

Green Lease Clauses in Europe

A practical approach



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Introduction

Green leases are on the increase in Europe. The development in the United Kingdom and France is particularly dynamic, but in other countries as well a standard for green leases is slowly developing. CMS has taken on the task of developing a uniform European standard.

To this end the legal position in eight different countries (Belgium, Germany, France, the Netherlands, Italy, Poland, Hungary, the United Kingdom) were compared. There are already publications in France and Germany which implement the current legal position in proposals for regulations (cf. for Germany: Green Lease – the Green Lease for Germany, and for France: French “Green Lease” and Environmental Appendix: model form and example clauses). CMS has prepared a uniform version for all countries compared on the basis of these regulations and compiled commentaries on the country-specific special features.

Although the starting point in the various European countries is different in each case from an economic and legal point of view and green leases do not have the same significance in each country it was possible to develop a uniform standard. It will be of particular interest for international investors or for those involved in real estate to find out which clauses can be used across Europe and what modifications may be required. The following clauses can be used as a basis in each of the countries compared. Which of the recommended clauses is suitable for the real estate concerned and the desired type of use is of course a decision to be made in each individual case.

National features can be taken into account on the basis of the commentaries. As the legal situation is in a constant state of flux because of the topical nature of the issue mandatory national law and current case law should always be complied with when using the clauses.

1. Definition

The following definition describes the content and the target of a green lease.

Proposed regulation

A green lease is a lease agreement which is intended to ensure that a leased property is used and managed in a manner which fosters sustainability. The tenant and the landlord thus mutually undertake to conserve natural resources and energy with regard to the leased property. The parties may also document the sustainability of the leased property by acquiring or receiving certification and creating the conditions for the environmentally friendly use of resources.

Comments

A 'green lease' under UK or Belgian jurisdiction can refer to several different types of document or clause. In fact, rather than being in a lease, terms are often found in a Memorandum of Understanding, which is then annexed to the lease.

The term 'green lease' is used in practice to refer to any type of provision that has the object of improving the sustainability of the building.

France has to a large extent adapted the Anglo-Saxon concept. Under the Grenelle II law (12 July 2010), some leases now contain a separate environmental appendix :

- Leases for premises with an area of more than 2,000 sqm. and
- Leases for premises intended for office or commercial use.

Apart from these cases, it is not mandatory to provide an environmental appendix in leases.

The content of the environmental appendix has been defined by a ministerial order ("décret" dated 30 December 2011).

Although buildings have been built in accordance with "green" principles and might have obtained a respective certificate, the lease does not reflect the fact that such buildings are "green".

Conclusion

Across Europe there is a largely uniform understanding of the term "green leases". The content and the aim is to comply with aspects of sustainability when engaging in a lease relationship. As a rule green leases are not regulated under statute. Only in France is there a duty to attach an environmental appendix to certain leases. This is for leased properties with an area greater than 2,000 m² and leased properties which are used as offices or for commercial purposes.

2. Sustainability codex

In order to make clear to parties what the aim of the green lease is, it is helpful to precede the binding regulations with an introductory remark. This introductory remark as a rule is a proposal and not in itself binding.

Proposed Regulation

The parties aim for a lease relationship which fosters sustainability and to this purpose enter into this green lease. They are conscious of their responsibility towards the environment and pursue the goal of protecting natural resources. The lease relationship should be conducted in a manner which conserves natural resources and energy. Sustainable use is guaranteed if both parties collaborate as far as ecological, economic and social factors are concerned.

Comments

Alternative wording if a Memorandum of Understanding is attached to the lease, could be the following:

The landlord and tenant agree in good faith but without legal obligation to agree and implement a Memorandum of Understanding with the aim of reducing energy and water use within the building and the premises and reducing and recycling waste. Save where the parties have separately signed and dated the Memorandum of Understanding the landlord will use its reasonable endeavours to put in place an appropriate Environmental Management Plan that is suited to the size and nature of the building.

It might be recommendable to define in more detail any implications of such clause either in this context or in connection with the respective clause of the green lease e.g. to define that references to “sustainable” and “sustainability” shall include the sourcing, specification, performance, recycling and suitability for purpose of any materials, processes or methodology and the question of whether something is sustainable is to be judged at the time the issue arises and not at the date of this lease. An Environmental Management Plan may include reasonable annual targets, for further details see recommendation 16.

Conclusion

As a rule, this clause is not binding but constitutes a declaration of intent. It leads to a uniform understanding between the parties stating what they intend to achieve on a sustainable basis. Instead of being attached in an introductory remark to the lease document it can also be attached as a memorandum of understanding (UK, Belgium) or used as an introduction to an environmental appendix (France).

3. General use, management

Under this regulation the parties undertake to use and manage the leased property sustainably. A list of duties can define which measures are to be taken to comply with sustainable principles. This clause forms the core of a green lease.

Proposed Regulation

The parties shall use and manage the leased property as sustainably as possible. The tenant shall instruct its employees to use the leased property accordingly.

Comments

Such clause could be amended by a further regulation or by a management plan for the building which without limitation may include reasonable annual targets for:

- aa) the reduction of energy consumption, carbon emissions, water use and waste at the building
- bb) the increase where possible of the use of plant and equipment based on renewable technologies, renewable energy, recycling of waste, recycled water and captured rainwater for the building and
- cc) other measures which it is practical to adopt in order to improve the environmental performance of the building
- dd) provided that the plan and such targets shall have due regard to economic viability

The above clause could possibly be amended by regulations like the following one:

In the interest of maintaining a comfortable indoor environment that promotes the productivity and well-being of its occupants, the parties undertake to meet the following objectives:

- a reduction in energy use, including more efficient use of heating and lighting and reduced production of greenhouse gases;
- a reduction in the use of air conditioning and greater use of natural ventilation;
- a reduction in the use of drinking water and greater use of recycled water or rainwater when it is possible;
- a reduction in the production of waste and the optimisation of waste processing with better use of selective sorting and recycling;
- the replacement of polluting products with environmentally friendly products (in accordance with ecological standards);
- the promotion of alternative means of transport for users of the building and visitors;
- the avoidance of materials and furniture containing a high level of volatile organic compounds.

Conclusion

The obligation to use and manage the leased areas observing sustainable principles can basically be validly agreed in all countries. In order to implement the clause the obligations should be specified in as much detail as possible.

4. Energy efficiency and renewable energies

Careful handling of energy is one of the most important aspects of a green lease. By agreeing the following regulations the parties undertake to handle energy with care and to use renewable energy sources.

Proposed Regulation

All [alternatively: At least • % of] electrical power purchased for the leased property shall be sourced solely from renewable energy sources. Renewable energy sources within the meaning of this provision are hydropower including wave-power, tidal power, salinity gradient and current energy, wind energy, photovoltaic, geothermal, biomass energy including biogas, landfill gas, sewage gas and the biodegradable components of household and industrial waste, and other energy sources which may in future be designated as renewable energy sources in applicable statutes.

Comments

This can be seen as a “dark green clause”. In many countries, such regulations do not yet exist although it would be valid if the parties agreed it. The acceptance of such clause by the tenant may be mainly driven by costs. If extra costs were to arise, these will probably have to be borne by the tenant.

Conclusion

This clause is probably permitted in all countries but is not yet very widespread. The EU promotes renewable energies in its Directive 2009/28/EC. For example, with effect from 2020, 20% of the entire European energy consumption has to be from renewable energy sources. National provisions must be promulgated by 31 December 2014. These provisions set out the minimum amount of energy from renewable energy sources which must be used in each new building and in each extensively renovated existing building. As in the future renewable energy (especially electricity and heating) will become more widespread the acceptance of such a clause will also increase.

5. Lighting

The following clause deals with energy-saving measures with regard to lighting.

Proposed Regulation

If the parties have to equip the leased property with lighting – as far as technically possible – this shall be done solely using energy-saving products (including compact fluorescent lamps or LEDs or any other future lamps which have a particularly low electrical energy consumption).

Comments

Even if energy-saving lighting is prescribed by statute an explicit regulation in the agreement helps to make the parties aware of their responsibility. This clause may be amended by an additional provision with concrete specifications for the scale for energy conservation:
The parties have to reduce their lighting use to a level that is 15% under the level authorised by the [] standard issued by [].

Conclusion

The efficient use of light sources results in financial savings for both parties. This positive impact means that the clause is usually accepted in most cases.

6. Electrical appliances

Under this clause the tenant undertakes mainly or exclusively to use energy-saving electrical appliances.

Proposed Regulation

In the leased property the tenant may only use electrical appliances (in particular kitchen appliances such as coffee makers, refrigerators, dishwashers and office equipment such as photocopiers, printers, etc) which fall into the highest [alternatively: at least the second-highest] energy efficiency category when they are first brought into the leased property. This does not apply to types of electrical appliance which are only available on the market in a lower energy efficiency category than that required here.

Comments

This clause could be amended by regulations regarding disposal of electrical equipment. It should be considered whether such clause might be unduly onerous on the tenant due to its business needs; it might then be difficult to agree in the market and should be amended by specific exceptions or replaced by a regulation which is more generous for the tenant.

Conclusion

Energy-saving electrical appliances benefit the tenant. Therefore, this clause serves a sustainable as well as an economic purpose. This aspect is not regulated by statute in any country.

7. Cleaning

This provision sets out criteria for ecological cleaning. It is neutrally worded as both parties are usually responsible for cleaning duties.

Proposed Regulation

Cleaning the leased property shall be subject to the following:

1. Any cleaning agents used for cleaning purposes must be ecologically acceptable (i.e. with the ISO 14024 type I environmental label). Where there is more than one possible cleaning procedure, the more environmentally friendly option shall be selected (e.g. mechanical rather than chemical pipe cleaning), even if this is more expensive.
2. The tenant must ensure that any cleaning contracts he may conclude in respect of the premises stipulate that all cleaning products used must meet [to be defined] standards [or ecologically acceptable] or any equivalent standard and that waste must be sorted and recycled where possible.
3. The tenant shall ensure that any contract concluded with cleaning companies stipulate that their personnel shall comply with the provisions of the lease in connection with the cleaning of the premises.
4. The tenant shall schedule cleaning times so as to minimise the use of lighting, heating and air conditioning.

Comments

Such clause might be amended by specifying appropriate cleaning and maintenance procedures for specialist “green” plant equipment fixtures or fittings. The clause may also raise awareness and provide training to cleaners.

With respect to cleaning agents the wording could be less specific for particular labels. This makes the clause slightly less prescriptive for tenants and makes the clause “light green” and more acceptable in the market.

Conclusion

Ecological cleaning agents are an important aspect of sustainability. This clause goes a step further than the statutory provisions in most countries. An increase in costs is not necessarily caused by ecological cleaning agents. It is important that the tenancy agreement obligations are transferred to the cleaning companies.

8. Waste

Under this provision the parties undertake to separate waste if this has not already been prescribed by statute. Further, this clause stipulates that the obligations of both parties will be adjusted to future.

Proposed Regulation

1. Any waste materials generated in using the leased property must be sorted and disposed of according to paper, glass, batteries, energy-efficient lightbulbs, packaging materials (or other waste segregation systems that may be introduced in future), organic waste and other waste.
2. In the event that the present system is more comprehensive or a more comprehensive system of waste disposal is introduced by law at some point in the future, the more comprehensive system shall take precedence. The landlord may prohibit waste which does not comply with these categories from being stored on the premises.
3. Waste collection systems which allow the waste to be collected and disposed of according to sentence 1 shall be provided by the landlord for the leased property as a whole and by the tenant for the interior of the leased property.
4. (Optional) In coordination with the tenant, the landlord undertakes to develop a waste management program for the building, including, as appropriate, sharing recycling and waste management facilities between the occupants.
5. In terms of procurement and equipment, the tenant undertakes to prioritise contractors with suitable policies on waste management, recycling supplies and re-using of non-perishable redundant materials.

Comments

It has to be taken into account that national, regional or municipal statutes may impose further or different obligations regarding recycling and separation of waste (e.g. the Waste Electrical and Electronic Equipment Regulations 2006). The option to agree on a more collaborative waste management program between landlord and tenant could make the clause more acceptable to prospective tenants.

Conclusion

In the meantime, most countries have a system for separating waste. If statutory provisions are stricter, these will take precedence. A waste management program may make this issue more acceptable to the tenant.

9. Consumption

This clause is to enable consumption to be controlled (in particular energy and water). A comparison of different tenants may be an effective incentive to reduce consumption.

Proposed Regulation

The parties agree to share with each other all data and relevant information they have or may obtain in the future in relation to the building and the premises in respect of:

- electricity consumption,
- gas consumption,
- the consumption of any other type of energy source,
- water consumption,
- waste generation, management and recycling,
- maintenance of production or distribution equipment used in connection with any of the energy sources used, water and/or waste management,
- air quality,
- the means of transport used by occupants.

Such data and relevant information will be provided yearly, as a minimum, in a format or according to a methodology to be determined by the landlord at a later date and, where necessary, adjusted so as to obtain data that can be used with the highest degree of efficiency.

The parties undertake to keep confidential all information received and exchanged during the drafting and duration of the lease and to instruct all third parties in possession of such information (other occupants of the building) to comply with this obligation of confidentiality.

Comments

It should be reviewed whether such clause needs to be amended in the light of applicable statutory data protection requirements.

The confidentiality clause might be amended as follows: However, this obligation of confidentiality will not apply to internal or external communication campaigns carried out by a party as regards its overall policy for improving energy performance. Nevertheless, each party undertakes to seek prior consent from the other party if, in the course of these campaigns, it wishes to release figures and if the other party is to be identified.

In addition, this clause may be amended by a provision establishing a committee to draw up an annual report: Once a year, the landlord will order a report to verify that the recommendations and the environmental objectives have been met. The report will be compiled by an independent and qualified auditor selected by mutual agreement of the landlord and the tenant. The cost of the annual verification and updating of this environmental audit will be borne by the [--].

The parties will establish a committee that will meet on a yearly basis. The committee will study the data and information shared by the parties, the overall environmental performance of the building and any alterations of the building that may affect the environmental performance of the building or the premises. The committee will adapt the environmental objectives of the parties regarding the reduction of energy consumption, carbon emissions and waste to the building and the premises. The committee will produce an annual report containing a summary of the energy and water consumption, the waste generated by the building and the premises and setting out the targets to be reached.

Conclusion

This clause (and its amendments) enables both parties to have better control of consumption. This is necessary to check the contractual aim (sustainable and energy-saving management of the leased property) and if appropriate take corrective action. Comparing different tenants is an incentive to improve sustainability.

10. Operating costs and ancillary costs

In principle, the landlord should manage the leased property as economically as possible. For this purpose, he will choose the least expensive service provider as a rule. This clause allows the landlord to incur higher costs if this is necessary for sustainable management.

Proposed Regulation

The tenant accepts that the landlord may solicit services and incur operating costs which are more expensive than the standard market services, if it is necessary to promote sustainable use of resources. The tenant shall not dispute any maintenance or operating cost as excessive provided that the landlord demonstrates that the higher cost was incurred in order to promote sustainability or use of renewable resources.

Comments

In order to be precise, operating costs and ancillary costs should be defined in the most detailed way possible.

Conclusion

This clause is important to enable sustainable management which may be more costly than the least expensive option without the tenant being able to object that the landlord has breached his obligation to manage the leased property as economically as possible.

11. Operating costs: consumption

This clause deals with distributing operating costs to tenants according to actual consumption.

Proposed Regulation

Where the ancillary costs are based on measured consumption or caused by the tenant, they shall be distributed solely according to a method which takes account of the different consumption or cause. In all other respects, the landlord shall determine the method for distributing costs, taking account of the principle of equal treatment of tenants and mandatory statutory requirements, particularly the ratio of the area leased in the leased property to the total area of the building.

Comments

Some jurisdictions allow the landlord to reasonably exercise discretion when deciding on the method to distribute costs. To avoid unnecessary discussion with tenants, the method for distributing costs should be defined in as much detail as possible. It must be taken into account that some jurisdictions provide for cost distribution measures to be mandatorily observed.

Conclusion

Calculating operating costs depending on the respective tenant's consumption has a positive effect on the use of resources. Thus, this provision is an important element of a green lease. Even if the distribution of costs according to actual consumption is prescribed by statute in many countries, a provision makes the meaning of this aspect clear to the parties.

12. Decorative repairs

Under this clause the tenant undertakes to carry out any decorative repairs taking sustainability largely into account.

Proposed Regulation

To the extent that this lease agreement requires the tenant to carry out redecoration work at the end of the lease or at any time during its term, the extent of such redecoration work shall be determined taking appropriate and particular account of the parties' endeavours to use and manage the leased property in a sustainable manner. In carrying out decoration work the tenant shall only use emission-free (and if not possible low-emission) materials which from a life-cycle perspective must be regarded as environmentally friendly and preserving natural resources. Materials which may be used are materials which have been awarded the European environmental label, the "FSC" seal or type 1 ISO 14024 environmental labels.

Comments

In some countries (e.g. France) it is usual to inform the landlord in advance before undertaking any works (15 days prior to starting the work).

If a tenant is not willing to accept restrictions on the materials to be used for decorative repairs as this would cause extra expense, a more general clause could be used: In carrying out all repairs and any other works under this Lease to use all reasonable endeavours:

- to do so in a sustainable manner
- to treat and maintain all materials in accordance with their manufacturers' instructions and recommendations and
- to minimise any material and adverse effect on any [Environmental Rating System] and/or any [Environmental Rating].

Conclusion

As a rule, the tenant usually has to carry out decorative repairs during the term of the lease and when the lease ends. However, up until now the tenant has not had to consider sustainability issues. By inclusion of such obligation, sustainability can be better achieved.

13. Structural alterations by landlord

This clause should enable the landlord to modernise the building which will serve to improve or have a sustainable impact on the leased property. If modernisation causes hardship for the tenant, the tenant is exceptionally entitled to refuse modernisation.

Proposed Regulation

1. The landlord may carry out measures in/on the leased property which serve to economise end or primary energy and/or water and/or bring about more efficient use of energy and/or greater sustainability of production of the energy used or otherwise promote sustainable use and management of the leased property. The tenant shall put up with such measures and has no right to reduce rent because of them; the tenant's other rights remain unchanged.
2. The tenant is not under an obligation to tolerate such measures if they cause it hardship which is unjustifiable even taking account of the legitimate interests of the landlord, other tenants in the building and the parties' intention to manage and use the leased property as sustainably as possible. In so doing particular account must be taken of the work to be carried out, the structural consequences and prior expenses of the tenant. The landlord shall carry out measures pursuant to the above provision in a way that will cause the least possible disruption to the tenant's business operations provided that avoiding such disruptions would not substantially increase the costs of such measures.

Comments

A somewhat softer clause which takes practices in the UK into account could be worded as follows:

A right for the landlord at all reasonable times and on reasonable prior notice to the tenant to enter and remain on the premises for the purpose of taking reasonable steps to review or measure any [Environmental Ratings System] and water use and its waste production or waste management save where up-to-date information in this respect has already been provided to the landlord by the tenant carrying out works:

- as part of the [landlord's building maintenance services]
- pursuant to an agreement with the tenant (and other occupants of the building) or
- pursuant to the [Memorandum of Understanding] which are aimed at:

- the more effective management or
- improving the efficiency of energy or water use or waste production and for setting up and managing recycling schemes (provided that such works cause as little disruption as reasonably possible and when complete do not adversely affect the tenant's beneficial use and occupation of the premises and that any damage caused by such works is made good to the tenant's reasonable satisfaction)
- the purposes of preparing any [EPCs] undertaking any measurements required for any [Environmental Rating System] or undertaking an air conditioning inspection and for such purposes the right to carry out the necessary tests on service media and any other plant and machinery in the premises but excluding any computers or other IT systems where the tenant (acting reasonably) objects on the basis of security or operational reasons.

To be able to make the clause as specific as possible and thus make it effective the measures the landlord is entitled to must be described as accurately as possible. Further, the conditions under which the tenant is possibly entitled to object to modernisation must be regulated as clearly as possible.

Finally, in the event that the parties cannot agree whether and to what extent certain measures serve to promote sustainability, a regulation could provide for advice or decision by an expert.

Conclusion

This clause enables conversion works which lead to increased energy efficiency and promote sustainability. In principle, the tenant must tolerate these measures but may reject them in cases of hardship or demand compensation from the landlord for any damage caused by these measures.

14. Structural alterations by landlord - increase in rent

This clause is to enable the landlord to demand reimbursement of (at least part of) the costs of modernising the leased property from the tenant.

Proposed Regulation

The landlord may increase the annual rent by [•] per-cent of the costs of such measures. If the measures were carried out in parts of the property used solely by two or more tenants and/or for communal areas, the costs shall be distributed reasonably among the individual tenants. If the measures are subsidised from public funds, the amount of such subsidies shall be deducted accordingly from the calculation.

Comments

It is important to ensure that the measures for which the tenant is to bear the costs are described in as much detail as possible. Furthermore, the conditions under which the tenant is obliged to reimburse costs must also be described in detail. Otherwise, there is a risk that the clause will be too vague and may thus be considered invalid.

In the UK, the costs for such measures would possibly be treated as part of the ancillary costs.

In general, the costs which the tenant has to reimburse should be reasonable. This would suggest that several offers be obtained from contractors and the contractor with the most favourable conditions be awarded the contract.

Conclusion

It is reasonable to expect the tenant to reimburse the costs of these measures as the tenant is profiting from modernisation of the leased property.

15. Structural alterations by tenant

This regulation deals with structural alterations and equipment of the leased property by the tenant.

Proposed Regulation

If the tenant has the right or the obligation to make structural alterations to the leased property and/or to equip the leased property with fixtures and/or fixed installations (hereinafter "tenant's fit-out") the following shall apply:

- The landlord may refuse consent to the tenant's fit-out if the tenant's fit-out is incompatible with sustainable use and management of the leased property.
- For tenant's fit-out the tenant shall solely use materials which are emission free (or if not possible low-emission), which from a life-cycle perspective must be regarded as environmentally friendly and economic with regard to resources. Any adverse effects which tenant's fit-out may have on energy consumption and air conditioning of the property as a whole and/or the leased property shall be avoided as far as possible and to the extent economically reasonable. Suitable materials are materials which have been awarded the "blue angel" or the European environmental label, the "FSC" seal or type 1 ISO 14024 environmental label.
- If such adverse effects are unavoidable, the tenant shall take suitable measures to compensate for such adverse effects (e.g. by acquiring regulated emissions certificates to compensate for CO2 emissions) and provide the landlord with evidence thereof.
- The landlord hereby grants consent to installation of tenant's fit-out which will or is likely to economise end- or primary energy or water and/or bring about more efficient use of energy and/or sustainable production of energy used or which otherwise promotes sustainable use and management of the leased property.
- When the lease relationship ends the tenant may leave the tenant's fit-out in the leased property and is under no obligation to restore the leased property to its original condition as far as the tenant's fit-out serves sustainable use and management of the leased property.

Comments

The landlord's right to refuse to consent to structural alterations mentioned in the first dash of the proposed example should be regulated in as much detail as possible. It is recommended in this context to oblige the tenant to describe the measures the tenant plans to execute in detail in advance. In principle, such alterations should also be prohibited as this could have an adverse effect on the ecological performance of the building or the premises.

In some countries, acceptance of this provision could suffer because it is felt to be too prescriptive (in particular in the UK). The following clause may be more easily accepted by a tenant:

In making any alterations or addition to the premises the tenant must comply with any reasonable policy from time to time adopted by the landlord in relation to environmentally responsible property management and the Environment Management Plan.

If alterations or additions are made to notify the landlord in writing immediately following completion of the cost of the works for insurance purposes.

Where the tenant is making alterations which are permitted by the landlord or by the provisions of this agreement which may have a material and adverse effect on:

- the asset rating in any Existing EPC or
- any Environmental Rating System and/or any Environmental Rating or
- the efficiency of the use of energy or water within the premises or the building

to provide such information as the landlord reasonably requires to enable the landlord to ascertain the effects of such alterations and to have due regard to and where reasonable implement any suggestions the landlord makes to minimise or if possible avoid any such material and adverse effect which the alterations may otherwise have.

In making alterations which are permitted by the landlord or by the provisions of this Agreement the tenant shall use all reasonable endeavours:

- to do so in a sustainable manner
- to treat and maintain all materials in accordance with their manufacturers' instructions and recommendations and
- to minimise any material and adverse effect on any Environmental Rating System and/or any Environment Rating.

Where the tenant carries out alterations to any plant equipment or services in the premises which affect the energy water or waste efficiency of such plant equipment or services the tenant shall provide such information about the energy water or waste efficiency of the altered plant or equipment as the landlord shall reasonably require.

Definitions:

“Environmental Management Plan”:

an environmental management plan for the building which without limitation may include reasonable annual targets for:

- the reduction of energy consumption carbon emissions water use and waste at the building
- the increase where possible of the use of plant and equipment based on renewable technologies renewable energy recycling of waste recycled water and captured rainwater for the building and
- other measures which it is practical to adopt in order to improve the environmental performance of the building
- provided that the plan and such targets shall have due regard to economic viability

“Existing EPC”:

a copy of the EPC for the [building] [premises] reference no [number]

“Environmental Rating System”:

any rating system for the premises/building adopted from time to time by the landlord [(acting reasonably)] for the purposes of measuring the environmental efficiency and/or performance of the premises/building

“Environmental Rating”:

any rating generated from time to time by the Environmental Rating System in respect of the premises and/or the building

Conclusion

If the tenant has the right to equip the building or carry out structural alterations sustainability issues should be taken into account. If the tenant fails to do so, the landlord is entitled to refuse to consent to these measures.

16. Environmental Management Plan/ Sustainability Manual

An Environmental Management Plan or Sustainability Manual is drawn up by the landlord (or agreed between the landlord and the tenant) and contains indications on the sustainable use of a building in particular with regard to modernisation and certification.

Proposed Regulation

In order to promote sustainable use and management of the leased property the landlord has compiled the Environmental Management Plan/Sustainability Manual attached to this lease agreement. The Environmental Management Plan/Sustainability Manual explains how the leased object is to be used in the interest of sustainable use and management. Those provisions of the Management Plan/Sustainability Manual which are directed at the users of the leased property form an integral part of this lease agreement. The tenant acknowledges these provisions and undertakes to observe them in using the leased property for the purpose designated in the lease. The tenant shall familiarise its employees with the content of the Environmental Management Plan/Sustainability Manual and instruct them to comply with the provisions contained therein. If any provisions of the Environmental Management Plan/Sustainability Manual are at variance to provisions of this lease agreement, the provisions of this lease agreement shall prevail. The landlord may amend the Environmental Management Plan/Sustainability Manual at its reasonably exercised discretion.

Comments

For the tenant to accept an Environmental Management Plan/Sustainability Manual naturally depends ultimately on the content of these documents and how extensive the obligations imposed on the tenant are. In practice, one has to be content with a softer clause, as for example in the following:

On the landlord's part, the provision to the tenant of a handbook or information pack which includes energy and environmental management information about the building (including any EPC/DEC ratings and recommendation reports, reduction targets, energy metering and monitoring data, an environmental policy and water performance data and waste strategy data).

Conclusion

The Environmental Management Plan/Sustainability Manual may clarify the details of sustainable use with regard to the leased property and in detail stipulate the obligations of both parties.

17. Certification

This clause deals with the certification of the building (e.g. BREEAM, LEED, DGNB). Certification is voluntary. In addition, in most countries there is a statutory obligation to have an Energy Performance Certificate (EPC) drafted; these EPCs are not part of the clause and must be regulated separately in the lease agreement.

This clause is based on the fact that certification has already been issued.

Proposed Regulation

1. The leased property has been assessed according to the [the name of the applicable certification body – e.g. BREEAM, LEED, DGNB] certification system. As a result of this assessment on [date] the leased property was awarded [name of certificate] certificate in [name applicable certificate class, e.g. gold]. A copy of the certificate (including a list of the criteria on which the leased object was certified) is attached to this lease agreement.
2. The tenant and landlord will take whatever steps are necessary to continue satisfying all the criteria according to which the certification was granted (“Certification Criteria”), whereby each party will take the necessary steps which fall into its area of responsibility under the general provisions of the lease agreement. The parties shall refrain from anything which would impair or preclude satisfaction of the Certification Criteria. Further details are set out in the sustainability manual. Maintenance/repair measures are subject primarily to the special provisions of this lease agreement.

Comments

Certification is common practice in European countries to varying degrees. The most widely accepted systems are BREEAM and LEED. In addition, individual countries have different national certification systems. If a national certificate is the aim, the clauses to this effect must be amended accordingly (in particular with respect to the following clauses concerning certification requirements or the continuing obligations to maintain the certificate).

In France, reference would be made to a green appendix and an energy performance diagnosis which have to be included in some leases.

The acceptance of clause (2) depends obviously on the contents of the “Certification Criteria”; these should be referred to as detailed as possible.

Conclusion

In principle, a certificate regarding the sustainability of a building is voluntary. Only in France have sustainability certificates for new buildings been prescribed by law since January 2013. Irrespective of this, investors and tenants are often interested in the proof of the sustainability of a building.

18. Certification: improvement measures

This clause relates to a building which has been certified however the landlord is aspiring to a higher level of certification and wishes to modernise the building with this purpose in mind. This clause is dependant upon certification and supplements clause 17.

Proposed clause

1. The landlord may carry out whatever measures are necessary in/on the lease object to up-grade current certification to a higher certification level.
2. To the extent that such measures concern parts of the property used solely by the tenant, such measures must be discussed and agreed upon with the tenant. The landlord shall carry out measures pursuant to the above provision in a way that will cause the least possible disruption to the tenant's business operations provided that avoiding such disruptions would not substantially increase the costs of such measures. Any rights and claims which the tenant may have (including without limitation rent reduction, compensation, termination) do not apply while such measures are being carried out.
3. The tenant and landlord will take whatever steps are necessary to satisfy all additional certification criteria, whereby each party will take the necessary steps which fall into its area of responsibility under the general provisions of the lease agreement. The parties shall refrain from anything which would impair or preclude satisfaction of the certification criteria. Further details are set out in the Sustainability Manual/ Environmental Management Plan. Maintenance/repair measures are subject primarily to the special provisions of this lease agreement.

Comments

For the sake of clarity and certainty the measures to which the landlord is entitled should be defined in as much detail as possible. This provision implies that the landlord is also entitled access to those areas leased by the tenant which it has the right to modernise. If appropriate, this should be expressly mentioned in the agreement.

It should be checked to see whether the last sentence of subparagraph 2 (rights and claims of the Tenant do not apply) requires more specification or an amendment in the light of national law. In this respect, a check should also be made to verify whether work should be carried out which does not directly affect the leased areas but still has adverse effects on the tenant and must be taken into account in this provision.

Conclusion

The clause is necessary to attain a higher certification level. As there may be considerable disruption to the tenant a check must be made to ascertain under which conditions of the respective national jurisdiction this is permitted.

19. Certification: certificate being sought

This clause refers to a building which has not yet been certified but is supposed to be assessed.

Proposed clause

(1) The landlord will assess the leased object according to the [name of applicable certification body or bodies] certification system. The landlord seeks to obtain [name of applicable certificate] certification in [name applicable certificate class]. The landlord may carry out whatever measures are necessary in/on the lease object to obtain the certification.

(2) To the extent that such measures concern parts of the property used solely by the tenant, such measures must be discussed and agreed upon with the tenant. The landlord shall carry out measures pursuant to the above provision in a way that will cause the least possible disruption to the tenant's business operations provided that avoiding such disruptions would not substantially increase the costs of such measures. Any rights and claims which the tenant may have (including without limitation rent reduction, compensation, termination) do not apply while such measures are being carried out.

(3) The tenant and landlord will take whatever steps are necessary to satisfy all certification criteria, whereby each party will take the necessary steps which fall into its area of responsibility under the general provisions of the lease agreement. The parties shall refrain from anything which would impair or preclude satisfaction of the certification criteria. Further details are set out in the Sustainability Manual/ Environmental Management Plan. Maintenance/ repair measures are subject primarily to the special provisions of this lease agreement.

Comments

With this clause, the landlord undertakes to seek certification although the level of certification is not binding. On the one hand, this clause may be more softly worded (by saying the landlord only has to use its reasonable endeavours to achieve certification), on the other hand stricter wording may be used (the landlord undertakes to achieve certification at a certain level).

Conclusion

If the landlord is aiming for certification it should find out at an early stage which level is achievable.

20. Certification: level of certification not yet defined

This clause refers to a building which has not yet been certified. A decision has not yet been made regarding which level of certification to aim for.

Proposed clause

(1) The landlord may carry out whatever measures are necessary on/in the leased object to obtain initial certification of the leased object according to the [name of applicable certification body or bodies] certification system or an equivalent certification system.

(2) To the extent that such measures concern parts of the property used solely by the tenant, such measures must be discussed and agreed upon with the tenant. The landlord shall carry out measures pursuant to the above provision in a way that will cause the least possible disruption to the tenant's business operations provided that avoiding such disruptions would not substantially increase the costs of such measures. Any rights and claims which the tenant may have (including without limitation rent reduction, compensation, termination) do not apply while such measures are being carried out.

(3) The tenant and landlord will take whatever steps are necessary to satisfy all certification criteria, whereby each party will take the necessary steps which fall into its area of responsibility under the general provisions of the lease agreement. The parties shall refrain from anything which would impair or preclude satisfaction of the certification criteria. Further details are set out in the Sustainability Manual/ Environmental Management Plan. Maintenance/ repair measures are subject primarily to the special provisions of this lease agreement.

Comments

In France there is an obligation to obtain certification (2012 RT, 2005 RT, HPE, THPE, BBC 2005...). RT 2012 is a new certification which has to be obtained for new buildings at a specific date, notably:

- 28th October 2011: building permit for new buildings for the tertiary and public sector,
- 1st January 2013: building permit for every new building with residential purposes (except for ANRU area, which date is 1st March 2012)

Every other construction in which the building permit is required before these dates shall obtain RT 2005.

Every construction may obtain one of the certifications (HPE, THPE, BBC 2005) provided by a French regulation dated 3rd May 2007 ("arrêté du 3 mai 2007").

Conclusion

The landlord should clarify as early as possible whether it wishes the building to be certified, which certification method to use and which level to aim for.

