
Negotiating Key Lease Provisions

**The Landlord's Perspective: What the Landlord's Lawyer Needs to
Keep in Mind**

Stephanie B. Shellenback
Drinker Biddle Gardner Carton LLP

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In drafting any lease or undertaking a negotiation with a tenant, the landlord's lawyer needs to understand and appreciate the perspective and goals of the client, keeping these matters in mind as the negotiation proceeds. Following is a brief discussion of these goals and how they relate to the negotiation process.

Preserve Integrity of Lease Form

Landlords adopt standardized lease forms for a variety of reasons, but primarily the landlord relies on its lease form to ensure predictability for the internal management of its investment and for its investors and lenders. Particularly for large portfolio landlords, a standardized lease form enables the landlord to manage its internal investment strategies and goals. For example, with standardized insurance language, a landlord can manage its insurance programs and address risk on a portfolio-wide basis.

While lease negotiations have, for the most part, moved away from a landlord's firm declaration to its tenant prospect: "Give me your top 10 issues so we can execute the document tomorrow!", a landlord does not want to undertake a wholesale rewrite of its lease form just for the sake of getting to the finish line. It is important for the lawyer to understand this balance, to understand the issues which are of utmost concern to the client and to move the negotiation to a point where both parties have an agreement they can live with for the term of the lease.

Honor Third - Party Requirements

The landlord's lawyer needs to be cognizant that there are other interests allied with those of the landlord, and that although those interests may not physically be present around the negotiating table, they must be recognized and respected. If the ownership structure of the property is in the form of a joint venture, the lawyer should be familiar with the investment strategies of the joint venture partners. Similarly, lenders will have certain requirements and expectations which should not be altered in the negotiation. For example, lenders do not want tenants to have set-off rights and do not necessarily want to be bound to fund tenant improvement allowances or refund cash security deposits which the lender did not receive.

Achieve Financial Certainty

While it is obvious that a landlord expects to receive rent payments on time, there are other financial and budgeting matters impacted by various lease provisions. One of the most significant issues in this regard relates to operating expense audits. A landlord wants to control the audit process and will not want to grant a tenant open-ended or on-going audit rights. The landlord needs to be able to close its books for a year without concern that an audit will open up questions from prior years. Another example relates to the treatment of any unapplied remainder of a tenant improvement allowance; the lawyer should consider language requiring the tenant to "use it or lose it" by a definite date, allowing the landlord to budget the expenditure with some certainty.

Predictability for Operational Side

Building managers will not want to be blind-sided by changes in a lease form which require the manager to take extraordinary actions or operate the building for one tenant outside the ordinary course. The lawyer should take care in drafting operating expense exclusions in a consistent manner and should verify that building management has reviewed any exclusions proposed by a tenant which seem unusual or atypical. If a tenant wants the right to request overtime HVAC, the lease language should ensure that building management has ample advance notice to provide such service. Finally, the lawyer needs to be mindful that even seemingly benign changes to an insurance provision in a lease could upset a risk management scheme the landlord has developed for its property portfolio.

Avoid "Hidden" Landlord Defaults

The landlord's lawyer should be careful not to put the landlord in a position in which it could be in default or suffer other consequences for failure to take some action which is outside the normal course of its responsibilities as a property owner and manager. For example, suppose a tenant is granted a renewal option at a market rate of rent. The renewal provision is best drafted so that the tenant initiates the actions toward exercise of the option, and must ask the landlord to advise it of the market rental rate before the outside date by which the option is to be exercised. Imagine if the onus were on the landlord to monitor each tenant's renewal options and the outside exercise date for each, including the need to advise each tenant of the contemplated market rental rate in advance of the exercise date. From the landlord's perspective, the option provision should not require the landlord to notify the tenant of the market rental rate without some prompt from the tenant, the argument being, of course, that it is the tenant's option to exercise, or not, within the timeframes established by the lease, and it is not the landlord's responsibility to track these dates and police them for the tenant.

Ease Future Refinancing

The landlord's lawyer should be mindful that the landlord may refinance existing mortgage debt on multiple occasions over the course of a lease term. Even if an existing lender is comfortable with provisions negotiated in a lease, whether they be changes in nondisturbance language, the granting of set-off rights or conditioning future subordination on delivery of a nondisturbance agreement, that is no guaranty that a future lender, at a different time and in a different set of market circumstances, will similarly accept such provisions. The landlord's lawyer should be aware of varying lender views on an issue and be able to advise the client on how such issues may impact underwriting decisions by a future lender.

Ease Future Sale of Property

With ownership of assets trading hands at a rapid pace in many markets, it is important for the landlord's lawyer to draft lease provisions and even compromise language in a manner as consistent as possible. Adopting this approach eases a potential property buyer's due diligence process and assists with management transition. An experienced lawyer will have a good sense of what types of provisions will be universally acceptable to most owners, and will avoid agreeing to concepts which, while they may help secure the execution and delivery of a particular lease, may create significant issues for a potential future purchaser of the building.

Keep Tenants Happy

Increasingly in today's market, the landlord's lawyer is viewed as a part of a building's leasing team. It is no longer acceptable for the lawyer to respond with an unequivocal "No!" to a set of tenant lease comments. The landlord's lawyer is expected to figure out a way to get the deal done even in the face of issues for which there seemingly may be no acceptable compromise. When lawyers negotiate by e-mailing blacklined documents back and forth, it is frequently difficult to get to the heart of an issue. Why has the tenant stricken an entire

paragraph? What is the issue, and is there a compromise available that is acceptable to the landlord? Oftentimes, these stalemates are best resolved by tossing aside the battling blacklines and discussing the issues of concern to each party. There is rarely a circumstance which cannot be resolved by a compromise that meets a tenant's need yet minimizes the risk to the landlord.

Sample Lease Language

**DELIVERY FAILURE – COMMENCEMENT DATE DELAY/ABATEMENT/TERMINATION
RIGHT/TEMPORARY SPACE**

(a) The Commencement Date, Rent and Tenant's other obligations shall be postponed to the extent Tenant is unable to occupy the Premises for the conduct of business because Landlord fails: (i) to substantially complete any improvements to the Premises required to be performed by Landlord under this Lease, or (ii) to deliver possession of the Premises for any other reason, except to the extent that Tenant, its contractors, agents or employees in any way contribute to either such failures. In the event the postponement of the Commencement Date shall continue for sixty (60) days beyond the Scheduled Commencement Date, Tenant shall be entitled to one (1) day of abatement of Rent for each day beyond the sixty (60) days that the Commencement Date is so delayed, which abatement shall be in addition to the abatement described in Section ___ hereof. In the event Landlord has been unable to deliver the Premises to Tenant by _____, _____ (the "**Outside Commencement Date**") for any reason other than delays caused by Tenant, its contractors, agents or employees, and except to the extent such failure has been caused by a Force Majeure Event (as such term is defined in Section ___ hereof), Tenant shall have the right to terminate this Lease by delivering written notice thereof to Landlord on or before the date which is thirty (30) days after the Outside Commencement Date, unless prior to Landlord's receipt of such notice of termination, Landlord has delivered possession of the Premises to Tenant. Any delay in the Commencement Date as described herein shall not subject Landlord to liability for loss or damage resulting therefrom, and Tenant's sole recourse with respect thereto shall be the postponement of the Commencement Date, the further abatement of Rent, and termination right as described herein.

(b) In addition, if Landlord is unable to deliver possession of the Premises to Tenant on or before _____, _____, and Landlord has available other space within the Building ("**Temporary Space**"), then Landlord may, if Landlord shall elect in Landlord's sole discretion, make such Temporary Space available for Tenant's use and occupancy for a period not to exceed ninety (90) days. If Tenant shall elect to occupy the Temporary Space, such occupancy shall be subject to all of the terms and provisions of this Lease, including the payment of Rent, but specifically excluding the provisions of Sections _____ and _____ [Renewal; Expansion/ROFO; Allowance, etc.]. If Tenant shall continue to occupy the Temporary Space beyond the ninety (90) day period specified herein, the provisions of Section hereof shall apply to such holding over. Tenant agrees to accept the Temporary Space in its "as is" condition as of the date of delivery to Tenant, and Landlord shall have no obligation to perform any work or improvements therein. So long as Tenant continues to occupy the Temporary Space, Tenant shall not have the right to terminate the Lease pursuant to paragraph (a) above.

DELIVERY FAILURE - LANDLORD'S LIABILITY FOR HOLDOVER PENALTIES

As of the date of this Lease, Tenant is currently leasing certain premises (the "**Current Premises**") located at _____, Chicago, Illinois, pursuant to a lease dated September 1, 1990 (as amended, the "**Current Lease**"), the term of which Current Lease expires on _____, _____. In the event Landlord is unable to deliver possession of the Premises to Tenant in the condition required by Section ___ hereof by _____, _____, and as a consequence thereof, Tenant is unable to occupy the Premises for the conduct of business by the Commencement Date of this Lease, then Landlord shall reimburse to Tenant the Holdover Penalties (as hereinafter defined) incurred by Tenant under the Current Lease which result from Tenant remaining in the Current Premises beyond the expiration date thereof to the extent attributable to Landlord's failure to deliver possession of the Premises as provided in Section ___ hereof. For purposes hereof, the term "**Holdover Penalties**" shall mean all rental amounts required to be paid and actually paid by Tenant in excess of one hundred percent (100%) of the base rent, taxes and operating expenses otherwise payable by Tenant under the Current Lease. Tenant shall not, without the prior written consent of Landlord, amend or modify the Current Lease, nor shall Tenant exercise any expansion, renewal or other rights of Tenant, increase the obligations of Tenant, or increase the rights or diminish the obligations of the landlord under the Current Lease with respect to the period following _____, _____; provided, however, that at the request of Landlord, Tenant shall exercise such rights under the Current Lease as Landlord shall reasonably request, which rights may reduce or abrogate the obligations of Landlord under this Section _____. Notwithstanding anything in this Section ___ which could be construed to the contrary, in no event shall Landlord incur any liability for Holdover Penalties which result from delays attributable to Tenant, or Tenant's contractors, agents or employees.

DELIVERY FAILURE – EXPANSION SPACE

In the event the delivery of the Expansion Space is delayed for reasons other than Tenant's Delay, the Expansion Space Commencement Date shall be deferred to the date on which Landlord is able to deliver vacant possession of the Expansion Space to Tenant. Landlord shall use commercially reasonable efforts to obtain and deliver to Tenant vacant possession of Expansion Space by the Expansion Space Commencement Date; provided, however, that Tenant's obligations under the Lease with respect to the Premises and the Expansion Space shall not be affected by any such action or failure to act by Landlord. Landlord shall not be subject to any liability and this Lease shall not be impaired if Landlord shall be unable to deliver possession of the Expansion Space to Tenant on any particular date; provided, however, that if Landlord is unable to deliver the Expansion Space to Tenant by the date that is one hundred eighty (180) days after the Expansion Space Commencement Date (the "**Expansion Outside Delivery Date**"), which Expansion Outside Delivery Date shall be extended one (1) day for each day of delay in delivery caused by Tenant's Delay or Force Majeure Event (as such term is defined in Section ___ hereof), if any, then Tenant shall have the right, upon prior written notice to Landlord delivered within thirty (30) days after the Expansion Outside Delivery Date, to rescind the Tenant's Expansion Notice, unless, prior to the rescission date specified in Tenant's rescission notice, Landlord tenders possession of the Expansion Space to Tenant. If Tenant fails to timely deliver such a rescission notice, Tenant shall have no further right to rescind Tenant's Expansion Notice. If Tenant elects to rescind Tenant's Expansion Notice, Landlord shall reimburse Tenant for the costs of the planning, design or construction of improvements for the Expansion Space paid or incurred by Tenant prior to the effective date of such rescission, but Landlord shall have no such reimbursement obligation if Tenant does not elect to rescind Tenant's Expansion Notice.

INTERRUPTION OF SERVICES - RENT ABATEMENT/TERMINATION

Landlord shall not be liable for any damages directly or indirectly resulting from the interruption in any of the services described above, nor shall any such interruption entitle Tenant to any abatement of Rent or any right to terminate this Lease. Notwithstanding the foregoing, in the event that any interruption or discontinuance of services provided pursuant to this Article ___ was within the reasonable control of Landlord to prevent and such interruption or discontinuance continues beyond five (5) business days after written notice to Landlord and materially and adversely affects Tenant's ability to conduct business in the Premises, or any portion thereof, and on account of such interruption or discontinuance Tenant's ability to conduct business in the Premises is materially and adversely impacted, Base Rent and Additional Rent shall thereafter abate proportionately for so long as Tenant remains unable to conduct its business in the Premises or such portion thereof. In the event such interruption or discontinuance (i) does not arise from Casualty (in which event the provisions of Article ___ shall govern and control); (ii) does not arise from an event that affects other buildings in the vicinity of the Building; (iii) is within the reasonable control of Landlord to prevent; and (iv) continues for two hundred seventy (270) consecutive days following Tenant's foregoing written notice to Landlord, Tenant shall have the right to terminate this Lease by giving Landlord written notice within the first thirty (30) days following expiration of such two hundred seventy (270) day period, unless within such thirty (30) day period, such services are restored or Tenant commences to occupy the Premises again for the conduct of business. Such abatement of Rent and termination right shall be Tenant's sole recourse in the event of an interruption or discontinuance of services or utilities required to be provided by Landlord hereunder. To the extent within Landlord's reasonable control, Landlord agrees to use reasonable efforts to restore such interrupted or discontinued service as soon as reasonably practicable.