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# Real Estate 2022

Denmark: Law & Practice  
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Skau Reipurth

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# DENMARK

## Law and Practice

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## 1. GENERAL

### 1.1 Main Sources of Law

As is the case with Danish law in general, Danish real estate law is based mainly on legislation rather than case law. However, case law does play an important role in the construction of the legislation and in the development of certain areas of law where legislation is absent (most notably in contract law). In the Danish construction industry, the general conditions of contract in the agreed documents AB 18, ABT 18 and ABR 18 (the AB Standards) are widely applied.

Regulation in Denmark is rather comprehensive and consists of a broad range of special statutes within areas such as the registration and protection of rights in real estate, area planning and zoning, surveying, real estate taxes, commercial and residential leases, compulsory acquisitions and compulsory sales of real property, construction, etc.

In order to be duly protected, most rights in real estate must be registered in the Danish Land Registry. The Danish Land Registry covers all of Denmark and is operated digitally. Each property has its own title register in the Danish Land Registry on which rights in the property are entered and can be identified by third parties.

### 1.2 Main Market Trends and Deals

In recent years, Denmark has seen more and more foreign investments in real estate. The transaction volume did, however, decrease slightly in 2018 and in 2019. 2020 was in Denmark, as in all markets, affected substantially by the COVID-19 pandemic, but the transaction volume was maintained at a high level from the fourth quarter of 2020 through 2021. Due to travel restrictions caused by the pandemic in 2020-21, it has been difficult for foreign investors to conduct physical inspections of potential investment opportunities in Denmark. However,

as most restrictions were lifted in late 2021, these difficulties are now limited. Many foreign investors in Denmark have established a local representation, and since Danish pensions funds still play a very active part in the market, investment activities have been maintained at a high level.

Interest rates remain very low and the Danish economy has seen many years of stable growth. In combination with a reliable and unique Danish mortgage credit system, allowing for favourable ways of financing real estate, this has ensured that the Danish real estate market has been considered a “safe haven” and an attractive market in which to invest.

### 1.3 Impact of Disruptive Technologies

Denmark is generally a highly digital country, where internet access is widespread, and where the communication with public authorities and the Danish courts is largely conducted through web-based solutions. With respect to the real estate sector, much information about Danish properties and their owners can be found online, including through web-based services provided by the Danish Land Registry, the Danish Business Authority and private online information providers. In 2009, the Danish Land Registry was converted from a paper-based system to a digital register, which has proved to be highly efficient. New technologies are used in almost all parts of the real estate sector.

Alternative payment technologies such as blockchain or the like have not yet made an impact on the Danish real estate market. However, it is expected that these technologies will, eventually, make an impact on the market. Further, use of proptech technologies with respect to real estate due diligence is expected to become more common in the future.

## 1.4 Proposals for Reform

Pursuant to a political agreement between the Danish Government and various political parties in the autumn of 2020, it is expected that new rules regarding taxation of balance-sheet property gains (“inventory tax”) will be introduced in 2023. According to the agreement, property companies with values exceeding MDKK100 (MDKK equals one million Danish Kroner) will be subject to the inventory tax. According to the agreement, domicile properties and properties used by the owner itself and/or group-related companies will not be subject to the inventory tax scheme.

As the political agreement is backed by a majority in the Danish Parliament, it is expected that the property company with a balance sheet exceeding MDKK100 will be subject to taxation of balance-sheet property gains. The political agreement has not yet been followed up by a legislative proposal, which means that many questions regarding the consequences are left unanswered. The Danish Government does not intend to present a legislative proposal until later in 2022, which creates some uncertainty for the investors. See also **2.11 Legal Restrictions on Foreign Investors**.

## 2. SALE AND PURCHASE

### 2.1 Categories of Property Rights

The main categories of property rights that can be acquired are legal ownership (title), easements/right of use, mortgages, encumbrances, liens and restrictive covenants.

The most commonly acquired property right is legal ownership (title) to the property, including both land and buildings (if any) as well as any installation placed on the property, such as wind turbines and radio towers (in addition to installations in the buildings). It is not possible to

acquire either the buildings or the land individually if land and buildings are owned by one party. However, it is possible to acquire such individual rights if from the outset the buildings and land are owned by separate parties.

Other notable property rights are easements and rights of use, which include specific limited third-party rights to land or buildings on the property, eg, lease agreements, right of way and restrictive rights limiting the property-owners’ use of the land for specified purposes.

### 2.2 Laws Applicable to Transfer of Title

In general, a sale and purchase agreement regarding Danish properties is subject to a large degree of freedom of contract whereby the parties are entitled to prepare the agreements to cater for specific transactions. Transfer of title is, first and foremost, governed by the Danish Land Registration Act (in Danish: *Tinglysningsloven*) as this act sets out the regulation regarding title registration (perfection) and other issues related to ownership of real property, including mortgages and third-party rights.

Real estate registered for agricultural activities is also governed by the Danish Agricultural Act (in Danish: *Landbrugsloven*) which sets out specific requirements with respect to transfer of title to farms and land plots in land zones.

### 2.3 Effecting Lawful and Proper Transfer of Title

In order to register a title transfer (perfection) with the Danish Court of Registration (in Danish: *Tinglysningsretten*) the parties must file a digital deed of conveyance in the Danish Court of Registrations’ IT system. The deed of conveyance is then signed by all parties by way of an electronic signature or – with respect to non-Danish citizens–by a way of a registration power of attorney (POA) issued to, for example, a Danish lawyer or real estate agent.

As set out above, the title-transfer registration with the Danish Court of Registration is only a perfection requirement – not a contractual validity requirement – and acts mainly as a way of protection against third-party rights. Further, in order to register mortgages and pledges on real estate, the mortgagor must be registered as the title-holder in order to file for registration of the mortgage on the real estate in question.

In general, COVID-19 has not resulted in new processes or procedures for the documentation or completion of real estate transactions in Denmark as these procedures are mainly completed digitally and, thus, Danish governmental office functionality with respect to transfer of title was not significantly affected by lockdowns. However, during the lockdown many transactions were completed through digital closing meetings.

## **2.4 Real Estate Due Diligence**

Buyers of commercial real estate usually carry out a legal as well as a financial, tax, technical and environmental due diligence review before acquiring real estate in Denmark.

It is customary in most transactions of a material size that the parties enter into a non-binding term sheet in order to outline the parties' commercial understanding and to determine the timeframe available for the buyer's due diligence review and the scope of such due diligence investigations.

The scope of the legal due diligence depends on whether the transfer is executed by way of a share deal or an asset deal. Asset deals include review of registered property rights (eg, title, easements, mortgages), planning restrictions, leaseholds, and tax/VAT issues, as well as building permits and construction agreements and guarantees covering the property.

Share deals include the above areas, in addition to (among other things) specific company-law

issues, financing agreements, employee rights, legal disputes and public issues.

For the purpose of the legal due diligence investigations, the seller would collect and establish a virtual data room containing all relevant documents for the buyer's review, which is followed by one or multiple Q&A requests/sessions with the seller and other advisers.

In general, under Danish contract-law principles a seller has a duty to disclose material information and documents to the buyer (duty of loyal disclosure) unless such information is already available to the buyer.

The COVID-19 pandemic has not resulted in material changes to normal due diligence processes. However, in some cases, physical investigations have been replaced by virtual site reviews, which is mainly relevant with respect to the non-legal due diligence.

## **2.5 Typical Representations and Warranties**

Typical representations and warranties in real estate transactions include property-specific representations and warranties such as:

- right to title;
- scope of existing encumbrances;
- unregistered third-party rights and leaseholds;
- compliance with public regulation (eg, fire regulation and public permits);
- hidden defects and environmental matters (qualified by seller's knowledge);
- tax/VAT payments; and
- disputes affecting the property.

In respect of share deals, the above-mentioned representations and warranties are supplemented by corporate matters, eg, third-party rights with respect to shares and warrants, employee matters, financing and accounting matters

as well as more elaborate warranty protection against tax risks.

The COVID-19 pandemic has not resulted in use of specific representations and warranties.

## 2.6 Important Areas of Law for Investors

The most important areas of law for an investor to consider when purchasing real estate in Denmark are the laws on securing ownership and taxation, as Danish real estate is generally subject to a high degree of tax regulation, as well as Danish lease law, which – in most cases – is regarded as tenant-friendly (especially with respect to residential leases) compared with foreign regulation.

Further, it is relevant to consider planning regulations, including local plans, and environmental laws with respect to development projects, as these areas are also highly regulated under Danish law.

The buyer's remedies against the sellers' misrepresentations and breach of warranties are customarily agreed to be limited to financial compensation only. The financial compensation is often limited by certain thresholds, de minimis clauses and the aggregate liability caps limited to a percentage of the purchase price of the property, unless such losses are caused by breach of fundamental warranties, such as tax and title to the property, which are not subject to such limitations.

The customary securities for seller's misrepresentations and breach of warranties are parent company guarantees as well as escrow arrangements and bank guarantees. Further, there is an increased use of W&I insurances with respect to real estate transactions exceeding MDKK100 covering the losses, if any, suffered by breach of seller's warranties/misrepresentations.

## 2.7 Soil Pollution or Environmental Contamination

As a main rule, a buyer of a real estate asset, such as land or buildings, is not responsible for soil pollution or environmental contamination of the property, unless that contamination was caused by the buyer itself.

According to Danish legal principles with respect to contamination (a principle known as “the polluter pays”), owners are not liable for soil contamination caused by previous owners of the property. Contamination could, however, lead to restrictions on the use of the property, going forward, and obligations with respect to, eg, construction works and removal of contaminated soil from the property.

## 2.8 Permitted Uses of Real Estate under Zoning or Planning Law

The permitted uses of a parcel of real estate under Danish planning laws are set out in publicly available local plans and municipality plans covering basic limitations, including minimum size of land plots, plot/building ratio, specific usage (commercial/residential areas) and so forth.

Certain local areas are also subject to future local plans to be prepared by the relevant municipality in connection with undeveloped areas being developed. Already-permitted uses of a parcel of real estate are not affected by a new local plan.

It is possible to enter into specific development agreements with public authorities; however, these agreements are subject to political adoption by local authorities, as well as public-hearing requirements which cannot be deviated from by agreement. However, once such a local plan has been approved by all parties, the above-mentioned uncertainty is limited.

## 2.9 Condemnation, Expropriation or Compulsory Purchase

Condemnation, expropriation and compulsory purchase of land are possible, but subject to specific rules and procedures set out in the Danish Constitution and the Expropriation Process Act. According to these rules, the Danish State can acquire land by way of compulsory purchase if it is necessary and in the common interest of the general public, pursuant to law, and provided that the owner of the land in question receives full financial compensation.

A compulsory purchase or expropriation must have a legal basis in an act passed by the Danish Parliament. That legal basis is provided in the Zoning Act, according to which the municipalities have a right to pass local plans providing grounds for expropriations.

## 2.10 Taxes Applicable to a Transaction

Transfer of title as well as registration of mortgages over real estate must be registered with the Danish Land Registration Court.

A fixed fee of DKK1,730 (approximately EUR220) and a variable fee equivalent to 1.45% (with respect to mortgages) and a fixed fee of DKK1,750 and a variable fee of 0.6% (with respect to title) of the amount secured by the mortgage/purchase price of the property is payable in connection with the registration. There is no upper limit on the variable fee; however, the official property valuation applies for commercial properties if the purchase price is agreed at a lower level.

The value of mortgages that have already been registered on the real estate in question may, under certain circumstances, be set off against new mortgages to be registered on the real estate in connection with refinancing arrangements.

Further, easements and rights of use as well as restrictive rights and covenants are subject to a fixed fee of DKK1,730.

If real estate is transferred by way of a share deal, no registration fees apply, which include mergers and demergers and similar corporate restructurings.

## 2.11 Legal Restrictions on Foreign Investors

Foreign investors acquiring real estate in Denmark must comply with the Danish Act on Acquisition of Real Property, which means that persons who are not residents of Denmark and who have not previously been permanently established in Denmark for a period of a minimum of five years must obtain permission from the Danish Ministry of Justice in order to acquire real estate situated in Denmark.

This also applies to non-Danish legal entities. However, EU citizens as well as legal entities established in EU member states or countries that have acceded to the Agreement on the European Economic Area (eg, Iceland, Norway and Liechtenstein) can under certain circumstances acquire real estate (except for vacation homes) without permission from the Danish Ministry of Justice. Due to the aforementioned restrictions, it is customary for non-Danish real estate investors to establish a Danish legal entity special-purpose vehicle (SPV) to acquire and hold real property, which requires no permission even though the Danish legal entity has been established for the sole purpose of acquiring one or more Danish real properties.

On 1 July 2021, the “Investment Screening Act”, a new Danish Act on screening of certain foreign direct investments, came into force. According to the Act, investments made by foreign investors could be subject to prior authorisation from the Danish Business Authority as well as sub-



ject to a five-year investigation period following an investment. Under the Act, the scope of an application is subject to a threshold of MDKK75. However, certain particularly sensitive sectors are subject to compulsory application for authorisation if a foreign investor acquires at least 10% of the shares in a Danish entity. This includes critical technologies and infrastructure, which could include major real estate assets. The scope of such critical entities remains to be further specified by Danish legislators.

## 3. REAL ESTATE FINANCE

### 3.1 Financing Acquisitions of Commercial Real Estate

In general, acquisitions of commercial real estate in Denmark are financed by way of a combination of cash and debt, and to a high degree by way of Danish real credit mortgages backed by Danish covered bonds. The financing options do not – as a rule – differ with respect to larger real estate portfolios.

Real credit mortgage loans are generally considered attractive, because of their low interest rate, long tenor and light covenants. Commercial properties can be financed by real credit mortgage loans by between 60–80% of the value of the real estate (depending on the actual use of the property). The remaining 20–40% can be financed either by cash or by bank loans.

Commercial real estate can, of course, also be financed by 100% private debt or cash.

Real credit mortgage loans can be issued within different types of credit facilities including fixed-rate loans, adjustable/floating-rate loans or a combination of these loans. Further, real credit mortgage loans can be subject to specific grace periods, paying interest only.

### 3.2 Typical Security Created by Commercial Investors

Typical security interests created over commercial real estate loans are real credit mortgages deeds as well as owners' mortgages, which are registered on the property and pledged to the relevant lenders as security for the loans.

Further, typical security interests include share pledges over borrowers' shares, pledges of lease rights/lease payments, transfer of lease guarantees and transfer of insurance rights with respect to property insurance claims as well as other real estate relevant receivables.

### 3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no specific restrictions with respect to granting security over real estate to foreign lenders under a loan agreement; however, interest payments to foreign lenders may be subject to withholding taxes and reclaiming procedures can affect the Danish-located borrower entity to some degree.

### 3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

See **2.10 Taxes Applicable to a Transaction** with respect to registration fees in respect to granting (perfecting) security over real estate such as mortgages.

With respect to enforcement of security over real estate, this enforcement is executed by way of a forced sale of the property by public foreclosure auction, which is subject to certain fees to the Danish courts. A lender enforcing security over real estate by way of a forced sale must pay a fixed fee of DKK800, as well as a variable fee of 0.5% of the property value, when requesting a foreclosure auction of that real estate.

### **3.5 Legal Requirements before an Entity Can Give Valid Security**

A Danish public or private limited company must not provide security or give guarantees in connection with the acquisition of shares in itself or in its direct or indirect parent company to the extent that its parent company is incorporated under the laws of the EU/EEA. Further, security or loan commitment may only be facilitated to the extent that it is in the interest of the company (the corporate benefit doctrine).

Thus, when purchasing a property company by way of a share deal, the target company may not provide security to the lender if this implies a direct or indirect security or financial assistance for the financing of the purchase of the company's own shares.

### **3.6 Formalities when a Borrower Is in Default**

As a general rule, a lender will be able to enforce a loan in default by way of issuing a notice to the enforcement court prior to initiating a forced sale of the property, see **3.4 Taxes or Fees Relating to the Granting and Enforcement of Security**.

If the lender does not pay the outstanding debt to the borrower within certain time limits, the borrower can enforce the relevant security by way of a forced sale or take over the pledged asset at a fair value, depending on the agreed terms in the loan or security agreement and subject to mortgage lenders priority order and similar inter-creditor issues.

No specific restrictions on lender's ability to foreclose or realise on collateral in real estate have been implemented in response to the COVID-19 pandemic.

### **3.7 Subordinating Existing Debt to Newly Created Debt**

It is possible to subordinate existing secured debt to newly created debt by way of agreement between creditors. This can also be effectuated when issuing additional mortgages on a property.

Further, in large-scale real estate finance transactions it is customary to regulate such subordination agreements in specific subordination agreements between two or multiple lenders in inter-creditor agreements.

### **3.8 Lenders' Liability under Environmental Laws**

As set out in **2.7 Soil Pollution or Environmental Contamination**, the principle known as "the polluter pays" applies both to owners of real estate and lenders holding or enforcing security over real estate, and thus lenders cannot be liable under environmental laws in the case of pollution caused by former owners of the property in question.

### **3.9 Effects of a Borrower Becoming Insolvent**

Security interests created by a borrower which becomes insolvent – as well as payments from the borrower to a lender – may be declared void in the case of the borrower's bankruptcy if that security has not been followed by payment of funds or if payments to the lender have been made at a point in time where the borrower's financial situation has declined dramatically. Such security interests or payments are subject to hardening periods of between three and 24 months.

### **3.10 Consequences of LIBOR Index Expiry**

Due to the expiry of the London Inter-bank Offered Rate (LIBOR) index, real estate loan agreements are now based on other reference

rates, such as the Copenhagen Inter-Bank Offered Rate (CIBOR). With existing loan agreements referring to the LIBOR, it is, however, customary that such loan agreements stipulate alternative references due to market disruption events, eg, if the LIBOR cannot be determined.

## 4. PLANNING AND ZONING

### 4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

The strategic planning and zoning system is regulated by the Danish Planning Act (in Danish: *Planloven*). Pursuant to the Danish Planning Act, the planning and zoning of land are regulated at four administrative levels, in which regulation laid out at a higher level must be complied with. The administrative levels are (starting with the highest level):

- national planning;
- regional development planning;
- municipality planning; and
- local planning.

### 4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

Through local planning, the municipalities regulate the use and the development of a limited part of the municipality, for example certain areas of the municipality or a single plot. In general, the provisions of local plans are quite detailed and will regulate the lawful use, size, design, preservation of current buildings, outdoor areas, structures, roads and access ways, etc, which restrictions are binding, not only on landowners, but also on tenants, infrastructure-owners and other parties who use the properties.

When the construction of new buildings or when the extensive refurbishment of existing buildings is contemplated, a building permit from the municipality must be applied for and obtained. If the extensive refurbishment or building are completed without or in non-compliance with a building permit, the municipality may ultimately order the building to be changed or demolished at the cost of the developer.

The planning system is decentralised as each municipality is responsible for the detailed local planning and the development of a part of the municipality.

### 4.3 Regulatory Authorities

The municipality is responsible for the compliance of regional regulation when preparing municipal plans and more specific local plans. A local plan will cover a small area of a municipality and will regulate the use of individual parcels of real estate. Building permits, which are also issued by the municipalities, must, inter alia, comply with applicable local plans.

Local planning must comply with the hierarchy of the planning system as set forth in the Planning Act, see **4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning**. The Danish Act on Construction regulates the legislation regarding the provisions of building permits and the technical requirements to which new buildings must adhere.

### 4.4 Obtaining Entitlements to Develop a New Project

Before commencing construction work, the developer must apply for a building permit from the municipality. The application must include descriptions and calculations of planned construction work, including static documentation (in Danish: *Byggeandragende*). The municipality hereby ensures that the new project complies with relevant rules and building regulations. The

construction work can be commenced when the building permit is obtained; however, the developer is still responsible for ensuring that all relevant regulations regarding restrictions on construction are complied with and that all necessary permissions are obtained.

If the local plan does not regulate the use and the development of a major new project, a new local plan must be prepared. Before adopting a local plan, the municipality will consult any third parties affected by the new project, giving them the opportunity to comment or object to the approval of the local plan/the project. Prior to decisions that may significantly affect the environment, an environmental assessment will be carried out, and a significant part of the process is a public consultation before the final decision is made.

#### **4.5 Right of Appeal against an Authority's Decision**

Decisions by the municipality regarding local plans, building permits, decisions on exemptions from local planning or new local plans can be appealed to a complaints board. Decisions by the complaints' boards can be tried in court at the request of any affected party.

#### **4.6 Agreements with Local or Governmental Authorities**

If the building permit and all relevant permissions and exemptions are obtained, it is not necessary (or possible) to enter into an agreement with the Danish municipality, as a development project must follow normal procedures by applying for a building permit. However, the municipalities are generally in favour of working closely together with developers that may bring activities to their municipality.

Local plans may impose that the developer has a duty to connect to the public sewer or district

heating and a connection fee shall be paid by the developer.

#### **4.7 Enforcement of Restrictions on Development and Designated Use**

Supervision of buildings is carried out by the municipality governing the local area in question. If a municipality becomes aware that a building does not comply with the planning and zoning regulation or the issued building permit, the municipality can enforce the rules by issuing a prohibition notice. If the developer does not comply with the prohibition notice, the municipality can order the building to be changed or demolished, at the cost of the developer, and/or issue fines.

## **5. INVESTMENT VEHICLES**

### **5.1 Types of Entities Available to Investors to Hold Real Estate Assets**

The most common legal entities used by investors when purchasing real estate assets are public or private limited liability companies, limited partnerships or limited liability partnership companies.

### **5.2 Main Features of the Constitution of Each Type of Entity**

The main feature of the above-mentioned types of legal entities are the following.

#### **Public/Private Limited Liability Companies**

The main features of these limited liability companies are that shareholders' liability is limited to the share capital injected into the company, that the company can be established by a single shareholder controlling the entity, and that the minimum cash or asset contribution to the company is DKK40,000 with respect to private limited liability companies and DKK400,000 with respect to public limited liability companies. Lim-

ited liability companies are subject to the Danish Companies Act.

### Limited Liability Partnership Companies

The main features of this type of legal entity is that it is subject to the same regulation as private limited liability companies, with limited partners acting as shareholders, but also being tax-transparent, which is why LLPs are typically used in situations where the limited partners may benefit from making use of the right to deduct and depreciate directly in personal income but at the same time be subject to limited liability. Limited liability partnerships are subject to the Danish Companies Act.

### Limited Partnerships

Limited partnerships incorporate the same tax transparency as LLPs, as well as limited liability to a high degree, but a minimum of one general partner carries personal and unlimited liability for the company's liabilities. The general partner can, however, be a private limited liability company. Limited partnerships are not subject to the Danish Companies Act.

### 5.3 Minimum Capital Requirement

As set out in **5.2 Main Features of the Constitution of Each Type of Entity**, the minimum cash or asset contribution to the limited liability companies is DKK40,000 for private limited liability companies and DKK400,000 for public limited liability companies. As limited liability partnership companies must be incorporated as public limited liability companies, the minimum cash requirement is also DKK400,000.

A limited partnership is not subject to statutory minimum capital requirements, but if the general partner is incorporated as a public or private limited liability company, the above requirements apply.

### 5.4 Applicable Governance Requirements

Only limited liability companies and limited liability partnership companies are subject to specific governance requirements under the Danish Companies Act. Public limited liability companies are required to establish a two-tier management board consisting of either a board of directors and an executive management board or a supervisory board and an executive management board.

A private limited liability company may choose a one-tier management structure consisting of one executive manager, which is why this legal entity is broadly used by foreign entities setting up companies in Denmark, due to light management requirements.

In all the aforementioned companies, the general meeting of shareholders elects the executive boards, and thus has rights to appoint the day-to-day management of the company, as well as to replace those members at any time, and the general meeting of shareholders can pass any decision at the ordinary or extraordinary general meeting.

### 5.5 Annual Entity Maintenance and Accounting Compliance

The annual maintenance and basic accounting costs with respect to the aforementioned legal entities amount to approximately DKK15,000 (provided that the company's business activities are fairly simple).

## 6. COMMERCIAL LEASES

### 6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

In general, Danish law provides a great deal of freedom of contracts with respect to the usage

of properties; however, a number of restrictions apply to residential leases. Thus, two or more parties may, as a general rule, enter into an agreement regarding the use of real estate which imposes rights and obligations upon the parties. Danish law distinguishes between limited rights (eg, a right of passage) and general rights of use. A general right of use could be set out in a lease agreement or in a leasehold.

## 6.2 Types of Commercial Leases

The Danish legal framework does not differentiate between different types of commercial leases, as commercial leases are characterised by a high degree of freedom of contract. However, the legal framework differentiates between the leasing of buildings, which are governed by the Danish Commercial Lease Act (in Danish: *Erhvervslejeloven*) and the leasing of land, such as parking spaces or undeveloped land, pursuant to which the Danish Commercial Lease Act does not apply.

## 6.3 Regulation of Rents or Lease Terms

Due to the high degree of freedom of contract in terms of the leasing of commercial real estate, the landlord and the tenant are free to agree the terms of a business lease, but subject to some mandatory restrictions in favour of the tenant set out in the Danish Commercial Lease Act. These provisions include formality requirements for agreements on service charges, limitations on fixed-term leases and the landlord's right to terminate.

In contrast, residential tenants in Denmark enjoy a high degree of legal protection which cannot be mitigated or deviated from by way of agreement.

Nevertheless, as a general rule, non-payment of rent can lead to termination of the lease agreement.

In the wake of the COVID-19 pandemic, the governmental authorities have enacted Corona Aid packages providing compensation to companies which have been forced to close due to the coronavirus pandemic. The governmental authorities did not enact any legislation that affected lease terms materially, but the governmental authorities urged the parties to find a common understanding regarding rent relief or late-payment plans.

Thus, the COVID-19 pandemic has not caused any major evictions due to non-payment of rents, however an increased number of empty commercial leaseholds caused by the pandemic made an impact on the general market situation in major cities in Denmark.

## 6.4 Typical Terms of a Lease

In general, commercial leases are entered into for an unlimited period and must be terminated by one of the parties. It is common that a commercial lease has a minimum term during which the lease is non-terminable, and the agreed period is usually twice as long for the landlord.

If the parties wish to agree on a fixed-term lease agreement, the time limitation must be based on the landlord's situation. If not, the fixed term may prove to be invalid.

Pursuant to the Danish Commercial Lease Act, the landlord is responsible for the internal and external maintenance and repair. However, as the parties are free to agree otherwise, it is often agreed that the landlord is responsible for the external maintenance and the tenant is responsible for the internal maintenance of the property. The terms in the lease agreement are often quite detailed and will regulate the division, extent and definition of maintenance obligations.

Unless agreed otherwise by the parties, the rent must be paid monthly in advance. This is most commonly agreed.

As a result of the coronavirus pandemic, there is now a tendency to specify the tenant's payment obligation despite any governmental restrictions imposed on the relevant business operations.

## 6.5 Rent Variation

Unless agreed otherwise, the landlord or the tenant are entitled to request that the rent be adjusted to the market rent (in Danish: *Markedsleje*). The rent must differ significantly from the market rent (present case law sets forth that a significant discrepancy corresponds to 10% to 15%), and the rent can at the earliest be adjusted four years after the commencement of the lease agreement.

## 6.6 Determination of New Rent

Determination and changes to the rent level according to commercial leases are subject to a high degree of freedom of contract, and the parties are free to agree on any change or increase in the rent. If the landlord and the tenant disagree on the determination of the market rent, see **6.5 Rent Variation**, this must be decided by the Danish courts. The party demanding the change in the rent must carry the burden of proof.

## 6.7 Payment of VAT

The landlord is free to decide whether VAT is payable on the rent. If the landlord has registered the property for VAT, the tenant must pay VAT of 25% in addition to the rent.

## 6.8 Costs Payable by a Tenant at the Start of a Lease

It is commonly agreed that the tenant shall pay a cash deposit equivalent to three- or six-months' rent (sometimes longer in the case of lease agreements with material non-termination periods). The deposit serves as security for the

tenant's compliance with the lease agreement and as security for the tenant's obligations in connection with vacation and other obligations under the lease agreement. The tenant must pay fees to its own advisers and a registration fee if the lease agreement is to be registered on the property.

## 6.9 Payment of Maintenance and Repair

The parties are free to agree on who has the responsibility to pay for maintenance and repair; however, it is most often agreed that the tenant shall pay its proportionate share of the landlord's expenses. The expenses are paid in addition to the rent and often include maintenance and repair of common areas, common utility costs, shared insurance premiums and so on.

## 6.10 Payment of Utilities and Telecommunications

It is commonly agreed that the tenant pays the cost of telecommunication directly to the supplier. However, it is possible to agree that the cost is paid by the tenant in addition to the rent, which is commonly agreed with respect to other utility costs.

## 6.11 Insurance Issues

The landlord takes out and pays for the insurance premium; however, it is commonly agreed that the tenant pays its share of the landlord's expenses in addition to the rent. The insurance often includes contents insurance, building and fire insurance with coverage of water damage, fire, storm, electrical defaults, sanitary items and glass.

As mentioned in **6.3 Regulation of Rents or Lease Terms**, the Corona Aid packages have to some extent provided tenants as well as landlords compensation if their business is forced to close down due to the COVID-19 pandemic. The Compensation Aid packages included, among other things, compensation for fixed expenses

such as rent and loss of revenue which has diluted the use of business interruption insurance. However, business interruption insurance is not commonly used in this situation in Denmark.

### **6.12 Restrictions on the Use of Real Estate**

The lease agreement will often describe the scope of the leased premises. Furthermore, it is possible to include a “user clause” regulating and specifying the use of the premises. The regulation is often defined in accordance with the use planned by the tenant.

Although the parties are free to agree on the terms of use, the tenant is generally obliged to treat the leased premises with due care and is liable for ensuring that the use of the leased premises does not violate any governmental regulation. The tenant often assumes the risk of any statutory requirements in respect of the tenant’s use of the leased premises. The landlord will be entitled to terminate for breach in the case of negligence.

### **6.13 Tenant’s Ability to Alter and Improve Real Estate**

If the municipality imposes an order to legalise the leased premises, the tenant has the right to comply with and fulfil the order.

Except for the above order, the tenant is generally not entitled to make alterations to the leased premises without the landlord’s prior consent. However, the parties may agree otherwise in the lease agreement. Upon termination of the lease agreement, the tenant must, often at its own expense, re-establish any alterations to the leased premises in accordance with the state of the premises at commencement. Improvements of the premises paid for by a tenant are often not included when assessing the market rent.

### **6.14 Specific Regulations**

The Danish Business Lease Act (in Danish: *Erhvervslejeloven*) governs most business leases regarding buildings. As an important exception, ground leases without buildings fall outside its scope. Landlords and tenants are, in most instances, free to agree on the terms and conditions in respect of a business lease and, accordingly, the parties are entitled to amend and modify rights and obligations imposed on the parties originating from the Danish Business Lease Act, eg, the size of the rent and other payments, maintenance obligations, etc. However, there are certain mandatory provisions protecting business tenants which cannot be deviated from by way of agreement (see **6.19 Right to Terminate a Lease**).

Residential leases are governed by the Danish Lease Act, together with the Danish Housing Regulation Act for certain leaseholds. In contrast to the high degree of freedom of contract governing the leasing of commercial real estate, residential tenants in Denmark enjoy a high degree of legal protection rights which cannot be mitigated or deviated from by way of agreement, eg, formality requirements, rent fixation, rent adjustment, maintenance, refurbishment and termination.

### **6.15 Effect of the Tenant’s Insolvency**

When a tenant is declared insolvent, the estate must decide whether to continue or discontinue the lease. If the estate decides to continue the lease, the estate is liable under the agreement and must comply with the terms set out in the lease. However, the estate is entitled to terminate the lease at any time, giving one month’s notice. If the estate decides not to enter into the lease agreement, the landlord has the right to terminate the lease, regardless of the limitations in the landlord’s right to terminate the agreement.



## 6.16 Forms of Security to Protect against a Failure of the Tenant to Meet Its Obligations

It is commonly agreed that the tenant shall pay a cash deposit (see **6.8 Costs Payable by a Tenant at the Start of a Lease**) or shall deliver a bank guarantee. However, the parties are free to agree otherwise, eg, that the parent company as a guarantor should assume primary liability and guarantee the performance of all the tenant's obligations arising from the lease agreement (parent-company guarantee).

## 6.17 Right to Occupy after Termination or Expiry of a Lease

Upon termination of the lease, the tenant must vacate the leased premises, and the landlord has the responsibility to assure that the tenant does not continue to occupy the leased premises. The landlord must give a written notice to the tenant specifying the deadline for vacating the leased premises. If the tenant continues to occupy the premises, the landlord must seek a court order permitting the recovery of possession of the premises (in Danish: *Udkørende fogedforretning*). This procedure can be lengthy.

If the landlord does not request the tenant to vacate the premises, after he or she learns of the tenant's continued occupation, the lease will continue.

## 6.18 Right to Assign a Leasehold Interest

Unless agreed otherwise, the Danish Commercial Lease Act sets forth that the tenant is entitled to assign the lease agreement, with the landlord's consent. However, the landlord can only reject an assignment if there are substantial grounds for doing so. In practice, it is difficult for a landlord to reject a proposed assignment and, as a result, restrictions on the tenant's ability to assign is often agreed.

Sub-letting is permitted only if the right to sub-let is expressly granted in the lease.

## 6.19 Right to Terminate a Lease

As previously mentioned, the Danish Business Lease Act contains certain mandatory provisions protecting business tenants, and the landlord's right to terminate the lease is limited to certain specified reasons therein. Any such valid reasons are few and cannot be expanded by way of agreement. Valid reasons for termination include (among other things) the landlord's own use of the buildings and demolishing or substantial construction works on the buildings. The landlord is also entitled to terminate the lease if the tenant has breached the agreement, eg, by default in payment, neglect, illegal use of the lease, etc.

The tenant is entitled to terminate the lease with the agreed notice (if the lease is not subject to an agreed non-terminability period or a fixed term).

## 6.20 Registration Requirements

The Danish legal framework provides no formality requirements for agreements on commercial lease, nor is a lease required to comply with any execution formalities.

However, it is advisable that a tenant registers an extract of the lease in the Land Register (in Danish: *Tingbogen*), if the agreed rights of the tenant exceed the rights under the Commercial Lease Act. If not registered in the Land Register, any such rights will not enjoy any statutory protection and may not be asserted against any future owner of the real estate or third parties. The rights of a tenant under the Commercial Lease Act are protected against third parties without being registered in the Land Registry.

## 6.21 Forced Eviction

If duly terminated or expired, the landlord is entitled to forward a notification to the tenant regarding the termination/expiry, and the tenant

is obliged to vacate the premises immediately. If the tenant does not vacate the property, the landlord must initiate enforcement proceedings to procure the vacation of the property.

### **6.22 Termination by a Third Party**

Generally, third parties are not entitled to terminate a lease. However, if the general public interest (in Danish: *Almenvellet*) requires it, private property, including real estate, may be subject to expropriation by the Danish State, and a lease agreement can in connection with an expropriation case be subject to termination. The tenant of the expropriated property must be compensated for losses suffered because of the expropriation.

## **7. CONSTRUCTION**

### **7.1 Common Structures Used to Price Construction Projects**

The most common structure used to price a construction project is a fixed price agreed upon by the employer and the contractor. Usually, the employer sets out requirements for the construction project in a call for tenders. Then, based on the call for tenders, the contractor prepares a bid. It is common that an agreed fixed price is subject to an indexed adjustment.

### **7.2 Assigning Responsibility for the Design and Construction of a Project**

For an employer, there are three common methods for assigning responsibility for the design and construction of a project. However, in respect of all three methods, it is not unusual to allocate some of the design responsibility to the contractor.

#### **Individual Trade Contracts**

With individual trade contracts (in Danish: *Fagentreprise*), the employer (usually assisted by consultants) is responsible not only for the design, but also for obtaining building permits,

managing the construction process, co-ordination of the works, etc. This form of contract can be advantageous for the experienced employer with a broad understanding of the various parts of a construction process because it ensures that the employer has maximum influence throughout the contract.

#### **Main Contract**

With a main contract (in Danish: *Hovedentreprise*), the employer is responsible for the design process. The main contractor manages the construction process, including any subcontractors, the time schedule, etc.

#### **Turnkey Contract**

With a turnkey contract (in Danish: *Totalentreprise*), in broad terms, the basic principle is that the contractor must provide the work ready for use at a fixed price and by a fixed date. In contrast to the main contractor, the turnkey contractor is given full responsibility to design, plan and build based on the employer's requirements.

### **7.3 Management of Construction Risk**

Different devices are used to manage construction risk on a project.

In accordance with the freedom-of-contract principle, the parties are generally free to agree upon indemnification clauses, warranty clauses, liability clauses, etc, as they see fit, ie, they can exclude or limit liability if they so choose. However, liability caused by wilful misconduct cannot be excluded or limited, and a court or an arbitration tribunal may set aside an agreed exclusion or limitation of liability due to gross negligence.

### **7.4 Management of Schedule-Related Risk**

Most construction contracts in Denmark contain provisions on delay-liquidated damages. The general conditions of contract applied widely in the Danish construction industry (AB 18, ABT 18

and ABR 18) (the “AB Standards”) state that no additional claims arising out of the delay can be made in excess of any agreed liquidated damages. If liquidated damages have not been agreed upon, damages will be calculated in accordance with general principles of tort.

The courts and arbitration tribunals in Denmark generally uphold provisions on liquidated damages, provided that the employer has notified the contractor of the delay (within a reasonable time after the employer became aware of it) and that liquidated damages are claimed from a specific point in time as a result thereof. Under some circumstances, stricter conditions for claiming liquidated damages apply.

## **7.5 Additional Forms of Security to Guarantee a Contractor’s Performance**

It is common for employers to seek forms of security to guarantee a contractor’s performance on a project. At the same time, it is not uncommon for a contractor to demand that the employer provide security for the fulfilment of his or her payment obligations to the contractor.

The AB Standards state that security must be provided “in the form of an adequate guarantee from a bank or a savings bank, an insurance guarantee or other adequate types of security.” However, public sectors and social housing organisations are exempt.

## **7.6 Liens or Encumbrances in the Event of Non-payment**

If the employer defaults on his or her payment obligation, contractors/designers are not given any preferential position to lien or otherwise encumber the property. However, the AB Standards state the right for a contractor to stop performing work following a written notice of three to five working days if the employer fails to pay amounts due. In addition, the contractor may

stop work immediately upon the employer’s bankruptcy.

The right of the contractor to stop performing work is, however, associated with several practical challenges, including a significant position risk. For example, if an employer claims that the contractor has incurred delay-liquidated damages, the employer may choose to withhold payment for work performed for this reason. If the contractor maintains the position that no delay-liquidated damages are owed, he or she can stop carrying out the work, but this is not without risk. If a court or arbitration tribunal finds that the claim for delay-liquidated damages was legitimate, and that the contractor’s stop of the work was not, the contractor will be liable towards the employer.

## **7.7 Requirements before Use or Inhabitation**

In most cases, the law imposes a requirement for obtaining an occupation permit before a project can be used for its intended purpose. The permit is granted by the municipality. Only if a construction project can be carried out without a building permit or application is an occupation permit unnecessary. Those constructions include small projects like car sheds, greenhouses or terraces.

Thus, for all practical (commercial) purposes, an occupation permit will always be needed.

# **8. TAX**

## **8.1 VAT**

In general, no VAT is levied on transactions involving sale and purchase of real estate. However, VAT is applicable in the case of transfer of new buildings (with or without land) and certain land plots on which construction can be made. The rules apply to companies and individuals carrying on business activities. The Danish VAT

is 25%. Under certain circumstances, a commercial buyer can recover the VAT.

## 8.2 Mitigation of Tax Liability

Profits obtained from the sale of real estate are subject to taxation (capital gains taxation). If the seller is a corporate entity, the applicable tax rate is 22%. In order to be duly protected against third-party rights, the transfer of title must be registered with the Danish Land Registry entailing a fee equivalent to (i) a fixed fee of DKK1,750 with the addition of (ii) an amount equivalent to 0.6% of the purchase price or the public assessment value, should the latter be the higher. On the contrary, a transfer of shares (thus, an indirect transfer of real estate) by a corporate entity generally does not trigger capital gains taxations and no registration fees are payable to the Danish Land Registry. It is market practice that the deferred tax liabilities are subject to commercial negotiations in the case that a transaction is completed through a share transfer (eg, the parties will negotiate at which rate the deferred tax liability should affect the closing balance sheet and, thus, the purchase price of the target company).

## 8.3 Municipal Taxes

The main taxes on commercial real estate are land tax (in Danish: *Grundskyld*) and, depending on the municipality and the nature of the business carried out from the property, a municipality charge (in Danish: *Dækningsafgift*). The land tax rate is between 1.6% and 3.4%, depending on the municipality. The land tax is based on public valuations of the property in question. The municipality charge is imposed on commercial properties used for certain business purposes to cover expenses that the municipality has relating to the property and its business operations. The rate cannot exceed 1% of the value of the building(s). Each municipality decides whether to impose a municipality charge. The charge can

be levied on buildings used for offices, shops, hotels, factories, workshops or similar purposes.

## 8.4 Income Tax Withholding for Foreign Investors

In short, dividends from Danish corporations are generally tax-free, provided that the shareholder is a company holding 10% or more of the capital of the dividend-paying company. However, this does not apply to shareholders domiciled in countries not subject to EU regulations or an applicable double taxation treaty entered into by Denmark and the relevant country. If a corporate shareholder holds less than 10% of the share capital, dividends may be taxable in Denmark and the possibility of a refund will depend on the relevant double-taxation treaty.

In general, corporate entities in Denmark must withhold dividend tax at a rate of 27% when distributing dividends. As corporate shareholders holding 10% or more of the capital are generally not subject to dividend tax, the shareholder is in general entitled to a refund. Interest payments from a controlled Danish company may also be subject to withholding tax. However, exceptions exist for foreign companies subject to a tax treaty or EU regulations.

Income stemming from real estate will form part of the taxable income alongside other income, if any. The corporate tax rate is 22%. Capital gains are also taxed at the corporate tax rate of 22%.

In general, limited partnerships and limited partnership companies are transparent for Danish tax purposes whereby the members of the partnership – and not the partnership itself – become the tax subjects.

Dividends distributed to private individuals domiciled in Denmark are subject to progressive taxation. Dividends are currently taxed at a rate of 27% for income up to DKK57,200 (2021)

and with a rate of 42% for income above that threshold. The threshold is adjusted annually.

## **8.5 Tax Benefits**

In general, the owner is entitled to make tax-deductible depreciation on buildings used for commercial purposes. Also, the costs of refurbishing and improving such buildings are subject to depreciation. However, if the buildings are used for certain commercial purposes, depreciation cannot take place, most notably if the buildings are used for offices, financial services and buildings used for residential purposes.

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**Skau Reipurth** has established itself as an elite law firm in Copenhagen and has one of the strongest teams in the various areas of commercial law. Skau Reipurth & Partnere's mission is to combine the very best professional standards with uncompromising integrity. The firm takes pride in providing personal advice based

on value-creating commercial know-how. Real estate and construction are significant practice areas for Skau Reipurth & Partnere. The firm's real estate and construction practice is considered among the best in this field and is recognised by leading individuals within the practice area.

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