When the rule is a third wheel

Many indicators show that Italian crisis seems to be behind us now. An increasing number of brands, in the retail field, are now carefully scrutinizing street storefronts (even in “secondary” cities); this is also the result of a general lackluster performance of shopping malls located in certain parts of the USA. Add to this the Italian experience during last the decade, where more the one mall has shut down.

Notwithstanding the strong increase of e-commerce, it seems that consumers cannot give up off-line retail and physical purchases. This happy combination would result in multi-channel retailing, which would put together both the physical channel and the digital one, taking advantage of the technological experience without giving up the charm of shop windows. The efforts of the operator in this ‘omnichannel’ strategy will consist more and more in providing a sales area which supports these two possibilities. However, this signifies an added economic effort, given that the shop shall have to be renovated with the required IT hardware and software. Staff shall also have to be properly trained to operate in a new shopping environment.

Italy represents an interesting objective for many investors in the retail market, given that, even after the crisis, families maintain a high level of wealth / disposable income[1].

It is necessary to adapt with the ongoing evolution of the retail market, providing operators with juridical instruments capable of supporting the effect of this new technological vitality and market flexibility. External and uncontrollable events must also be taken into consideration, for example, variations in the tourism ‘tide’, essential source of cash-flow for many luxury brands.

Within this framework, where artificial intelligence shall soon be a component in the selection process of our

purchases, it is extraordinary that a manager of properties, where these purchases occur and where important steps in the selection of products takes place, should adhere to a Law, regulating lease agreements, from 1978 (!).


Maria Adele De Luca

This Law is considered no longer up-to-date and is too rigid in respect to current market economics and the needs for flexibility of present day commerce. The basis of this 1978 Law, is still focused on safeguarding the lessee, which is considered *tout court* as the weaker part of the lease relationship. It does not foresee the adoption of solutions resulting from an open negotiation framework, which could lead to null and void clauses.

This concept of the lessee as the "weaker part" of the relationship, renders the aforementioned Law totally out of date, especially if we consider large holdings, which, having a portfolio of 4 or 5 strong brands, or more and an extremely well organized company structure with in-house legal and commercial departments, are in a stronger contractual position than the lessor.

Both investors and operators are seeking concrete and precise solutions and it is not sufficient to rely on the varied and copious interpretations from judges, developed through the years, with the scope of adjusting the rigid Law of 1978 to current reality.

Which solutions can be proposed to managers/tenants, which, on the one hand, must be assured of a proper location to conduct business with a window for their brands that can last in time and, on the other hand, must face an oscillating market, which, could transform the shop into a black hole?

Which solution can be considered the fairest in this context, more than the one created by the freedom of negotiation between parties and by the cleverness of legal professionals?


Susanna Antonielli

The new rule created by the 3° paragraph of article 79 of law 392 of 1978, which transfers the right of contractual agreements to the interested parties – only for lease agreements with an annual rental fee of at least 250,000 Euro – with terms and conditions as a waiver to the framework of the normally applied Law, calls for a widening of the horizon in order to include the requirements of a much wider audience.

We draw attention to the fact that, with the exception of lease agreements whose rent is equal to or higher than 250,000 Euro, the recognition of granting a sum to the lessor as an "entry fee" is unlawful and that, therefore, the relevant clause is null and void[2].

In contrast, within the framework of "important (value) property leases", the possibility to convey directly to the lessor a part of the key money, in the form of an entry fee, paid by the new lessee who enters into the shop premises, or, by way of example, the possibility of the lessee to lawfully waive the goodwill indemnity in advance, can create certain attractive commercial exchange mechanisms.

Open negotiation of the contractual clauses, moreover, would allow the parties to overcome the constraint of the lease duration (the 6+6 year period today is often deemed inadequate for the needs of both the owners and the lessees).

One could speculate, under a negotiation standpoint, to share and regulate some of the economic benefits, which before, due to the inflexibility of the Law – were untouchable. Negotiations might allow, for example, the possibility to grant parachute exit options to the lessor.

Furthermore, in order to avoid long-standing discussions with the Courts in respect to the requirements, or lack of, concerning the conditions of sudden occurrence, unpredictability, and/or the unwillingness of certain circumstances, which would justify grounds for withdrawal[3], the contract could include, for the benefit of the lessor, certain specific safeguards. For example, the (certified) reduction of footfall, turnover below a certain percentage over a period of time, or the significant increase in footfall as a result of business factors. Furthermore, a withdrawal hypotheses could be motivated by extraordinary events such as the acquisition, merger or "change of control", or the elimination of a company's line of business due to a different business model.

Our thanks, for his precious contribution, to Mr. Massimo Chiarella of Redevi, a company specializing in retail and real estate matters.

Written by:

***Maria Adele De Luca**, partner at FDL Studio legale e tributario*

***Susanna Antonielli**, corporate jurist in the retail field.*

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[1] The catering field appears to be growing and is the most dynamic; the "outdoor meal" has become a fundamental element in the shopping experience because it combines time for shopping with socialization.

[2] See Supreme Court decision dated 16 October 2008, n. 25274, according to which: *" in commercial lease agreement matters, the current rules, contained in Law of 27 July 1978 n.392, allow contractors to freely determine the initial rent but prohibits the lessor from claiming payments of sums non-repayable or in the form of " good entry" (other than the rent and the security deposits); such payments are therefore without justification and the relevant agreement is null and void, in accordance with the Law of 27 July 1978 n.392, article 79 (given the intention to attribute to the lessor an advantage which is in contract with current provisions)…*".

[3] However, the agreement that allows the lessee to withdraw, in any case, when there are serious grounds, appears to be mandatory even in the context of major property leases.

About Maria Adele De Luca

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