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LEASING TO A FOREIGN ENTITY REQUIRES SPECIAL ATTENTION

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Leasing real property to a foreign entity presents a special set of concerns for landlords, and those who are leasing real property to a foreign entity should carefully evaluate these concerns – and, where appropriate, address them in the lease. This article highlights the special considerations that a landlord encounters when leasing to a foreign entity.

Leasing to a Foreign Mission

If the proposed tenant in a leasing transaction is a Foreign Mission or a foreign diplomat, special considerations are in play, and these may hinder the leasing transaction or prevent the landlord from adequately protecting its position under the lease. (A "Foreign Mission" is defined as "any mission to or agency or entity in the United States which is involved in the diplomatic, consular or other activities of, or which is substantially owned or effectively controlled by a foreign government, or an organization representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States or which engages in some aspect of the conduct of international affairs of such territory or political entity, including any real property of such a mission and including the personnel of such a mission." *See* http://bit.ly/2a KySCx.)

Department of State Approval Requirements

There are specific reporting and approval requirements that must be satisfied by any "Foreign Mission" tenant before a lease may be executed.

Pursuant to Section 4305 of the Foreign Missions Act, Foreign Missions are required to notify and obtain approval from the Department of State's Office of Foreign Missions prior to finalizing any proposed lease, acquisition or disposition of real property in the United States. Foreign Missions Act, 22 U.S.C. § 4305. (Note: An "acquisition" under the Foreign Missions Act includes any renovation, alteration, addition or change in use of an existing property. Diplomatic Note 11-189.) The notification and approval requirements often also apply to acquisitions by individual members of the Foreign Mission or to a foreign government's "miscellaneous foreign government office." Diplomatic Note 11-189. Furthermore, any residential home or apartment leased by a Foreign Mission for use by members of the mission is subject to the same notification and approval requirements. *See* Purchase or Lease of Foreign Mission Property, http://bit.ly/2asbBkL.

The burden under the Foreign Missions Act is on the Foreign Mission to seek and obtain the required approval of a proposed lease. However, a landlord may suffer negative consequences as a result of a Foreign Mission's failure to timely seek or receive this approval. To begin with, approval of the transaction may entail a substantial amount of time. Once a Foreign Mission has submitted the requisite information to the Office of Foreign Missions for approval of the transaction, the latter has 60 days to review and approve the request. Foreign Missions Act, 22 U.S.C. § 4305(a)(1)(A).

Additionally, if the Office of Foreign Missions of the Department of State does not grant approval, it may require the Foreign Mission to divest itself of, or forgo the use of, any real property determined by the Office of Foreign Missions not to have been acquired in accordance with the Foreign Missions Act. Foreign Missions Act, 22 U.S.C. § 4305(b). Furthermore, the Foreign Mission's property will not be granted the diplomatic privileges and immunities that would otherwise be available to it, including inviolability and exemption from real estate tax. Diplomatic Note 11-189. Hence, a landlord should ensure that any Foreign Mission obligated to obtain approval under the Foreign Missions Act fulfills its obligation to timely obtain such approval prior to lease execution.

Since most landlords and tenants kick off lease transactions with a letter of intent, the completion of a letter of intent is the ideal time to obtain approval from the Office of Foreign Missions. Note that the Office of Foreign Missions generally takes the position that it is approving an activity rather than a document, and it is possible for the parties to a lease to obtain the requisite approval prior to completion of documentation.

Properties that are acquired by Foreign Missions for diplomatic purposes must be used for such purposes, and they may not be used for any other purpose or leased to any party not affiliated with the Foreign Mission. Purchase or Lease of Foreign Mission Property, *available at* http://bit.ly/2asbBkL. In order to avoid an improper use, leases should restrict a Foreign Mission's use of the leased premises, and they should limit the right of the Foreign Mission to sublease the property to those uses permitted under the Act.

Foreign Sovereign Immunity

In addition to hurdles relating to lease execution, a landlord must also consider the sovereign immunity of a Foreign Mission tenant in any transaction, and should attempt to receive a waiver of this immunity. As a general matter, the doctrine of foreign sovereign immunity provides a foreign state with immunity from the jurisdiction of United States courts; however, the Foreign Sovereign Immunities Act of 1976 (the FSIA) limits this immunity to "public acts." Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. § 1602-1611). "Private acts," which include commercial activities, are not granted such immunity. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (codified as amended at 28 U.S.C. § 1602-1611). Under the FSIA, Foreign Missions, government ministries, embassies, consulates and militaries are afforded protection under the FSIA, as are entities that are owned or controlled by foreign governments. *See* A Primer on Foreign Sovereign Immunity, March 8, 2006, *available at* http://bit.ly/2avc7BW. Pursuant to Section 1610 of the FSIA, absent a waiver of immunity, judgments may not be enforced against premises leased or owned for diplomatic purposes. Andrew L. Odell, Esq., Contributing Author, Leases with Foreign Sovereigns and International Organizations, Chapter 14, *Commercial Leasing Handbook*, New York State Bar Association original publication, 2002, revised edition February 2011.

A landlord should therefore obtain an express waiver of sovereign immunity under the FSIA from any tenant that falls within the purview of foreign sovereign immunity in order to ensure that the landlord will be able to: 1) enforce the terms of the lease; and 2) prevent the tenant from withholding rent or other obligations under the lease by claiming protection under the FSIA. While "private acts" are not granted immunity, a landlord should not take the risk that the activity could constitute a "public act" and therefore be entitled to immunity. The landlord should obtain a waiver under the FSIA from the tenant in order to deflect a tenant's defense to enforcement of the lease on the basis of its sovereign immunity for public acts.

A similar concept of sovereign immunity applies to individuals, and a landlord should determine whether a person has diplomatic immunity when leasing real property to a foreign diplomat. The Geneva Convention provides that U.S. courts may not hear cases against people who have been granted diplomatic immunity, and the Vienna Convention on Diplomatic Relations protects diplomatic premises in addition to individual diplomatic officers. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The Department of State issues identification cards to foreign officials who have diplomatic immunity, and a lease cannot be enforced in the event of a default if the landlord does not receive a waiver of immunity from such individual. Sarah Louppe Petcher, Leasing with Impunity? A Landlord's Guide to Diplomatic Immunity, Feb. 4, 2013, *available at* http://bit.ly/2afvAYx. Hence, a landlord should consider its options when deciding to lease to an individual who has been granted diplomatic immunity, and appropriate waivers should be addressed in the lease.

Foreign Entities As Guarantors

In a number of lease transactions, a domestic U.S. entity will be the tenant, and its parent, a foreign entity, will act as the guarantor of the tenant's obligations. The enforceability of the guaranty against the foreign entity becomes a paramount concern. If a landlord leases space to a U.S. subsidiary of a foreign entity, and the subsidiary either: 1) does not have sufficient net worth to support the lease obligations; or 2) does not maintain financial statements separate from its parent, the foreign parent entity (the Foreign Parent) may be required to guaranty the lease. While the Foreign Parent may have sufficient assets to act as the guarantor, the landlord may encounter difficulties in enforcing or collecting any judgment against the foreign guarantor.

In order to protect itself, a landlord evaluating a lease guaranty from a Foreign Parent should give special attention to guaranty provisions relating to consent to jurisdiction, service of process, choice of law and enforcement of a U.S. judgment in the guarantor's place of formation or domicile. Sidney G. Saltz, International Guaranties, 2008, *available at* http://bit.ly/2aMZuE9. The guaranty should also do the following: 1) provide that the guarantor consents to jurisdiction in the U.S. jurisdiction (city and state) in which the leased property is located; 2) specify an agent for service of process who is located in the same state as the leased property, which agent will not or cannot revoke its appointment; and 3) clarify that the internal laws of the state (without reference to principles of conflicts of law) shall apply to the terms of the guaranty. Commercial Lease Guaranties from Foreign Entities: What You Need to Know to Safeguard Your Security, *Real Estate, Land Use & Environmental Law Blog*, July 28, 2015, *available at* http://bit.ly/2as1AtW.

The landlord's ability to enforce a judgment obtained in a U.S. court against a foreign guarantor requires the greatest level of attention while drafting and negotiating the guaranty, as it requires knowledge of the laws of the country in which the foreign guarantor is located. A foreign jurisdiction may impose requirements that affect the validity and binding nature of the guaranty. For example, some foreign states require the corporate seal of the guarantor to be affixed upon a guaranty in order to bind the guarantor. Additionally, while the principle of apparent authority (discussed in further detail herein) applies in the United States, a guarantor's foreign jurisdiction may not follow the same principles, and thus the guarantor's corporate authority to execute the guaranty, and authorization of the signatories, should be confirmed under the laws of the foreign jurisdiction.

Furthermore, a judgment obtained in the United States may not be enforceable in a foreign jurisdiction unless certain procedural requisites have been satisfied. If the judgment is not immediately enforceable, a trial may be required in the jurisdiction of the guarantor. This trial, which is likely to be time-consuming and expensive, will occur in the home court of the defendant guarantor, and all of these obstacles may be too great for the landlord to overcome. At a minimum, a guaranty should give the landlord the right to recover all fees and expenses incurred in enforcing the guaranty, including enforcement in a country other than the United States. *Id*.

As a practical matter, a landlord may prefer to address the uncertainty of enforcement of a judgment rendered in the United States in a foreign jurisdiction by requiring the guarantor to provide a legal opinion. Counsel should be able to state whether or not a judgment obtained in U.S. courts will be enforceable in the guarantor's foreign jurisdiction without a new trial. *See* Sidney G. Saltz, International Guaranties, 2008. Of course, it would be preferable if the guarantor had sufficient unencumbered assets in the United States to satisfy a judgment in the United States. Another possibility is inclusion of an international arbitration clause in the guaranty. The New York Convention, which the United States has ratified, provides that nations will enforce arbitration awards from other nations. Commercial Lease Guaranties from Foreign Entities: What You Need to Know to Safeguard Your Security, *Real Estate, Land Use & Environmental Law Blog*, July 28, 2015.

Apparent Authority

In general, apparent authority arises when a principal holds an agent out as having authority to act on the principal's behalf, and a reasonably prudent person would assume that that agent has authority to act in light of a principal's conduct. As noted above, while parties in the United States rely on the principle of apparent authority for domestic contract law, a foreign jurisdiction may not follow the same principle, and a foreign tenant could argue that a lease was not properly executed and therefore is not binding on it. Prior to entering into any lease, a landlord must be mindful of a foreign jurisdiction's requirements for authority to create a binding contract or obligation. As is so often the case, delivery of a legal opinion addressing authority, as well as enforceability, would be quite helpful.

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