

Closing Up Shop: Keep Open Provisions In A Qatar Retail Lease

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For retailers and landlords entering into long term leases and making significant capital investment in one of Qatar's emerging malls, consideration should be given to the effects of agreeing to a keep open clause.

Keep Open

Keep open clauses are commonly found in leases for retail units in shopping and retail centres. The purpose of such clauses is simple and two-fold: to dictate the opening hours of the retail shops and to ensure that the tenant of a retail unit continuously trades throughout the term of the lease. The level of detail found in keep open clauses can vary widely from lease to lease.

The commercial objective of the keep open clause is simple, landlords want all shops in its centre, especially its anchor tenants, open for business and trading for the advertised opening hours to attract as much footfall and passing trade as possible. Where the centre rents are based on turnover, the keep open clause is even more essential to a landlord. Obviously, closed shops, even where the tenant continues to pay the rent, are undesirable, as closed shops can detract from the reputation and profile of the centre and ultimately the profitability, turnover, and the investment value of the centre.

Tenant to be Mindful

However, a tenant will not want to be obligated to keep open or keep operating its shop at full rent unless either: an 'anchor' tenant in the centre, or a certain number of other 'major' tenants, or, as a very minimum, that a certain number of 'shops' are also open and trading.

In agreeing to a keep open clause, the tenant must be mindful of:

- the level of discretion given to the landlord to change the opening hours and any financial penalties that can be imposed;
- finding itself obligated to stay open even when other shops, in particular an anchor tenant, that it is relying on for passing trade is allowed to close for refurbishment or moves out permanently; and
- ensuring it has flexibility to close for periods for operational reasons.

For the majority of tenants, a landlord will be unwilling to accept a lease without a keep open clause. It may only be an anchor tenant who will be able to negotiate dispensing with a keep open clause, or to limit its effect. Indeed, certain anchor tenants simply will not accept the inclusion of a keep open provision. Whereas smaller tenants, who rely on passing trade from a larger shop for business and are not able to negotiate out of a keep open clause, may find themselves having to stay open when an anchor is closed for refurbishment or even moves out permanently.

Therefore, when negotiating a lease, tenants should seek assurances as to whether other tenants are subject to the same requirements to stay open, particularly if they are relying on any other major tenants' trading. A tenant generally will not want to be obligated to open or keep operating its shop at full rent,

unless an anchor shop in the centre (i.e. a department store or supermarket) is also open and operating, or a certain number of other major tenants are also open and operating, or, at the very least, a certain number of shops are open.

Landlord Perspective

From a landlord's point of view, empty shop windows and vacant units can detract from the reputation and profile of a centre resulting in a decrease in footfall and the ability of the landlord to attract new tenants. Ultimately this may affect the investment value of the centre, particularly if the vacating tenant is an anchor tenant, and finding a replacement tenant may be difficult. In such cases, a landlord may wish to explore other remedies other than pursuing a breach of contract (lease) and termination.

What if a tenant decides to cut its losses and close up shop?

If a tenant ceases to trade, but continues to pay rent and comply with all other terms of its lease, then it will be in breach of its lease, but what can a landlord do?

Unlike the Landlord and Tenant Law in Dubai, which provides a specific ground for eviction of the tenant of a commercial shop where 'the tenant left the same without occupation and without legal reason for 30 continual days or 90 non-continual days in one year', the Qatar Lease Law has no specific ground for termination and eviction based on 'closing up shop'.

Whilst it may be arguable that closing up shop falls within the remit of the ground for eviction under Article 19 (iii) of the Qatar Lease Law, being 'that the tenant is using the leased premises for purposes contrary to the lease provisions', it is unlikely that the meaning of this ground would be extended so as to include a breach of a keep open clause. In any event, in an economic market where retailers are forcing store closures, a landlord would be unlikely to want to evict the tenant, as a replacement tenant may be hard to find. In which case, the landlord would likely want to seek alternative remedies, such as specific performance to force a tenant to continue or resume trading; or an injunction to prevent a tenant from closing if the landlord thinks that is likely.

Whilst specific performance and injunctive relief are available to the landlord in Qatar, under certain conditions, neither option is without potential difficulty. An order for specific performance can be refused if the performance of the same would be considered unduly onerous on the tenant. A tenant should also bear in mind that the courts also have powers to award, in certain circumstances, penalties for non-compliance with an order for specific performance and compensation, should a tenant fail to comply with such an order.

How the Qatar courts will interpret a keep open provision, forcing a tenant to continue or resume trading, is yet to be seen. It is difficult to know if a Qatar court would accept tenant loss in itself as an excuse for breach and to what extent forcing a tenant to continue trading would be seen as unduly onerous. For landlords, the remedy of specific performance and the remedy of injunction, although available, may also prove to be futile if it pushes the tenant into insolvency.

What is clear is that the keep open clause must be drafted in detail, and very clearly, to establish both the purpose of the clause and the benefit of reliance, in order to increase the likelihood of success in a landlord enforcing the same in Qatar.