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Green Leases

**– A possible response to the energy concept of the
Federal Government? –**

Introduction

On 28 October 2010 the first bills regarding the implementation of the so-called energy concept 2050 of the Federal Government have passed the German parliament. According to the energy concept, Germany shall become the country with the most efficient, most climate-friendly and most competitive energy supply worldwide. It is the express aim of the Federal Government to have a carbon-neutral property landscape by the year 2050. A key element is saving energy. For that reason, one part of the energy concept will lead to amendments of the German lease law as well as of the regulations concerning the energetic refurbishment of buildings. Such refurbishments shall become more “investor-friendly”. What exactly is meant by that is not perfectly clear yet. Needless to say, the lobby industries of both the property owners and the lessees have already massively criticized the concept: for the first group, the envisaged subsidies are far too small, and the latter fears that the entire costs of the energetic development of buildings will have to be borne by the lessees. It’s old hat, one wants to say. And yet, the aims of the German Federal Government are ambitious. It is worthwhile to re-think the issue of energy saving and to consider what “green” provisions one might want to add in a lease agreement.

Green Leases

Lease agreements which contain such provisions become more and more common. They first could be found in Australia and in the U.S. Green leases as such are not a German invention, although it quickly becomes apparent when looking into a German standard lease agreement that leases in Germany are – in comparison to the international standard – already quite green. In particular, clauses dealing with the installation of water meters for each individual lease area as well as the usage-gearred clearance of electricity, heating, water and gas as well as the splitting of the costs and their allocation to the particular lease area and/or to common areas are standard procedure or may be even required by German law. But, as always, there is still room for improvement.

Energetic Redevelopment

A core element of saving energy and costs in a German property portfolio will be, according to the energy concept of the Federal Government, its energetic redevelopment. The German property inventory consumes approximately 40 % of the energy and produces approximately one third of the CO₂ emissions. Even if the proposed obligation to redevelop existing properties should not become law, there are various motivations for property owners to modernize their buildings, be it to obtain certification of the building, be it within the frame of maintenance and repair works, be it to improve the substance of the property, be it to boost the marketing chances. According to German law, a commercial lessee has to endure such measures carried out by the landlord if the prerequisites of Sections 554, 578 para. 2 of the German Civil Code are met.

A reader going further through the provisions of the German Civil Code will make a surprising observation: whilst the landlord of residential property can share the costs for modernizing measures which lead to the saving of energy or water with its tenant, a landlord of commercial property cannot. The reason for that can only be found in the history of the provisions. They formed part of a special set of rules (outside the German Civil Code) for residential leases which has been implemented into the German Civil Code only some ten years ago.

Landlords of commercial property are therefore well advised to have some language added in their sample leases according to which the costs of measures

carried out to save energy can be shared with their tenants. Moreover, they may not only want to add a clause according to which the provisions for residential buildings of the German Civil Code shall be applicable *mutatis mutandis*, but to provide for an altogether proper regime of provisions. The reason for this is that the available provisions for residential buildings are not distinct and disputes about as to how they have to be read are foreseeable. The clauses for residential leases should therefore be adjusted to the needs of commercial parties, and in particular with regard to the prerequisites of the suffering of redevelopment and modernization measures, as well as with regard to the allocation of related costs.

Further Clauses – an Assortment

Moreover, there is of course a whole bundle of other green provisions one might want to implement into a lease agreement. For example, landlord and tenant could commit themselves to use either exclusively or at least preferentially certain products, e.g. sustainable renewable raw material, recycled material, or not to use certain products which are suspicious of being harmful to health. Needless to say, the owner of a certified building will have an increased interest in such an agreement. Many of the clauses which are to be found in green leases are more or less agreements of intent and do not contain hard, enforceable commitments. Without doubt, the parties can agree upon binding clauses as well. As an example, a tenant can commit itself to procure that its employees adhere to an ecologic behaviour. The tenant might then accept an obligation to reduce the consumption of electricity (light, air conditioning, heating) or to install waste separation procedures. Further, the parties could agree upon certain maximum amounts of energy and maximum amounts of waste.

When entering into enforceable commitments a landlord also needs to take into account the provisions of the German Civil Code concerning General Terms and Conditions. Once a landlord limits the options of its tenant too much, it may well be that the respective clauses cease to be in line with the legal concept of the German lease law and are therefore invalid. As a consequence, the remainder of the lease agreement will not become invalid, but will be rather “grey” than green in this regard. As this is a relatively new matter, reliable experience or even court decisions are not yet available.

Conclusion

Before long, many landlords will have to face the challenge of carrying out energetic redevelopments in their buildings. There are various reasons for this, ranging from simple preservation measures to better marketing chances. As long as the German legislature does not adjust the respective provisions of the German Civil Code to also meet the needs of commercial properties and does not improve the provisions as such, every landlord will be well advised to have tailored provisions agreed upon with his tenants in future leases. An addendum to existing leases might also be an opportunity to introduce such supplemental provisions. In this case, the landlord may propose to also include further commitments, e.g. for energy saving or for preservation of resources. In particular when entering into a long term lease (in Germany, commercial leases which run for ten or even fifteen years are rather common) landlords should not miss out on the opportunity to have their tenants participate in the costs of measures for energy saving.

If you have questions on the foregoing, please contact Christoph M. Tegel (tegel@schiedermair.com). Please note that the information contained in this newsletter is not meant to replace legal counsel. You should seek specific advice before taking any action with regard to the matters discussed above. All of our newsletters are available at www.schiedermair.com