

Explaining retail occupancy in Tunisia

For shopping centre developers and retail occupiers, renting a shop in Tunisia is very different for those familiar with leasing practices in the GCC, writes **Simon Thomson**

The Tunisian legal code is inherited from the Napoleonic code of France. It is, thus, quite different from countries whose laws originate from English law, including (loosely) the GCC states, Indian sub-continent and most English-speaking countries. Tunisia, being an Arab country, the official language for legal documents is Arabic. French, however, is the 'officially' accepted and recognised alternative language. For example, it is a market practice for tenancy agreements to be written in French. English is not recognised.

Real estate may be conveyed on either a freehold (absolute ownership) or leasehold basis. Shop premises are conveyed widely on either basis, with no real reasoning by the conveyer for electing one form over the other, apart from commercial grounds.

The relationship between landlord and tenant is set out in the official legal commercial code and, specifically, the 1977 law governing landlord and tenant in commercial premises. The practice in Tunisian law of ownership in co-propriété is well established and widely understood. The English law equivalent is roughly compared to joint ownership or flying freeholds.

The commercial advantages of the two formats are obvious in that sale offers the chance of short term gain and may be the choice of builders whereas leasing provides the opportunity for long-term gain and is preferred by investors. Leasehold tenure is also preferred for multiple occupancies in large buildings as it provides greater control over the management and maintenance of the on-going investment.

This is the recommended and normally accepted format for major shopping malls

worldwide, including the leading malls in Tunis. Furthermore, retailers in Tunis prefer renting shops in the major malls as it provides them with greater flexibility and a reduced commitment in the event of deterioration in trading conditions.

Retail leases

Duration: Shop leases tend to be initially for a period of three years, but in line with French practice may continue for further periods of three years on what may be known by some as a '3, 6, 9 year' term or renewed automatically each year after the third year.

Rent and indexation: Shop rents for new projects tend to be fixed at a rate per square metre per month irrespective of the size or positioning of the unit within the development. Once fixed and tenants are signed up, after expiration of the first three years rent will be subject to an automatic annual uplift of 5% – known as 'indexation'. There is no legal ruling as to the rate at which indexation is set – it's purely on market practice, inflation and economic conditions. Indexation appears always to be upwards and no one can recall downward indexation.

Key money: In certain, but not all new buildings, the developer charges a premium capital payment over and above the annual rent on the commencement of the lease. This sum is known as a 'prix d'entrée' but is not recognised in Tunisian law; it may even be illegal for



a 'promoteur' (developer) to ask for a 'prix d'entrée' on a new development in the first two years. It is only accepted as being market practice; in order to remain within the law, it is construed as being a 'contribution' towards the building cost to which it is geared in theory.

In essence, the rationale for procuring such a key money payment is to redress the otherwise historically low level of base market rents generally prevailing. Payment of the 'prix d'entrée' can be made in full at the commencement of the lease, but depending on the sum involved and the individual developer, payment may be made in instalments and spread over the first three years of the lease term.



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In one instance, 25% payment was made on lease signing, 25% on shop fit out and 50% when the mall opened. Deferred payment terms of the 50% balance was offered over three years, subject to interest at 7% per annum over the last two years of the initial lease term, with the first year interest free.

Rent payment and tax: Rent is normally payable three monthly in advance and is subject to value added tax (VAT). Additionally, the tenant is required to account to the tax authority for collection of income tax (corporate or individual) for which the landlord is liable. This procedure is by way of a withholding tax. For every payment of rent the landlord must procure a certificate from the tenant of payment of the tax withheld. Failure to do so will render it impossible for the landlord to account for prepayment of income tax at the end of the tax year.

Lease registration: Once signed, lease agreements must be registered with (a) the tax office and (b) the trade registry. The tenant who also bears the cost of any

stamp duty customarily undertakes this. Although the lease will start on signature of the lease agreement, the court will not recognise it in the event of a dispute unless/until the agreement has been registered. Normally, lease agreements are expected to be registered "within a month" of signing. Registration may be undertaken at a later date, subject to payment of a penalty (amount not specified).

Turnover or overage rents: Payment of rent geared to retail turnover is not known in Tunis.

Other terms and conditions: Terms and conditions regulating good operational management appear to be standard in mall leases and include such issues as user clauses, the control of quality of tenant within a particular use band and penalising tenants for failure to open (in one case, allegedly by charging double rent).

In the event of a tenant wishing to assign their lease, the landlord can require the right of first refusal, which to be exercised may have to be within a pre-determined period - typically 14 days. In such an event 'fonds de commerce' may become payable (see below).

Goodwill – 'Fonds de Commerce'

The term 'fonds de commerce' is broadly translated to mean 'goodwill', but unlike English law, tends to have stronger legal cognisance in Tunisian law. The term also tends to be interpreted erroneously to mean 'key money' thus causing confusion with the same translation when applied to 'prix d'entrée'.

The right to receive 'fonds de commerce' arises only after two years of the establishment of a 'commercial relationship', such as between a landlord and tenant. 'Fonds de commerce' is regulated by law and is one of the reasons why a tenant needs to register the lease with the authorities.

The value of the 'fonds de commerce' of a particular business is determined by a judicial expert and may be used for several purposes. These include:
- being pledged by the

business owner to raise finance for the retail business or acquisition of the shop - independent assessment of the level of compensation payable by the landlord to the tenant in the event of seeking re-possession where the tenant is not in default of the lease

- placing a value on a business where the sitting tenant of a successful business is seeking assignment of the lease, new operator or surrender to the landlord.

Under Tunisian laws the ownership/operation of a retail business appears to be less 'cemented' to the occupational lease agreement than under English-based law. In Tunisia it is seemingly possible for a lessee of a particular business to 'sell' his business to another party while retaining the lease, the consideration being the level of 'goodwill' or 'fonds de commerce'. Alternatively, a lessee of a retail business may assign the entire lease and business with the premium again being the 'fonds de commerce'.

Businesses entitled to 'fonds de commerce'

A 'fonds de commerce' value can only accrue to a business as opposed to an individual providing a service. Thus a pizza restaurant trading successfully from a particular location over several years will have developed a clientele and customer flow deemed to be attached to that location and particular business to which a value can be applied. On the other hand, a business offering a service such as that provided by the skill of an architect or an artisan creating a 'unique' product would be unable to apply for 'fonds de commerce' on the grounds that the value of the goodwill in their business is bespoke to them and incapable of transfer to a third party. ■



Simon Thomson is founder and principal of Retail International, UK. The above article is based on his research and understanding of the prevailing practice for the occupation of retail premises situated in new purpose-built buildings designed for multiple occupation by conventional shops in Greater Tunis.