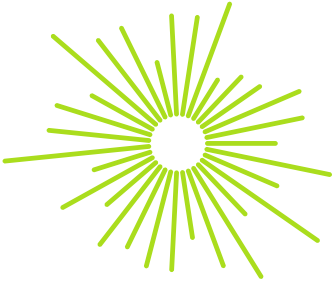




Danish Business Lease Law



May 2013

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This memorandum was prepared as a service to clients and friends of Gorrissen Federspiel. It describes the Danish Business Lease Law from an investor perspective but serves solely as general information and should not be considered or relied on as legal advice.

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Scope

This memorandum only concerns lease agreements concluded under the current Danish Business Lease Act. The law governing lease agreements concluded earlier may differ substantially from the current law.

The Danish Business Lease Act

The current Danish Business Lease Act came into force on 1 January 2000 and has later been amended.

Most provisions of the act only apply if nothing else is agreed upon between the tenant and the landlord. The main principle of the act is that the parties to a lease agreement are free to negotiate the terms of the lease.

This allows landlords to draft contracts securing a stable cash flow.

Rent and other payments

The rent level can be freely agreed upon when entering a contract.

It can be freely agreed that the tenant pays any types of expenses in addition to the rent, if

- the type of expense is stated specifically in the contract or an appendix, and if
- the estimated amount of each such expense is specified in the contract or an appendix.

Rent adjustments are regulated in the provisions of the contract.

If no form of rent adjustment is agreed upon in the contract both parties may demand a rent adjustment to market level every 4th year. Such adjustment is subject to the rent being at least 10-15 % higher or lower than market level.

It is often agreed upon in lease contracts to follow the statutory rules of rent adjustment to market level.

Both parties may, unless such right is forfeited in the contract, demand an increase or decrease in the rent level corresponding to changes in property taxes in addition to any adjustments to market level.

Any principle on adjustment of rent may be agreed upon, including:

- Indexation, and
- Percentage of turnover

It is common to agree upon some limitations in the rent adjustment. Common limitations include:

- Rent can only be adjusted by indexation and not to market level.
- No rent adjustments for a specified period of time.
- In addition to indexation only one of the parties can demand rent adjustments to market level.

Overall, the freedom to tailor rent adjustment clauses creates an attractive investment climate allowing investors to e.g. either pursue a strategy directed towards high returns or a strategy focusing on stable cash flows.

Maintenance

In legal terms, maintenance is the necessary repair following:

- Wear and tear,
- Destructive events,
- Weather,
- Accidents,
- Theft, and
- Vandalism.

It should be noted that the concept of maintenance is different in lease legislation than in other kinds of legislation – notably the legislation on taxation.

Unless otherwise agreed the landlord has the full responsibility of maintaining the building, including the leased premises.

The tenant is, however, always responsible for damage caused by improper conduct on his part.

A provision commonly agreed upon, is that the tenant is to maintain the leased premises while the landlord maintains the structural components of the building.

It is also possible to assign all the responsibility of maintaining the building to the tenants. This is most commonly seen in a context where the landlord performs the actual maintenance in exchange for a refund of the costs from the tenants.

Subletting

Subletting is not permitted unless otherwise agreed upon between the parties.

A right to sublet is often necessary in connection with franchising.

When subletting the premises the tenant is continuously responsible for the contract. Subletting does not legally affect the landlord's position.

Assignment

Assignment of the tenancy implies that the existing tenant is released from the contract while a new tenant assumes all responsibilities in the contract.

The lease therefore continues unchanged apart from the change of tenant.

The tenant may assign the tenancy, unless the landlord objects to the assignment on substantial grounds, such as the proposed assignee's financial position or lack of knowledge within the relevant line of business.

The parties can agree that the tenant is not entitled to assign the tenancy. Right to assignment, however, is common in Denmark. A tenant will therefore be more likely to accept assignment under certain conditions, for example an increased security deposit or bank guarantee, as opposed to fully waiving the right to assignment.

It has almost become a market standard that a tenant is unable to assign the tenancy during any non-termination period for the tenant.

It is possible to agree on change of control clauses if the tenant is a limited liability company.

Termination

The tenant may freely terminate the lease contract.

Both parties may terminate the lease contract by giving 3 months' notice to the end of a month.

Non-termination periods may be negotiated, as well as longer periods of notice.

The landlord, however, can only terminate the tenancy agreement in case of:

- Planned own use
- Planned demolishing or substantial construction works on the building
- Other substantial grounds for termination

For a retail lease the termination furthermore has to be reasonable based on an assessment of both parties' situation. The same applies to termination based on planned own use cf. below.

These restrictions in the landlord's right to terminate the lease cannot be derogated by agreement.

Damages

Termination by the landlord gives the tenant the right to claim the following damages:

- The tenant's removal costs
- Depreciation of the machinery and equipment, installations etc. belonging to the tenant as a result of the removal
- The value after operational depreciation on the installations, improvements and other arrangements performed by the tenant at his own expense, with the consent of the landlord, and which the tenant cannot remove without significant losses, unless the tenant has undertaken to re-establish such alterations
- Operating losses during a normal moving period
- Reasonable costs incurred by the tenant for expert assistance
- Other expenses that can reasonably be ascribed to the termination of the lease

For non-retail leases the parties can agree upon any or no damages.

Damages in retail leases

In addition to the above mentioned damages, the tenant is entitled to receive compensation for customers lost as a result of the removal. (Starting point for this calculation is the tenant's annual net profits.)

The parties cannot agree upon fewer damages than listed.

Fixed-term tenancies

Fixed-term tenancies can be agreed upon. Unless otherwise agreed, these cannot be terminated during the lease term.

A fixed-term provision can be set aside by a court if the provision is not reasonably founded on the landlord's situation.

Good reasons for fixed-term tenancies could for example be:

- The landlord is planning to renovate the property.
- The landlord is planning to use the leased premises for his own use.

Re-negotiation

For non-retail tenancies, the parties can agree that the lease is to be re-negotiated every 8th year.

This is in effect a way to terminate a lease, since the re-negotiation does not have to be carried out in good faith.

Rent default

When a tenant defaults, an eviction can be carried out through the bailiff's court.

An eviction can be carried out approximately 3 months from the time of the default. This gives an investor with an attractive property a relatively low credit risk.

Vacation by tenants

There are no legal restrictions to agreements on the state of condition of the leased premises at the time of the tenant's vacation.

However, it is common in Denmark to agree upon the vacation of the premises in a newly refurbished state.

Newly refurbished state includes that:

- Everything must be in working condition,
- a complete paint job is to be carried out,
- Carpets are renewed or other appropriate treatment of the floors.

If no specific state of condition at the time of vacation has been agreed upon, the premises have to be vacated in the same state as they were received, with normal wear and tear taken into consideration.

Security for tenant obligations under a lease

Unless otherwise agreed upon, the tenant does not have to provide security.

The parties are on the other hand free to agree on any kind of security. A cash deposit, a bank guarantee or a parent company guarantee are the most common forms of security on the Danish market.

A deposit or bank guarantee is often equivalent to 3 to 12 months' rent. A parent company guarantee is often unlimited.

If the premises are constructed to suit the tenant's special needs larger guarantees are common.

Since cash deposits are not to be kept separate from the landlord's other means e.g. in escrow, the aggregate cash deposits in effect work as zero interest junior financing.

Sale of leased properties and the landlord's bankruptcy

The landlord is free to sell leased property without consulting the tenants.

Because of that the tenant's right to use the leased premises is secure and valid irrespective of a sale. The same protection is established for the tenants in case of the landlord's bankruptcy.

This also means that an investor buying a property runs the risk of being met with old claims from tenants. To mitigate this risk, careful structuring of a purchase is necessary. This includes a proper due diligence, indemnities and in some cases possibly even delayed release of part of the purchase price from escrow.

VAT

It is voluntary for the landlord to add VAT to payments under the contract. It is, however, very common for VAT to be added since it makes a landlord's expenses VAT deductible.

The Danish VAT rate is 25 %.

Drafting of lease contracts

The Danish Business Lease Act sets out several important requirements for the drafting of lease contracts.

Both the validity of a re-negotiation clause or a clause on the tenant's duty to pay for utilities etc. in addition to the rent, are for example subject to specific drafting requirements.

When drafting a lease contract it is therefore required to make oneself proficient with Danish business lease law.

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