THE LEGAL PROTECTION OF THE
SMALL RETAILER IN THE SHOPPING
CENTER

A comparative study between Canada and France

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Abstract

The issue of the protection of the small retailers in shopping centers deserves to be addressed since those retailers do not always have the economical weight to negotiate their leases on an equal footing with their landlords. In Canada and France, this situation is not dealt the same way: where Canada relies on contractual freedom to balance the interests involved, France is very protective. This thesis aims to study and compare those two regimes and tries to determine whether small retailers need protection.
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The extent that malls have been taking in France these past years is exceptional. Since recently, malls as they are designed in North America did not exist in France. Not so long ago, French malls were only composed of a big hypermarket with a few shops in a gallery, undeniably managed as a unit, but independent from each other. They were more like shops geographically assembled than actual malls.

But today, French envision malls like a big place of living. Imported from the United States, the concept of "fun shopping" has arrived in Europe. Consumer expectations are changing and French malls facing declining traffic must reinvent their spaces. Tomorrow’s malls are warmer, brighter, more environmentally friendly and more animated. Tomorrow’s malls play on the register of the usability of the promenade to generate impulse buying. The malls’ model evolves to retail parks which contains three or more megastore with a common parking area shared among the retailers.
French supermarket chains have adapted to this approach combining business and leisure, however the law did not follow this evolution yet. Nevertheless, some issues arise from this new organization, especially regarding the relationships between the various actors within the mall. Indeed, while shopping centres become bigger, more integrated and diversified, the small retailer seems to have fewer and fewer weight. Therefore the question of the juridical response to this new approach of the mall arises. Does the Canadian law come with a special protection for small retailers in shopping centres? But more important, the question is to know whether small retailers really need a special protection? As a matter of fact, there are professionals.

Studying the Canadian model of the shopping center would help to understand how Canadian law deal with the particular configuration of shops in malls, and whether they provide special protection to their small retailers. Besides, since the entertainment need, if this new conception of the shopping centre as a place of leisure is new in France, it exists for decades in North America, so it seems legitimate to look at Canadian law for an answer.

In my opinion, there are two principal aspects in this problematic: the protection of the small retailers *per se* when negotiating and signing the commercial lease (Part. 1), and the organization of the relationships between all the mall’s actors (Part. 2). The aim is to see how the Canadian law is dealing with those issues that
occur in a giant mall, and see if such an approach would be applicable in France.

Though first of all, we need to understand the ins and outs of the shopping center
PRELIMINARY PART

Before getting into the heart of the matter and talking about protection of small retailers and leases, we need to understand what the shopping center is all about and how it functions.

I. DEFINITION OF THE TERMS

We first need to define what the shopping center is (A) and then distinguish it from related concepts (B).

A. The definition of the shopping center

A shopping center includes not only the stores demised to particular tenants but also common facilities which are made available to all tenants and their customers. They therefore meet very specific definition, distinct from single stores.

A shopping center is defined by The International Council of Shopping Centers (ICSC) as a group of independent retail and other commercial establishments that is planned, developed, owned and managed as a single property, typically with on-site parking provided.¹

¹ http://www.icsc.org/
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First of all, we have to differentiate the mall from the shopping center. “Malls typically are enclosed, with a climate-controlled walkway between two facing strips of stores. The term represents the most common design mode for regional and superregional centers and has become an informal term for these types of centers.”2 Those are the most common downtown shopping center. “A strip center is an attached row of stores or service outlets managed as a coherent retail entity, with on-site parking usually located in front of the stores. Open canopies may connect the storefronts, but a strip center does not have enclosed walkways linking the stores.” These shopping centers are more likely to be found in the suburbs.

Then, the size of the shopping center depends on the market it serves. The International Council of Shopping Centers3 made a classification and has defined eight principal shopping center types.

**The Neighborhood Center:** This shopping center is designed to provide convenience shopping for the day-to-day needs of consumers in the immediate neighborhood and is usually anchored by a supermarket or a drugstore anchor.

**The Community Center:** The community center typically offers a wider range of apparel and other soft goods than the neighborhood center does and is anchored by a supermarket, a super drugstore or a discount department store.

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The Regional Center: The regional center provides general merchandise (a large percentage of which being apparel) and services and is anchored by a traditional mass merchant, a discount department store or a fashion specialty store.

The Superregional Center: This shopping center is a larger sized regional center offering the same kind of merchandise and services, but with several anchors that is to say a combination of traditional mass merchants, discount department stores and fashion specialty stores.

The Fashion/Specialty Center: The speciality center is composed mainly of upscale apparel shops, boutiques and craft shops carrying selected fashion or unique merchandise of high quality and price. It is anchored by one or several famous and attractive apparel brands.

The Power Center: It is dominated by several large anchors offering tremendous selection in a particular merchandise category at low prices. In those shopping centers, there are only a minimum amount of small specialty tenants.

The Theme/Festival Center: In those shopping centers there is an unifying theme.

The Outlet Center: In outlet centers, manufacturers' outlet stores sell their own brands at a discount. Those centers are generally located outside cities.
In France, a shopping center is legally defined as a building gathering together a group of retail businesses subject to administrative authorization\(^4\).

For the French National Council of Shopping Centers\(^5\), a commercial real estate property can only be called a shopping center if it includes at least 20 stores or services and a sale area of at least 5,000 m\(^2\). The French classification of the shopping center is less developed than the Canadian one and is only based on the size.

The French National Council of Shopping Centers proposes the following typology: the Super Regional Shopping Center is at least 80,000 m\(^2\) and contains at least 150 stores or services; the Regional Shopping Center is at least 40,000 m\(^2\) and encloses at least 80 stores or services; the Big Shopping Centers is at least 20,000 m\(^2\) and has at least 40 stores or services; the small Shopping Centers is at least 5,000 m\(^2\) and contains at least 20 stores or services; and the Theme Center is specialized shopping centers.

**B. Distinction of the shopping center from related concepts**

One could easily confuse the shopping center with related concepts. It is therefore necessary to distinguish it from these concepts.


\(^5\) http://www.cncc.com/
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The shopping center is distinguished primarily from the collective store since the legal relationship between the merchant and the owner of property rights is different. In the collective store, the merchant indirectly holds real property rights as a member of the corporation that owns these rights. In the shopping center, it's either the retailer himself who will have property rights or a commercial real estate promoter who will own and rent the spaces to retailers eager to regroup.

The shopping center also needs to be distinguished from any real estate company, and especially the French form of the Real Estate Civil Society (Société Civile Immobilière). The shopping center, unlike any company, has no legal personality. This is a set of commercial premises which may belong to one or more persons. Only those persons may have a legal personality.

Finally, the shopping center differs from the supermarket or any of the stores enclosed within it. Indeed, if the primary business of the shopping center is a large area called the anchor store and attracting customers, these two concepts are not identical.

II. HISTORICAL OF SHOPPING CENTERS

The historical of shopping centers is very linked to the establishment of entertainment, which is important since the question to know who is legally responsible for those attractions is crucial.
A. **In Canada, shopping centers originally designed as convenience entertainment centers**

A shopping center is the modern adaptation of the historical marketplace, but much bigger. Shopping centres were created when cities began to spread out in suburbs. Indeed, at the time, there was not “appropriate access either by road or public transit to existing commercial cores” 6. Therefore, if people could not go to food stores, it was decided that food stores would come to them. “The phenomenal growth and development of shopping centers naturally followed the migration of population out from the cities and paralleled the growth of the use of the automobile”7.

At first, those stores were individual stores with huge parking facilities since suburban could only come by car. Yet soon enough, as managers could see the commercial potential of these facilities, satellite stores were implanted along the food stores. That is how the concept of suburban shopping center is born.

“The mall was originally conceived of as a community center where people would converge for shopping, cultural activity, and social interaction”8. Indeed, “Ever since the mid-1950's, when the suburban enclosed mall model first evolved, entertainment has always been some part of the mix. It might only be music, a

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central mall court with a periodic fashion or other shows, seasonal decorations or a visit by the Easter Bunny and Santa Claus.”

The goal for the shopping centers is obvious. There are good chances that someone going to the mall to watch a movie or to see Santa at Christmas ends up shopping in one of the stores. That is a good way to attract customers. However, it comes with legal consequences, especially when it comes to know who has to pay for those entertainment expenses.

B. In France, from convenience to life venue

The evolution of shopping centers in France is quite similar to Canadian's as for the development of gigantic shopping facilities in the suburbs. French shopping centers were organized around a big food store attracting customers.

However, the main difference between France and Canada is that there was not any place for leisure in first French malls. When in North America, the shopping center is, and has always been, defined as an entertaining place, in Europe it was commonly defined as a place to shop, to buy food, clothes, etc… but not a place to have fun. As a matter of fact, for most people, shopping was seen as drudgery. Which is why this is about to change in an attempt to make customers want to come to shopping centers. Indeed, nowadays, taking the lead from the US, Europe

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develops entrainment within the shopping center, obliging each retailer to more cooperation regarding the organization of the shopping center.

We can observe two main changes in French shopping centers. First, the spirit of aesthetic luxury presides over renovation of many old shopping centers\textsuperscript{10}, which cost can be tremendous. Secondly, the offer of new services to customers grew, such as a free nursery in \textit{Nice Etoile}, the loan of free strollers to \textit{Vélizy 2} or the interactive terminal that can be found in almost all shopping centers. This evolution creates the new problem to know who will have to pay for all these equipments and free services.

\section*{III. ORGANIZATION OF SHOPPING CENTERS}

Explaining the dynamics of a shopping center requires understanding how a shopping center is built and who its actors are.

\subsection*{A. The managers of the shopping center}

In France, shopping centers often belong to real estate groups. They can either belong to a single owner or be a condominium, the latter system being the most common considering the cost. Generally, owners of shopping centers are investment companies in commercial real estate. Among the leaders, there are especially KLEPIERRE and the CASINO group. Faced with financial groups, there are also a

\textsuperscript{10} \textit{“Le centre commercial devient un lieu de vie”}; Les Echos n° 19523; 19\textsuperscript{th} October 2005; page 15.
few independent groups, such as SOCRI, a family southern France group owner of Montpellier and Béziers Polygones and Nice Etoile, which are three downtown shopping centers like Eaton Center is in Toronto. Sometimes local authorities (municipalities, county councils ...) are associated with operations and have a stake, or local merchants hold a share capital. More rarely, due to the very high amount of investment, are traders who own regional center.

In Canada, the developer of the shopping center purchased a piece of land and then found an anchor store (being a department store if the shopping center is big enough) and the major satellites stores. Once this is done, the developer can look for financing on the behalf of the architecture of the future shopping center. This process usually takes several years.¹¹

Just like in France, shopping centers can be owned by investment companies and local authorities. For instance, Yorkdale Shopping Centre is owned by a joint venture between the Ontario Municipal Employees Retirement System (through its subsidiary Oxford Properties Group Inc.) and the Alberta Investment Management Corporation (one of Canada's largest and most diversified institutional investment fund managers). ¹²

¹¹ “Shopping Center Leases”; by Benjamin Pollack; University of Kansas Law Review, ISSN 0083-4025, 1960, Volume 9, p. 308
B. The concept of anchor store

An anchor store, or key tenant, is one of the larger stores in a shopping center. The idea is that a large nationally known store lures customers, who are then likely to spend money in all the other stores of the shopping center, even if they did not come for these other stores. These anchor stores are the stores, or more often nowadays the brands, which are going to attract customers and all the other shops are clustered around this anchor store.

Traditionally, the anchor store is almost always a food store, especially in France, or a famous department store or major retail chain. For example in Toronto Eaton Centre the anchor store is Sear, and in Montpellier Polygone the key tenant is Galleries Lafayette, two big and notorious department stores on three levels. These are the most lucrative store for the owner of the mall since they rent the bigger space and attract many customers.

In France, the shopping centers' anchor stores are called "locomotives" providing a flow of customers or prospects. These locomotives are generally hypermarket providing mainly food (sometimes, but more rarely, it can be a big department store). Even in downtown malls, the locomotive is often a food store.

In Canada, the anchor stores are more diversified. During the last 30 years, more and more foreign retailers have settled in Canada. "Between 1975 and 1995, the
number of foreign retail stores more than tripled, from slightly more than 3 000 to approximately 10 000, and their floor area more than doubled. And as of 1996, foreign retailers accounted for about 35 percent of all retail sales in Canada."13 The figure below, excerpted from Simmons and Kamikihara's publication, demonstrates the growing share of foreign retailers in Canada.

This trend is relevant in our study of shopping centers because the same trend is visible within shopping centers where international famous brands such as Zara or Apple come to become a new type of anchor stores leading to weakening even more small tenants. Whoever the anchor store of a shopping center is, the effect is the same. When a strong brand implants, the dynamics follows. Furthermore, more and more often there are not only one but several anchor stores.

Those key tenants are often the first tenants to be held on board and in this case they have their word to say about the plans and outline specifications.

C. The small retailers (or line tenants)

The small retailers, or line tenants, are all the other stores of the shopping center. They are the ones who lack negotiation power when signing their leases and may need some legal protection.

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13 “Commercial Activity in Canada: 2010”; J. Simmons and S. Kamikihara; Centre for the Study of Commercial Activity, Ryerson University; February 2011.
The differentiation between anchor stores and small retailers generate differentiated treatment towards anchor stores and small retailers. Indeed, while the first are going to be able to impose their terms, the latest will often be in a position of inferiority facing the managers of the shopping center. Indeed, the small tenant differs from the large ones in that it either does not have a national custom at all, or its custom it not sufficient to make enough customers come to the shopping center.

If the anchor store if often consulted about the planning of the shopping center and the leasing, the small retailers are often confronted to a *fait accompli*. Their bargaining power about the protection the lease can offer them will depends “on the size of the center, the stage of development of the shopping center at the time of the lease signing, the tenant’s financial strength, and it’s ‘pulling power’, i.e. it’s estimated ability to bring shopping traffic into the center, and the business philosophies of the developer and the mortgagee”\(^\text{14}\).

The problem is all about power fight and the big anchor stores imposing their conditions to the smaller stores. How does the law deal with that inequality? Are the leases protecting in any way?

As a matter of fact, both in France and Canada, the shopping center’s leases do not differ from other store’s leases, since there is no specific legislation for shopping centers. However, it does not mean that shopping center’s leases do not have some

\(^{14}\) “The shopping center lease”; by Benjamin Pollack; Nebraska Law Review, ISSN 0047-9209, 1970, Volume 50, p. 379
specificities of their own. Indeed, they differ from other leases mainly in provisions that govern the use of the common areas and the relationships of all the parties in the cooperative venture, but all those differences are contractual.
PART I – THE NEED OF PROTECTION OF THE SMALL RETAILERS IN SHOPPING CENTERS

The tenant in a shopping center interact with others actors in two ways. First, when settling in the premises the tenant signs a commercial lease with his landlord governing their future relationship. Then, the tenant has to deal with the others tenants of the shopping center, most of the time organized in a merchant association.

CHAPTER 1: THE PROTECTION OF THE SMALL RETAILERS AGAINST THE LANDLORD: FREEDOM OF CONTRACT VERSUS PATERNALISM

Shopping centers have changed the way of consuming. Customers like to find everything they need at the same place in order to save time out of convenience. This has a negative impact on retail commerce that may make a survival question for small retailers to find a spot on a shopping center. That creates a highly unequal power relationship. Shopping centers’ managers are spoiled for choice as to the stores they are going to give space to and hence can impose their conditions. How can the law protect the small retailers?
The small retailer wants to make sure his possession is safe and to protect himself against a termination of the lease, while the lucrative tenants attracting customers in the shopping center do not have to worry as much as the small retailers who do not benefit from a national brand.

Neither in France nor in Canada there is any particular regime for the shopping centers. The commercial leases legislation applies. However, the commercial lease legislation is very heavy in France and protective for the tenant, while it is very liberal in Canada since most of the aspects of the lease are subject to negotiation.

In Canada, and most generally in North America, commercial lease is all about negotiation and very little protection is provided to the tenant by the law. Meanwhile, in France, the commercial lease is described as almost ownership of the shop with a quite long mandatory length and the very important compensation due to the tenant in case of eviction.

I. IN CANADA, THE APOLOGY OF THE FREEDOM OF CONTRACT

A. The legal framework

1. The protection provided by contract law

In Canada, there are several legal sources applying to the commercial lease. The protection is mostly mere contract law and it is all about the negotiating power of the
parties. This can make commercial leases very complex and intimidating. Indeed, on most subjects, the lease can be whatever the landlord and the tenant agree to and be enforceable. Indeed, almost everything can be stipulated in the lease and be binding on both parties. That is why, since the bargaining power is often favorable to the landlord, most leases protect more the landlord than the tenant.

However, contract does provide protection to weaker parties. The question is to know whether a professional merchant can be considered as a weaker party in his relationship with his landlord. Indeed, contract law protects weaker parries such as infants, mentally incompetent or drunk persons\textsuperscript{15}; who do not have the ability to protect themselves when entering into a contract with someone in full possession of his faculties.

2. The protection provided by special legislation

Besides contract law, there are a few special legislations applying to commercial leases. Both common law made in Courts and provincial statutes provide statutory legal rules applying to commercial leases. In Toronto for instance, the Ontario’s Commercial Tenancies Act outlines the relationship, rights and obligations between commercial landlords and tenants in Ontario.

\textsuperscript{15} Sale of Goods Act, 1990
As a matter of fact, there are only a few special protections conferred by the law to the merchant. On the contrary, commercial leases legislation is known for protecting the landlords.

Regarding the form and the procedure first, the commercial lease does not have to be written, there is no form legally required. Nevertheless, in practice, the lease is almost always written in a very formal form. Also, the lease must be registered at caveat by way of notice (unless the lease is shorter than 3 years).

In addition, where a conflict arises, there is no special jurisdiction with a special competence since judges are being assumed to be generalist and deal with any legal issue that arises. The jurisdiction where the property is located is competent, regardless of the jurisdiction where the landlord and the tenant reside.

Furthermore, under the Ontario’s Commercial Tenancies Act, when a tenant has failed to pay the rent, the landlord has two options available. First, a landlord may change the locks of the unit and evict the tenant on the sixteenth day after the day rent was due\(^{16}\). The landlord is not obligated to notify the tenant that the locks will be changed. This agreement is deemed to be included in the lease, unless it is otherwise agreed. Second, a landlord may seize and dispose of a tenant’s property that is contained within the rented premises\(^{17}\). The landlord is not required to give advance notice of seizing the tenant’s property, unless the lease provides for it.

\(^{16}\) Section 18 (1) of the Ontario’s Commercial Act, "Re-entry on non-payment of rent"
\(^{17}\) Section 30 (1) of the Ontario’s Commercial Act, "Exemption of goods, seizure under execution and by distress"
However, landlords are required to notify the tenant of the distress and the sum of money required to cure the default before proceeding to sell the seized property. Before disposing of seized property, the landlord must hold it for five days. If the proper payment is made by the tenant in this five day period, the landlord is not permitted to sell the tenant’s property. Otherwise, after the proper appraisals are made, the property can be sold.

Indeed, in Canada, while residential leases are highly regulated, in contrast, commercial leases are subject to an important freedom for the parties. For instance, in Ontario, the legislation is so protective towards the tenants that a landlord would have to wait a long time (most of the time about 4 months) before being able to get non-paying tenants out\textsuperscript{18}. Furthermore, a landlord cannot charge rent in an amount greater than the lawful rent permitted under the Residential Tenancies Act\textsuperscript{19}. The contrast between commercial and residential legislation is therefore striking.

Still, this contrast can easily be explained. Indeed, on one hand, the right to housing is a right recognized in the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights. Having a roof over its head is of such importance that it supplants, at least momentarily, the property right of the landlord. On the other hand, the merchant is seen as a professional who is sophisticated enough to know all the legislations and professional practice. The

\textsuperscript{18} Section 111 (1) of the Ontario Residential Tenancies Act, 2006.
merchant, as a professional, knows what is best for him and how to get it. Therefore, he would not need the law to protect him, unlike the residential tenant.

However, there is some protection provided to the tenant. One illustration of the protection of the tenant is for instance that any off-the-books payment made for the right of leasing a property is illegal. Therefore, the tenant would have the right to sue for recovery of such payments. But these protective rules are very circumstantial.

B. The important place of the negotiation

Since there are only very few imperative rules on commercial leases, they are mostly governed by contract law. Therefore, the tenant’s ability to negotiate will depend on his bargaining power. The low supply of leases might compel the tenant to sign the landlord’s standard lease without negotiating any change.

In practice, the draft of the commercial lease is often a two-part process. First the tenant and the landlord sign the offer to lease. As a matter of fact, a proper offer and its acceptance is a condition for a valid contract. It can act as an interim lease if it has the five essential elements of a commercial lease: the parties, the place, the term, the commencement date and the rent.

Then, after negotiations have taken place, the parties can sign the lease containing the negotiated details of the premises provided to the tenant by the landlord.
As we saw, most of the commercial lease, including some essential parts of it, is left to the free negotiation of the parties.

1. The definition of the activity

The definition of the activity exerted on the premises must be determined in the lease. The contract must have a defined object in order to be efficient. Indeed, it is always best to draw up the boundaries of the activity in order to avoid hosting an undesirable activity. In a shopping center, the definition of the activity exerted in the premises is even more important since the variety of the shops within the center is the key of the success and it is the role of the landlord, as manager of the shopping center, to guarantee this variety.

There might be contractual restrictions that could limit the future direction or expansion of the business if the landlord has defined narrowly the permitted use of the premises in the lease. The tenant may need written permission to use the premises for any purpose other than the one written in the lease. That can make it difficult for the tenant to expand his activity. That might also affect the tenant’s ability to sell his business. That is why the tenant should be careful about the terms used in the lease to define his activity.
2. The length of the commercial lease

The term of the commercial lease is free to negotiate. The tenant will occupy the premises for a fixed or renewable period of time. The lease may be month-to-month or for a much longer term. Commercial leases in Canada generally have from 3 to 10 years length (the most common initial term being 5 years). Most of the time, the lease contend an option to renew.

The tenant must be very careful while negotiating the term of his commercial lease, since it can be a potential source of risk for him. A term lease too long will lead to lock-in the tenant in a lease that could become harmful for him. On the contrary, the risk of a term lease too short is the possibility of relocation, which can be catastrophic since the location is central in the success of a store. The negotiation of this point is therefore crucial.

A clause in the commercial lease contract may include renewal options, which can help the tenant to avoid relocation. The renewal can be either automatic or non-automatic. On one hand, automatic renewal means that the lease continues indefinitely on the agreed upon period (weekly, monthly, or yearly) until either the tenant or the landlord gives notice to the other party that they will be terminating the lease. On the other hand, non-automatic renewal implies that the tenant will have to provide written notice exercising his option to renew the lease. However, when a lease is not automatically renewed, it can be very detrimental for the tenant.
Regarding the notice period, once again, freedom of contract prevails.

3. The rent

The parties are free to fix whatever initial rent they wish. Here, the amount will only depend on the professional practice and the bargaining power of the parties. Generally, there will be a base rent to which is added operating cost.

The rent can be determined in several ways. First, the rent can be a percentage rent lease, meaning that the tenant might pay a percentage based on his sales in addition to the base rent. It can also be a gross rent lease where the tenant pays a gross amount of rent equal to the base rent plus other specific expenses left to the discretion of the landlord. The rent can also be a net lease which requires the tenant to pay some or all of the property expenses that normally would be paid by the landlord in addition to the base rent. The rent can finally be a net-net lease providing that the tenant pays a base rent, taxes and insurance costs to the landlord; or a triple net lease providing that the tenant also pays for operating and maintenance costs. All those modalities have a great impact on the sum the tenant will finally pay which is why he should be very careful when negotiating the rent clause.
There are also often escalation clauses in commercial leases to prevent landlords from reduction of rent resulting from inflation. Those clauses can be pass-through of operating expenses or references to an index (the Consumer Price Index for instance).

Tenants have challenged those clauses on several grounds: contracts of adhesion, unconscionability\textsuperscript{20}, rescission, reformation for mutual mistake, fraud on the part of the landlord. However the success has been uneven.

Rent reviews are not regulated. There may be a clause in the lease regarding the rent review. The landlord will generally seek to negotiate “upward only” rent reviews. Even if rent increases are not regulated, landlords should always consider giving a tenant a reasonable notice of a rent increase in writing.

At the renewal of the commercial lease, the rent must be set through a rent-setting mechanism contained in the lease or through negotiation. An effective renewal provision provides both a formula for the rent and a mechanism for determining the rent in the absence of an agreement. Otherwise, if the parties fail to determine the rent, the court will usually supply it\textsuperscript{21}. Most often, the rent will be set at the fair market value.

\textsuperscript{20} Conduct that does not conform to the dictate of conduct, contract that is unjust or extremely one-sided in favor of the person

4. **The parties’ obligations**

The contract must also determine the parties’ obligations in order to avoid future disputes.

For instance, the contract must determine which repairs are the tenant’s responsibility and which are the landlord’s.

**II. IN FRANCE, AN ASSUMED PATERNALISM**

Unlike Canada, France has a heavy regulation about commercial lease. This contract is regulated by both the Civil Code (articles 1713 and following) and the Commercial Code (articles L.145-1 to L.145-60) and a 1953 Decree.

Those statutes provide great protection for the tenant and are mandatory. There is “a statute of the commercial lease” because there are many imperative rules providing a real statute to the tenant. This statute is a matter of public order of protection, in order to protect the activity and the tenant.

The tenant has such power over the commercial premises that we speak of “commercial property”, mostly because he gets a very important compensation if the landlord terminates the contract. This eviction indemnity due to the tenant is equal to the commercial value of the goodwill. However, this protection is subordinated to an important formalism.
A. **The conditions to benefit from the statute of the commercial lease**

Indeed, only the “*commerçants*” can benefit from the legal protection provided by the French Commercial Code. As provided by the Article L.145-1 “The provisions of this Chapter apply to leases of buildings or premises in which a *fonds de commerce* is operated, this *fonds de commerce* belongs […] to a *commerçant* or an industrialist registered in the Trade and Companies Register.”

Therefore, in order to be a “*commerçant*” and benefit from the protection of the Commercial Code, the merchant must comply with a few fundamental conditions. However, since the statute is public order, where a merchant comply with all the conditions, the landlord cannot deny it to him.

1. **A stable and permanent local**

In the absence of an official legal definition, the local designates a covered and enclosed space within which the tenant exercises his rights. The criterion of stable and permanent local imposed by the law implies that the space rented has a fixed and immovable characteristic. The Court of Appeal of Douai said that “a local in the usual sense of the word depends on a building and has the same character of fixity
than this building. Thus, a movable local is not within the scope of the statute of commercial leases” 22.

This legal definition seems to exclude from the protective statute of commercial leases the indeterminate and movable premises provided to the tenant where the landlord has the power to fix or restrict them at any time 23. Indeed, stability is only established as long as the tenant is guaranteed to have the enjoyment of the same local for all the duration of his lease, with no possibility for the landlord to move it to his convenience, faculty which is traditionally an obstacle to the benefit of the statute.

Similarly, the merchant who disposes of the leased premises only intermittently, a few hours per day or a few days per week, do not have permanent enjoyment of the premises and cannot benefit from the statute of commercial leases 24.

It was thus held that the statute of commercial leases do not apply when the dividing, the location and the surface of the leased premises are left to the discretion of the landlord who is free to impose his tenant modifications of the surface and the implantation 25.

However, the Supreme Court, when called upon to judge about a newspaper stand, held that even if the general meeting of co-owners of the building in which the

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22 Douai Court of Appeal, June 11th 1987
23 Cass.civ. 3°, February 24th 1976, n° 74-13314, Published to the Bulletin
25 Cass.civ. 3°, February 20th 1985, n°83-16019, Published to the Bulletin
leased premises are located stated in the lease that the premises are a "small movable stand", as long as the local is closed and enjoys a well-defined location, whose possible relocation is not left to the discretion of the landlords, it is a local in the sense of the Article L.145-1 of the Commercial Code and a commercial lease can be granted\(^\text{26}\). In other words, a movable local can be subjected to the statute of commercial leases as long as the landlord cannot modify the location at its discretion. However, scholars followed so far by the judges, deny the existence of a true local in case of simple racks or stands which do constitute a covered and enclosed space.

2. The ownership of the *fonds de commerce*

The most important of the conditions to benefit from the statute of the commercial leases is that the *fonds de commerce* must be the tenant’s property. And yet, the *fonds de commerce* belongs to the merchant if and only if the customers are his\(^\text{27}\).

Although there is no legal definition of what the clientele is in French law, we can establish that it means all the people who enter into business with a professional. This concept is fundamental because it is the essential element without which the *fonds de commerce* does not exist.

\(^{26}\) Cass.civ.3\(^{e}\), June 1st 2010 n° 09-65482, Unpublished
\(^{27}\) Cass.civ.3\(^{e}\), May 18\(^{th}\) 1978, n°76-13943, SCI du 16 avenue Friedland vs. Massoneau, Published to the Bulletin
This could be a problem with stores included in a shopping center. The jurisprudence requires that tenant’s customers must be predominant compared to the customers of the shopping center in which it operates. In case of dispute over the nature of the lease, the tenant has to prove that his customers are different from the customers of the shopping center.

In practice, this evidence is always difficult to provide due to the location of the premises inside the shopping center. The tenant will have to demonstrate that his own customers are more numerous than the customers of the shopping center in order to benefit from the protective statute of the commercial leases.

However, the Supreme Court softened its position. Regarding the line tenants integrated in the shopping center, the Supreme Court abandoned the test of the preponderance of the tenant’s customers as compared with the customers of the shopping center. In the famous decision Town of Orcières the Court recognized the right of commercial property to a cafeteria manager who had his own customers made up of snowshoe hikers and skiers independently from the commercial complex in which the cafeteria was located. The Court claimed that these customers did not need to be predominant over the ones of the commercial complex.

Thus, merchants practicing in a shopping center are rarely denied the existence of their own clientele regardless of whether it is predominant or not.

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28 Cass.civ. 3°, March 19th 2003, n° 01-17679, Commune d’Orcières vs. Martin Teissère, Published in the Bulletin
3. **The freedom of exercise of the business**

In addition, the tenant will also have to demonstrate that he has some management independence. Indeed, the benefit of the statute of commercial leases may be denied if the owner of the *fonds de commerce* is subject to incompatible constraints with the free exercise of his activity. This was held by the Supreme Court in a case where was recognized the right to commercial property to the tenant of a shop located within a hotel with his own clientele and whose constraints imposed by the rules and regulations of the hotel (opening and closing hours; operating conditions) did not constitute an effective barrier to his autonomy and his freedom to exercise his business.\(^{29}\)

The burden of proof is on the landlord, since it is presumed that as long as the tenant has a local and a clientele, he is free to run his business independently. This is not for the tenant of a shop in a shopping center to demonstrate his management autonomy in order to benefit from the statute of commercial leases, but it is for the landlord who refuses the application to prove that the tenant is subject to incompatible constraints with the exercise of an autonomous business.

The independence of management implies that the tenant is not submitted to commercial policy of the shopping center in which they work and reflects a true

\(^{29}\)Cass.civ.3°, January 19th 2005, n° 03-15283, SARL Grand Case Beach Club management association vs. Welch, Published to the Bulletin
economic independence of the tenant in the management of his business. Thus, if the shopping center’s manager decides when the tenant can open and close his shop, what his operating conditions must be, what he can or cannot sell, who he can or cannot hire, what prices he should fix, etc…, the tenant does not have sufficient autonomy to be a *commerçant* since these shackles are certainly incompatible with the free exercise of business.

However, the fact that in shopping centers opening hours are imposed by the rules of procedure of the center is not likely to deny the statute of commercial leases to *commerçants*.

The Court has refused to grant the statute of the commercial leases to a tenant installed on the premises of a shopping center on the ground that he had no other customers than the center’s that hosted him. This particular case was about a tenant operating a fish shop installed at the entrance of a shopping center whose customers was mainly composed of the customers of the hypermarket operated by the owner of the premises of the shopping center\(^\text{30}\).

However, some national or international brands, very famous or just highly specialized, can generate their own customers independently of the shopping center and therefore do not have the same issue. However, even then, one could consider that the customers are the franchisor’s who hold the brand and not the franchisee’s. In the case of franchise the question is to know whether the clients were the

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\(^{30}\) *Cass.civ. 3\(^{e}\), November 27\(^{th}\), 1991, n\(^{o}\) 90-15177, Published in the Bulletin*
franchisor’s, who owned the brand attracting the customers, or the franchisee’s, who works every day in contact with the customers.

In 2002 the Trévisan decision\(^{31}\), the French Supreme Court decided that the franchisee has his own customers as long as the franchisor let him the freedom to dispose of all the elements constituting the *fonds de commerce* and that the franchisee practice his activity at his own risk.

If all those conditions are filled by the tenant, even if there is no mention in the lease contract, the tenant can claim the application of the protective statute of the commercial lease.

4. **Be registered at a relevant commercial registry**

Finally, according to the Article L.141-1 of the Commercial Code, the tenant must be registered at the Trade and Companies Register in order to benefit from the commercial leases statute.

However, the Court of Cassation mitigated this condition. Indeed, the Court held that registration is only a condition of the statutory right to renewal of the tenant, but not a condition of the application of the statute itself. In other words, the *commerçant* does not need to be registered to benefit from the statute of the

\(^{31}\) Cass.civ. 3°, 27 Mars 2002, n° 00-20732, Publié au bulletin
commercial leases but he needs to be registered in order to be entitled to renewal of his lease.

B. **The protection provided by the commercial lease legislation**

French law regulates a large portion of commercial leases. The Commercial Code aims the scope of the statute of commercial lease, the lease length, the renewal or the refusal to renew the lease, the sublease, the rent, the termination, the despecialisation and the applicable procedure.

On the other hand, some spaces of contractual freedom remains since some aspects of the lease are not regulated by the law while others are regulated but not in a mandatory way. Indeed, there are two types of public order: the public order of direction, which protects the public interest; and the public order of protection, protecting the weaker ones. Since the statute of the commercial leases aims to protect the merchant, seen as a weaker party, it is a matter of public order of protection and not public order of direction. Therefore, the protected party can give this protection up as long as it is knowingly. In other words, the tenant can renounce to some of the rights granted by the commercial lease statute.

1. **The form and the procedure**

Like in Canada, the commercial lease does not need to be written in France, even if in practice it is. However, a written document can be necessary considering
the proof rules. The lease can be registered at the Tax Office to give it a certain date, but this is not mandatory.

However, unlike in Canada, there are specialized jurisdictions to deal with commercial leases. The *Tribunal de Grande Instance* is the competent court to hear about commercial leases disputes.\(^\text{32}\)

2. **The activity**

The conclusion of a commercial lease is only possible if the premises are administratively assigned to the exercise of a commercial activity. The tenant cannot exercise any other activity than the one mentioned in the lease, unless the landlord agrees.

The tenant can ask the landlord to change the destination of the commercial premises leased as determined by the contract. There are two kind of despecialisation: the plenary de-specialisation where the tenant changes his activity (i.e. from books shop to clothes shop); and the partial de-specialisation where the tenant adds a related or complementary activity to his own (i.e. a bakery selling chocolates). Both despecialisation have a very formal procedure.

\(^{32}\) Article R.211-4 of the Code of Judicial Organization
3. The length

Contrary to Canada, the law does regulate the length of the commercial lease. The commercial lease has a 9 years length; however the tenant (and only him) can terminate the lease every 3 years. This is why we call the commercial lease a “3-6-9 lease”.

At the end of the 9 years, the landlord must renew the contract. There is an automatic renewal unless a notice is given. If the landlord refuses to renew the lease, he will have to give a 6 month notice to the tenant and pay him an eviction indemnity equivalent to the commercial value of the goodwill.

There are a few and very limited exceptions to the obligation: the tenant misconduct; the tenant is no longer a merchant and therefore does not beneficiate of the protective rules of the commercial lease; the demolition of the building.

If the lease is not renewed nor terminated, it is automatically extended, but without a proper renewal the lease is not considered a commercial lease anymore.

4. The rent

Regarding the rent, just like in Canada, the parties are free to set the rent. The rent can also be indexed but this index must be directly related with the activity.
Nonetheless, the rent review is regulated. It can only be asked to a judge every 3 years (art. L.145-38 C.com.): it is called the triennial review. The rent reviewed must be equal to market rental value (art. L.145-33 C.com). There are 5 criteria to determine this value: the characteristics of the premises; the destination of the premises; the obligations of each party; the local factors of commerciality and the market prices in the neighbourhood.

There is a ceiling for the rent in accordance with the quarterly commercial leases index, unless there was a material modification of the local factor of the commerciality inducing a variation of the premises value higher than 10%; there was a notable modification of the characteristics or the destination of the premises or the obligations of the parties; or there was a despecialisation (the tenant changed his activity).

If the landlord wants to change the rent at renewal of the lease, he must give notice to the tenant with a proposition a renewed lease. The rent must comply with the same imperatives as the rent reviewed, that being the market rental value and the ceiling. The tenant must be careful to ask for renewal, otherwise if the lease last more than 12 years he will lose the benefit of the rent ceiling.
C. The regime of the lease if the tenant is not a “commerçant”

Premises located in shopping centers are not automatically subject to the statute of commercial leases. Where a merchant operates within the confines of a hypermarket, proof of the existence of the *fonds de commerce* can be difficult to provide, to the extent that the merchant benefits from the shopping center’s customers and is often forced to operating conditions imposed by the owner of the shopping center. That is why, in order to avoid unnecessary inconvenience, the lessee in a hypermarket should always insert a clause providing that the lease is subject to the statute of commercial leases. Indeed, even where the merchant does not respond to the conditions to benefit from the statute of the commercial leases, it is always possible to opt conventionally for it. However, once the parties have opted for the statute, the fact that they willingly chose to submit to it is irrelevant and they cannot derogate to any of its rule. The possibility for the customer to insert such a clause will depend on its bargaining power.

Sometimes, the merchant does fulfil all the conditions of applicability of the statute but, even if the shopping center manager cannot refuse the benefit a commercial lease to him, he waives under the pressure considering the imbalance in their relationship. Landlords, placed in a dominant position faced with the strong demand for locals in their shopping centers attracting a significant flow of potential customers, impose the lease terms. Depending on the degree of fame of the tenant and his ability to attract more potential customers, the balance of power may be
reversed and the merchant far from negotiating the terms of the lease, strives at the contrary to seduce the shopping center manager in order to be chosen.

Nevertheless, since the statute of commercial leases is public order and therefore automatically applicable, it is necessary to play with its applicability conditions in order to escape it. But this can be considered fraud by the Courts and yet as the Latin legal maxim says it well “Fraus omnia corruptit”\textsuperscript{33}. It was judged that the landlord who signs an agreement other than a commercial lease under conditions establishing a will to defeat the mandatory provisions of the statute of commercial leases is not entitled to invoke the terms of the agreement signed against the tenant. It is therefore necessary to be careful and not to sign leases evading status of commercial leases in the sole intention.\textsuperscript{34} This decision, one more time, is dictated by the desire to protect the tenant.

On the other hand, the tenant who does not fit the conditions to benefit from the commercial leases legislation is bound by the terms of the lease signed with the lessor (most of the time the manager of the shopping center) and must refer to the contract’s terms to know the extent of his rights and obligations. In those contracts that are only regulated by contract law, the freedom left to the parties is huge. Therefore, an unbalanced relationship between the tenant and the shopping center management may give rise to aberrations.

\textsuperscript{33} fraud corrupts all
\textsuperscript{34} Cass.civ.3° April 1\textsuperscript{st} 2009, n°07-21833, Published to the Bulletin
Where the statute of commercial leases is not applicable the question is to know what kind of lease will be concluded between the merchant and the shopping center manager. Indeed, in that case contractual freedom is total. Thus, in some shopping centers, retailers have signed 10 years leases which do not give the same protection to the tenant than commercial leases especially regarding the rent and they were faced with rent increases difficult to bear. Other retailers have signed precarious leases for a period not exceeding 2 years.

Sometimes the owners of shopping centers use contracts informally qualified as "probation leases" highlighting the limited commitment of both parties who can assess the suitability of the lease with a limited engagement. These leases are often chosen by merchants wishing to evaluate the success of the shopping center before go on board of a long-term relationship governed by the statute of commercial leases and by landlords wishing to test the solvency of the tenant.

Meanwhile, the practice of 12 years leases (informally called "6-9-12 leases") is becoming commonplace in shopping centers. Indeed, the commercial lease with a term of 9 years is in principle subject to the rule of rent ceiling during its renewal. However, in a 12 years lease, the rent ceiling rule does not apply and the renewed or revised rent is automatically set at the rental market value. As such, these leases are often favorable to the landlord since the rental market value generally moves upward. This derogatory regime also allows escaping the payment of any entrance fee or eviction indemnity.
The patience of the landlord until the twelfth anniversary of a nine-year commercial lease is another very effective practice to avoid the statute. Indeed, the Article L.145-34 of the Commercial Code establishing the principle of the rent ceiling upon renewal of the lease provides that these provisions “are no longer applicable when, by the effect of tacit extension, the term of the lease exceeds twelve years.” And yet, there is no obligation for either party to attract the attention of the other on the effects of tacit extension of the lease beyond its expiration date.

The organisation of relationships in the shopping center is a thorny issue, since several retailers have to share the cost of the center maintenance, especially in retail parks where there is more than one megastore leading the shopping center and multiple entertaining activities organized in order to attract more customers.

The shopping center lease presents many problems of its own that any other kind of commercial lease would not consider. Those problems stem from the fact that a shopping center is a cooperative merchandising venture.

Each shopping center has its merchants’ association in order to organize the life of the center and the coherence of the different retailers. The purpose of these associations is also to promote the mall to the public through advertising, promotional events or commercial animations. However, issues can arise as to decisions making and the repartition of the costs.

I. THE OBLIGATIONS OF THE PARTIES AS FOR THE ORGANIZATION OF THE SHOPPING CENTER

A. In Canada, a contractual approach of the parties obligations
The Canadian landlord has the obligation to take care of all the common areas of the shopping center. To do so, he will generally provide in all the leases that the tenant will have to pay a certain amount, in addition of his rent, for the Operating Costs of the center\footnote{Harvey M HABER, The Commercial Lease: A Practical Guide, 4th ed. (Canada Law Book, 2004), p.125 and next}.

In addition, in order to assure the promotion of the shopping center, the tenant is often contractually obliged to have to pay to the landlord a regular payment to finance a Promotional Fund. The Promotion Fund is generally to be administered by the landlord. This Fund will be used to pay the organization which will take care of the promotion of the shopping center and this organization may be the Merchants’ Association of the shopping center.

B. \textbf{In France, many obligations chargeable to the landlord}

The management of the shopping center is provided by the managers, sometimes tenants have a say on the management policy. Indeed, nowadays managers of shopping centers associate more merchants to the life of the center that they once did. In addition, the brands attracting customers to the shopping center still carry more weight when it comes to making their voices heard.
The trend is also to the transformation of commercial spaces in actual places of life and leisure on the American model of “malls”. Indeed, shopping centers generally located at the outskirts of cities are trying to compete with downtown shops, considered more friendly by consumers, and therefore organize animations and major promotion operations. However, for these operations to be carried out it is obviously necessary for merchants to be involved. Merchants therefore contribute more to the management of shopping centers in which they are located. Thus, many centers have therefore established advisory committees and in some cases, the members of these committees manage budgets, communication, and animation.

All the merchants do not necessarily have the same weight. It always comes to a balance of power, and the merchants who attract the most potential customers are the most influential. Sometimes, the famous brands located in the shopping center even have a certain power in the selection of the new businesses establishing in the center, especially when it grows, which is an efficient way to control the competition. However, a consensus can be complicated to achieve.

Regardless of the influence and the balance of powers in the shopping center, when internal rules are enacted all merchants must respect them. For example, shopping centers' managers often provide the obligation to respect common business hours, in order to avoid that some shops are closed while others are opened which may have a bad effect on the customer. Besides, merchants generally have to follow some maintenance rules inside their shop. Indeed, a poorly maintained shop or a
poorly maintained shop window reflects a negative image of the entire center to customers.

These rules can be specified in the lease or in the by-laws of the shopping center. However, the binding effect will be the same since a well-drafted lease will provide that the tenant signing the lease is presumed to agree to the center’s by-laws and append the pre-cited by-laws to the lease.

The tenant is not the only one with obligations, the landlord also has some of his own. Indeed, even if there is no special clause in the lease, the landlord must ensure that the tenant has a favorable business environment by maintaining the common areas of the shopping center. Judges of the Supreme Court held that, from the moment that the failure to maintain the common areas of the shopping center has the effect of depriving the tenant from the benefits he should hold from the lease, the landlord fails to his obligation to deliver the leased premises, to maintain them and to provide a quiet use to the tenant for the length of the lease in accordance with the Article 1719 of the Civil Code. Thus if it appears that the common access to the leased shops are degraded because poorly maintained by the landlord it is a failure of execution of the maintenance obligation by the landlord.

However, as long as the landlord does not neglect the shopping center and in the absence of any special provision, he is not required to compensate the loss suffered by the tenant because of the low attendance of the shopping center, and

36 Cass.civ.3°. October 31st 2006, n° 05-18377, Lesage vs. Opac, Published to the Bulletin
more generally, he does not have to answer for changes in the commercial environment of the shopping center since it is not included in the contractual relationship. The problem is that the frontier between the maintenance obligation ensued from the lease and external problems not covered by the contractual field is thin and can be difficult to establish. Yet, only the lack of maintenance covered by the contractual field is compensable. Naturally, a clause in the lease could require from the landlord to maintain a degree of commerciality in the center.

In addition to his obligation to maintain the common areas, the shopping center manager has the obligation to keep watch over the premises. Indeed, these establishments are opened to the public, it is then mandatory to ensure continuous monitoring by an internal service or a security service provider. The plan of action must comprise at least the presence of security guards during the opening hours of the center to the public. In order to avoid to have to pay for the maintenance and those security devices, shopping centers’ managers often set up merchants’ association.

II. THE MERCHANTS’ ASSOCIATION OF THE SHOPPING CENTER

The shopping center has under its roof dozens of different businesses; it is therefore essential to have some rules regulating relations between all these merchants. Internal rules are generally implemented and a merchant’s association set

37 Cass.civ.3° July 12th 2000, n° 98-23171, Published to the Bulletin
up in addition to the obligations charged to the parties in the leases. How are the obligations share out between the merchants and the shopping center managers?

A. **In Canada, a frequent compulsory membership**

In Canada, there is no law prohibiting the landlord to provide that the tenant must immediately join the Merchants’ Association when signing the lease and pay the dues and assessments determined by the Association\(^{38}\).

However, in the case there is a Promotional Fund in the shopping center, the tenant should always be very careful not to pay twice for the same thing. More precisely, if the tenant pays dues to the Promotion Fund and to the landlord for the maintenance of the shopping center, he should not pay anything to the merchants’ Association unless the Association provides different services in addition to the promotion and the maintenance of the shopping center.

Besides, since there is no interdiction for the landlord to provide a compulsory membership to the Merchant’s Association, the tenant should demand that his membership can only be compulsory if and only if all the other tenants are bind by the same provision in order to avoid the Free rider problem. Once again, since there is neither statute nor case regulating this point, the landlord will not be obliged to agree to such demand.

However, if those common sense rules seem to go without saying, they only follow from negotiation of the lease between the tenant and the landlord since there is no legal rule strictly prohibiting a compulsory membership to the Merchant's Association, even if the tenant pays twice for the same thing or if others tenants do not join the Association.

B. In France, a regulated membership

Each shopping center has its merchants association. The shopping center’s manager and the merchant gather in those merchants’ associations to discuss the management of the center.

The purpose of these associations is among other things to promote the shopping center with customers through actions such as advertising, promotional or event campaigns, the shopping center and thereby associate the merchants to the economic development of the center. With the payment of a fee, the tenant can benefit from advertising impact, commercial benefits and media coverage created by the actions of the merchants’ association.

However, these advertising campaigns have a cost for the association. These costs are shared by all the merchants member of the association through fees they have to pay. These fees are often proportional to the surface of the leased premises. It was therefore customary for leases to contain a clause, often described as essential
and crucial, requiring the tenant to adhere to the merchants’ association during all
the length of the contract and its renewal, for contribution.

Indeed, the admission requirements for new members are freely determined in
the articles of incorporation of the association and all formulas can be considered: an
approval by an organ of the association or a third party, the need to exercise a certain
profession or activity, an engagement to use only the association for specific
operations, etc.... Thus, compulsory membership can be provided as well.

That is why in France, shopping centers have wanted for a long time to impose
a mandatory membership to these associations. The managers of the shopping
centers, as landlords, included clauses in the lease to impose the adhesion to the
merchant’s association. However, require from someone to join an association as a
condition for the lease is not lawful. The rules and regulation of the shopping center
cannot provide that membership to the association is compulsory or automatic for
any new or existing tenant. The desire to join the merchants’ association is essential
and cannot be presumed.

This is indeed what emerges from the European Convention on Human Rights,
which Article 11 states that “Everyone has the right to freedom of quiet assembly and
to freedom of association with others, including the right to form and to join trade
unions for the protection of his interests. No restrictions shall be placed on the
exercise of these rights other than such as are prescribed by law.” Furthermore,

Article 4 of the famous Statute of July 1st 1901 on the Associations agreements provides that “Any member of an association may withdraw at any time after payment of the subscriptions due for the current year, notwithstanding any contrary clause.”

A clause in a commercial lease requiring the tenant to join the merchants’ association of the shopping center and to maintain his membership is therefore incurably void. In this way is preserved the fundamental freedom to associate and to not associate, freedom which is recognized in the European Convention on Human Rights. This solution was emphatically stated by the Supreme Court in a 2001 ruling that apart from the cases where the law determines otherwise, no one is required to join an association governed by the July 1st 1901 Statute nor, being a member, to remain a member.

From then on, as long as the membership in the shopping center merchants’ association do not arise from an express will of the tenant, it may be canceled by the judges and consequently lead to the repayment of the subscriptions paid by the tenant. Likewise, and even if the clause requiring from the tenant membership to the association is void, the association is entitled to restitution by equivalent of the benefits that the merchant received.

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40 Cass.civ.3°, June 12th 2003, n° 02-10778, Published to the Bulletin
41 Assemblée plénière, February 9th 2001, n°99-17642, Published to the Bulletin
The legal protection of the small retailer in the shopping center - Sabrina Benghoune

We are witnessing a phenomenon of reciprocal restitution following the annulment of an executed contract\(^{42}\). Therefore, in practice if the clause imposing the membership is recognized as void, subscriptions are not necessarily refunded to the merchant.

This solution is not surprising since the annulment of an executed indenture leads to reciprocal restitutions and, where setting the parties back to the state they were before this execution is not possible, the party who has received a performance in kind that he cannot return must pay a compensation equivalent to the performance\(^{43}\). And yet it had already been held that the annulment of a contract because of the breach of fundamental freedom to not associate does not obstruct the principle of mutual restitution where the contract has been executed\(^{44}\).

In practice we note that, despite the solution of the nullity of the compulsory membership clause encouraged by the Supreme Court, merchants’ associations were maintained in the vast majority of shopping centers. After all, it is likely that tenants find a significant advantage to the very existence of such associations since they allow defining and better organizing the commercial and promotional policy of the shopping center.

From then on there is one question: in light of the legal precedent forbidding the compulsory membership clauses to the shopping center’s merchants’ association,

\(^{42}\) Cass.civ.1\(^{e}\), July 12\(^{th}\) 2012, n\(^{o}\)11-17587, Published to the Bulletin
\(^{43}\) Cass.civ.1\(^{e}\), March 28\(^{th}\) 2008, n\(^{o}\)07-12657, Unpublished
\(^{44}\) Cass.civ.3\(^{e}\), November 23\(^{rd}\) 2011, n\(^{o}\)10-23928, Published in the Bulletin
how to avoid the Free rider problem\textsuperscript{45}? It seems unlikely that the impact of an advertising campaign for the shopping center only benefit to those who have participated in its financing.

So many landlords adapted the drafting of their leases with particular emphasis on the notion of common interest between them and the tenants regarding the existence of the merchants’ association in order to try to counteract the effects of the Supreme Court legal precedent. Thus, the Supreme Court held that “a clause in a commercial lease in which the tenant agrees to join a merchants’ association which object is to manage shared services of the shopping center housing the leased premises as well as its advertising promotion in the common interest of its members, and is obliged to maintain his membership throughout the length of the lease is not contrary to freedom of association as enshrined in Article 11 of the European Convention on Human Rights, from the moment that it is part of a voluntary undertaking in consideration of the benefits the tenant planned to receive”\textsuperscript{46}.

In addition, many scholars have suggested the ploy of “marketing funds”. This fund, created and managed by one landlord, is affected to the promotion and the entertainment of the shopping center and the tenant agrees to contribute to the functioning of the fund for all the length of his lease and possible renewals, by settling an additional charge. However, the setup of such a fund managed only by

\textsuperscript{45} In economics, the free rider problem refers to a situation where some individuals in a population either consume more than their fair share of a common resource, or pay less than their fair share of the cost of a common resource. (Investopedia definition)

\textsuperscript{46} Cass.civ.1\textsuperscript{°}, May 20\textsuperscript{th} 2010, n°09-65045, Published to the Bulletin
one landlord can have a detrimental effect on him in case of failure of the attractiveness of the shopping center. Indeed, tenants may, a priori, prevail from the existence of the fund to invoke the sole responsibility of the landlord in case of failure of its objectives.

However, the most commonly used solution to circumvent the prohibition of compulsory membership is the establishment of the merchant’s association in the legal form of an Economic Interest Group⁴⁷ (EIG). Indeed, the situation is different where the merchants gather together in an EIG since it is lawful to forbid the tenant to sale his shares or withdraw from the Group during all the length of the lease.

Indeed, it was held that a condominium bylaws obliging each co-owner to hold a share of the civil company managing the condominium and providing that any sale of a lot should be simultaneous with the transmission of the shares of the civil company to the buyer. In the present case, the condominium bylaws of a residential area required from all the co-owners to hold a share of the civil company owning a sports club. Because some of the co-owners did not participate in sports activities and leisure offered by the civil company which they did not use the premises, equipment or materials, they asked the judge to allow them to withdraw from the company. The Court of Appeal of Paris granted their request but the Supreme Court decided otherwise based on Article 1134 of Civil Code providing that a legally formed contract takes place of law for the parties. The fact that the co-owners do not

⁴⁷ Group created with the intention of developing the activity of its members.
participate in sports activities is therefore irrelevant, they have to participate in operating costs and losses in the same way that the users of the sports facilities.

The EIG is therefore an efficient way to get around the ban of compulsory membership. However, this structure has the disadvantage of making its members jointly and severally liable for the debts of the group.

III. THE PARTICULAR CASE OF THE OBLIGATION OF NON-COMPETITION

The shopping centers are frequently outskirts from the center of cities aside from habitations. It is therefore necessary for them to have a wide variety of shops to meet all the needs of customers in order to attract them. It is only because they know they will find everything they need that they agree to make the effort to come. This variety of trade can be organized through non-competition clauses.

A. The non-compete clauses in France

In France, many shopping centers’ by-laws contain such clauses prohibiting merchants to develop a business already operated by another merchant in the center. Those non-compete clauses participate in the protection of the collective interest of all merchants in the shopping center. Because of its very nature the shopping center concentrates many shops and must be diversified. Indeed, for the exploitation of each

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48 Cass.civ.3°, July 8th 1998, n°96-20583, Published to the Bulletin
business to be sufficiently profitable, it is essential that every merchant can rely on all the customers that the center is able to attract. While clothes shop are not affected by the presence of other clothes shops, on the contrary, a book shop for instance may be negatively affected if another book shop opens in the shopping center, which show the necessity of such clauses.

Like any non-compete clauses, these clauses have to respect some conditions of validity. The non-competition clauses must be limited in time and space; in activity and must be proportionate to the subject of the contract. These limitations are justified by the freedom of trade that should not be hindered lightly.

These clauses can take several forms. First, it may be a non-compete clause properly speaking by which the tenant refrain himself from exercising any business competing with a merchant already set up in the center. The non-compete clauses being present in all leases, they are binding for all the merchants of the center. Therefore, it is not difficult for the center’s manager to enforce them by contractual methods, which allow a general non-compete obligation.

Second, these clauses may take the form of an exclusivity clause by which the manager of the shopping center acknowledges that the beneficiary of the clause is the only merchant in the shopping center exercising a specific activity. However, the tenant beneficiary of an exclusivity clause is not entitled to require from the landlord to enforce the clause with by the other tenants. Indeed, the clause is not contained in
a contract signed by the other merchant; the exclusivity obligation is only a right benefiting tenant of lease in which it is provided. The doctrine of privity of contract provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it. However, the Supreme Court has recognized that, even if other tenants are not parties to the contract containing the exclusivity clause, the tenant benefiting from the clause is entitled to require from the landlord to enforce this clause with the others merchants of the center in accordance with the biding nature of any contract. 

In addition, if the shopping center’s manager chooses to insert a non-compete clause in one lease, he has the obligation to insert the same non-compete clause in all leases related to the center. Indeed, the judges of the Supreme Court imposed the landlord to treat all his tenants in the same way. Ignoring the Article 1134 of the Civil Code they held that when all the leases of the shopping center do not contain non-compete clauses, those included in some leases can be canceled as from the date the merchant summoned his landlord. The judges canceled such clause because it created "an imbalance between the rights and obligations of each party, which should remain common to all tenants and continue over time." They therefore considered that, by not ensuring the spread of the clause in the geographical area for the length of the lease, the landlord broke the reciprocity of obligations and therefore committed a fault towards all the tenants of the shopping center who signed such a clause. In this case, the Supreme Court created a real limit to contractual freedom.

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49 Cass.civ.3°, Mai 4th 2006, n° 04-10051, Published to the Bulletin
50 The article 1134 provides the binding effect of the contract between the parties
51 Cass.civ.3°, May 3rd 2007, n° 06-11591, Published to the Bulletin
Indeed, some landlords or tenants may have some legitimate interests to the presence of a non-compete clause in their lease that others may not have.

What about the silence of the lease about competition? Regarding the leased premises, the Article 1719 of the Civil Code provides that “the landlord is obliged, by the nature of the contract, and without the need for any special provision [...] to make the tenant enjoy quietly the premises during the length of the lease”. In the past, this legal obligation to guarantee quiet enjoyment of the premises was interpreted as imposing to the landlord a duty of non-competition towards the tenant. André TUNC wrote that “It is certain that the landlord would fail to fulfill his quiet enjoyment warranty obligation if he competed with his tenant or exploited to his profit a competing or similar business.” For those scholars, the quiet enjoyment warranty compel the landlord not to compete with his tenant, not directly by operating a similar business, nor indirectly by granting a lease to another merchant for a competing activity in the same building. Then the Supreme Court went in the same direction by holding that “the landlord is bound by law to guarantee the tenant quiet enjoyment of the premises, and thus implicitly obliged to protect him against the competition by not consenting any future similar lease.”

Nowadays however, judges refuse to draw such conclusions of the Article 1719 of the Civil Code. Indeed, the obligation to guarantee quiet enjoyment is not unlimited and does not include the expected profits of the tenant. The landlord guarantees quiet enjoyment not a successful enjoyment. Thus, for Yves SERRA “by

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52 Cass.soc., May 24th 1957, Gaz. Pal. 1957. 2. 177
handing the premises over to the tenant, the landlord does not give any hope of profit or any hope of future contracts.” This solution was endorsed by the Supreme Court holding that the landlord has the legal obligation to guarantee the quiet enjoyment of the premises but does not have to guarantee the quiet enjoyment of the activity carried on in the leased premises. Therefore, bad faith set aside, as long as no clause forbids him to, the landlord can rent premises to a tenant exercising a similar business53 or to exercise himself the same business as his tenant on premises in the same building54.

B. **The non-compete clauses in Canada**

Non-compete clauses are valid and enforceable by Canadian courts only if they are limited in time frame, business scope, and geographic scope to what is reasonably required to protect the company benefiting from the clause. In addition, the scope of the agreement must be unambiguously defined. Indeed, in Shafron v. KRG Insurance Brokers Inc. the Supreme Court of Canada held that a non-compete agreement is invalid its terms are not sufficiently legally defined and make it ambiguous55.

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53 Cass.civ.3°, March 16th 1976, n° 74-10593, Published to the Bulletin
54 Cass.civ.3°, February 25th 1975, n° 73-14181, Published to the Bulletin
55 Shafron v. KRG Insurance Brokers (Western) Inc.; Supreme Court of Canada, 23rd January 2009.
In Hibbett Sporting Goods, Inc. v. Biernbaum\(^56\), the Alabama Court of Appeal court upheld a non-compete agreement between a shopping mall and a sporting goods store, Hibbett. The owner of Hibbett and the owner of the shopping mall orally agreed that the owner of the shopping mall would not lease space to another “sporting goods store.” Hibbett’s owner soon after sought to enjoin the owner of the mall from leasing space to Athlete’s Foot. The court held that “Under the contract, [the owner of the mall] is prevented only from leasing space . . . to another "sporting goods store"; therefore, the contract is sufficiently limited as to time, territory and type of business. The contract obviously is in partial restraint of trade, but because it is sufficiently limited in geographic area and type of business restrained, it is not void.”

PART II – THE APPROPRIATENESS OF THE PROTECTION OF SMALL RETAILERS IN SHOPPING CENTERS

I. THE CRITIC OF THE PATERNALISM: AN OBSTACLE TO THE COMMERCIAL RENTAL?

The commercial lease statute is, as we saw it, very protective for all tenants, small or large. Some French scholars consider that today the statute of commercial leases the way it was shaped in 1926\(^{57}\) and 1953\(^{58}\) only responds to the needs of some beneficiaries, particularly merchants renting shops at the foot of habitation buildings, but does not meet the contemporary needs on other rental configurations or other methods of distribution, such as shopping centers for instance\(^{59}\). The fact that there is only one mandatory regime for all commercial leases when there are so many different commercial situations seems inappropriate. Those scholars advocate to implement a minimum corpus of major mandatory provisions of public order, and to leave all the other provisions to the contractual freedom.

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\(^{57}\) Act of June 30\(^{th}\) 1926; Landlords and tenants.
\(^{58}\) Decree No. 53-960 of September 30\(^{th}\) 1953 governing relations between landlords and tenants regarding lease renewal of commercial or industrial premises.

La modernisation des baux commerciaux, in La modernisation du droit des affaires, colloque de La Rochelle juin 2005 LexisNexis;
A. Mbotainingar, Statut des baux commerciaux et concurrence, thèse Paris-Dauphine, coll. Dr. de l'entreprise, T. 76, 2007, Litec LexisNexis;
J. Monéger, conclusion à l'ouvrage Pour un bail commercial adapté aux réalités économiques, CREDA, Litec LexisNexis, 2010, p. 287 s.
Other scholars recommend copying French matrimonial property regimes\(^6^0\). The matrimonial regime consists in a common body of statutes of absolute public order and a body of optional statutes, with a supplementary statute applying statutes automatically in the absence of choice. Such a system would have the advantage of considering separately the provisions applicable to professional leases, office leases, hotels leases, shops leases located on the street or located in shopping centers, etc... A new type of commercial lease would born and grow.

Indeed, the “3-6-9 lease” is not always adapted to the wishes of the parties. The landlord obviously wants to avoid having to pay an eviction indemnity in case of termination, since those indemnities are perceived as too high, and more generally desires to escape a very protective statute of the tenant. The tenant meanwhile, even though he meets all the applicability conditions of the statute of commercial leases, may not wish to have to be held for a minimum period of 3 years nor having to pay an entrance fee which is often provided in the commercial lease. Sometimes, large retail chains are satisfied with, even sometimes looking for, rental stands which are not subject to the statute of commercial leases in order to escape the constraints when the benefits are not interesting. Sometimes, the protective commercial lease can even have the opposite effect to the one sought by the legislature.

\(^6^0\) Art. 1387 and s. of Civil Code.
II. THE CANADIAN FREEDOM: THE LACK OF PROTECTION OF THE SMALL TENANTS

It is therefore legitimate to wonder if the Canadian model is the answer. Commercial leases unquestionably offer more freedom for the parties and therefore more flexibility to different situations. It is therefore a tool praised by landlords and many powerful tenants.

However, the main issue remains the lack of protection provided to the tenant who does not have enough weight to negotiate a favorable lease. Indeed, a lot of small business tenants do not appreciate many of the implications of the lease they sign.

As a matter of fact, we can observe that there are many differences between commercial leases signed by small and larger companies, and those differences are reflected in shopping centers.

These issues are highlighted in a study ordered by the UK Government61, where the commercial lease is very similar to the Canadian's in that there is a significant contractual freedom, in response to the concern that business tenants were not being offered sufficient choice and flexibility in lease terms. In particular, the

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main concern was towards small business tenants who do not have the same negotiation process and do not sign the same leases as larger companies.

The Report points the finger at several areas of concern regarding the relations between the tenant and the landlord. First, the upwards only rent reviews leading to rents not being reduced even if trading conditions and market rental levels fall significantly. The second issue concerns the confidentiality clauses which attempt to hide the details of lease rents and other terms to third parties. The third issue is about the rent determination process at renew and lease renewal. Finally, the fourth issue concerns the ability of tenants to sell or sublet the premises during the lease term.

Each of these issues is much more developed with small business tenants who seem to be less aware. Indeed, the study demonstrates that small business tenants do not always take professional legal advice before signing leases because of the cost it represents. The Department for Environment, Food and Rural Affairs found that around 30% of tenants did not take any legal advice at all. The study highlights that a large minority of micro tenants with fewer than 10 employees are have no previous experience of taking leases, are less likely to take professional advice and therefore are often offered a lease on a take it or leave it basis (the study reveals that 27% of small tenants got a take it or leave it offer from the landlord). For many of them, it is only months or years after signing the lease that they realize the shortcomings it contains.
In addition, the study reveals that small tenants are more likely to have a short lease. The study shows that small tenants occupy commercial retail leases at average length of 7.5 years against 12 years for large tenants.

These results point the finger at the dangers of a weak bargaining power during negotiation of the lease. Just like in UK, in Canada small retailers are most of the time worse off than large retailers since there is not much legal protection for them.

Furthermore, the redaction of the lease has an impact on the marketability of the premises itself. Indeed, if the tenant is going to be the first lessee of the premises, he should always try to negotiate amendments to the form of the lease, which may later prove to have a substantial bearing on the marketability of the premises.
CONCLUSION

The conclusion we can draw from that study is that some characteristics of leases in Canada are mainly based on tenant type rather than on property characteristics. This is permitted by the great freedom conferred by the law to landlords.

We can state that on one hand a too permissive regime leads to unbalanced leases at the expense of small retailers, which are now fewer and fewer in shopping centers face to international giants invading our malls. The effects of this imbalance are obvious and demonstrate a genuine need for protection. On the other hand, a regime judged overly restrictive by landlords who use an infinite creativity to escape its provisions and can therefore be inefficient.

The result is that in all cases the small retailers are never fully protected. Perhaps the solution lies in the reform proposed by the French authors, namely to adapt the statute of commercial lease to current business realities by reworking the regime. The goal would be to tend to a new regime of commercial leases, both in France and Canada, in order to have an effective protection of small retailers.

However, if the need arises in France, it seems that despite the shortcomings of the purely contractual system of commercial leases in Canada, the liberal mindset is
not willing to protect a party, although weaker against his landlord, being a professional.
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