



BMHAVOCATS

LESS IS MORE COMMERCIAL LEASE AGREEMENTS IN FRANCE

QUESTION

ANSWER

What is a commercial lease pursuant to French law?

A commercial lease agreement relates to leases where a registered business legal person or company operates a commercial, industrial or artisanal business within premises. Offices are concerned as long as the tenant carries out a commercial, industrial or artisanal business activity.

Are the legal rules mandatory?

Should a lease meet the conditions of a commercial lease, it is mandatorily subject to French law regarding commercial leases. The status contains public policy provisions established mostly to protect the tenant and its business ("*fonds de commerce*").

What is a "*fonds de commerce*"?

The so-called "*fonds de commerce*" is specific to France. The "*fonds de commerce*" refers to the business activity conducted on the premises and includes the clientele, equipment, stock and work contracts. It also includes the brand name or trademark, the patent rights, and the right over the leased premises ("*droit au bail*").

What is the duration of a commercial lease?

The duration of the lease may not be less than 9 years, with an early termination option every 3 years. This is why French commercial leases are often described as "*bail 3/6/9*". Leases with a duration of more than 9 years are also allowed. In such a case, a waiver of the 3-year termination option by the tenant may be requested by the landlord and specific rules may apply regarding the rent at the renewal of the lease.

Under which circumstances are the tenant and the landlord entitled to early termination?

Except in cases of specific leases (e.g. duration exceeding 9 years, offices, factories), the tenant has the right to break the lease at the end of each three-year period by giving six-months' notice. No compensation is then due to the landlord. The lessor may also break the lease at the end of a three-year period, but only on specific grounds defined by law, mainly in cases such as when the demolition and reconstruction of the building is planned. The landlord must then pay compensation to the tenant ("*indemnité d'éviction*") covering the loss of the "*fonds de commerce*".

At the expiration date is the contract automatically terminated?

No. The tenant has a right to renew, should the "*fonds de commerce*" be effectively and continuously operated during the three years prior to the expiry date of the lease or its tacit renewal.



Is the contract automatically renewed at the expiration date?

No. The tenant must request a contract renewal from the landlord and may request a decrease of the rent should the market rental value be lower than the current rent. The landlord can also offer the renewal of the contract and may request a rent increase provided specific conditions are met.

What happens if neither party requests the renewal of the lease?

Should neither the landlord nor the tenant request a renewal prior to the expiration date of the lease, the lease will be automatically extended under the same terms and conditions, notably of rent. During this extension of time, the lease may be terminated at the end of any calendar quarter subject to six-months' notice.

Is the landlord entitled to terminate the lease at the expiration date of the contract?

The landlord has the right to terminate the lease at the expiration date or to refuse the tenant's request for renewal. Unless the termination is based on specific grounds (e.g. failure to perform the lease, subletting without consent or other circumstances provided by law such as lack of operation within the premises), the landlord must pay compensation to the tenant. Said compensation is intended to cover all of the tenant's damages related to the non-renewal of its lease. The compensation can amount to a maximum of the total value of the tenant's business ("*fonds de commerce*").

How is the rent set?

The amount of rent is freely agreed on by the parties when negotiating the contract. The rent may be fixed or based on a percentage of the turnover. The parties may also agree to combine a fixed rent and a turnover rent. Commercial leases often, if not always, contain a yearly indexation clause linked to specific indexes, such as the commercial rent index ("*indice des loyers commerciaux*" or "*ILC*") for stores, the rent index in the service sector ("*indice des loyers et activités tertiaires*" or "*ILAT*") for offices and factories such as logistics platforms.

How is the rent set at the time of renewal?

The rent of the renewed lease is based on the market rental value. However, provided specific conditions are met such as the activity carried out on the premises and the duration of the lease, the increase in rent upon renewal of the lease may be capped ("*plafonnement*"). For such leases, the rent increase may not exceed the variation of the applicable index since the lease took effect.

Must the tenant pay for service charges and repairs?

Yes. However, the service charges that the tenant must reimburse to the landlord must be listed precisely and completely in the commercial lease. Otherwise, the tenant may challenge the charges and refuse to pay. The charging of certain costs, particularly those relating to major building repairs, is prohibited.

Is the tenant entitled to transfer the lease without the landlord's authorization?

The tenant is entitled to transfer the lease when transferring its "*fonds de commerce*". Otherwise, if not permitted by the lease agreement, the transfer requires the prior consent of the landlord.

Is the tenant entitled to sublease without the authorization of the landlord?

No. Unless otherwise stipulated in the lease or approved by the lessor, any total or partial subletting is prohibited.

What about the rent during COVID-19?

Many tenants have stopped paying rent during the closure of their stores claiming the following:

- A force majeure event,
- Non-performance of the landlord's obligations,
- The temporary destruction of the premises.

Some landlords have agreed to a rent reduction during the period of closure while others have remained opposed to any negotiation and have taken the matter to court. The first interim decisions have been rendered and a clear line is difficult to emerge.

Want to learn more? Contact us!