Real Estate Newsletter

Monday 16 March 2015

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News

EDITORIAL

Real Estate Procedures – some problem areas requiring particular attention

Regardless of whether we are talking about taxation arrangements, upward adjustment procedures or (fiscal or legal) contentious issues, rules applying to real estate procedures vary across sectors and frequently turn out to be extremely complex. That is why certain key features warrant particular attention. That is why we have decided to devote a special issue of the Real Estate Newsletter to these important topical issues.

We shall outline the rules governing litigation that arises when the Tax Administration challenges real estate valuations, either under the judicial or the administrative courts. Readers will have the opportunity to observe how procedures for the upward adjustment and disputation of the rental value of property liable to property tax or local taxation (Contribution Economique Territoriale - CET) can be affected both by shortcomings in the valuation methods used and restrictions to taxpayers' guarantees during proceedings or limitation periods. We shall also include an introduction to the areas of main concern to property auditors regarding property VAT in audits nowadays.

Readers should remain extremely alert to civil or administrative risks of litigation in building matters, given the numerous and varied grounds for appeal available to third parties.

Some flexibility can be seen in the area of capital gains on property by non-residents, as legislators put an end to discriminatory tax rates for individuals and reduce the scope of application of the requirement to appoint a tax representative.

As regards commercial leases in particular, we shall examine the effects of the provisions of the Pinel Law of 18 June 2014 on limitation rules which have led to illegal clauses in statutory commercial property leases being deemed to be non-binding.

As this is all very much in the news, a final three articles will review recent developments in the continuous updating of rents for local taxation purposes, the attractiveness of OPCIs which has been boosted by the Macron Law and the welcome abolition of special rules governing the establishment of the assessment base for registration fees on sales of real estate companies.

Pierre Carcelero, associate

Disputed property valuations – the divisive effects of interventions by ordinary and administrative judges

By **Richard Foissac,** Partner, specialised in taxation. He deals with cases involving the acquisition and restructuring of listed and unlisted real estate groups and advises them on their transactions. He lectures in tax law at the Universities of Paris I and Nice Sophia-Antipolis.
richard.foissac@cms-bfl.com

It is not unusual for concomitant or successive disputes to arise in the area of property taxation, particularly when the tax administration seeks to challenge the valuation adopted by the parties when a property is transferred. It is not necessarily the prime concern of the Administration or the judge to find a comprehensive, consistent solution.

In cases such as establishing registration fees or challenging capital gains made upon property transfer, the tax administration frequently disputes the valuation adopted by the parties. Grounds for this kind of challenge can be a failure to disclose part of the price, in which case the main difficulty turns on the question of proof, which is not the focus of today's article.

Challenges can also relate to the issue of property valuation. In such cases, the rules governing upward adjustments of the adopted value and the implications that this may have for determining tax liabilities vary according to different taxes and may sometimes lead to discrepancies or even outright contradictions.

The purpose of this article is to outline the differences between the valuation rules set by the Court of Appeal (Cour de Cassation) and those set by the Council of State and then to tease out the main difficulties that may arise during the rectification procedure or may be caused by the intervention of the taxation judge.

We should perhaps note that, generally speaking, this kind of development concerns companies whose assets are exclusively, or primarily, held in real estate, insofar as this kind of company's securities tend, in practice, to be valued on the basis of the value of their assets, subject to adjustments for matters such as cash flow, company debt and tax liabilities. We should also perhaps remember that, in most cases, litigation over property valuations is sparked, in each jurisdiction, by issues emerging from widely differing contexts.

"The tax administration frequently disputes the valuation adopted by the parties."

In the case of disputes which are a matter for the ordinary judge and, ultimately the Court of Appeal, which are the jurisdictions competent to handle registration rights (transfer duties for a consideration or free of charge, solidarity tax, etc.), Article L. 17 of the French Tax Procedure Handbook (TPS) is the main instrument that allows the tax authority to substitute the market value of the property liable to taxation for the tax base reported by the parties.

On the other hand, the Council of State and the administrative judge are the authorities that generally settle disputes involving the value of a property due to the tax implications of transactions challenged on the grounds of an abnormal management decision

Valuation methods that focus on valuing property

The Court of Appeal and the Council of State both agree on the principle whereby the valuation of an asset, particularly a property, should be based on the sales comparison approach but they each apply different limitations.

In the case of the Court of Appeal, the Administration and the judge may only depart from this rule when they have established that all comparisons with other properties are impossible1, even by updating the value of selected comparator properties[2].

The Council of State, less rigorously, permits reference to the characteristics of the valued property, to a local government real estate department estimate[3] and or to an updated resale price discounted by a coefficient on age[4].

In both cases – and subject to special rules pertaining in particular to local taxation – the parties may, when eligible to use alternative valuation approaches, apply the income approach (capitalisation of reference income) by readjusting a previous valuation, applying professional scales or even using the company's accounting data.

1 - Cass. com., 10 May 1988, Dalbos.
2 - Cass. com., 15 July 1992, No. 1325 D. Rhinn, RJF 4/91, No. 532.
3 - CE 13 November 1987, No. 69967, RJF 1/88, No. 102.
4 - CE 18 March 1985, No. 36198, RJF 5/85, No. 681.

Furthermore, the Court of Appeal rejects categorically all reference to comparisons with sales made later than the chargeable event [5], even when such sales concern the very property which is the subject of the disputed valuation This solution is, incidentally, consistent with the doctrines of tax administration[6], even though it is not however legally binding as it is a taxation procedure, and indeed a procedure frequently flouted.

The Council of State, on the other hand, permits the Administration or the judge to use transfers effected later than the disputed transaction (or even the chargeable event), providing that they do not reflect a development arising from events which themselves are later[7]. There are certainly grounds for considering that, in the case of upward adjustments involving evidence of the (established or presumed) intentionality of an undervaluation, the judge may set the Administration less rigorous limits than those set by the Court of Appeal. Notwithstanding, even evidence of intentionality should, in our view, basically mean that references which the taxpayer could, as a result, not have known on the date that the disputed transaction was carried out are ruled out.

Conflicts and discrepancies that might arise in the course of the rectification procedure

As registration fees and taxation of profits are not systematically monitored by the same services, it is not unheard of for the two services to come up with two different valuations for the same property. When the two procedures are not concomitant, the service responsible for the second procedure does not deem itself systematically bound by the previously submitted valuation, even when the corresponding upward adjustment has been accepted.

Furthermore, and more confusing still, should the rectification procedures follow their course along similar timeframes, the services responsible for each are one not required to reach common ground.

Sometimes one of the upward adjustments might be abandoned and the other retained.

This is perfectly understandable when the abandoned upward adjustment, in terms of direct taxes, results from an absence of intentionality.

On the contrary, if an upward adjustment of registration fees is abandoned, this would imply, in the absence of any other motives motives (for example, procedural considerations), recognition on the part of the tax administration that the valuation adopted by the parties is justified. In cases such as these, it would appear particularly questionable for notified upward income tax adjustments to be maintained on the grounds that the transferor is deemed to have intentionally reduced the valuation of the property under consideration.

The problem here is that the conditions under which an audit service might be led to waive a notified revised assessment do not always allow us to deem this waiver as binding under Article L. 80 B of the TPS.

Conflicts and discrepancies that might arise in the course of the legal proceedings

It should first be noted that if the Court of Appeal requires the tax administration to present comparable elements to support the valuation it has used when it proposes the rectification, the Council of State agrees – subject to a minimum reason for proposing the rectification, that the supplementary tax base can be set on the basis of elements produced at a later date.

Should motivation be identical, initial production, by the Administration, of comparable elements which are irrelevant or erroneous[8] could thereby lead to the procedure being revoked in respect of the registration fees and the confirmation of tax adjustments relating to income or corporation tax (in principle with regard to elements produced by the Administration at a later date).

It is indeed regrettable that the valuation laid down by a final decision under the first procedure should not be mandatory for determining the tax base under the second.

If, in principle, the first decision does not have the force of res judicata compared with the second dispute, on the grounds of having a distinct object albeit not cause, the identity of the issue under discussion, namely the valuation of the same property, should lead, at least in practice and in the absence of exceptional circumstances, to an identical solution, which we would find extremely desirable.

and **Pierre Carcelero**, tax specialist associate. He looks after cases involving the acquisition and structuring of listed and unlisted real estate groups and advises them on their operations. He lectures in tax law at the University of Montpellier.
Pierre.carcelero@cms-bfl.com

5- Cass. com., 29 November 1994, No. 2216 D, D. Jourdan-Barry, RJF 3/95, No. 416.
6- Response by Orvoën: Senate 2 August 1973, p. 1184, No. 12942.
7- CE 10 December 2010, No. 308050, SARL PRUNUS, RJF 2011, No. 278.
8- It is not indeed unusual for property characteristics retained as comparable to be incorrect, due to clerical errors made when they are entered into the tax administration database.

Distinguishing features of disputes over local taxation of real estate

One distinguishing feature of disputes over local taxation of real estate, principally relating to property tax and corporate property tax (Cotisation Foncière des Entreprises, CFE), arises as much from complexities involved in controlling the tax bases as from the procedural rules themselves.

By **Alexis Bussac,** associate specialised in local taxation. He acts as legal adviser and lawyer in the areas of property and local taxation.
alexis.bussac@cms-bfl.com

Property rental value, which serves as the basis for these two taxes, in the case of premises other than industrial premises, is calculated in comparison with the reference rental values for premises as of 1 January 1970. These reference premises are recorded in handwriting on minutes that can be consulted at the land registry services of each commune. Rental value is updated annually.

0The fact that these rates are neither uniform nor centralised at national level, along with the empirical nature of the weighting system for taxable surface areas, makes the whole exercise of verifying tax bases particularly complicated. And further complications arise when we see that large numbers of reference premises are either obsolete or no longer valid due to demolition or change of use. Here, the amending Finance Law for 2014 provides overdue validation of valuations of premises carried out before 1 January 2015 in comparison with this type of premises.

This lack of transparency should be remedied when property rental values for commercial premises are revised with the introduction, from 2016, of a new valuation system based on a schedule of tariffs for each valuation sector. Notwithstanding, there is some concern that the ways in which these sectors have been delimited and the criteria chosen for determining localisation coefficients might limit the scope of this simplification.

The second difficulty in local taxation disputes relates to the short timeframe within which complaints can be made. They must be lodged with the Administration, in principle, at latest by 31 December of the year following the collection of the disputed tax (Article R. 196-2 of the TPS).

Likewise, the Service has a period for intervention which expires, in the case of property tax, on 31 December of the year following the year in respect of which the tax is due (Article L. 173 of the TPS), and, in the case of the business premises contribution (CFE), on 31 December on the third year following the year in respect of which the tax is due (Article L. 174 of the TPS).

If the case should go to appeal, under Article 56 of the TPS, appeals processes do not apply to local taxation. The severity of this text has been mitigated by the Council of State which deemed, on the basis of the general principle of the rights of defence, that the Administration could not raise business tax without allowing the taxpayer to submit comments. This rule, which is applicable to the business premises contribution (CFE), has been extended to property tax on built properties.

Disputes over local taxation effectively come under the regime of objective evidence, namely a judge rules on the basis of a combination of items shown in the investigation file and not by placing the burden of proof on one of the parties. It is up to each party to supply items to support their claims.

Finally, the last distinguishing feature concerns the absence of a second instance jurisdiction for property tax. The Administrative Court of Appeal is competent to rule, on an exceptional basis, on property tax when a judgement simultaneously concerning both property tax and the business premises contribution (CFE) is referred to it.

We can only hope that these rules will be modernised to make them more protective of taxpayers' rights when it comes to taxation which represents an ever-more burdensome charge.

VAT adjustments on real estate

Currently notified VAT adjustments on real estate relate to works carried out by the purchaser in return for a rent-free period, payments in kind and renovation works.

Central administration has not issued any instructions concerning works carried out by the purchaser in return for a rent-free period, which explains why taxpayers notified of adjustments have had such a surprise.
The audit services effectively use the same line of reasoning as they do for waivers on the right to terminate the lease at the end of the first three-year period, which is the lessee's right under a commercial lease: they consider it to be a case of two bartered services for which payments are offset, and thus subject to VAT paid both by the lessor and the lessee.
If we want to dispute this readjustment, we must examine the nature of the works under consideration: are the works incumbent on the lessor or on the lessee?
If the latter, the readjustment can frequently be contested as it is not clear what precise service is provided by the lessee to the lessor.

"The audit services (…) readjust VAT in cases where the developer has not paid VAT on signing the land sale contract, and this overrides payment in kind."

Payments in kind have given rise to an administrative instruction published in the BOI-TVA-IMM-10-20-20-20120912, stating:
"As a general rule, the tax is payable when the chargeable event occurs.
Nevertheless, under Article 269 (2)(a)(a) of the French General Tax Code, in the case of delivery of buildings to be constructed, the tax is payable on each occasion that sums are paid for the different instalments as stipulated in the contract as work progresses.
In the case of payment in kind, when the delivery of the premises paid in kind falls under a contract for a building to be constructed, the tax due on this becomes payable on delivery of the land which is its consideration."
However, a readjustment which seeks to exact payment of VAT on signing the land sales act can be contested in cases when the developer commits not to the sale of a property to be built but to the sale of a finished property, because Article 269(2)(a)(a) of the General Tax Code must be interpreted literally, i.e. as referring only to the sales of properties to be built.

Finally, we have become aware of adjustments in relation to property renovation.
We know that Article 257 of the General Tax Code understands new properties as being properties which had not been completed more than five years previously, those which are the result of new construction or works on existing properties consisting in constructing new premises above existing buildings or restoring to new condition either the majority of their foundations or the majority of those elements, excluding the foundations, which provide resistance and stiffness to the structure or the majority of frontage work or all finishing elements in such proportions that cannot be less than two thirds for each of them.
The relevant finishing elements are as follows: floors that do not provide the structure's resistance or stiffness, external door and window frames, internal partitions, plumbing and sanitary facilities, electrical installations and, for works carried out in metropolitan France, the heating system. The difficulty lies in knowing exactly what is meant by "restore to new condition".
Indeed, the audit services tend to consider that it is necessary to replace the element in question totally to satisfy this condition.

By **Philippe Tournès,** partner, specialised in VAT particularly relating to property.
philippe.tournes@cms-bfl.com

Civil and administrative litigation in construction matters: extreme vigilance is needed

By **Céline Cloché-Dubois**, associate, specialised in planning and environmental law.
She acts as legal adviser and lawyer to public enterprises and individuals.
celine.cloche-dubois@cms-bfl.com

Before starting any construction work, it is worth being extremely vigilant about any binding rules in planning permits and any damage that could result to third parties. Third parties have many avenues of redress open to them across a range of different laws: planning law and also private law. These avenues of redress can lead to the revocation of planning permits, and/or the award of damages, and even the demolition of a building even when built in accordance with the planning permit issued to the builder.

Avenues of redress in planning law

Appeal on the grounds that the action taken is not within the powers of the planning permit.

A planning permit may be challenged by any third party with an interest in bringing an action. Under the provisions of Article L. 600-1-2 of the French Planning Code, any third party has an interest in bringing an action if they hold or regularly occupy a property or benefit through this property from an agreement to sell, to lease or a preliminary contract of sale before completion, on the essential condition, however, that the permitted project is likely to have a direct impact on their conditions of occupancy and possession. This interest in bringing an action is determined by the date on which the petitioner's request is posted at the town hall.

"A planning permit may be challenged by any third party with an interest in bringing an action."

Appeal by third parties is time limited. The time limit for an appeal against a planning permit for third parties runs from the first day (of a continuous period of two months) that the permit is displayed on the land. It is incumbent on the recipient of the permit to prove the regularity and continuity of the display, by all possible means : statements issued on the honour of neighbours, attestations by municipal police officers, observations by bailiffs. The display of the planning permit must abide by certain formal rules in terms of place and the particulars included on the display panel. If it is not displayed in accordance with these rules, the time limit for the appeal does not run. In any case, no actions seeking to revoke a planning permit remain admissible on expiry of a period of one year "after the completion of the construction or development".

A third party contesting a planning permit before an administrative judge cannot give just any reason to request and obtain the revocation of a planning permit; the only reasons permitted have to do with non-compliance with planning rules, namely the land use plan, the local land use plan and national urban planning regulations. Reasons related to easement violations in private law or regulations under civil law cannot be given.

Administrative judges have broad powers at their disposal: if the disputed project has only one defect which could be regularised, the judge may revoke the permit only partially and, essentially, set a deadline for the permit holder to seek to regularise the defect. The judge may also, at the outset, stay the proceedings if they observe that it is possible to regularise the contested permit by means of an amended permit. Finally, the judge may sentence natural and legal persons to pay damages if the appeal is deemed to be an abuse. This verdict can be given if the action "exceeds the defence of the applicant's legitimate interests and [causes] undue harm to the recipient of the permit".

Proceedings for demolition and damages

Builders of a property built in accordance with a building permit (entirely properly) not only run the risk of seeing their permit revoked but also that of seeing their building demolished and being themselves held liable for damages. Indeed, under Article L. 480-13 of the French Planning Code owners can be sentenced by the court of law to demolish their building if the building permit is revoked by the administrative judge. In circumstances such as these, court proceedings for demolition should be taken at latest within two years of the administrative court's final decision. Under the same Article, builders can be sentenced to pay damages if the planning permit is revoked. The same period of two years is available for bringing a claim for damages.

Avenues of redress in private law

Neighbours disturbed by the construction of a new building have several proceedings open to them to can bring through the civil courts, either to prevent or delay construction or to seek legal redress for the disturbance caused.

Tort claim for breach of a planning regulation

When a building has been constructed in breach of planning regulations and the neighbouring owner can demonstrate that the breach of these requirements causes them harm, they can bring a tort action before the civil court on the grounds of Articles 1143 and 1382 of the French Civil Code for the purpose of obtaining the demolition of the structure in question. It is settled case law that breach of regulations of Article R. 111-21 of the French Planning Code can be used to justify a demolition order brought on the grounds of Article 1382 of the Civil Code.

Misfeasance for breach of a rule of private law

The planning permit is granted subject to the rights of third parties, without any verification of compliance with rules of private law. Nevertheless, persons who consider themselves aggrieved on the grounds that their property rights or other private law provisions have been violated can assert their rights through litigation before the civil courts, even when the planning permit complies with planning laws. The legal basis for their claims may vary depending on the particular circumstances and depend, not only on the conventional rules of torts or quasi torts, but also on the theory of "troubles anormaux de voisinage" (abnormal neighbourhood nuisance).

On the basis of this theory, neighbouring third-parties, who consider themselves aggrieved because of the neighbouring construction, may require either its complete dismantlement or the mitigation of the abnormal neighbourhood nuisance and/or monetary compensation for the remaining nuisance which has led to a loss in the value of their own property. This autonomous system is based on the principle that "no one shall cause an abnormal neighbourhood nuisance to any other". On each occasion that neighbouring third-parties can establish the existence of a nuisance that exceeds normal neighbourhood nuisances from construction works or the construction itself, they can use this system which requires neither proof of fault nor the role of custodian. An abnormal neighbourhood nuisance claim requires demonstration of the existence of personal nuisance and the abnormality of the alleged nuisance.

An assessment of the abnormal (in comparison with ordinary neighbourhood obligations) or clearly excessive nature of the nuisance is not linked to any failure to comply with legal or regulatory provisions, but depends on the circumstances of time and place. In the case of a nuisance resulting from the construction of a property, the fact that this property complies with the building permit and respects visibility easements regarding the neighbouring properties does not prevent proceedings being brought by the victim for neighbourhood nuisance.

"An abnormal neighbourhood nuisance claim requires demonstration of the existence of personal nuisance and the abnormality of the alleged nuisance."

and **Charlotte Felizot,**
real estate associate.
She acts in all areas of real estate law particularly in commercial property leases, housing and professional leases, co-ownership, construction and construction insurance. She lectures at the University of Paris X on pre-contracts and housing leases.
charlotte.felizot@cms-bfl.com

Tax rates and the tax representative: a welcome development now that French law is brought into line with European Union law

Differences in tax treatment of capital gains on the transfer of properties located in France between individuals resident in France and non-residents has given rise to much litigation.

By **Julien Saïac**, partner in international taxation. He deals specifically with issues relating to international restructuring and real estate investment.
julien.saiac@cms-bfl.com

Under Article 244(a)(a) of the French General Tax Code, capital gains on property in France accruing to non-residents were effectively traditionally taxed at a rate of 33.13% while residents in France, the European Union (EU) and the EEA countries were taxed at a rate of only 19% on the same transfers. In a ruling of 26 December 2013, the Council of State had ruled that the "standstill clause" in Article 64 of the Treaty on the Functioning of the EU, which, in principle, authorises Member States to maintain the restriction on the free movement of capital existing on 31 December 1993, did not apply to investment in real estate in France by residents of third countries. Discrimination under Article 244(a)(a) of the French General Tax Code would therefore appear to be on its way out.

More recently, the Council of State ruled on 20 October 2014 that the difference in the rate of taxation of capital gains on the transfer of a property located in France by a Real Estate Company, whether its associated natural persons resided in the EEA countries or not, also represented a restriction on the movement of capital. The second amending Finance Law for 2014 has taken into account the implications of this case law and has modified the rate of taxation provided by Article 244(a)(a) of the French General Tax Code so that, from 1 January 2015, capital gains on real estate made by natural persons, directly or through the intermediary of a corporation, will be taxed at a rate of 19%, regardless of the place of residence of the transferor (France, EU, EEA or third countries).

"From 1 January 2015, capital gains from property accruing to natural persons, directly or through the intermediary of a corporation, shall be taxed at a rate of 19%, regardless of the place of residence of the transferor."

In the past, taxpayers resident in third countries could file claims for the partial (or even total) repayment of the payment they have made within the normal times allowed, on the grounds of the aforementioned case law.

Furthermore, as we know, non-resident taxpayers who transferred a property in France were required to appoint a tax representative domiciled in France who had to be accredited by the tax administration. This representative was required to complete the paperwork and cover the payment on behalf of the non-resident in the event of default. Following a ruling of the EUCJ of 5 May 2011 finding against a similar mechanism in Portuguese law, the European Commission, on 25 April 2013, had sent France a formal notice to amend its regulations, on the grounds that this obligation to appoint tax representative was burdensome and costly and represented a restriction to the free movement of capital. In order to take into account this case law and formal notice, Article 62 of the second amending Finance Law for 2014 has, for transfers from 1 January 2015, removed the obligation to appoint tax representative for individual taxpayers residing in the EEA countries (with the exception of Lichtenstein). When the transferor is a corporation, the extension operates at the level of each of its partners. Thus, the obligation to appoint a representative has been removed, in particular for Real Estate Companies held exclusively by partners resident in EU Member States. We can only welcome the fact that French law has been brought into line with European Union law on these two points.

Limitations on commercial property lease litigation with the Pinel Law

All actions covered by commercial leases have been subject to the single regime of biennial limitation under Article L. 145-60 of the French Commercial Code since Law 2088-776 of 4 August 2008, known as the LME (Law of Modernisation of the Economy). This is the case of proceedings on setting a new rent (Cass., 3e civ., 28 February 1979, No. 77-13 394), proceedings on the three-yearly review (Cass., 3e civ., 1 June 1988, No. 86-14 659), proceedings on payment of interest due on rents paid in advance under Article L. 145-40 of the French Commercial Code (CA Paris, 8 March 1984, D 1984 IR, p 314) and proceedings on notice to leave without possibility of renewal (Cass, 3e civ., 15 Nov. 2005, No. 04-16 591).

2005, n° 04-16 591).

Notwithstanding, Law 2014-626 of 18 June 2014 (Pinel Law) has amended the penalty applicable to any commercial lease clause which fails to have regard to the mandatory provisions of the commercial leases statute. While the penalty of a clause such as this had consisted until then of its nullity, amended Articles L. 145-15 and L. 145-16 of the Commercial Code now provide for clauses in breach of these provisions to be deemed non-binding[1].

This amendment has significant consequences for procedure.

Effectively, before the Law of 18 June 2014, proceedings concerning the nullity of provisions contrary to public policy provisions were subject to the biennial limitation period under Article L. 145-60 of the Commercial Code, specific to the commercial leases statute. It should, however be noted, that in accordance with the rules of civil proceedings the defendant in proceedings was entitled to oppose, perpetually, the nullity of the clause which was contrary to public policy provisions, but one only exceptionally in defence (Cass., civ. 3e, 2 June 1999, No. 97-19 324). With the Pinel Law, any illegal clause "is deemed to be non-binding". The clause deemed to be non-binding is supposed to never have existed. Consequently, no limitation period is applicable in its case unlike in the case of the null clause. From now on, all proceedings seeking to abolish a clause on the grounds of its violation of a public policy provision in the commercial leases statute are free of all limitations. This will permit either of the parties, at any time, during the initial lease or renewals thereof, to use the irregularity of the clause and deprive it of effect. This type of situation gives rise to legal uncertainty. The same applies to proceedings which seek to have an indexation clause (included in a commercial lease) declared non-binding, on the basis of Article L. 112-1 of the French Monetary and Financial Code: The Paris Court of Appeal recently ruled (CA Paris, 2 July 2014, No. 12/14759) that no limitation period applied to such proceedings.

"The clause deemed non-binding is supposed never to have existed. Consequently, there is no limitation period applicable in its case unlike the invalidity clause."

Furthermore, it is not possible, even once the contract has been concluded, to waive the "non-binding nature" of the clause, as it falls outside the scope of the contract. This is an essential difference with the null clause which can be subject to a conventional waiver, providing this is introduced once the right to invoke nullity has been acquired and the waiver is unequivocal. Thus, the strategy of negotiating with one's co-contractor the waiver of a mandatory rule or of passively waiting for the biennial limitation period to pass will now be ineffective.

1- See 'Illegal clauses in commercial leases are now deemed to be unwritten', in the Real Estate Newsletter of 1 December 2014.

By **Jean-Luc Tixier,** Partner, specialising in real estate law and public law.
He consults and pleads in litigation year for commercial and industrial companies and works with developers on planning law, construction law and matters involving the sale and rental of buildings, long leases and construction leases. He lectures at the University of Paris I.
jean-luc.tixier@cms-bfl.com

and **Sandra Kabla,** associate specialist in commercial leases, acting as legal adviser and lawyer. She lectures at the University of Paris I.
sandra.kabla@cms-bfl.com

Continuous updating of rents: a new legal requirement

By **Laurent Chatel,** Partner specialised in taxation, responsible for the local taxes service. As part of real estate transactions, he checks land values used as a tax base for local taxation, audits these values for sales deals in the real estate sector and negotiates with the tax services conditions for imposing tax in local taxation as part of major restructuring work.
laurent.chatel@cms-bfl.com

Local taxation bases date back to 1970 and are now obsolete, which gives rise to much litigation. Future assessments normally applicable in taxes from 2016 (land tax and corporate property tax) will be based on the rent average at 1 January 2013 for each category (offices, shops, depots, hotels, etc.) and assessment sector (resulting from the breakdown of departments into six marketable zones).
It should be noted that, in the case of the current land register review, owners of the properties concerned sent in 6660 REV reports in spring 2013 with descriptions of their premises.
The tax administration is currently using this information to establish new land register details. Only non-industrial commercial premises are concerned, with the consequent exclusion of industrial premises assessed by the accounting method and housing.
Unlike current updating mechanisms which use a uniform rate approved each year by Parliament in the Finance Law, the Legislator has adopted a "continuous updating of rents".
As part of this new land Registry property review, average rents for 2013 will be updated in line with the rents that companies with taxable premises under their names for Corporate Property Tax (CFE) will be required to meet each year beginning, for the first time, in early May 2015. It should be understood that the rents reported by companies each year will provide the only source of information used for updating the pricing schedules from which tax assessments will be determined.
Put simply, this requirement to continuously update rents means that corporations liable to corporate property tax will be obliged to report rent for the reporting year annually. The rent collected from these companies will not be used to tax them directly but will enable the Administration to (statistically) assess variations in rent which might justify the pricing schedules determined after the assessment of the rental market on 1 January 2013 to be updated.
At this stage, non-profit organisations liable for housing tax are not required to meet this legal requirement despite occupying premises assessed under the same pricing schedules.
One might also expect companies which are exclusively owner occupiers not to have to report in this way, unless they have rents to declare. Indeed, companies will incur additional costs in meeting this legal requirement because it will be mandatory for them to use the EDI request system, which computerises the entire rent reporting chain.
As in the case of financial statements, this computerisation method uses an EDI partner. Rents are effectively reported by means of an additional form attached to the financial statement which is deposited via the EDI-TDFC procedure.
Companies liable to corporate property tax must acquire from their usual EDI partner the computer applications they need to request from the French Public Finances Directorate General (DGFIP) a detailed file of all the premises they occupy with different "invariants" so that they can indicate how much rent they pay for each of them.
Further information should be published shortly by the Ministry on the precise date on which the EDI-request system will come into operation, the nature of information provided through EDI-request and the reporting requirements for these rents.

"This requirement to continuously update rents involves requiring corporations liable for corporate property tax (CFE) to report rents annually for the reporting year."

The attractiveness of OPCIs confirmed under the Macron Bill

The bill for growth, economic activity and equality of economic opportunity (the Macron Bill), not initially designed to have an impact on real estate investment vehicles, adds considerably to the attractiveness of real estate collective investment undertakings (OPCIs) as it extends their list of eligible assets to furnishings allocated to properties.

Since OPCIs were introduced by Ordinance No. 2005-1278 of 13 October 2005, Article L. 214-92 now Article L. 214-36 of the French Monetary and Financial Code (following recodification as a result of the transposition of the Alternative Investment Fund Managers Directive in France), listing the eligible assets for OPCIs, has not covered furnishings in property held directly or indirectly by an OPCI. Article L. 214-34 of the Monetary and Financial Code simply notes that the purpose of the OPCI is to invest in (existing or planned) rental property and Article L. 214-36 of the Monetary and Financial Code only covers, as "property" assets, properties, the real rights attached to these properties, the rights held as lessee pertaining to leasing contracts for these properties, units or shares in companies whose main activity is real estate, units and shares in OPCIs (or similar foreign vehicles), and shares in REITs.

Through amendment No. 2119, approved at first reading by the National Assembly, Article L. 214-34 of the French Monetary and Financial Code states that OPCIs, in addition to their investment in (existing or planned) rental property, "may also [...] acquire directly or indirectly, for the purposes of rental, furnished properties, capital goods and all furnishings allocated to the buildings owned and required for their functioning, use or exploitation by a third party".

The way this amendment is drafted is of major interest in two ways: the amendment no longer, as had been initially envisaged, provides for a maximum ratio of furnishings calculated on the basis of total property assets.

The introduction of this kind of ratio would give rise to various legal and accounting issues. Indeed, who could the regulation have appointed to calculate this ratio?

How would the issue of the depreciation of the furnishings automatically adversely affecting the value of these assets be handled?

Furthermore, the amendment also provides that the furnishings, along with the property to which they are allocated, must be rented to a third-party operator.

It would therefore appear to be seeking to avoid the risk of seeing OPCIs becoming residence managers as a result.

This possibility of acquiring furnishings is also provided for indirectly, as the draft version of Article L. 214-36 of the French Monetary and Financial Code makes express provision for real estate companies, invested in by the OPCI, holding properties "as well as the furnishings" of these properties.

Logically speaking, the constraint on the nature of the OPCIs' income has been lifted with the insertion of the reference to rents, from furnished properties, amongst the OPCI products listed under Article L. 214-51 of the Monetary and Financial Code.

"The amendment no longer provides for a maximum ratio of furnishings calculated on the basis of total property assets."

By **Damien Luqué**, an associate with the Financial Services team. He acts in structuring real estate investment vehicles (OPCI, SCPI, FPS) on behalf of management companies and financial institutions.
damien.luque@cms-bfl.com

Calculation of fees on the purchase of real estate companies: a welcome return to square one

By **Christophe Frionnet**, partner specialising in taxation. He advises companies on all their operations. He lectures in real estate taxation at the University of Paris I.
christophe.frionnet@cms-bfI.com

Since the Finance Law for 2012 (Art. 5(I)(3)), investors in stocks in unlisted companies whose main activity is real estate were required to withhold the purchase price plus certain debts contracted by the target in the calculation base for transfer costs (at a 5% rate). This included all debts unrelated to the acquisition of property and property rights listed as company assets. This provision, in its attempt to counter certain schemes for artificially inflating the debt of real estate structures (with the purpose of reducing registration fees), proved not only complex to implement (particularly in the presence of sub- subsidiaries) and also much too broad in its application. How would it be possible to distinguish, amongst unpaid current-account loans, sums not directly related to these assets and would it be reasonable to penalise this kind of situation which was not directly related to the legislator's original intention? This was particularly true when an outstanding debt had been used to fund works or developments to improve properties.

The decision was taken therefore to review this text under the amending Finance Law for 2014, Article 55 of which restores the previous basis of calculation, quite simply the sales price or market value of the securities (new Art. 726 of the French General Tax Code). This step backwards will not however deprive the taxation services of their oversight over the regularity procedures for determining this price and these rights, particularly in situations where the legislator may have been motivated in 2011 by abusive collection. It can however be hoped that these services will analyse these transactions in terms of costs with even more care than the application of the previous reform managed to achieve.

C/M/S/ Bureau Francis Lefebvre

2 rue Ancelle
92522 Neuilly-sur-Seine Cedex
Tel. 01 47 38 55 00

To contact the authors of this newsletter, please contact the editors who will forward your enquiry to the relevant people. You can also contact:

Laurent Chatel, laurent.chatel@cms-bfi.com
Richard Foissac, richard.foissac@cms-bfi.com
Christophe Frionnet, christophe.frionnet@cms-bfi.com
Julien Saïac, julien.saiac@cms-bfi.com
Jean-Luc Tixier, jean-luc.tixier@cms-bfi.com
Philippe Tournès, philippe.tournes@cms-bfi.com