

**1 – Contracts for the Rental of Real Estate Stores located
in Shopping Centers in Moroccan law**

“A Comparative Study – In the Light of French Jurisprudence”

عقود كراء المحلات العقارية الموجودة بالمراكز التجارية «دراسة مقارنة - في
ضوء الاجتهاد الفقهي والقضائي الفرنسي»

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Abstract

This study aims to approach the legal status of lease contracts for real estate shops located in shopping centers, which, despite the economic and social value that they undertake, do not entitle merchants who engage in a commercial activity with the right of commercial property.

It should be stressed that most of these mall-centric businesses are linked to big brands, which primarily and directly contribute to enhancing the mall's shopping appeal; this leads us to question the legal and factual justifications for excluding these stores

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from the protection stated in the Commercial Leases Act, and consequently the impossibility of building up independent business assets there.

In order to study and analyze this legal and realistic problem, we set out from the study and analysis of the legal basis for this legal point in the Moroccan Commercial Lease Law 49.16, in parallel with French jurisprudential and judicial orientations, in order to present an integrated jurisprudential and legal approach.

Keywords: real-estate stores, shopping centers, commercial property, comparable case law

ملخص:

تهدف هذه الدراسة إلى مقارنة الوضعية القانونية لعقود كراء المحلات العقارية الموجودة بالمراكز التجارية، التي رغم القيمة الاقتصادية والاجتماعية التي تضطلع بها إلا أنها لا تخول التجار الذين يزاولون نشاطا تجاريا بها حق الملكية التجارية.

علما أن أغلب هذه الأنشطة التجارية التي تتمركز على مستوى المراكز التجارية ترتبط بعلامات تجارية كبرى، تساهم بشكل أساسي ومباشر في تعزيز الجاذبية التجارية للمركز التجاري، الأمر الذي جعلنا نتساءل عن المبررات القانونية والواقعية الموجبة لاستثناء هذه المحلات التجارية من الاستفادة من الحماية المقررة في قانون الكراء التجاري، وبالتبعية عدم إمكانية تكوين أصول تجارية مستقلة بها.

وفي سبيل دراسة وتحليل هذه الإشكالية القانونية والواقعية انطلقنا من دراسة وتحليل الأساس القانوني الخاص بهذه النقطة القانونية في قانون الكراء التجاري المغربي 49.16، بالموازاة توجهات فقهية وقضائية فرنسية، لأجل تقديم مقارنة قانونية فقهية قضائية متكاملة.

الكلمات المفتاح: المحلات العقارية، المراكز التجارية، عقود كراء، الملكية التجارية، الفقه القانوني المقارن

Introduction

Human life is based on transactions, foremost among which are netting contracts, therefore controlling, codifying them and being aware of their provisions is essential for the integrity of people's lives, protecting their interests and rights, and contributing to economic advancement.

The commercial lease contract is one of the most important and prominent contracts whose fundamental role can by no means be denied in the field of commercial transactions, considering that this contract provides the lessor with the opportunity to invest their capital and manage the affairs of their real estate, in the way they see fit, and enables the tenant to exploit real estate shops commensurate with their commercial purpose in order to invest their capital through the establishment and development of their commercial assets¹.

And if the issue of commercial rent assumes an economic and social importance by expanding the scope of application, which contributes to revitalizing the real estate field and containing the active commercial assets that are constantly developing, and contributing to granting more space for job opportunities that are based on free initiative through the establishment of commercial assets in real estate shops The rent – because this initiative is often hampered by the large financial value of the real estate shops in the event of a desire to buy it or the fear of arbitrariness by real estate owners in the event of thinking of renting it outside the protectionist rules of the commercial rent system – the matter

(1)- Philippe Malaurie, Laurent Aynes, Pierre-Yves Gautier, Special Contracts, 4th edition-Lextenso 2009, p. 329 .

is not without practical problems, perhaps the most prominent of which is the legal point related to the exclusion of Contracts for renting real estate shops located in commercial centers within the scope of the application of the new commercial lease law N°. 49.16¹.

It should be noted that renting these real estate shops located in commercial centers requires merchants wishing to exploit them to provide important financial guarantees, in addition to the relatively high rent payment compared to normal shops, which raises more than one question about the issue of excluding them from the advantage of commercial ownership.

Approaching this issue requires us to deal objectively and impartially, by putting forward the legal justifications adopted by the drafters of this law and discussing them in the light of legal mechanisms along with judicial work and comparative jurisprudence – with a view to reaching results that can be trusted (II), but before that we will work to define the concept of a commercial center(I).

I. First: The concept of a commercial center

The commercial center is considered in the concept of the Moroccan Commercial Rent Law N49.16 ° according to the fifth clause of Article 2 of this Law “Every commercial compound with a unified logo built on a uniformly prepared and exploited property, and includes one or several buildings that include shops with one or multiple activities, and in the ownership of a self-owned person or several private persons, a legal person or several legal

(1)- The Dahir N:1-16-99 of July 18, 2016, promulgating Law N:49.16 relating to leases of buildings or premises rented for commercial, industrial or artisanal use, was published in Arabic in the Official Bulletin N :6490 of August 11, 2016.

persons, and is managed uniformly either directly. by the owner of the commercial center or by anyone assigned by the latter.

Management means all measures taken to improve the reputation and attractiveness of the commercial center, and increase the number of its visitors such as advertising, activation, marketing, ensuring respect for the technical and engineering features and characteristics of the center, organizing working hours, guarding or cleanliness.”

This definition did not provide a logical vision that justifies the exclusion of contracts for renting shops located in commercial centers from the commercial lease system, especially since the legislator within this definition talks about the visitors of these commercial centers. However, when we are dealing with the commercial assets stationed in these commercial centers, we are talking about the commercial customers of the commercial asset of the leased, which we will address in some detail at the time.

Likewise, with regard to the management referred to at the level of this definition, it is limited to security administrative management only, without going beyond that to commercial management.

Also, this definition distinguishes between major commercial centers and centers known in practice as »Qaysariyyat«, which embody simple commercial gatherings compared to commercial centers, whether in terms of geometric shape or in terms of commercial integration, as »Qaysariyyat« often depends on the unit of products offered, either jewelry or Electronic machines..., in which we believe that the subcontractors of the shops stationed in them benefit from the application of the commercial lease law.

French jurisprudence defined the commercial center as a group of shops whose number is not less than twenty, lying on an area of not less than 5000 square meters. Where it is run by a commercial unit whose purpose is to bring customers, and therefore it aspires to perform a double recreational function based on providing space for wandering and consumption so that this space allows customers to shop¹.

These commercial centers are subject to a strict licensing system, due to their connection to the general urban development of the cities in which they are located and their impact on their commercial mobility. This license authorizes extensive exploitation of various commercial activities while taking care to monitoring the fundamental changes in the level of activity of these commercial complexes, and focusing on respecting the requirement of space that must be available in the commercial center as a commercial unit, regardless of the different nature of the partial commercial activities that are exploited in the total number of shops that make up the commercial center², “cinema halls, shops, gyms...” .

It should be noted that the decision to grant this license must be reasoned taking into account three main points³:

2. First: Urban planning

- Its effects on the revitalization the geographical area that will contain it.
- The project's effects on public transport channels.

(1) –Jean-Marc Poupard, “shopping centres, new places of sociability in the urban landscape”, edition l’harmattan– Paris, April 2005, page: 35.

(2)– Anne D’Andigné–Morand, “Commercial, industrial and artisanal leases”, 15 edition, Delmas Paris, Year: 2010/2011, P: 431–432.

(3)– Anne D’Andigné–Morand, Op.Cit., P :437.

Second: Sustainable Development

- The environmental quality of the project.
- Its involvement in strengthening and developing public transport networks

Third: consumer protection

II. The conflict between the system of commercial centers and the concept of commercial ownership

in principle is evident. We must emphasize that, despite the fact that owners of real estate shops located in commercial centers are not given the protective rights under the Commercial Rent Law, it is clear that the success of these centers is due to the collective presence of these active commercial assets, since they meet the various demands of the consumer who wants to save time and money by finding various shops, offering different products and services at different prices and of different quality – both commercial, cultural, and sports– in the same area and in an entertaining, special social atmosphere¹.

These major commercial centers rely on specialized commercial assets in various activities, aiming to maximize their exploitation and integration through well-known shops to become more popular².

What is the basis on which the legislator has based this exception? How can it not benefit these merchants who have been allowed to exploit their commercial assets within these commercial

(1)– Amal Al-Manaie, «The Extent to which Shops Located in Commercial Centres are Subject to the Dahir of 24 May 1955», Journal of Judiciary and Law, Vol. 164, 2014, p.21.

(2)– Hamad Mohammed Mahrez, «The Idea of Commercial Property: Its Development and Means of Protection», Knowledge Establishment, 1st ed., 2003, p. 73.

centers after paying hefty sums, in addition to the raised tithes?

As indicated above, the new commercial lease law is based on a fundamental idea that there are no special tenants for a commercial venture who lease a place of business, but rather we are facing «visitors of the commercial venture», which excludes any possibility of forming a commercial origin in these commercial centers, especially since we know that the element of tenants is one of the most important components of the commercial origin, but do we really have to accept this idea when it is launched?

We must be aware that we are dealing with customers and not visitors, as each customer is naturally a visitor to the particular commercial source they are looking for – Nike, Cart Noire, etc. – rather than visitors to the shopping centers. The current situation confirms that a large number of them are not active commercial customers, as their role is limited to wandering around these centers. However, these visitors may be persuaded to buy the products and services offered by the e-merchant, and so they turn from visitors to customers of the particular commercial source.

The French Court of Appeals affirmed this in its decision of February 5, 2003¹, which declared that «Merchants who use their commercial assets in shopping centers can draw customers through their commercial names, but we cannot deny that these traders, who are engaged in activities within the shopping centers, focus on the fact that these latter serve as a source of potential customers».

(1)- Yves MAROT Bail commercial et centre commercial : un arrêt bien surprenant rendu par la Cour de cassation, pourvoi n° T 01-16.672 ; arrêt no°155 FS-P+B, LE 5 février 2003, RÉSULTAT DE RECHERCHE LEXTENSO.FR – 11/01/2018 15:14 | UNIVERSITE D'ORLEANS .P : 4.

The French judicial interpretation here has stated that the merchant must provide special stamps for their customers, meaning that two distinct customers must be present in the decision issued by the French Court of Appeal on March 19, 2003¹, which declared that «the merchant who uses the premises dedicated to selling fish in the commercial center cannot take advantage of the commercial sale system because there are two distinct customers in the commercial center».

In its decision of October 14, 2014², the same approach was adopted, which stated the following: «... a tenant who does not own an independent store from a large commercial group and does not have private customers cannot acquire commercial ownership.”

Here, the French Court of Cassation revealed to us a strong obstacle that may prevent the application of the commercial law system to traders within business groups. This is because the burden of proof that merchants are required to provide is a difficult one; the declaration of the existence of two particular customers or the contrary is a matter of the court’s discretion³.

Therefore, the new commercial rent law is launched, exempting them from the idea of the trader’s dependence on the real estate within the commercial centers for autonomy in management.

(1)–cass civ 19 Mars 2003, N°402 FS_PBRI, Cité par Mémento Baux commerciaux 2015–2016, Op. cit, p : 385.

(2) – Jehan–Denis Barbier, Cass. 3e civ., 20 mars 2014, n° 13–24439 : Administrer juin 2014, p. 32, RÉSULTAT DE RECHERCHE LEXTENSO.FR – 11/01/2018 15:20 | UNIVERSITE D’ORLEANS, P : 1 .

(3)– Aline Divo; Françoise Maigné–Gaborit; Brigitte Gaucière; Philippe Riglet; Jean–Luc Tixier, « Mémento Baux commerciaux 2015–2016 », Editions Francis Lefebvre– Paris, année: 2015.2016 , p : 385– 386.

The management of the commercial center is the one that is aware of it, and by management it is meant «all measures taken to improve the reputation and attractiveness of the commercial center and increase the number of visitors, such as advertising, activation, marketing, ensuring the respect of technical and engineering features of the center, organizing working hours, security or cleaning». However, it should be noted that this management referred to only applies to the opening and closing times of the commercial centre – the same timing used by all traders – and does not have a special label. It ensures cleanliness and security in general, which we believe does not reach a level of denial or rejection of the independent management of the traders operating inside, as they enjoy independence in terms of setting the pricing policy, how to display their products and services through the virtual real estate, with the help of their users who have full freedom of choice, as well as bearing the costs of benefiting from water, electricity and cleaning services.

In the context of the independence debate, there is an issue related to the status of traders who own shops and operate under international trademarks and brands under a franchising agreement¹. Do they have the right to benefit from the commercial origin privilege?

The licensee, who is independent of the trademark owner, has

(1)– A franchise contract is one of the methods that seeks to expand the geographical circle of a project based on a relationship between the grantor owner of the trademark and the grantee of the merchant who wants to become an independent business owner without risking too much, adopting this mark as a strong commercial mechanism to support his business activity (Yasser Sayed Al-Hadidi, Commercial Franchir in the light of competition legislation and prevention of monopoly, Comparative Study, First Edition, Arab Renaissance House Cairo, 2012, p. 5.)

legal personality and separate financial liability that allows him to contract on his own name and account, register in the commercial register, and be bound by the professional tax table under his own name and address. He has an independent business location and independent employees, is required to keep a separate accounting, and is responsible for the administrative and financial management and practice of his commercial activity. He will not receive any compensation from the donor in case of loss of customers due to the termination of the contract.¹. The French Court of Appeal determined that the trader who holds a privilege to engage in commercial activity in real estate shops which contain machinery and have two individual customers is the owner of a business source of income, allowing them to take advantage of the commercial sale system. This is because if the public customers are either a trademark or a brand which is owned by the original company, then the private customers of the commercial source owned by the trader have been acquired only through the adoption of material elements such as machinery and primary materials, as well as immaterial elements such as the right to sale. As a result, the trader who has been granted the privilege is held responsible by suppliers, loan institutions and insurance companies².

Conclusion :

Based on what has been said, it can be said that the exception for the lease contracts of the shops present in commercial centers

(1) – Hanan Bakour: The Commercial Licensing Contract in Morocco, Doctoral Thesis in Law, Mohammed V University, Faculty of Legal, Economic and Social Sciences, Agdal, 2003/2004, pp. 153–154.

(2)–Mémento Baux commerciaux 2015–2016, Op. Cit, p : 391.

was not justified for several reasons :

the absence of any legal framework that guarantees the rights of this broad category of merchants, making them subject to the authority of the administration supervising these centers; it is enough to mention that a merchant inside these centers cannot rent the shop from the owner, as this behavior constitutes a serious mistake that requires the cancellation of the original lease contract and the expulsion of the merchant from the owner without any legal basis.;

They ensure that this exception is not misinterpreted through the unconvincing justifications that this law has adopted and presented, with the first justification being that the «visitors» are specific to the commercial center, whereas the ones intended by the commercial bargaining system are «customers» who intend the brand concentrated in the commercial vehicle. They also consider how many visitors to the center become customers due to the effect of the quality of services or products offered by these commercial stores;

The second argument, which is related to «administrative management, security and cleanliness of the commercial center» and has no connection to «commercial management exchange» that focuses on setting prices, organizing products and services, and marketing them, is something that the cyber trader, the owner of the commercial activity, is familiar with.

The order that makes us emphasize the need to review this exemption or enact a specific law that guarantees the rights of this group of traders.

NOTES DE BAS DE PAGE

1- Philippe Malaurie, Laurent Aynes, Pierre-Yves Gautier, Les Contrats Spéciaux , 4ème édition-lextenso 2009,P :329 .

2- Le Dahir N:1-16-99 du 18 Juillet 2016, portant promulgation de la loi N:49.16 relative aux baux d'immeubles ou de locaux loués à usage commercial, industriel ou artisanal, a été publié en arabe au Bulletin Officiel N:6490 du 11 Aout 2016.

3 -Jean-Marc Poupard,«les centres commerciaux, de nouveaux lieux de sociabilité dans le paysage urbain», édition l'harmattan- Paris, Avril 2005, page : 35.

4- Anne D'Andigné-Morand, «Baux commerciaux, industriels et artisanaux», 15 édition, Delmas Paris, Année :2010/2011, P :431-432.

5- Anne D'Andigné-Morand, Op.Cit., P :437.

6- Amal Al-Manaie, The extent to which shops located in commercial centers are subject to the Dahir of May 24, 1955, the Journal of the Judiciary and Law, N°164, 2014, p. 21.

7- Hamad Mohammed Mahrez, The Idea of Commercial Property, Its Development and Means of Protection, Knowledge Establishment – First Edition- 2003, p. 73.

8- Yves MAROT Bail commercial et centre commercial : un arrêt bien surprenant rendu par la Cour de cassation, pourvoi n° T 01-16.672 ; arrêt no°155 FS-P+B, LE 5 février 2003, RÉSULTAT DE RECHERCHE LEXTENSO.FR - 11/01/2018 15:14 | UNIVERSITE D'ORLEANS .P : 4.

9-cass civ 19 Mars 2003, N°402 FS_PBRI, Cité par Mémento Baux commerciaux 2015-2016, Op. cit, p : 385.

10 - Jehan-Denis Barbier, Cass. 3e civ., 20 mars 2014, n° 13-24439 : Administrer juin 2014, p. 32, RÉSULTAT DE RECHERCHE LEXTENSO.FR - 11/01/2018 15:20 | UNIVERSITE D'ORLEANS, P : 1 .

11- Aline Divo; Françoise Maigné-Gaborit; Brigitte Gaucière; Philippe Riglet; Jean-Luc Tixier, « Mémento Baux commerciaux 2015-2016 », Editions Francis Lefebvre- Paris, année: 2015.2016 , p : 385- 386.

12- A franchise contract is one of the methods that seeks to expand the geographical circle of a project based on a relationship between the grantor owner of the trademark and the grantee of the merchant who wants to become an independent business owner without risking too much, adopting this mark as a strong commercial mechanism to support his business activity (Yasser Sayed Al-Hadidi, Commercial Franchising in the light of competition legislation and prevention of monopoly, Comparative Study, First Edition, Arab Renaissance House Cairo, 2012, p. 5.)

13 - Hanan Bakour: The Commercial Licensing Contract in Morocco, Doctoral Thesis in Law, Mohammed V University, Faculty of Legal, Economic and Social Sciences, Agdal, 2003/2004, pp. 153-154.

14-Mémento Baux commerciaux 2015-2016, Op. Cit, p : 391.