.

**Termination notice:** If termination notice period is not determined by the lease agreement concluded for the indefinite period of time, it is eight days as of receiving of the termination notice.

**Money laundering:** under the Anti-Money Laundering Act, landlords do not have any specific obligations with regard to lease agreements in shopping centres.

**Terrorism and security:** There are no specific obligations for tenants.

**Prescribed form:** The Law does not prescribe obligatory form of the lease agreement.

**Sale of the asset:** According to the Law, in case the Shopping Center is sold to the new owner, the acquirer takes rights and obligations of the Landlord, and the rights and obligations from the lease agreement arise between him and the lessee. The previous owner of the Shopping Center remains jointly and severally responsible for all obligations of the acquirer towards the Tenant arising from lease agreement which were effective when the acquisition of the Shopping Center took place, as long as those lease agreements are in force.

# SLOVAK REPUBLIC

## The legal framework

By

ADVOKÁCIA s.r.o. (Mrs. Ľubica Rodinová, attorney) and Mr. JUDr. Martin Hudec, attorney

### Preliminary Remarks

In the Slovak Republic, retail leases of non-residential premises located in a Shopping Centre (as well as any other leases) are governed by Act No. 116/1990 Coll., which governs the lease and sublease of non-residential premises (hereinafter as the “**Non-residential Lease Act**”) and the Civil Code, Act No. 40/1964 Coll., if the problematic is not solved in the Act No. 116/1990 Coll. Retail leases of part of the Common Parts (as defined in Art. 3.3 below) located in a Shopping Centre are governed by Act. No. 40/1964 Coll. Civil Code as amended (hereinafter as the “**Civil Code**”).

The Non-residential Lease Act includes special provisions on non-residential leases and the Civil Code includes general provisions on leases which are used if such statements are not solved in the Non-residential Lease Act. Most of the provisions of the Non-residential Lease Act and the Civil Code are not mandatory and the parties may agree otherwise in a lease contract, unless deviation from a certain provision or principle of the Civil Code is explicitly prohibited by the Civil Code or unless such deviation is contrary to general principles of good morals or public order.

The expressions “Tenant, Landlord, Shopping Centre, premises, rent, service charges etc.” used in this document have the meaning usually assigned to such expressions by Slovak laws and do not refer to any particular Tenant, Landlord, shopping Centre, premises, rent, service charges, etc.

## 1. TERM

### 1.1 Contractual Term

Usually, the parties agree a lease for a definite period of years, but there are no statutory limitations as to the length of the lease term. Lease contracts may be concluded for an indefinite period.

### 1.2 Break Rights

The parties may agree to a break option, i.e. a premature termination without a breach of a contract.

In the case of a breach of the lease contract by either party, the other party may terminate the contract:

- with a notice of termination (with a notice period of agreed number of months) for the statutory reasons stipulated in the Non-residential Lease Act if the lease contract is concluded for definite period or if the lease contract is concluded for indefinite period the reasons for termination may be agreed differently to those mentioned in the Non-residential Lease Act; or
- withdraw from the contract (i.e. terminate with immediate effects as from delivery) for reasons stipulated in the Civil Code, unless further or other reasons for withdrawal are agreed in the lease contract.

Typically, the Landlord may terminate the lease if the Tenant defaults in lease payments, uses the premises contrary to the lease contract, breaches the lease contract or its obligations under the lease contract or if the Tenant is bankrupt (bankruptcy is declared over the Tenant’s assets) or in case of insolvency proceedings in respect of the Tenant. Typically, the Tenant may terminate the lease if the premises become unusable or the Landlord breaches its obligations under the lease contract.

### 1.3 Renewal Rights

According to the valid legislative and decision of the Slovak Supreme court there is no possibility for an automatic renewal of the lease contract for the non-residential premises by virtue of Law if such possibility is not

agreed directly in the lease contract. The alternative way to renew the lease contract is to conclude an amendment to the lease contract and to agree on longer lease period.

#### 1.4 Disputes and Forfeiture

As mentioned above, reasons for termination are stipulated in the Non-residential Lease Act (in case of termination notice) or in the Civil Code (in case of withdrawal). In case of the termination notice for the lease of non-residential premises which are concluded for definite period the termination reasons are strictly given by the Non-residential lease act and cannot be modified / changed. Prior warning notice or a remedy period (before serving a termination notice) is not mandatory, but may be agreed in the lease contract (for agreed number of days / working days depending on the nature of the particular breach).

## 2. RENT

### 2.1 Principal Rent

The amount of the principal rent may be freely agreed by the parties, usually payable in advance for agreed period of time.

### 2.2 Turnover Rent

The turnover rent (if such is agreed) may be calculated monthly (in some cases on a monthly, quarterly or yearly basis).

### 2.3 Rent Review

The law does not prescribe reviews of the basic rent, but it can be agreed between the Parties.

### 2.4 Procedures to Recover unpaid Rent

Default in payment of rent (and service charges) constitutes a valid reason for statutory termination under the law.

By virtue of the Civil Code, the Landlord may retain the Tenant's movables in and on the premises to pay towards the Landlord's claim against the Tenant.

In case the Landlord does not recover due contractual receivables using contractual collaterals (if such collaterals are agreed between the Parties), it can start enforcement proceedings in front of the competent court on the basis of issued invoices.

## 3. PREMISES

### 3.1 Extent of Demise

Usually, the whole premises are leased to Tenants.

### 3.2 Extent of the Shopping Centre

The Shopping Centre comprises of building(s), land(s) where the building is (buildings are) situated and adjacent lands to be used together with and for the purposes of the Shopping Centre. The Shopping Centre includes all premises in the building(s). Also, Shopping Centres usually include any extensions to the buildings and lands, as may be made by the Landlord from time to time.

### 3.3 Common Parts

The Landlord manages the Shopping Centre Common Parts and grants access to the Tenants to the Common Parts. The Common Parts usually comprise of indoor and outdoor areas accessible by the public.

The Landlord may lease the Common Parts.

### 3.4 Rights reserved by Landlord

The Landlord usually has the exclusive right to manage and to execute works related to the Common Parts, including reconstructions of and additions to the Common Parts and the Shopping Centre but excluding the premises (i.e. premises leased to individual Tenants which, according to the Civil Code, the Landlord may not modify the premises during the lease term).

In addition, the Landlord usually has the right to:

- access the premises in order to verify their use and maintenance by the Tenant and the Tenants compliance with its obligations under the lease contract and the Shopping Centre's rules;
- be provided with accounting data related to the Turnover made in the premises, and review accounting data and books related to the premises if it doubts that the Turnover data provided by the Tenant is correct;
- decide to exploit the parking as a paid-parking; and
- assign the rights under the lease contract.

## 4. ABILITY TO TRANSFER THE LEASE OR SUBLET

### 4.1 Assignment

According to the Civil Code, either party may assign its rights and obligations under the lease contract without the consent of the other party.

The assignment of right and obligations under the lease contract by the Tenant can be agreed on a case by case basis by the Landlord.

### 4.2 Underletting

The Tenant may sublet the premises only with the Landlord's consent. Subletting without the Landlord's consent is a serious breach of the lease contract. The sublease always terminates upon the termination of the lease at the latest.

### 4.3 Sharing Occupation

According to the Slovak law, sharing occupation of the premises may constitute a sublease and the principles governing subleases apply, i.e. it is only possible with the Landlord's consent and sharing occupation without such consent constitutes a serious breach of the lease contract.

### 4.4 Change of Control

Change of control is not regulated by the Civil Code with respect to contracts, but transfer of shares or an ownership interest in the Tenant which may result in the change of control may be agreed in the lease contract to constitute an assignment of the lease contract and change requires the Landlord's prior and written consent. In such case the same rules and principles as agreed in case of the assignment of the contract shall apply.

## **5. ALTERATIONS/REPAIR**

### **5.1 Restrictions Affecting Alterations**

Tenant's may make alterations to the premises only upon receiving the Landlord's approval if not agreed otherwise.

### **5.2 Tenant's Fitting out Works**

Initial fit out of the premises is made by the Tenant (premises are usually handed over to Tenant in the shell and core condition) at its own cost, following the Landlord's approval of the Tenant's fit out works, projects and designs.

### **5.3 Signage**

Any business establishment must bear a signage and Tenants are allowed to place their trade name on the premises by virtue of the Commercial Code, but details of placing the Tenant's signage on the premises are usually agreed in the lease contract (typically, on the façade above premises' entrance and the signage must comply with the Landlord's / Shopping Centre's standards).

### **5.4 Repair and Decoration / Maintenance**

According to the Non-residential Lease Act, the Landlord is liable for all maintenance and repairs of the Shopping Centre including the premises (if not agreed otherwise for the premises) save for ordinary maintenance of and minor repairs to the premises which is to be carried out by the Tenant.

## **6. TRADING**

### **6.1 Keep Open**

Tenants must comply with the opening hours and have the premises open for trading and the public during the opening hours stipulated for the Shopping Centre by the Landlord, unless the Tenants are not allowed to have the premises open by virtue of legal regulations (e.g. an act prohibiting sale on public state holidays).

### **6.2 Trading Names**

Change of the brand names which the Tenants operate under or any change of the type of commercial activity carried out by the Tenants in the leased premises may require the Landlord's prior approval.

## **7. INSURANCE**

### **7.1 Insured risks**

The Landlord maintains insurance of the Shopping Centre, usually including the premises; costs of such insurance are recovered through the service charges.

The Tenants maintain at their cost insurance of their assets placed in the premises and liability insurance for damage caused to third parties in connection with the Tenants' use of the premises, including damage caused by the performance of the fitting out works and alterations.

### **7.2 Uninsured risks**

The law does not specifically regulate insurance related to leases, but it can be agreed and regulated between the Parties.

## 8. SERVICE CHARGE

### 8.1 Typical regime

The Landlord is responsible for providing common services necessary for the due operation of the Shopping Centre, including maintenance, repairs and cleaning of the Common Parts and Shopping Centre's common systems and equipment and including supplies of utilities to the Common Parts.

The law does not specifically regulate the right of the Landlord to charge service charges to Tenants, but it can be agreed and regulated between the Parties..

### 8.2 Promotions and marketing

The law does not specifically regulate right of the Landlord to charge marketing fees from Tenants, but it can be agreed and regulated between the Parties.

### 8.3 Tenant's Associations

Not formed in Slovakia.

### 8.4 OTHER POINTS TO NOTE

- **Destruction of the Premises** – according to the Civil Code, if the premises as the subject of lease cease to exist (e.g. due to their destruction) or according to Non-residential Lease Act, if it has been decided to remove the building or to modify the building which prevents use of non-residential premises, the lease may be terminated by the Lessor.
- **Force Majeure (circumstances excluding liability)** – according to the Commercial Code, a party is not liable for default if the default is caused by an extraordinary unforeseeable and insurmountable obstacle created independently of its will.

## SPAIN

By

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### Preliminary Remarks

Spanish legislation differentiates between commercial and residential leases, and a more protective legal regime applies to tenants holding urban residential leases.

In commercial leases, the parties may freely agree to most of the terms and conditions subject to very minor mandatory provisions (e.g. the need to give a two-month deposit and which court has jurisdiction over any disputes which may arise between the parties).

Any matter not contemplated in the lease agreement will be governed by the provisions of the Urban Lease Act - Sections 29-35 - and the Spanish Civil Code.

(It is noted that, some geographies maintain regional or consuetudinary regulations on rights over the property that may indirectly affect lease agreements).

### 1. TERM

#### 1.1 Contractual Term.

There is no set minimum or maximum duration. The parties are free to agree these periods at their own discretion.

The lease expires when the time period has lapsed, without the need for any special action by the parties.

#### 1.2 Break Rights.

It is unusual for either the landlord or the tenant to have the right to break the contract. An exception is often made in the case of anchor/key tenants, where it is not unusual for the tenant to have the right to break the contract after a minimum number of years provided that they serve prior written notice.

#### 1.3 Renewal Rights.

There is neither any right of renewal for the tenant (unless otherwise agreed in the contract) nor an eviction indemnity payable by the landlord.

#### 1.4 Disputes and Penalties.

Disputes and eviction are, by default and generally, subject to the courts and not to arbitration or mediation. However, it is possible to agree in writing alternative methods of settlement for specific disputes, but this is not extended as market practice. Therefore, the court will be the method used by the parties to settle disputes and the relevant court will be dependant on the location of the shopping centre.

In the event that the landlord claims for eviction due to either (i) failure of the tenant to pay the rent or, where applicable, any of the payment amounts have been assumed or (ii) the expiration of the lease term, a special statutory procedure must be followed.

Any other breach of the contract apart from the two stated above shall be dealt with using the ordinary procedure.

Penalties are usually fixed in the contract and they usually act more like a deterrent than a real punishment. The contract usually provides that the application of penalties does not affect the right of the parties to

compensation for excess damages. It is also common to establish in the contract the amount of compensation that is to be paid in the event of termination of the contract due to the tenant's non-compliance.

## **2. RENT.**

The usual amounts payable by a tenant for the premises leased within a shopping centre is a scheme of principal rent (also called fixed or base rent) and turnover rent (related to sales).

### **2.1 Principal rent.**

The tenants are required to pay a monthly base rent, which is freely agreed on by the parties. This is usually paid by either direct debit or transfer.

The payment of this rent coincides with either the signature of the lease agreement, or the opening of the premises or the shopping centre to the public, or the term granted to carry out the fit out works. The base rent is the benchmark for other amounts such as the legal deposit (performance bond) or the quantum of a judicial procedure.

### **2.2 Turnover rent.**

Turnover rent is generally found in shopping centre lease agreements. It is calculated on a monthly basis (or in some cases on a quarterly or yearly basis) by the positive difference between a certain percentage of the tenant's monthly gross sales (exclusive of VAT) and the base rent due for the same month (or the relevant period of reference).

The turnover should include, (from the landlord's perspective) the online sales linked in any manner to the leased premises. This topic is currently one of the most discussed between landlords and tenants.

### **2.3 Rent Review.**

There is no rent revision procedure unless otherwise agreed in the lease agreement. If present, this typically references the Consumer Price Index (CPI) of the previous calendar year, but also in extraordinary circumstances, by adding a percentage to the CPI.

Some landlords use alternative criteria for rent reviews, most notably by incorporating part of the value of the previous year's turnover rent into next year's base rent. Where this method is used, the rent increase is higher than if reviewed by the CPI. The application of this alternative criteria usually applies on set contractual anniversaries and not as a method of annual review.

### **2.4 Procedures to recover unpaid rent.**

In addition to the judicial procedures, tenants are usually required to provide a performance bond – this usually takes the form of either a security deposit or a bank guarantee equivalent to a certain number of months of the base rent. These performance bonds can be unilaterally activated by the landlord in the case of the tenant's failure to pay any amount payable pursuant to the lease agreement. These performance bonds also assist with securing the good performance by the tenant of all of the terms, covenants, obligations and conditions of the lease, including penalties and compensations.

## **3. PREMISES.**

### **3.1 Extent of Demise.**

The tenants will normally let the interior of the unit only, therefore the structure of the unit and the shopping centre remains with the landlord. The surface is calculated following technical criteria included in the lease agreement or in its annexes which also includes the layout.

When the parties are negotiating leases in respect of stores that have already been built (after the opening of the shopping centre), the parties accept that any difference between the area mentioned in the contract and the real area is irrelevant. When negotiating leases relating to stores in a shopping centre that is still under

construction or new stores resulting from a change in the shopping centre layout, it is customary for contracts to set the criteria for measuring the store area and the consequences of area differences are considered relevant.

If any other area is let (storages, façade spaces for signages, loading docks or terraces) it shall be complementary or subject to an autonomous agreement.

### 3.2 Extent of the Shopping Centre.

The shopping centre is defined as comprising all of the stores let to tenants, the common areas (including areas accessible by the public, parking areas and technical areas) and the administration offices; it also includes the building(s) and any external areas adjacent to it and integrating the property, as they may be from time to time.

This definition applies irrespective of if the shopping centre is owned by a sole proprietor or a condominium.

### 3.3 Common Parts.

Common parts are defined in the public deed of horizontal division or the internal regulations of the shopping centre and this is replicated in the lease agreements. They often coincide with the external areas not covered by registered plots, being parking areas, terraces, food courts or anything similar in nature, and the internal areas such as technical rooms, etc.

The use of external common elements is generally granted to all of the tenants, occupants and clients of the shopping centre, according to the rules set by the landlord (exceptions can be made with some tenants under special agreement).

The landlord is responsible for the maintenance of such areas and the related costs are recovered through the services charges payable by the tenants.

### 3.4 Rights Reserved by Landlord.

The landlord has the exclusive right to manage and to execute works related to the common parts.

In addition, the landlord usually has the right to:

- access to the leased stores, in order to verify their maintenance and the compliance with the shopping centre's rules;
- be provided with accounting data related to the turnover made at the premises, and supervise turnover made in order to verify the compliance with the obligation to pay the turnover rent;
- decide to operate the parking as paid parking;

## 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

### 4.1 Assignment.

Unless otherwise agreed, the tenant may assign the lease without the landlord's prior consent, but this entitles the landlord to increase the rent by 20%.

The tenant must notify the landlord within one month after the assignment has taken place.

In shopping centre lease agreements, the parties usually exclude the above principles by prohibiting any kind of assignment (or requiring the prior written consent of the landlord), exceptions are made in some cases, for example if the assignment is inside the group of companies to which the tenant may belong.

### 4.2 Underletting.

Unless otherwise agreed, the tenant can sublease without the landlord's prior consent, but this entitles the landlord to increase the rent by 10% if the sublease is just of part of the premises and by 20% if the sublease is of the whole of the premises.

The tenant must notify the landlord within one month after the sublease has completed.

It is common to exclude the above principles by prohibiting any kind of assignment (or requiring the prior written consent of the landlord), exceptions are made, in some cases, for example if the sublease is inside the group of companies to which the tenant may belong.

#### 4.3 **Sharing occupation.**

The sharing of occupation is comparable to the assignment or subleasing of the premises, and such rights extend and apply to this subject,

#### 4.4 **Change of control.**

Unless otherwise agreed, any corporate operation (mergers, acquisitions, etc., which for this purpose are considered as an assignment) is permitted but this entitles the landlord to increase the rent by 20%.

The parties usually exclude the above principles by prohibiting this kind of assignment (or requiring the prior written consent of the landlord), exceptions are made, in some cases, for example if this change of control is inside the group of companies to which the tenant may belong.

### 5. **ALTERATIONS/REPAIR.**

#### 5.1 **Restrictions affecting alterations.**

Tenants are not allowed to carry out any works to the premises without the prior written consent of the landlord.

#### 5.2 **Tenant's fitting out.**

Fit-out works are expressly authorised in the lease agreement subject to (i) the prior approval of the landlord in respect of the fit-out project submitted by the tenant and (ii) the obtaining by the tenant of (a) the compulsory licences and of (b) an all-risk construction insurance policy and a civil liability policy.

#### 5.3 **Signage.**

Tenants are usually allowed to place their trade name on the store façade. Change of such signage is subject to the landlord's consent.

Some anchor/key tenants are also entitled to place signage on the shopping centre's façade.

#### 5.4 **Repair and decoration.**

Contractually, the tenants have the obligation to keep the store and all of its assets in perfect operational and maintenance conditions, including the water piping, sewage, electrical and security installations, telephones and air conditioning, and to also bear the costs of any repair works deemed necessary at the expiry date of the contract.

The landlords bear the costs of ordinary and extraordinary repairs of common parts and of the parts of the shopping centre constructed by the landlord. The costs of the ordinary repairs are recoverable through the tenants by way of the service charges. Conversely, it is unusual to include the costs of extraordinary repair in the common expenses budget.

Legislation provides that the tenant must carry out minor repairs to the premises arising out of its normal activity at its own expense and if the authorities impose the execution of some works in the premises, the responsibility will be allocated to the tenant or the landlord regarding the obligations described.

#### 5.5 **Fit-out works/improvements made by the tenant in the store and their regime.**

All works carried out at the premises by the tenants as well as any improvements thereto, including any equipment installation, are an integral part of the store and property of the landlord, and the tenants are not entitled to any compensation.

Upon termination of the lease agreement, the landlord may require the tenants to leave the premises in the same condition as when they were handed over.

## **6. TRADING.**

### **6.1 Trading hours.**

the tenants are obliged to comply with the opening hours foreseen for the relevant activity either in their lease agreement or in the internal regulations.

Usually the landlord reserves the right to modify the trade hours (temporary or definitively).

### **6.2 Trading names.**

The trade name is included expressly in the lease agreement and cannot be modified unless prior written consent of the landlord is obtained. The tenants are obliged to comply with all of the legal requirements for using it.

Often, anchor/key tenants are authorised to change the trading name of the premises provided that it pertains to the group of companies to which they belong, with prior notice.

### **6.3 Control of trading hours.**

The landlord controls the trading hours of the tenants through the security services supplier (opening and closing schedules), which are reflected in the respective daily reports.

### **6.4 Competition rules.**

Generally, lease agreements contain a clause which express that the tenant is not granted any exclusive right to sell merchandise or services of any type within the shopping centre and that the landlord has the right to lease other space in shopping centre to tenants selling equal or similar merchandise and services.

When it comes to restrictive clauses and their review of legality, the market share of the particular tenant and landlord, the geographical area, and other circumstances should always be taken into consideration and analysed on a case-by-case basis.

## **7. INSURANCE**

### **7.1 Insured risks.**

The tenants assume the responsibility for all of the risks relating to the use and operation of the store, as well as the risks which may arise, therefore being compelled to take a multi-risk insurance covering an amount as may be deemed reasonable by the landlord. Also, before the tenant start to execute works in the premises, it must be present to the landlord a works insurance policy.

The landlord, on the other side, usually enters into an all- risk property insurance - covering the exterior and structure of the building, common areas, common installations and facilities within the shopping centre - and a third-party liability insurance.

### **7.2 Uninsured risks.**

It is market practice to exclude risks derived from terrorism, pollution, fraud, etc.

### **7.3 Business insurance.**

The landlords and the tenant can also take out business interruption insurances (covering a decrease in turnover, an increase in operating costs or the net profit) with different coverages in nature and intensity.

## 8. SERVICE CHARGE

### 8.1 Typical regime.

Usually, lease agreements stipulate that the landlord is responsible for providing common services to the shopping centre including security, cleaning and maintenance of common parts and common equipment, these costs are then recovered through the service charges.

Each tenant is required to pay its share of the service charge or to pay a fix contribution to the same (pre-determined and agreed at the time of entering the contract and which is subject to the same indexation as rent). The administration of the service charges (and of the promotion charges) is done by the landlord.

### 8.2 Promotions & Marketing.

Either lease agreements or the internal regulations generally include marketing and promotional charges as part of the services charges budget of the shopping centre (due to the close relationship between sales, promotions and visits). They can be included in the general budget or in a specific one.

They are also borne by the tenants considering the quota assigned to the premises.

It is not infrequent that anchor/key tenants waive any/all of the contribution because of their own traffic attraction.

### 8.3 Tenant's associations.

Some landlords promote the constitution and participation of tenants in an internal organisation, reserved for those currently operating, as a forum to inform of the relevant operational aspects; no legal entity is attributed and there is no membership cost for tenants.

## 9. GREEN LEASE

Current legal requirements regarding green leases reduce to the holding of an energy efficiency certificate of the leased asset (noting that major legal changes are foreseen due to the European Green Deal and Next Generation Funds.)

In addition, it is common that lease agreements identify general commitments (tied to compliance with regulations, e.g. in waste management or sustainability) and technical appendix and internal regulations detail specific requirements (such as those derived from BREEAM, etc.)

## 10. FORCE MAJEURE AND COVID.

Covid 19 has revealed, in general, a non-develop lease contractual system to *regulate force majeure* or hardship (*rebus sic stantibus*) events, neither existing profuse doctrine or jurisprudence to be applied. Legislation specifically enacted for Covid 19 has not set any clear criteria, prioritising negotiation between parties and only, subsidiary and under restricted requirements that made its scope very reduced, rent moratoriums or fixed rent discounts up to 50% for a limited period.

In this sense, the potential application to lease contracts of the *rebus sic stantibus* doctrine and the force majeure - in some of its dimensions - cannot be totally excluded, but the Supreme Court has repeatedly stated that both must be construed restrictively and on a case-by-case basis only (contracts are binding on the parties and none of them can breach, delay, withhold or excuse its contractual obligations under the contract other than with the other party's consent (*pacta sunt servanda*)).

After an initial wave pushing to profusely define and regulate in contracts force majeure and hardship situations, landlords and tenants have mainly understood the difficulties of agreeing undefined terms submitted to

jurisprudence constructions. Thus, contractual changes have focused in declaring the intention of the contracting parties to negotiate in good faith if an unforeseen event occurs.

In the context of the Covid 19 pandemic, the courts have been receiving a relevant number of claims from tenants regarding these two concepts, but no conclusive decision has yet been issued.

## 11. OTHER POINTS TO NOTE.

### 11.1 Prescribed form.

The principle of freedom of form is of application, providing that the essential elements of the contractual relationship are observed (consent, object and grounds).

In practical all shopping centre lease contracts are recorded in writing, and those intending to have effects vis-à-vis third parties, in public deed (for their access to Land Registry).

### 11.2 Termination of the contract in case of insolvency.

The judicial declaration itself does not entitle any of the parties to terminate the contract where both parties still have reciprocal obligations to fulfil; thus, prior unfulfilled obligations will be part of the insolvency process, but post unfulfilled obligations will be considered under the general grounds of contract termination, irrespective of the insolvency process,

### 11.3 Money Laundering.

European Anti Money Laundry Directives 4<sup>th</sup> (EU Directive no. 2015/849) and 5<sup>th</sup> (EU Directive no.2018/843) were implemented in Spain through national laws, being the 6<sup>th</sup> Directive (EU Directive no. 2018/1673) not yet transposed.

This legislation recently extended the concept of “Obligated Parties” in the field of promotion, agency, commission or intermediation activities in the sale and purchase of real estate to what could be called “large lessors” (not so much by number of leases – the existence of a single lease being sufficient – but exclusively based on the amount of the monthly rent in excess of €10,000 or €120,000 on an annual basis.)

This consideration entails the assumption of a set of due diligence obligations (formal identification, real ownership, business purpose, monitoring, etc.), as well as the obligation to notify the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC) of some transactions with indicators or relationship to money laundering or financing of terrorism.

In addition, it is extended as voluntary due diligence, even if the landlord is not considered as "large lessor", to have specific documentary controls with tenants carrying out activities subject to qualified surveillance under law (lotteries, jewellery, etc.)

### 11.4 Terrorism and security.

It is common that lease agreements identify general commitments (tied to compliance with regulations) but not defining specific obligations for tenants. Shopping centre administration and security services providers, under the duty of collaboration with law enforcement, coordinate the preventive or corrective actions to be applied in the assets that may vary from time to time, depending e.g. on the national security alert level.

## SWEDEN

By  
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### Preliminary Remarks

#### 1. TERM

##### 1.1 Contractual Term

The normal market practice for a lease agreement in a Shopping Centre is to grant a lease for a fixed contractual term of at least three (3) years. The main reason is that the Landlord is allowed to charge the Tenant a flexible rent, as long as the lease term is for a minimum of three years. It is also common for a Tenant to invest in the premises, therefore a lease may include an initial contractual term of minimum 3 or 5 years (or sometimes longer), in order for the investment to pay off.

##### 1.2 Break Rights

The Tenant is only granted the right to break the contract term in advance, not the Landlord. The Landlord is only allowed to terminate the contract in case of serious breach (forfeiture), otherwise the Landlord can only terminate the contract at the end of the contractual term. Tenant's are usually granted the right to break the contract term in advance in cases where the contractual term is at least six or seven years in order to give the Tenant some flexibility. However, the Tenant is usually only given the right to break the contract in advance for moving out (not for re-negotiation of the contractual terms).

##### 1.3 Renewal Rights

Tenants are automatically given a right of tenure, as soon as the lease relationship with the Landlord has lasted nine (9) months. The right of tenure means that the Tenant shall have the right to stay in the premises on conditions that are in line with market practice and that are fair. However, the Landlord has the right to terminate the contract and demand that the Tenant moves out, in cases of renovation/rebuilding/demolition of the premises/building, as long as the Landlord offers the Tenant a similar substitute premises. If the Landlord offers conditions that are in not line with market practice or are unfair (in case of renewal) or demands that the Tenant moves out without offering acceptable substitute premises, the Tenant has the right to receive damages (a minimum of one year's rent) if the parties do not reach an agreement and the Tenant moves out. Normal market practice is to include an automatic renewal contractual period of three years, in case neither party terminates the contract. Normal practice is to include a notice period of nine months. In order for the Tenant to be able to invoke its right of tenure in case of termination, the Tenant has to file an application to the Rent Tribunal (an Administrative Court dealing with rent disputes and similar) not later than two (2) months from receiving the termination from the Landlord.

##### 1.4 Disputes and Forfeiture

Grounds for forfeiture of the lease are not possible to agree on in a lease, instead the grounds as stated by law are the exclusive grounds for forfeiture which able to be invoked by the Landlord. Forfeiture occurs where the Tenant commits a breach of contract, which is deemed serious by nature. Normally, a breach consists of the Tenant not paying rent, but it could also consist of the Tenant not providing a sufficient lease guarantee, not keeping its business open during the agreed opening hours or not fulfilling the Tenant's maintenance obligations. It is important that the Landlord reacts immediately in case of breach, and alerts the Tenant of the breach and its consequences. Disputes between Tenant and Landlord are normally dealt with in District Court.

## 2. RENT

2.1 It is market practice to include a sales based rent (turnover rent) with a minimum guaranteed rent. On top of that, the Tenant usually pays a share of the landlord's operating costs for the Centre (service charge), a marketing fee, a waste management fee and a share of the property tax. The minimum guaranteed rent is often connected with the consumer price index and regulated accordingly. Recent court practice has shown that it is important for the Landlord to be specific and detailed in the conditions for the service charge, otherwise the Landlord stands the risk of not being able to charge the actual amount distributed to the Tenant or risks giving the Tenant an unfair notice and offer for renewal, which could lead to damages. Offering the Tenant a rent which exceeds the market rent for the premises could also lead to damages, as the Landlord's offer for renewal in such a case would be considered as unfair.

### 2.2 Rent Review

During the course of a lease, the indexation normally leads to regular adjustments of the minimum guaranteed rent according to the consumer price index. The sales based rent is normally fixed during the lease term. The conditions for calculating a share of the property tax takes into consideration the fact that the size of the property tax and the premises' share of the property tax can be adjusted during the lease term. All other rent supplements are fixed during the lease term. It is common practice to review the rents in case of a renewal. In such case, it is important for the parties to collect comparable leases of similar premises in order to support arguments for the level of market rent for the premises in question. The usual practice is for the parties to meet in front of the Rent Tribunal and argue their positions for a renewal. The Rent Tribunal can also give its decision on the market rent for the premises in question.

## 3. PREMISES

### 3.1 Extent of Demise

The definition of the shop premises to be let is not just a matter of identifying which unit a Tenant may occupy. It can also determine the extent and cost of various contractual obligations, such as obligations to repair, maintain and insure, which may be tied very closely to the definition of the premises. Normally, the premises included in the lease consist of a specified area of shop premises, with or without an additional storage area and an additional right to mount a sign on the façade of the Centre.

### 3.2 Extent of the Shopping Centre

Again, a description of what constitutes a Shopping Centre may well have a significant impact on the financial obligations of the parties, either in terms of a primary obligation to repair and maintain, the cost of service charge or other reimbursements to a Landlord. Normally, the Centre is defined as the whole area (indoors and outdoors) which forms the Centre, including areas for parking and deliveries.

### 3.3 Common Parts

In addition to defining the extent of obligations to repair and maintain a Centre, it is important to establish the extent to which Tenants of a unit (and their customers) can use other parts of the Centre. Some common parts may need to be reserved exclusively for centre management purposes. Normally, the Landlord has an exclusive right to decide on the rules for the common parts of the Centre with strict rules for the Tenants to abide by the Centre rules (such as rules on waste, goods transport/deliveries and security).

### 3.4 Rights Reserved by Landlord

Landlords will always require a number of rights to enable it to maintain the Centre in good order over time, including the right to close certain areas for repair and some rights to extend or alter the Centre. Normally, the Landlord is given plenty of room to enable it to keep the Centre up and running while performing normal maintenance and repairs in the Centre. Larger renovations, rebuilding's and extensions of the Centre require special conditions and specific agreements with Tenants to avoid rights of rent reduction, damages and/or termination of the lease.

#### 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

The fluctuations in the retail market make it increasingly desirable for individual Tenants to be able to dispose of or sub-let all or part of their premises. On the other hand, the identity of Tenants and the maintenance of a good retail mix in a Centre is important in maintaining the attractiveness of the Centre as a whole and the value of Landlord's investment. This section is divided into three sub sections for ease:

- 4.1 **Assignment** - this is the Tenants ability to dispose entirely of the lease to another Tenant. As soon as the lease relationship with the Landlord has lasted three (3) years, the Tenant has a right to assign the lease to another Tenant unless the Landlord can show that the new Tenant is unfit as Tenant such as unable to pay rent or similar.
- 4.2 **Underletting**- this is when the Tenant does not escape the terms of the lease but is able to pass on the obligations relating to all or part of the premises to a sub-tenant. The Landlord is normally able to deny the Tenant of an underletting, with reference to the conditions in the lease and/or specific circumstances such as ability to fulfil the conditions of the lease, pay rent or similar.
- 4.3 **Sharing occupation**- this may arise in a variety of circumstances. For example, a corporate Tenant may wish to allow a subsidiary or associated company to trade from the same premises; a department store may wish to allow an independent fashion retailer to use a designated area in the department store under an independent brand name; or a book shop may wish to licence an independent coffee shop to operate within its premises. The Tenant has the right to share occupation of the premises, unless this causes problems or similar for the Landlord.

#### 5. ALTERATIONS/REPAIR

Tenants have a variety of practical or promotional reasons as to why they may wish to make alterations in any given shop, including simply to adhere to a new brand image adopted by a multiple retailer in all its outlets. At the same time, the Landlord is concerned to control alterations for a variety of estate management reasons including: minimising nuisance to other Tenants, protecting the structural integrity of the Centre and seeing that all works are properly insured. The normal conditions of a lease usually contain conditions which require the Tenant to receive prior approval from the Landlord before any works/alterations/repairs are made within the premises. Works are only allowed to be carried out during specific hours, so that customers or other operations in the Centre are kept undisturbed. Larger works/alterations/repairs are not allowed unless specifically planned and approved by the Landlord beforehand. The lease also contains rules on which entrepreneurs are allowed to perform works, rules for such works and insurance conditions.

#### 6. TRADING

- 6.1 The Tenant is obliged to keep open for trade during normal opening hours of the Centre, which the Landlord will regard as being crucial for maintaining the Centre's image as a lively retail destination. Normally, there are direct consequences if the Tenant breaches such conditions. Consequences include penalties and in case of repeated breaches, forfeiture of the lease.
- 6.2 The lease contains specific and detailed conditions regarding the Tenants use of trading names, given that major Tenants frequently re-brand and rename themselves.

#### 7. INSURANCE

The Landlord is usually responsible for insuring the building, whereas the Tenant is responsible for insuring the premises, its business and staff.

## **8. SERVICE CHARGE**

The Landlords operating costs for the Centre are distributed to the Tenants as a service charge. The service charge is normally a flexible fee, distributed to the Tenants on the basis of the individual premises' share of the total amount of costs for the Centre. The Landlord usually invoices a preliminary amount during the course of a year and the preliminary amounts paid are then offset against actual costs, with the difference paid by/to the Tenant.

- 8.1 Typical court practice has shown that it is vital for the Landlord to be specific and detailed in the service charge conditions contained in the lease. General and unspecific conditions have been deemed invalid and unfair, which has led to the Landlord not being able to recharge actual costs and/or having to pay damages to the Tenant. However, as long as the Landlord clarifies exactly which costs form part of the operating costs and the service charge, there is generally speaking no limit to what can be included. Normally, regular operating costs such as energy, cleaning, security, maintenance and similar are included, whereas investments and larger works are not included.
- 8.2 In recent years, Tenant's associations in the Centres have disappeared due to the fact that the Landlord wishes to be in full control of all operations of the Centre.

## **9. GREEN LEASE**

It is common practice to include a section in the lease regarding environmental/green conditions, such as renewable energy, recycling of waste and consumption standards.

# SWITZERLAND

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## Preliminary Remarks

Swiss tenancy law is codified in the Code of Obligations, the lease is regulated in articles 253 et seq. and the usufructuary lease in articles 275 et seq. Additionally, implementing provisions are set forth in the ordinance on rent and lease of residential and commercial premises. Most of the provisions regarding the lease of commercial premises are identical with the respective provisions regarding the lease of residential premises. For both types of tenancy, the level of mandatory provisions for the protection of the tenant is low compared to other jurisdictions. The regulation of tenancy law in Switzerland is relatively stable. Since the 1990s, there have been only a few adjustments.

## 1. TERM

### 1.1 Contractual Term

Swiss tenancy law does not provide for specific maximum lease terms for commercial premises such as shopping centres (hereinafter “shopping centre lease”). Usually, shopping centre leases are concluded for a fixed term. Switzerland has an oversupply of commercial premises. A continuous appetite for “online shopping” and the prospering build-up of online marketplaces that are open all around have an impact on shopping centre lease terms. As we have seen in the past fixed terms of 10 years and more, it seems that 5 year lease terms are predominant. The Covid-19 situation initially led to some reluctance with the agreement of long-term contracts. However, this uncertainty seems to be gone for Q3 2021.

### 1.2 Break Rights

Depending on the determination of the parties, a lease can end as a result of: (i) lapse of time of a fixed term lease; (ii) unilateral termination or (iii) party agreement (termination agreement or conclusion of a new contract).

With a fixed term lease, the parties intend to ensure that the end of a rental agreement is predetermined when it is concluded. A lease term can have a “real” or a “non-real” time limit. A lease with a real time limit ends without notice at the specified date and a notice of termination of the lease agreement is not required. Those contracts are rare.

Most of the time, so called non-real fixed-term relationships are encountered related to shopping centre leases, which contain for example the following clauses:

*“The lease can be terminated on May 30, 2025 at the earliest” or “The lease is concluded for a fixed period of 5 years, ie until the end of May 2025, and then continues for one year at a time, if not terminated earlier by one party. “*

For unlimited leases, parties may agree on notice periods (allowing for unilateral termination), while for commercial premises such as shopping centres they must be not less than six months. The termination dates can be freely agreed upon. If no termination dates are agreed upon, each party may terminate the lease on a date fixed by local custom or, if there is no local custom, at the end of each six-month period of the lease.

### 1.3 Renewal Rights

In most shopping centre leases, the contract gives the tenant the option to extend the lease for a further predetermined period. Such option right shall enable the tenant to amortize any investments made in the rental premise and its infrastructure. With an early announcement, the landlord has the advantage of being able to

plan and structure its rental income in the longer term while it avoids also short-term tenant changes. The options are gladly exercised in times of rising rents, but in times of falling rents they will be exercised less often.

#### 1.4 Disputes and Forfeiture

In Switzerland, before litigation the parties generally need to have an attempt at conciliation before a conciliation authority. For disputes regarding the lease of premises, the conciliation authority is comprised of a chairperson and a representative for each of the landlord and tenant. There are certain exceptions where a conciliation attempt is not needed (e.g. in clear cases regarding eviction or if the value in dispute is above CHF 100'000 and the parties mutually agree to waive an attempt at conciliation).

## 2. RENT

### 2.1 In General

In general, the parties to a rental contract are free to agree the rent (see however the possibility to challenge unfair rents, below). With the rent the parties agreed on, all costs incurred by the landlord from the ownership and the maintenance of the property are covered. For leases of an indefinite period, the rent may be adjusted taking effect at the next possible termination date. For fixed term tenancies, a rent adjustment can only be made if a corresponding clause for rent adjustment has been agreed on in the contract (index linked rent or graduated rent):

In the case of an indexed rent, the parties will agree in advance that the rent will only be adjusted to changes in the National Consumer Price Index (CPI). That agreement is known as the index clause. Such adjustment of the amount of the rent to be paid does not subsequently represent a rent adjustment, but an adjustment of the lease agreement. According to Art. 269b Swiss Code of Obligations, index clauses are only valid if the following two conditions are cumulatively met:

- The rental agreement must be concluded for at least five years; and
- Indexed rent must refer to the CPI.

In the case of a graduated rent, the parties agree on increasing the rent periodically by fixed amounts. This is only valid if:

- The lease is contracted for at least three years;
- The rent is increased no more than once a year; and
- The amount by which it is increased is fixed in Swiss francs.

It is noteworthy that Swiss tenancy law does not allow for combination of an indexed rent with a graduated rent, which is set in advance for the entire duration of the contract and increases in stages at periodic intervals.

### 2.2 Rent based on turnover

Rent based on turnover is widespread in the retail, catering and hotel industries. It allows variants of contract structuring.

Rents based on turnover only are rare. The landlord usually insists on a minimum rent, which is owed regardless of the turnover. The minimum rent is regularly indexed, so that this share usually increases. There are no minimum or maximum rates required by law. The percentage varies depending on the industry, location and negotiating skills of the parties. In retail, 3 - 7% are common. In shopping centres rates around 10% seem to be practicable.

Generally, the tenant will submit its financial statements once a year or once a semester to the landlord, who then adjusts the rent due accordingly. Whether revenues from online sales are also included, may be agreed upon by the parties.

### 2.3 Rent Review

A landlord may not charge a tenant unfair rents. A rent is considered unfair if it generates excessive returns derived from the commercial premise. A rent is in principle not considered excessive in the following (exemplary) cases:

- if the rent withstands market comparison in the concerned area where the commercial premise is located;
- if the rent is based on additional benefits (resulting in higher costs) provided for by the landlord; or
- if in case of a new building, the rent lies in the range of a cost-covering gross return.

In the case of leases for an indefinite period, a rent adjustment can be made effective at the next possible termination date, which requires compliance with the notice period which is at least six-month for commercial properties such as shopping centres. The tenant may challenge the rent increase before the conciliation authority as unfair within 30 days of receiving notice of it.

In the case of a fixed-term lease, an adjustment of the rent is only possible if a corresponding adjustment clause has been agreed and defined in the contract in advance (see above, index-linked or graduated rent).

### 2.4 Procedures to recover unpaid rent

The tenant is obliged to provide security if it has been agreed and determined in the lease agreement. In a shopping centre lease it is common that landlords require a security in the equivalent of the rent for 6 months.

Where the tenant of residential or commercial premises furnishes security in the form of cash or negotiable securities, the landlord must deposit it in a bank savings or deposit account in the tenant's name.

The tenant is in arrears with the payment of the rent if it does not pay on time; according to article 257c Swiss Code of Obligations at the end of each month. A reminder is therefore not necessary as the tenant is automatically in default. Accordingly, the landlord can start debt collection proceedings immediately. However, in order to terminate the contract, the landlord must observe various formalities including:

#### a) Threat of termination

If the tenant is in arrears with the payment of due rent or ancillary costs, the landlord may set the tenant a payment deadline of at least 30 days by registered mail and threaten that the lease agreement will be terminated if outstanding debts are not settled. If the tenant fails to pay by the end of the period, the landlord is allowed to terminate the lease agreement with a notice period of 30 days effective at the end of each calendar month. The termination must be made using an official form (article 266 I Swiss Code of Obligations).

#### b) Debt collection proceedings

In addition to the extraordinary termination, the landlord can demand the rent due by initiating debt collection proceedings and requiring the responsible debt enforcement office to issue and deliver a payment order. This is also the path that has to be followed in order to dispose the deposit or bank guarantee provided by the tenant; Because the deposit has to be deposited with a bank in a savings account or deposit that is in the name of the tenant, the landlord needs (i) a legally binding order for payment(ii) a legally binding judgment or (iii) the consent of the tenant in order to release the deposit. In case the tenant does not fight the payment order, or the judge sustains the payment order, the conditions to ask the bank to hand over the deposit (or draw a guarantee) are met.

In addition to the above, the landlord has a special lien on chattels located on the leased commercial premises such as shopping centres and either used as fixtures or required for the use of the premises, as security for rent for the past year and the current six-month period.

### 3. PREMISES

#### 3.1 Extent of Demise

The law does not contain a definition of commercial premises. According to the current case law, a commercial premise is any space which, according to the lease agreement, serves conducting commercial or professional activity (e.g. offices, sales rooms, workshops, magazines and storage rooms). To date, doctrine and case law do not agree on whether the exercise of a gainful activity is mandatory for the qualification as commercial premise. If the tenant runs a business according to commercial principles, business premises can be assumed. However, commercial premises do not exist if the rooms are used by the tenant exclusively for recreational purposes (horse stable, wine cellar, craft room, garden shed, etc.). Given that, it is undisputable that shopping centres qualify as commercial premises. However, Swiss law does not provide any definition related to the term “shopping centre” and this is upon the parties to define.

#### 3.2 Extent of the Shopping Centre

What constitutes a Shopping Centre is in discretion of the parties.

#### 3.3 Common Parts

Whether landlords use the common parts for commercialisation is in the discretion of the parties.

#### 3.4 Rights Reserved by Landlord

The tenant must tolerate works intended to remedy defects in the object or to repair or prevent damage and must permit the landlord to inspect the object to the extent required for maintenance, sale or future leasing. However, the landlord must inform the tenant of works and inspections in due time and take into account of the latter’s interests when they are carried out.

### 4. ABILITY TO TRANSFER THE LEASE OR SUB-LET

#### 4.1 Assignment

The tenant of commercial premises may transfer the lease to a third party with the landlord’s written consent and the landlord may withhold consent only in certain situations (e.g. insufficient solvency of new tenant or exclusivity considerations within a shopping centre). This can give the tenant the possibility to transfer the lease including the corresponding economic assets such as customer base and investments, to a successor. This right is mandatory, but mitigated by the fact that the former tenant is still jointly and severally liable until the end of the lease or a maximum of 2 years.

#### 4.2 Subletting

A tenant may sub-let all or part of the property with the landlord’s consent and the landlord may refuse its consent only if:

- a. the tenant refuses to inform the landlord of the terms of the sub-lease;
- b. the terms and conditions of the sub-lease are unfair in comparison with those of the principal lease; or
- c. the sub-letting gives rise to major disadvantages to the landlord.

The right to sublet the premises is mandatory and may not be contractually waived.

#### 4.3 Sharing occupation

A joint tenancy agreement is in place when more than one person is a tenant. The co-tenants co-sign the lease agreement. As a consequence, the tenants act jointly vis-à-vis the landlord and can also terminate the contractual relationship jointly only. Accordingly, a co-tenant has the same rights and obligations under the lease agreement as the tenant and is jointly and severally liable for the entire rent.

The landlord must, with the exception of monetary claims, always express its claims and rights to act vis-à-vis all co-tenants.

According to case law, co-tenants form a simple partnership pursuant to Art. 530 et seq. CO. The members of a simple partnership - and thus also the co-tenants - are jointly and severally liable by law for the liabilities incurred by the partnership. Solidarity means that each tenant is liable for all liabilities arising out of the lease contract and it is up to the creditor, in casu the landlord, to decide with whom it wants to enforce the debt, in particular, for example, outstanding rent debts, and have them enforced.

#### 4.4 Change of control

If the owner of the leased property changes due to sale, donation, etc. the lease agreement with all of its rights and obligations is transferred to the acquirer (article 261 Swiss Code of Obligations). The new owner may terminate the lease agreement with effect from the next date, subject to the statutory notice period, if he/she can claim urgent personal need for him/herself or close relatives or in-laws (which is, however, not crucial for shopping centres).

### 5. ALTERATIONS/REPAIR

In principle, the tenant is not entitled to renew or modify the rented property (i.e. work that affects the substance of the rented property).

The tenant may renew or modify the rented property only with the landlord's written consent. Consent can be given before, during or after alterations are carried out. In the absence of consent, the tenant must restore the original condition at the latest at the end of the rental period. For shopping centre lease agreements, it is common that such consent will be included in the lease agreement whereby the landlord accepts tenants fitting out. The details of the fitting out will be specified as well in the lease agreement. It is noteworthy that in Switzerland, craftsmen may register a so-called "builder's lien" on the property of the landlord. In order to avoid any issues arising of this, landlord and tenant should address this in the lease agreement.

According to article 259 Swiss Code of Obligations the tenant must remedy defects which can be dealt with by minor cleaning or repairs as part of regular maintenance on its own costs. However, costs for regular maintenance in common areas may be charged respectively distributed to all tenants of the shopping centres.

If the landlord has given its written consent to alterations made by the tenant and if the rented property shows a considerable increase in value as a result of the work, the tenant may demand corresponding compensation at the end of the rental agreement.

### 6. TRADING / KEEP OPEN

The nature of a shopping centre lease may give rise to a tacitly agreed duty of use on the part of the tenant, as for example in the case of a restaurant (in a shopping centre). In this case, the non-use of the leased property constitutes a breach of the duty of care and entitles the landlord to a compensation and to termination of the lease agreement without notice.

Concluding from the above, shopping centre lease agreements usually stipulate opening hours (which shall comply with local use).

### 7. INSURANCE

#### 7.1 Insured risks

Landlords are required to take out a policy covering damages related to fire and natural hazard damage such as storm, hail, flood, etc. In most regions in Switzerland, the so-called "cantonal building insurance" is mandatory for every owner of a property. Additionally, private insurance companies offer the possibility to cover risk respectively damages stemming from water (e.g. pipe burst), damage to the building resulting from theft etc.

Landlords usually take out a third party liability insurance to cover damages to third parties stemming from the property (e.g. snowfall from the building, falling roof tiles, etc.).

It is common in Switzerland for landlords to require tenants to take out a tenant liability insurance which covers damages to the property caused by the tenant. Please note, all belongings of the tenant can be covered by taking out a specific policy by the tenant.

## 7.2 Uninsured risks

Switzerland has a very well thought through system of insurances in place and virtually all risks can be covered by a relevant insurance policy.

## 7.3 Business insurance

In the context of business interruption, the above mentioned risks (e.g. fire, water) which may lead to a loss of rent can be covered by relevant insurance policies.

# 8. SERVICE CHARGE

## 8.1 Typical regime

It is the landlord's duty to maintain the premises in a condition suitable for contractual use, therefore most repairs and renewal works have to be done by and on account of the landlord (minor cleaning and repairs however, have to be done by the tenant, see above, section 5).

Actual outlays made by the landlord for services connected with the use of the premise (accessory charges) contain charges such as: heating, hot water, common-area electricity or public taxes resulting from the use of the premises. The landlord has to specify the accessory charges in the lease in detail and may only charge the actual costs and may not make profits with accessory charges. Charges for common areas of a shopping centre are distributed according to floor space.

## 8.2 Promotions and marketing

The installation of displays, advertising, billboards, etc in the shopping centre will also be covered in the lease agreement. Promotion and marketing for the shopping centre may be organised by the landlord and can be part of a tenants' association (see below).

## 8.3 Tenants associations

If there is a tenants' association, it is common for membership to be compulsory for all tenants and for the costs of the respective activities to be shared among the tenants. A compulsory membership of an association does not constitute an inadmissible tie-in transaction if there is a sufficient connection with the use of the leased premises.

# 9. GREEN LEASE

There is no requirement to share data.

# 10. FORCE MAJEURE AND COVID

During the COVID-19 pandemic, many shops had to stop or restrict business activities due to official measures. As a result, many shops suffered drops in sales or a loss of revenue. In practice, for many business premises, the landlord and tenant agreed on special conditions concerning the rent during lockdowns.

A government bill providing for a 40% reduction of the rent of stores affected by closure or severe restriction, as well as hardship measures, was not adopted by Parliament. However, tenants of business premises were granted an extension from 30 days to 90 days for the payment of rents for the period around the first lockdown in Spring 2020. In addition, there were other support measures for business enterprises that were not directly related to the rental relationship, such as bridging loans or compensation for short-time work.

Doctrine is split on whether the official measures entitle the tenant to reduce the rent or to temporarily stop the payment altogether. It is discussed whether the restriction of the use of the business premises is a defect in the rental object, whether it is a so-called objective impossibility or whether the change in circumstances is so serious that a judicial adjustment of the contract would be required (*clausula rebus sic stantibus*). In August 2021, the rental court in Zurich ruled that the official measures neither constitute a defect in the rented premise nor entitle the tenant to invoke a partial impossibility. The reason for this being that in an ordinary lease contract for business premises, the operating risk lay solely with the tenant and the landlord only had to ensure that the object was handed over and maintained in a condition suitable for contractual use. The court also stated that the requirements for a judicial adjustment of the contract due to substantially changed circumstances were very strict and required the tenant to explain in particular how the official measures had specifically affected the business operations. In the present case, the tenant had not done so. The decision was not yet legally binding at the time of writing.

## **11. OTHER POINTS TO NOTE**

### **11.1 Tenant ESG data**

There is no requirement to share data.

### **11.2 Money laundering**

Landlords are not subject to anti-money laundering legislation.

### **11.3 Terrorism and security**

The tenant is obliged to participate in exercises, which the landlord is obliged to carry out by law. Further obligations may be included in the contract.

### **11.4 Prescribed form**

There are no formal requirements concerning the tenancy agreement itself. However, there are formal requirements for certain actions during the tenancy such as increasing the rent and in particular for the termination of the tenancy agreement by the landlord. The landlord must use a form approved by the canton in which the business premises are located. The form contains information on how the tenant must proceed if it wishes to contest the termination or apply for an extension of the lease.

Where the ownership of a premise changes, the lease passes to the new owner. However, the new owner has the possibility to terminate even a contract limited in time under that so-called extraordinary right if he claims an urgent need of the premises for himself or close relatives or in-laws. This right of the new owner to terminate the lease extraordinarily may be excluded by entering the lease under priority notice in the land register (article 261b para. 1 Swiss Code of Obligations). If this is the case, every future owner must allow the premise to be used in accordance with the existing lease.

# UZBEKISTAN

By

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## Preliminary Remarks

Leasing of premises is one of the widespread types of business activities due to the steady supply and demand for them.

Lease relations in the Republic of Uzbekistan are regulated by the Civil Code of the Republic of Uzbekistan and provisions of the Law of the Republic of Uzbekistan “On Lease”, which provides definitions of the lease contract, subjects and objects of lease relations, essential terms of the lease contract, grounds for changing the terms of the lease contract, its cancellation and termination, as well as certain types of lease contract: leasing of enterprises, leasing of property of citizens. The law also stipulates the grounds for dispute resolution, as well as the liability of the subjects of lease relations.

Only the owner of the property may lease it. The owner of the property may lease the property only after obtaining the title to the property. It is impossible to lend-lease the property at the stage of construction thereof.

Within the Republic of Uzbekistan the “Trust Management” practice is allowed and in some cases is used (here the entire company as well as its separate types of activities, including real estate management, may be transferred to the management of the Management (holding) Company). The Management Company manages all relations with Tenants.

## 1. BASIC PROVISIONS

### 1.1 Contractual Term

The lease agreement may not indicate the term and not indicate whether the agreement is subject to state registration with the justice authorities.

According to article 539 of the Civil Code of the Republic of Uzbekistan, a lease agreement concluded for a period of more than a year is subject to state registration with the institution of justice. Thus, the contract is valid for exactly one year. Consequently, such an agreement, by virtue of paragraph 2 of Article 539 of the Civil Code of the Republic of Uzbekistan, is subject to state registration and, due to the lack of registration, cannot be considered concluded.

In a situation where the contract is recognised as not concluded, the lessee is obliged to pay the rent to the lessor for the entire period of using the property, however, it has no legal basis for using the property. He needs to either conclude a lease in accordance with the law, or vacate the premises.

### 1.2 Break Rights

In accordance with the applicable laws of the Republic of Uzbekistan, several methods of contract termination are allowed for both parties. In most cases, contract is terminated by pacific settlement of disputes (pre-trial settlement). In case of failure to achieve results through negotiations, a dispute is submitted to the court.

Because financial situation of each individual tenant, as well as economic conditions of the business may change, it makes sense for the Tenant to protect itself against the risks of not being able to continue business in the leased property.

Liability of the parties for breach of contract provides for the imposition of penalties on the guilty party or contract termination.

The parties themselves shall select procedure and conditions for contract termination.

Landlords often include a clause in the lease contract stating that in case of unilateral withdrawal of the Tenant from lease contract the Tenant shall pay to the Landlord the amount of money specified in the contract as a fee for withdrawal from lease contract based on Article 237 of the Civil Code of the Republic of Uzbekistan (inadmissibility of unilateral refusal to fulfill obligation) and Article 382 of the Civil Code of the Republic of Uzbekistan (grounds for contract change and termination).

In practice, the contract is terminated by written notice by initiating party 30 days prior to termination.

The parties may also agree to terminate a contract otherwise.

### 1.3 Renewal Rights

Having guided by the provisions of the applicable laws of the Republic of Uzbekistan the Tenant has a preemptive right to extend the lease relations with the Landlord upon expiry of this Contract.

The Parties shall agree on the possibility of extending the contractual relations for a new term one (1) month prior to the expiry of the lease term.

If the Parties agree to extend the lease relations, the Parties shall enter into a corresponding Lease Contract for a new term.

If the Parties will not agree to extend the lease relations for a new term, the lease term shall terminate.

Generally, a preemptive right to extend the lease relations is applied in all Lease Contracts.

### 1.4 Disputes and Forfeiture

The provisions of the laws of the Republic of Uzbekistan provide for a pre-trial dispute resolution procedure. Such procedure is not obligatory and is voluntary in nature.

The Parties shall use their best efforts to resolve and settle amicably all disputes and disagreements that may arise under the Contract.

If the Parties will not reach a mutual agreement through negotiations, all disputes arising shall be resolved and referred to the court of competent jurisdiction in compliance with the requirements of the effective procedure of the Republic of Uzbekistan.

### 1.5 Respect

The Tenant shall respect and consider the opinion of the Landlord, the other Tenants, and the neighbors at the floor and garage in all matters.

The Tenant shall also to respect and abide by all rules, regulations and procedures in force in the Building and the surrounding area.

The Landlord shall make the Tenant aware of all rules, regulations and procedures in force in the Building and the surrounding area.

## 2. RENT

### 2.1 Basic rent

Taking into account different rates of inflation, the law establishes the right of the Landlord to change the rent rate no more than once a year, unless otherwise stipulated in the lease contract (Article 544 of the Civil Code of the Republic of Uzbekistan). However, rent increase is possible only with the Tenant's consent, even if there is an exception in the contract. In the absence of the Tenant's consent to change the rates, the Landlord shall apply to court with an action for amendment of the contract in terms of rent.

Rent is generally paid in advance on a monthly or quarterly basis ("fixed part of the rent"). The Landlords often grant a short grace period free of rent charges to the Tenants for the period needed to complete fit-out works or conduct renovation works.

### **Additional rent**

The Tenants are typically charged additional fees for the services on maintaining common areas, cleaning the territory of the Shopping Centre, maintaining security, marketing activities, etc. (“variable part of the rent”).

The Tenants’ consumption of utilities is measured by separate meters and is paid as a variable part of the rent.

### **VAT**

Provision of property in the operating lease is a sale turnover and is subject to value added tax according to paragraph 1 of the second part of Article 239 of the Tax Code.

VAT is charged on the rental cost paid by the Tenant to the Landlord according to contract. However, amounts of compensation paid by the Tenant to the Landlord under the lease contract (e.g. for security and cleaning of the leased premises made by the Landlord) shall also subject to value added tax.

Calculation of rent VAT depends on the procedure for reimbursement by the Tenant of the cost of consumed electricity, heat energy, water, gas, utility services (“Utility Services”) and communication services.

The Landlord usually enters into contracts with utility service providers. Therefore, the lease contract determines how the Tenant will reimburse the Landlord for the services it consumes:

- separately for actual consumption;
- including their cost in the rental amount.

Accounting for leasing transactions depends on:

- the procedure for reimbursement of utility services by the Tenant;
- the share of rental revenue in total revenues from sales, i.e., whether or not renting is your primary activity.

## **2.2 Turnover**

As an alternative to fixed rent, the Tenants in major shopping centers usually pay rent to the Landlord as a percentage of their turnover.

Such percentage is payable if the percentage of turnover exceeds the value of the fixed rent.

If the percentage of turnover does not exceed the fixed rent, the Tenant shall pay the fixed rent.

Percentage of commodity turnover shall be calculated of the amount of commodity turnover (excluding VAT) of the Tenant from the shop floor located in the leased one.

The Tenant undertakes to notify the Landlord in writing of the amount of commodity turnover of the billing month (with a breakdown of this information by day) and provide such information in electronic form no later than the first business day of the month following the billing month. Notice shall contain the confirmation of the Fiscal Data Operator’s system.

The Tenants usually insist on paying only a certain percentage of their profits or income and on eliminating the fixed part of the rent.

## **2.3 Rent Review**

It is common market practice to stipulate a yearly indexation of rent payments.

When concluding a lease contract it is necessary to prescribe in the text of the contract a rent formation mechanism through variable values, in particular, taking into account the limitation of currency risks.

Rental rate in lease contracts is frequently linked to the exchange rate of foreign currency, which creates risks for the Tenant of a significant increase in rent in the event of significant fluctuations in the exchange rate.

The Landlord insists on linking rent and other payments to the exchange rate of foreign currency, so the Tenant needs to protect itself against a significant increase in the exchange rate by introducing conditions in the lease contract that limit such risk.

## 2.4 Procedures to recover unpaid rent

In case of non-payment of the rent, the Landlord usually applies to court; however, before doing so, the Landlord is obliged to comply with the pre-trial procedure for resolving the dispute and send the Tenant an appropriate notice demanding that the debt be paid.

In the event of delay in rental payment, the Landlord has the right to impose penalties on the Tenant.

The Tenant undertakes to indemnify the Landlord for damages that may arise in connection with the payment of penalties imposed on the Landlord in accordance with the applicable laws of the Republic of Uzbekistan, caused by improper performance by the Tenant of the obligations under the Contract.

If the Tenant is delinquent in paying the rent for more than a month, the Landlord has the right to completely restrict (close) his access to the Premises, and to withhold the property located in the Premises as a pledge.

## 3. PREMISES

### 3.1 Extent of Demise

The Leased Premises are provided to the Tenant for their use for the Tenant's needs. The Tenant shall not be entitled to use the Leased Premises for other purposes.

### 3.2 Extent of the Shopping Centre

The Shopping Centre comprises all premises, common areas and any external areas adjacent to it, which are usually occupied by parking space. The entire area of the Shopping Centre may be leased out, except for premises already leased to other Tenants and the common areas needed for the functioning of the Shopping Centre.

### 3.3 Common Parts

The Tenants and their customers can freely use the common parts of Shopping Centers, such as halls, elevators, parking lots, atriums. The service charges for common parts of a Shopping Centre are typically allocated among the Tenants. Sometimes, additional fees may be collected from the customers, for example, for the use of parking spaces. However, the Landlord usually provides parts of the common parts for rent, for instance, for installation of vending machines, ATMs, coffee stations, small shops, advertising structures or seasonal fairs.

### 3.4 Rights Reserved by Landlord

The Landlord has the right to monitor the proper use of the Leased Premises by the Tenant.

The Landlord has the right to determine at its own discretion the mode of operation of the Building as required by laws.

The Landlord has the right to visit the Leased Premises during Tenant's working hours to verify Tenant's compliance with the condition of the Leased Premises.

The Landlord shall provide in the Leased Premises power supply, air conditioning, ventilation, heating, preventive maintenance and servicing of utilities, equipment and fire protection systems.

The Landlord shall not be liable for power and water supply breakdowns caused by power and water suppliers.

The Landlord has no right to interfere in the economic activities of the Tenant in case it does not violate the terms of the Contract.

### 3.5 Control

Upon prior written notice to the Tenant, the Landlord or its authorised persons may enter the Leased Premises during working hours in order to observe the rights of the owner of the Building and to negotiate the condition of the Leased Premises.

## **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

### **4.1 Assignment**

The Tenant is usually forbidden from assigning its rights and obligations under the lease contract without the prior consent of the Landlord. Assignments between affiliated companies are usually allowed.

### **4.2 Underletting**

The Tenant is forbidden from subletting the Leased Premises and assigning its rights and obligations under the Contract to another person (subletting), as well as providing the Leased Premises for free use without the written consent of the Landlord.

In the event of subletting with the written consent of the Landlord, the Tenant shall bear all responsibility.

### **4.3 Sharing occupation**

Sharing occupation is not common in normal practice and usually takes the form of subletting, which is generally forbidden without the Landlord's prior consent.

### **4.4 Change of control**

If during the term of the Contract the ownership and other rights to the Leased Premises pass from the Landlord to a new owner, or the status of the Landlord changes, the Contract remains in force until the end of the lease term. In this case, the Landlord shall notify the Tenant in writing of the occurrence of such circumstances.

## **5. ALTERATIONS/REPAIR**

### **5.1 Alterations**

The Tenant has the right to make changes and alterations within the Leased Premises that are necessary for its own purposes only with the written consent of the Landlord and provided that the integrity of the utilities and other communications, load-bearing walls, floors, ceilings and all equipment and fire alarm systems installed in such premises are not compromised.

### **5.2 Tenant's fitting out**

The Tenants typically conduct their own fit-out works under the supervision of the Landlord and with the prior approval by the Landlord of the fit-out project. The Tenants are often granted a grace period for the time needed to complete fit-out works. Most lease contracts stipulate that upon termination of the lease contract, the Tenant has to remove any alterations and return the premises in the same condition as they were at the beginning of the lease or that any inseparable improvements made to the premises become the property of the Landlord without compensation.

### **5.3 Signage**

The Tenant has the right to place, at its own expense, outside the Leased Premises, in places of the Building designated by the Landlord for this purpose, signs and symbols deemed acceptable by the Landlord. The Tenant shall obtain the necessary written approval from the Landlord to do so. Lessee's free advertising on the Landlord's Building is also allowed.

### **5.4 Repair and decoration**

Pursuant to Article 554 of the Civil Code of the Republic of Uzbekistan, upon termination of the lease contract, the Tenant shall return the property to the Landlord in the condition in which he received it.

Transfer of communications, new electrical wiring, and alteration of the premises without the Landlord's consent changes the condition of the property and, therefore, violates the terms of the lease contract. In this situation, the Landlord is entitled to terminate the lease contract due to the change in the property. Cost of leasehold improvements made by the Tenant without the Landlord's consent shall not be reimbursed to the Tenant. Therefore, when concluding the contract, it is necessary to agree in the text of the lease contract the

procedure for making alterations, transferring communications, or when making changes, to take a written consent of the Landlord to the changes made.

#### 5.5 Assistance

The Tenant shall assist the Landlord in performing the required minor warranty and repair works or alterations to the Leased Premises, without any claim for damages.

### 6. TRADING

6.1 The Tenant is provided with the premises for retail trade fit for its functional purpose, except for those prohibited by the applicable laws of the Republic of Uzbekistan. The Tenant shall carry out retail trade exclusively under its own brand (Trademark).

6.2 The Tenant shall coordinate the hours of operation with the Landlord, and adhere to the approved hours of operation in the Landlord's Leased Premises.

6.3 The Tenant undertakes to observe the laws of the Republic of Uzbekistan within the entire Building, including legislative acts regulating the trade activities, works and services, to obtain and/or to have all permits, licenses of the competent authorities of the Republic of Uzbekistan for the type of being carried out activity, to pay all relevant taxes to the budget on time. In this case, the Tenant shall be solely liable for compliance with the laws of the Republic of Uzbekistan in the leased premises.

6.4 It is widespread practice for Landlords to control the Tenant's opening hours, as all shops in the Shopping Centre should be open for public during normal business hours.

The lease contract usually contains a special provision that the Tenant undertakes to comply with the rules of the Shopping Centre and special lease rules. Such documents describe in detail the rules for using premises in a Shopping Centre and the procedure for carrying out retail activities. Their breach by the Tenant may lead to fines or termination of the lease agreement.

6.5 Any advertising and promotional activities, and actions by the Tenant within the building, with the exception of inside the leased premises, shall be carried out as agreed by the Landlord.

6.6 In practice, the parties do not normally include a clause stating that the Landlord undertakes not to lease the premises out in the same building to other Tenants if they sell the same goods / provide the same services as the Tenant under a lease contract due to potential breach of antitrust laws. However, certain agreements may forbid the Landlord to lease the premises out to the Tenant's competitors within a certain distance from the Tenant's shop. And vice versa – the Tenant may be obliged not to lease premises for placing a similar store within a certain radius from the Shopping Centre. In certain circumstances, the latter two cases can be construed to be in breach of competition laws and should be used carefully.

### 7. INSURANCE

7.1 The Tenant is recommended to insure, at its own expense, from the day it occupies the leased premises, the property and tangible assets inside the premises against all possible risks associated with the Tenant's business activities so that the Landlord can conduct its activities without any hindrance.

7.2 If there is an insurance policy/certificate, a copy shall be provided by the Tenant to the Landlord within five (5) business days from the date of insurance.

## **8. SERVICE CHARGE**

### **8.1 Cleaning**

The Tenant shall make at its own expense the daily wet cleaning of the Premises with the obligation not to take food or other foodstuffs within the leased premises by its employees and visitors.

### **8.2 Promotions and marketing**

The Tenant takes an obligatory and active part in measured advertising and marketing activities within the Building, aimed at increasing the attendance of the Building and sales by holding various promotions, shows, promotional and festive events.

### **8.3 Tenants associations**

There is no such practice in Uzbekistan.

## **9. GREEN LEASE**

There is no such practice in Uzbekistan.

## **10. FORCE MAJEURE AND COVID**

Due to the epidemiological situation in the world and the spread of coronavirus in Uzbekistan, the government introduced a “force majeure” state for business in the event of default of contracts.

To mitigate the negative effect of the coronavirus pandemic and the global crisis on the economy, the Ministry of Investments and Foreign Trade or the Chamber of Commerce and Industry is instructed to issue certificates of force majeure upon application by entrepreneurs who recognize the occurrence of force majeure events in connection with COVID-19.

In general, the parties can attempt to agree on mutually favorable terms, in the event of one of the parties’ force majeure. For example, to extend the deadline for the fulfillment of the obligations, by amending the contractual obligations. If no agreement is reached, one of the parties, who needs to confirm a force majeure event, may apply to the Ministry of Investments and Foreign Trade or the Chamber of Commerce and Industry for a certificate.

## **11. OTHER POINTS TO NOTE**

**11.1** In new Shopping Centers, it is usual for Landlords to require Tenants to start fit-out works prior to the commissioning of the Centre and to impose strict penalties for Tenants if they fail to finish such works and open the premises to the public at the opening day of the Shopping Centre opening day.

### **11.2 Tenant ESG data**

Generally, the Landlord has no right to oblige the Tenant to provide information related to business operations and the products sold, unless otherwise provided by the lease contract. For example, the lease contract may stipulate the obligation of the Tenant to provide the Landlord with data on monthly receipts for the purpose of calculating the turnover fee.

### **11.3 Confidentiality**

The tenant undertakes not to disclose details of the Contract or any other Contract between the Parties, to any third party or to any of its employees or agents unless it has a need to know such information in connection with the performance of the Contract. In such case, the Tenant shall ensure that such persons undertake not to disclose such data subject to the terms and conditions of the Contract.

The Tenant shall not advertise or publish the fact that it has entered into the Lease Contract or disclose any of its terms without the Landlord's prior written consent.

#### 11.4 Prescribed form

In accordance with the law, the real estate lease contract shall be entered into in writing by execution of a single document signed by the parties.

Failure to comply with the form of the building or facility lease contract entails its invalidity.

The building or facility lease contract entered into for a term of at least one year shall be subject to state registration and shall be deemed entered into from the date of such registration. Often, the building or facility lease contract registration requirement is avoided by concluding a contract for less than one year, and then renewing it for a new term if necessary.

#### 11.5 Contract Status

The Lease Contract constitutes and expresses the full understanding between the Parties with respect to all issues referred to herein, and all prior discussions, intentions, representations and understandings between the Parties, if any, shall become void and be replaced by this Contract unless otherwise specified herein.

# UKRAINE

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## Preliminary Remarks

Ukrainian lease contracts are regulated mostly by the Civil Code of Ukraine (articles 759 – 786, 793 - 797) and the Commercial Code of Ukraine (articles 283 - 291), aimed to protect both the landlords and the tenants.

There is no dedicated regulation for commercial private leases, except for the above provisions. Thus, the parties are free to regulate their relations in the lease contract without a lot of overbearing mandatory rules. Moreover, most of the international commercial approaches in lease regulation are used by the parties based on their agreements.

However, as to the lease of public property, it is regulated by the State and Municipal Property Lease Law, which contains certain additional mandatory rules.

The caselaw in this regard is partially developed, although it is common for Ukraine to change the approach to caselaw from time to time.

## 1. TERM

### 1.1 Contractual Term

The law does not restrict the parties in choosing the term of a lease contract, which may not even have a time limitation.

The market practice is to have a lease contract concluded for at least 3-5 years. However, for anchor tenants the lease term may be significantly larger (from 10 to 25 years or even more).

### 1.2 Break Rights

A tenant usually negotiates its right to early termination, and the parties may agree for it to arise after several years of lease. The landlord may or may not want to have such a right at the beginning of the negotiations, but if the tenant insists on having an early termination right, the landlord will usually require reciprocal approach. However, this may differ for anchor tenants where the key issues in negotiation will be the compensation of the tenants' investments or tenants' global policy to enter into the lease with such conditions subject to economical terms and conditions.

To use the break right, a tenant would be typically obliged to notify the landlord in writing from 3 to 6 months prior to such early termination.

### 1.3 Renewal Rights

A tenant enjoys statutory pre-emptive right for conclusion of the lease for a new term.

At the same time, quite often landlords require the tenant to waive these rights in the contract. This may differ for anchor tenants, especially when talking about the tenants leasing the mono buildings.

### 1.4 Disputes and Forfeiture

Most often disputes are settled in a Ukrainian court. This rule is mandatory for domestic players.

An international commercial arbitration clause is commonly used in contracts with international anchor tenants. Alternatively, smaller international retailers do not enjoy such privilege as a rule.

As to the forfeiture, the law sets out several imperative grounds for a unilateral termination of the lease contract, which include:

- a. for the landlord:
  - i. the tenant does not pay rent for three months in a row;
  - ii. the tenant uses the premises against their purpose, including as set out by the contract;
  - iii. the tenant has allowed a third party to use the premises without the landlord's consent;
  - iv. the tenant's negligent behavior poses a risk to the premises;
  - v. the tenant has not commenced to capital repair of the premises, if it was obliged to.
- b. for the tenant:
  - i. the quality of the premises is undue or incompliant with the contract;
  - ii. the landlord does not perform its duty to conduct capital repair of the premises.

The market practice is that the landlord usually wants to have a number of grounds for its unilateral termination, including delay in payment, the tenant's failure to perform its commitments to be open for customers during the shopping centre's working hours, to notify of the tenant's turnover, etc. Typically, a list of cases for unilateral termination also may be demanded by the anchor tenants.

## 2. RENT

### 2.1 General

In Ukraine, a typical lease contract will provide for the split of various payments: the principal rent, the turnover rent, the operational expenses payment, and the marketing expenses payment (the two latter are discussed in section 8 Service Charge).

All payments are payable in local currency (foreign currency, most often Euro or US Dollar, coefficient being applicable in most cases) and subject to VAT.

Land and property taxes can sometimes be charged separately from other payments due to certain local tax specifics.

### 2.2 Principal rent

Almost all lease contracts in Ukraine are based on principal rent, which is usually fixed for the whole lease term and tied to the area of the leased premises.

### 2.3 Turnover rent

The vast majority of the commercial lease contracts also contain the turnover rent, which is paid regardless of the leased premises' area. Usually, it is paid only if the turnover rent exceeds the principal rent and after deduction of the principal rent. In this regard, price of goods returned, VAT should be also deducted from the figure of turnover.

Online sales are most often not included into the calculation of the turnover rent save for cases when the goods are stored in the leased premises.

### 2.4 Indexation of payments

It is common practice that the rent payments, as well as the service charges (see section 8 below) are subject to indexation. Sometimes, the landlord also wants to include provisions on revision of the payments once in a while, usually once a year.

### 2.5 Tenant's security

To secure the tenant's payment obligations, the landlord will usually require the tenant to provide a bank guarantee and/or a security deposit in the amount of one to two months payments.

### **3. PREMISES**

#### **3.1 Extent of Demise**

The most common practice in Ukraine is to define the premises to be leased by stipulating the leased area, the lot's number and annexing the layout of the floor where the premises are situated to the contract.

#### **3.2 Extent of Shopping Centre**

The definition of the shopping centre varies from contract to contract. However, the market practice is to lay down the shopping centre's address in the contract. Sometimes it also includes the shopping centre's total area, registration number (in Ukrainian real estate register), etc. As Ukrainian market is in its development phase, it is not common to include future extensions of the shopping centre into the defined term, however, sometimes it is done.

#### **3.3 Common Parts**

Usually, common parts are defined as the parts of the shopping centre, its adjacent territory (parking, accesses to/ from and through the shopping centre) designated for common use by the tenants and other visitors of the shopping centre, often with a list of such parts.

Contracts do not usually regulate the regime of common parts that are restricted for the landlord's use only. On the contrary, the anchor tenants demand additional restrictions in this regard so that the common parts, especially areas near cash line or the passages, are totally free and clean.

Common parts are almost never used by the landlords for their own commercialisation, while the contracts usually prohibit the same for the tenant.

#### **3.4 Rights Reserved by Landlord**

Landlords usually want to reserve the right to enter the leased premises at any time and without any conditions to check compliance of the tenant's activity with the contract, to oversee the utilities' metering devices, etc. At the same time, the tenants most often require that such right be limited by working hours, presence of the tenant's representative, as well as a prior notice. Although, emergencies are often excluded from such limitations.

Both under the law and the contract, the landlord will have the right to conduct capital repair of the shopping centre, including the leased premises. It is uncommon for a contract to provide limitation of the landlord's repair rights, however, sometimes the landlord undertakes to coordinate the dates and the terms of capital repair with the tenants, inform the tenants of the repair in advance and/or limit its interference with the tenants' operating activity. To protect their interests, tenants also try to negotiate a termination right if the capital repair lasts for a long period. On top of that, anchor tenants will usually seek to include substantial fines for their idle time exceeding the agreed term for capital repair or in case of the landlord's substantial interference with their activity.

### **4. ABILITY TO TRANSFER THE LEASE OR SUB-LET**

#### **4.1 Assignment and Underletting**

The market practice in Ukraine is that the landlord will include its right to assign the lease into the contract, and the tenant will not enjoy an equal right, at least in the first draft of the contract. As the negotiations proceed, the tenant may require the assignment and/or sublease rights for itself, however it is usually limited to members of the tenant's group or TOP-5 tenants with similar business activity on the certain market. Though, in the majority of cases the tenant's assignment and/or sublease will require the landlord's consent on a case-by-case basis.

#### **4.2 Sharing occupation**

Sharing occupation is uncommon and is almost never used in Ukraine unless a part of the premises is subleased to another person.

#### 4.3 Change of control

Typically, contract provisions do not include change of control clauses, save for anchor tenants. In this case tenants commonly demand to include the provisions on prior notification before change of control, for instance, to protect their operation from further acquisition of the shopping centres by their competitors. Violation of such provisions may result in applying penalties or even withdrawal from the contract. As to general regulation, the law does not contain any special rules or restrictions on this matter.

### 5. ALTERATIONS/REPAIR

#### 5.1 Restrictions affecting alterations

Typically, the landlord is responsible for structural alterations while the tenant is obliged to conduct all necessary non-structural alterations.

#### 5.2 Tenant's fitting out

Speaking about newly developed shopping centres, all tenants, especially anchor ones, must complete their fitting out of the premises prior to the shopping centre opening date so that on the opening date the occupancy rate achieves its maximum. In already opened shopping centres all tenant's fitting out of the premise must be conducted in the way that does not interfere the normal operation of the shopping centres (for instance, to conduct fitting out within night-time, to close the frontal part, etc.).

#### 5.3 Signage

One of the key conditions to a lease is a tenant's right to use the space for the tenant's own signage. Given that the signage usually reflects the tenant's trademark, in this regard it is required to obtain the landlord's approval in part of size and other technical characteristics of such signage.

In Ukraine placement of the tenant's signage on the facade of the shopping centre is considered as the external advertising also requiring obtainment of the respective approvals from municipality.

#### 5.4 Repair and decoration

Generally, the tenant is obliged to keep the premises in good repair. The major shopping centres also could require conducting renovation of the leased premises at least once in 5 years.

### 6. TRADING

#### 6.1 Keep open

In Ukrainian leases it is quite common for the tenant to be obliged to keep the premises open for trade at all times within the working hours of the shopping centre. Violation of this obligation will often be the basis for penalties or even early termination.

The most common working hours are from 10 am to 10 pm 7 days a week. The tenants are obliged to follow the house rules, which will regulate specifics of relations with the landlord, peculiarities of trade and use of common parts, etc., and provide for fines for the violations of the rules. There are frequent arguments over the landlord's right to amend the rules as the tenant wants to limit this right to avoid the landlord's abuse by establishing unreasonable fines or otherwise.

#### 6.2 Competition clauses

In Ukraine, competition rules are rather rare. Only a limited number of the landlords apply them. The competition clauses provide for a large increase in rent in case a store under the tenant's name or trademark is opened in a certain radius.

Sometimes large tenants, especially when separate buildings are leased, will also require the landlord to refrain from building similar facilities in a certain radius.

However, such provisions should be analysed for their compliance with Ukrainian competition law. Sometimes, if the competition clause is harsh, a permit for concerted actions may be required to put competition clause into a contract.

### 6.3 Trading names

The allowed use of the premises provides for the operation under the specified trademarks. Change of the trademarks will require amendment of the contract or at least the landlord's consent. Rebranding usually will not require any additional actions.

## 7. INSURANCE

### 7.1 Insured risks

The landlords usually require the tenant to have a third-party liability insurance with an approved insurance company with a specified insured sum, as well as require the tenant's contractors to have the same during fit-out works. The insured risk in this case is causing damage to third parties.

### 7.2 Uninsured risks

Insurance agreements often provide for a long list of exceptions, which would include the majority of force majeure event, as well as criminal offences, such as stealing. Pandemic is rarely an exception from insurance.

### 7.3 Business insurance

As insurance market in Ukraine is not well-developed, the vast majority of tenants, save for the international anchor ones, will not have any additional insurances beside the ones specifically required by the landlord. The landlords, on the other hand, will more often than not insure the shopping centre, especially if it is mortgaged.

## 8. SERVICE CHARGE

### 8.1 Operational expenses

The service charge in Ukraine is mostly regarded as operational expenses payment intended at compensating relevant landlord's expenses. However, the contracts do not regulate how the landlord shall use these payments, and the tenant will not usually have the right to control it. The landlord will not disclose the amount of its actual operational expenditures. Having said this, typically the parties fix the amount of operational expenses rather than use open book approach. The utility services are usually charged by metering devices, and for common parts – pro rata to the area occupied.

### 8.2 Promotions and marketing

Marketing payments are as well a separate type of payments made by the tenant under the contract. Same as with the operational expenses, the landlord will not disclose the amount of actual marketing expenses, neither allow the tenant to control the use of marketing payments. Thus, such marketing fees are also fixed. However, anchor tenants occasionally require the landlords to prove the provision of relevant marketing services with the aim of proving relevant expenses to tax authorities or include the sum of marketing payments into the principal rent.

When a shopping centre is opening for the first time, the landlord may also request the tenant to pay a one-time opening fee that is also spent on marketing purposes.

### 8.3 Tenants' associations

Tenants' associations are evolving in Ukraine and their impact on the market is very fragmented.

## 9. GREEN LEASE

A typical lease contract does not include any "green" provisions and the tenant will not be required to share any "green" data with the landlord. However, the landlord will have the data on the tenants' utilities consumption, because the payment for utilities is often done through the landlord. Although, the level of consumption has no impact on the contract or relations between the parties.

## 10. FORCE MAJEURE AND COVID

### 10.1 Force majeure

Under Ukrainian law, force majeure is any unusual and inescapable events that render performance under a contract impossible. In contracts, the definition of force majeure will often copy that in the statutory law, but can sometimes extend the list of force majeure circumstances, depending on the parties' negotiations.

Ukrainian law provides that force majeure abolishes liability for non-performance of contract but does not relieve of the obligations or provide the grounds for termination. However, the parties sometimes lay down that a force majeure is a ground for termination if it lasts for a certain period of time.

The tenants try to include Covid-19 related events to the list of force majeure events, and the majority of landlords agree.

To confirm force majeure, a certificate of Ukrainian chambers of commerce and trade is required.

### 10.2 Impossibility to use and COVID-19

In addition to the force majeure rules, there is a general rule that a tenant shall be relieved of rent for the time of impossibility to use the premises. In addition to the said general rule, the Parliament has adopted another rule providing for the landlords' obligation to lower the rent upon the tenants' request within the period of quarantine restrictions. Such lowered amount of rent cannot exceed the landlords' expenses for paying land and property taxes, and utilities.

As to the market practice, the landlords used to relieve the tenants from obligation to pay rent during Covid-19 related lockdowns and required the tenants to continue paying operational expenses and/or marketing payments. At the same time, there were some landlords that required the tenants to perform all payment obligations in full.

The Covid-19 related caselaw was not always uniform. When the tenants requested decrease of rent, the courts tending to uphold the tenants' claims. However, when the tenants claimed rent relief based on impossibility to use the premises, some courts took the tenants' side, while the other construed "impossibility to use" not in the context of the premises' intended purpose (e.g., a store), but in a universal context, i.e. impossibility to use them for any purpose whatsoever.

## 11. OTHER POINTS TO NOTE

- 11.1 The lease contract with duration that equals or exceeds 3 years is subject to mandatory notarial certification with the main purpose of making the lease visible through mandatory registration of the leasehold with the State Register of Proprietary rights to Real Estate. The contracts concluded with violation of these requirements are deemed void, and the leasehold becomes effective upon its registration.
- 11.2 Should the shopping centre be mortgaged, the consent of mortgagee to transfer the premises into lease or conduct the alterations/ repairs is required, otherwise the contract could be invalidated.
- 11.3 Tenants enjoy statutory pre-emptive right to purchase the leased premises, which landlords usually require to waive in the contract. However, a major tenant of a separate building, especially in a built-to-suit structure, will want to keep this right on top of an elaborated change of control clause.

- 11.4 Change of the owner of the shopping centre does not terminate the lease contract if otherwise is specified in the contract.
- 11.5 The landlord could require the tenant via the contract's provisions to provide the data related to business operations and the products sold, including on environmental compliance and/or safety of the sold goods. However, the tenant does not have such obligation under the law, this is not a market standard and almost never done in practice.
- 11.6 Under Ukrainian anti money laundering law, the landlords are not subject to financial monitoring and are not obliged to control the tenants' source of funds or conduct extensive KYC procedures.
- 11.7 Tenants almost never play an active role in any security or anti-terrorist measures. Usually, the security of the shopping centres is organised by the landlord. The tenant may ask for connection to the landlord's security point subject to an additional fee or conclude a separate contract with a security company.
- 11.8 Some leases, especially in case of mono-tenants leasing large buildings, may require merger clearance.

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