Cross-Border for Beginners - How to Acquire Your First U.S. Business Space - Structuring for Success – Caveat Emptor ©

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JOHN BUSEY WOOD

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I have spent over 3 decades assisting businesses from other countries in their efforts to successfully enter the U.S. market, acquire operations locations and negotiate and contract. The entries have not always been smooth or successful. In many instances they have failed or had costly “do-overs”. Most of the failures or costly “do-overs” resulted from the entrant beginning its business in the U.S. in the same manner or custom that was successful in its own country. Basically just transplanting its culture, operations and product to the U.S.

The more successful entrants seemed to plan early and obtain advice and guidance from U.S. companies with successful track records and cultural understanding before starting to take action in the U.S. So armed with this awareness of higher levels of success resulting from the strategic practices of those successful companies learning first and adapting their cultural backgrounds to the U.S. ways of conducting business, I have endeavored to teach and represent companies and individuals early in their processes to help make the entry less costly and more successful. I have also written many booklets for chambers of commerce such as the Swedish-American Chamber, German-American Chamber and others. In an attempt to help businesses early in their processes and strategy to prepare for and adapt for U.S. business entry, I have taken one of these booklets which is newly written for the Spanish-American Chamber to publish and revised it to more generally provide “beginner guidance” and issue identification to assist those that would “Come to America” to participate in this expansive, rewarding and ethical business environment.

This booklet is intended to help the general business person gain a broad understanding of the process and the issues involved in purchasing or leasing a real estate space for its business and how to structure that business to minimize liabilities and to negotiate more successfully. This booklet is not intended to provide specific legal or other professional advice, but is an overview on “how to begin the process”. Individual situations have their own distinct considerations and appropriate professional assistance should be sought. While it is written for the Spanish-American Chamber community to use for their interested businesses, it will give a very good “window into” U.S. business practices, negotiation and contracting customs and “real estate styles and regimens” for all businesses wishing to become “cross-border” players.

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JOHN BUSEY WOOD

John Busey Wood advises public and private companies on real estate acquisitions, facilities management, construction and development, brokerage law, commercial leasing, commercial property management and litigation. For over 35 years Mr. Wood has represented owners in the design and negotiation of commercial leases covering in excess of 100 million square feet of retail, office and mixed use space projects. He has assisted large volume space users in the effective management of their facilities portfolios and in reducing costs and risk. These experiences, coupled with a unique blend of professional disciplines and his design and deployment of sophisticated new-generation commercial lease forms during the late 1970's and the 1980's resulted in his being featured in articles on the impact of commercial leases on companies and being referred to by The Wall Street Journal and other publications as "the father of the modern killer lease." His extensive national experience in developable land, improved property acquisitions, large scale retail and office developments, and leasing and management programs have made him an ideal corporate facilities support resource for companies. He is a noted authority on fair market value determination and valuation of properties as well as rental escalations, expenses, allocations, auditing and litigation/dispute resolution. Among noteworthy projects, Mr. Wood directed the legal team in a national portfolio acquisition with a value in excess of $2 billion and he participated in the development, leasing and financing of over 4 million square feet of regional shopping malls and retail centers nationwide. In 1998 he negotiated the largest ground/space lease transaction in the history of New York City, containing more than 1.6 million square feet and including "fast-track" rehabilitation, construction lending, permanent financing and options for fee acquisition. In addition, Mr. Wood has advised, directed teams and designed correlated construction contracts for "fast-track" design-build projects, conversions and renovations in New York City, exceeding 8 million square feet, with values greater than $4 billion. Mr. Wood has also directed large-scale leasing programs for major New York City office towers and mixed use properties. He regularly directs litigation teams in landlord-tenant disputes, construction disputes and retail lease close-outs. His financing, auditing and computer expertise contributed to his uncovering the largest computer-leasing fraud in the United States, the O.P.M. Leasing fraud. Mr. Wood is a licensed Class "A" commercial real estate broker, a Certified Public Accountant and holds B.B.A. (Accounting and Economics), M.B.A. (Accounting and Finance) and J.D. degrees.

Mr. Wood is a member of the Association of the Bar, NYC, New York State Bar Association, American Bar Association ("ABA"), (Vice-Chair of the Commercial Leasing Committee and former Chair of the Office Leasing Subcommittee), and Board of Legal Advisors to the Practicing Law Institute ("PLI"). He has been a member of the Board of Directors of the International Association of Corporate Real Estate Executives (NY Chapter), American Institute of Certified Public Accountants ("AICPA"), and American Association of Attorney-CPAs. Mr. Wood served, from 1982 through 1991, as a member of the Associated Builders and Owners of New York, the New York Building Congress and its Board of Legal Advisors, and the Real Estate Board of the City of New York ("REBNY"). Mr. Wood is co-chair of the American Arbitration Association National Real Estate Dispute Resolution Committee. Mr. Wood frequently lectures on property acquisition and management, commercial leasing and construction contract techniques, transaction structuring and brokerage law at major real estate brokerage firms in New York City, REBNY, and at the New York University Graduate School and Real Estate Institute. He also lectures at PLI, where he is the New

York and national Chairman of the National Commercial Leasing Seminars, and at the executive and annual meetings of the ABA and AICPA. Mr. Wood has frequently served as a “party selected” and Federal arbitrator and with the American Arbitration Association. in fair market rent valuation and rental/expense/adjustment disputes and audits and he is an American Arbitration Association - National Neutral - Commercial Panelist-Arbitrator. He has also served as Assistant Attorney General (Kansas), and as special counsel to Bronxville Board of Zoning Appeals, Planning Board and Board of Trustees and is a member of the Westchester-Putnam Boy Scouts of America Council and the National Eagle Scout Association.

Mr. Wood has presented papers on "Equity Leases" and “Work Letters” to the ABA and on “Accounting and Tax Issues for Work Letters and Allowances” to the AICPA. His article "Trump [Tower] Tenant Finds Turnkey [Construction Agreement] Saves the Day" appeared in the Legal Times of Washington and New York, October 21, 1985. Mr. Wood co-authored, with Alan M. DiSciullo, Esq., the treatise Negotiating and Drafting Office Leases, published by Law Journal Seminars-Press (Library of Congress ISBN 1-58852-061-7, 1995-2009 supplemented twice a year); co-authored "Section V.A, Fire and Casualty Insurance" in the Real Estate Law and Practice Course Handbook , Published by PLI, 1994-2010; co-authored "Building Owner's Assumptions Spark Zoning War", Legal Times of New York, August/September, 1985 and co-authored "Financing Real Estate Development through Participation Leases", Real Estate Review, Volume 20, No. 4, Winter, 1991. He is the author of the book, Navigating The Dangerous Shoals of a Commercial Lease – For Beginners, published by New York University Graduate School, 1992-2009 and the ABA. Mr. Wood is listed in Who's Who in Real Estate, Who's Who in American Law, 2nd and 4th Editions, and Who's Who Registry of Global Business Leaders, 1993-4 Edition. Mr. Wood is AV peer rated by Martindale-Hubbell and was peer-nominated and peer elected an American Bar Foundation Fellow. Mr. Wood has been Senior Editor of "Real Estate Corner", a monthly article on commercial real estate for corporate professionals published by The Metropolitan Corporate Counsel, Inc. and has appeared on national television speaking on current trends in national real estate.

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Cross-Border – For Beginners

I. How to Acquire Your First U.S. Business Space - Structuring for Success

Real estate transactions in the United States can be surprising for many Spanish business persons. It can be a revelation for experienced executives to find out, first-hand, how the same straightforward and logical acts, usual and appropriate in Spain, can, when done in the United States, result in surprising and unintended, but considerable, financial and legal consequences.

For example, consider the fictitious Spanish executive sent to New York City by the parent company in Spain to explore possible locations for a flagship retail store – the first to be opened in the United States as part of the parent company's global expansion strategy. After a day spent in exploring different New York neighborhoods, the executive sees an attractive street-level vacant store with a sign taped to the window: "Available: For Rent/Purchase" and indicating a name and phone number to call "For More Information". Based on what is able to be seen from outside, the executive thinks that this store may be perfect for the company and the executive calls and sets up a meeting with the person whose name and phone number were listed on the sign in the vacant store's window. During this telephone conversation, the executive expresses interest in the property, discloses the affiliation with the parent company, and provides a general idea of the intentions with respect to acquiring space. The executive then goes on to express interest in seeing the inside of the store and asks about the rent, how long the property is available for leasing and whether it is in good condition or there is work to be done in the space to accommodate the business contemplated by the Spanish employer. The person on the phone provides the information requested as well as some information about the market in general, and offers assurances that this particular property is in "great shape". An appointment is made to see the property and the conversation is concluded with expressions of interest all around and thanks expressed by the executive for the information that has been provided on the market in general and on this space in particular.

Unbeknownst to the executive, this initial contact will determine the nature of the company's relationship with this property as well as with every other property the executive may see or about which the executive may acquire information or descriptive materials.

There are many variations on the "initial contact" scenario described above: For example, if, instead of being vacant, the space was occupied by an ongoing business, the Spanish executive probably would have had a face-to-face conversation with someone at the store itself; if, on the other hand, the space was vacant, but it was part of a property under development, the executive most likely would have spoken with someone who had been placed in the space for the express purpose of responding to inquiries, and possibly also, if a telephone call was also placed by the executive, to the person whose name and number appeared on the sign. No matter what the particulars, the effect of the initial contact is the same. By the time the Spanish executive has concluded the initial conversation about the space -- regardless of intentions – the executive (depending on the exact words exchanged) has inadvertently triggered a host of legal and financial liabilities for the company and perhaps even its parent company back at home. At the

very least, the executive has effectively waived the company's rights to employ a broker that has been deliberately chosen, one whose loyalty the executive has specified to be undiluted by conflicts, and one who will provide only the specified services needed at prices that have been fully negotiated, or even discounted, as appropriate. A further result of the initial contact is that the executive has effectively caused the cost of this real estate transaction to have increased considerably, without having gotten a commensurate added value.

Additional consequences of such a conversation during such an initial contact also depend on, among other things, the place where the conversation and the property are located (here, we are assuming New York City) and the identity and function of the person with whom the executive has had the initial conversation. If the executive spoke with the landlord's broker, the executive has most likely retained the broker as the company's broker, and perhaps even, depending on the exact words, as its "exclusive" broker for this property requirement or other properties or locations. If the broker is employed by the landlord, the executive has placed the company in the less-than-desirable position of having brokerage representation that will be compromised by the broker's pre-existing loyalty to the landlord. It is important to note that the landlord's interests are not aligned with to tenant's needs on many issues, including the condition of the property, about which the executive specifically enquired. Any oral declaration made by the broker (or by anyone for that matter) that the property is in "great shape" cannot, in fact, be relied on to protect a tenant or purchaser from the consequences of latent or hidden defects in the space or in the building, or issues of legal compliance affecting both, which will not be apparent from even the most exacting visual inspection.

If the executive spoke with an owner or landlord, the executive may have not triggered an immediate brokerage liability for the company, but the executive has, equally unknowingly, created an additional expense for the company, because the company will now need to employ a broker to act as a consultant to represent it on issues that ordinarily would have been dealt with the broker acting as its broker. (The tenant's or purchaser's broker's fees are customarily paid by the landlord). The landlord, who has "found" the executive without benefit of any broker, will (understandably) refuse to pay for the services of any broker other than the one the landlord already employs. In fact, in such a situation the landlord will further protect itself in the lease or the contract of sale, as applicable, by providing in the applicable document that the tenant or purchaser will be responsible for any claims made by any broker other than the landlord's own. In addition, the executive has also disclosed or registered the identity of the company, and perhaps even the parent company, as a "party interested" in the property, thereby making that interest very public. The timing of such a disclosure of identity and/or interest should always be controlled by the tenant or purchaser. This is valuable strategic information that should be used and distributed only when appropriate to obtain maximum leverage and impact. In addition to making an inadvertent commitment to that property and the broker or owner by such disclosure of information, it may well have an adverse affect on the company's bargaining position.

If the executive's conversation was with a representative of the current occupant of the premises, a somewhat less likely occurrence, other different, but no less significant, legal and financial consequences will follow, with predictably problematic effects. This could include, among other things, the possibility of a claim by a third broker, that third broker being the broker employed by the current occupant offering the property for sale or lease.

While there can be a great many different initial contact scenarios and a great variety of consequences, what is important to remember here is that as a direct result of one simple conversation, intended purely to gather information without further commitment, the Spanish executive almost certainly has incurred significant liabilities and responsibilities for and on behalf of the company for brokerage commissions and/ or consulting fees, placed the company in a disadvantageous position by being represented by a broker with divided loyalties, and caused the significant erosion of the strong

bargaining position that may have been enjoyed by the company. In addition, the Spanish executive's company, and possibly the related and affiliated Spanish companies may also be affected with unintended consequences since now it may be considered to be "doing business" in New York, and, as a consequence, subject to the jurisdiction of the Courts of the State of New York for tax purposes as well as for purposes of other liabilities. Once the company enters into a lease or a contract to purchase property in New York, it will doubtless subject itself to the jurisdiction of that state; however, the timing of the decision to "do business" in New York, and consequently be subject to the courts of that state, should be controlled by the company and should be undertaken deliberately when the company is fully prepared for the consequences, not as here, with the company finding itself in a serious situation for which it is not yet prepared or yet structured itself.

Our example of the fictitious Spanish executive was designed to illustrate -- in the simplest terms -- what could happen as a result of a single initial "exploratory" conversation or visit to a property. In reality, it is possible, even likely, for an executive whose mission is to understand and seek out properties in a United States real estate market, to have many such initial exploratory conversations with a variety of different parties about multiple candidate properties and possibly in several additional cities before finally returning home to report. The total financial and legal impact of all these multiple conversations could be so significant as to foreclose, or at least temporarily postpone, the company's expansion plans because these actions may have inadvertently made the space acquisition too risky or too expensive to accomplish.

However, that situation is not at all inevitable, and, with the kind of thoughtful pre-planning that is described in this booklet, including making use of the checklists provided, it can be avoided, and the real estate and related corporate transactions be carefully structured to successfully acquire the property and minimize legal and financial liabilities to the tenant or purchaser.

The purpose of this booklet is to provide a guide to Spanish companies or individuals that have decided to do business in the United States and are seeking to purchase or lease office, warehouse, manufacturing or retail store space for their business. It covers the entire process of acquiring space, including how to find the property by finding and employing a broker, and how to determine the appropriate nature and scope of the broker's employment as well as how to secure additional services from the broker and the pricing of such services. This booklet also describes the principles involved in contracting for the property, whether purchasing or leasing, and the kinds of protections that should be built into the documents to protect the purchaser or tenant from assuming liabilities inappropriate to the levels of risk and ownership inherent in the transaction. In addition, it will address what is involved in fixing up the property so it will be suitable for the specific purpose of the occupant All of these aspects of the transaction will be considered in the context of allowing the purchaser or tenant to do what it needs to do to be successful in running its business and still avoid costly hidden traps and missteps resulting from not following customary business practice in the United States or from peculiarities of United States law.

Although we have prepared this booklet principally as a guide to real estate matters, it will also address, on a more limited basis, related corporate issues raised in structuring the U.S. business in order that it may hold or acquire the property or the lease and, at the same time, minimize its liabilities, and the risk of exposure to liabilities of the home company in Spain. It will also review relevant Federal and state real estate and cross-border tax concerns of Spanish companies holding real estate interests, guaranteeing obligations or otherwise "doing business" in the United States. And, it will discuss some of the more striking cultural differences between Spain and the United States and common attitudes, assumptions and approaches that the Spanish business person will most likely encounter when doing business in the United States.

We note that it is essential that the process of acquiring space for the new United States–based business is not undertaken until the form and structure of the new business has first been determined and established, so that the appropriate legal safeguards are in place by the time the representative of

the Spanish company is ready to take action in the United States, or, at a minimum, by the time the Spanish company is ready to commence business operations in the United States. As shown in our example, without such careful planning, once that representative comes into the United States the representative may unintentionally trigger liabilities that can stretch across the Atlantic to cause the home company in Spain to be exposed to those liabilities as well.

II. What to Expect When You Do Business in the United States: Differences in Expectations and How These Affect Deal Formulation

The many shared values between the United States and Spain are an important part of why many Spanish companies are so comfortable and successful in the United States. However, there are significant differences in expectations and approaches as well. It is extremely important before beginning the process of a real estate transaction in the United States to understand the custom and practice that surrounds the way business is transacted -- including the nature of the formal and informal relationships that come into existence among the various participants in the transaction -- in order to avoid inadvertently misunderstanding the dynamic of the interaction, and, as a result, losing the deal, or, even worse, making the deal and winding up being hurt badly as a result of incurring unintended or unanticipated liabilities.

The Importance of Caveat Emptor

In the United States, the principle underlying most business transactions is "caveat emptor" -- or "let the buyer beware". This phrase is a warning to the buyer or tenant that in the transaction to follow it will get just what is offered by the seller or landlord, and nothing more. In fact, what the buyer or tenant will actually get is only what is put into the written document signed by both parties that memorializes the transaction, that is, the contract of sale or the lease. Moreover, since the seller or landlord is under no legal duty to disclose all of the relevant information about the property, what it appears that the buyer is offered may be very different from what is, in fact, actually offered, and, thus, what it will ultimately get. Accordingly, if the buyer or tenant wants or needs something more or something different from what the owner or landlord is offering, it must ask and negotiate for what it wants or needs and then confirm that the needs are properly reflected in the transaction documentation. The common practice in the United States is that every seller or landlord negotiates for nearly every aspect in a real estate transaction and expects that the prospective tenant or purchaser will negotiate as well. In a real estate transaction in the United States, the parties understand that the first offer is simply a starting point, and nothing more; it is not intended to be the "best" offer, nor even a "fair" offer.

For example, consider the condition of the property, a fundamental component and a very material part of a real estate transaction. In the United States, "as is/ where is" is the standard condition in which property is offered for sale or for rent. This means the property is offered in the condition in which the purchaser or tenant sees it --- or more accurately, the condition in which it presently exists, which may in fact be quite different that what is revealed by simple observation. There is no obligation incumbent upon the landlord to voluntarily disclose to the prospective seller or tenant the condition of the property, whether that condition is appropriate for the purchaser's or tenant's purpose or whether it can legally be made so. In fact, the condition of the property is nearly always highly negotiated, with the extent of the negotiations being a function of the bargaining power of the parties. The tenant or purchaser can develop a more favorable bargaining position by having a thorough understanding of the property through its investigatory due diligence and

professional physical inspection of the property. The parties negotiate for the "physical" as well as the "legal" condition of the property. Thus, the tenant or purchaser will seek assurances for the physical condition of the property (what is seen as well as unseen) to be appropriate to allow the business to be conducted. Accordingly, the tenant or purchaser (and its architect, engineer, and counsel) will be concerned with things like the sufficiency of the electrical capacity of the building and the premises, the strength of floors, and the functionality of mechanical and other building systems serving the premises.

In addition, the tenant or purchaser will seek assurances that the owner has complied with relevant laws that affect the property, and will seek information as to the state of title of the property. In this situation, the tenant or purchaser would need to be concerned with, among other things, whether the owner has complied with laws concerning safety, including fire safety and the presence of certain hazardous materials at the premises, and laws concerning the upkeep of the appearance of the premises and/or the building if the building is "landmark" property and required to meet specific requirements under the appropriate preservation law. In addition, it is up to the tenant or purchaser (and its counsel) to do the research and be satisfied that there are no zoning or comparable laws or regulations that will prohibit the tenant or purchaser from conducting its business in the particular building or the premises. Finally, the purchaser or often the tenant (depending on the nature of the lease) must research and understand the status of the owner's title to the property, and as appropriate, secure title insurance as to the quality of the title granted. This process of negotiating with respect to the legal condition of the property may be surprising to Spanish busines spersons, inasmuch as the practice in Spain is very different: In Spain most items affecting the legal status of the property have been established and disclosed to the prospective purchaser or tenant by requirement or operation of law before the property is ever actively marketed.

The goal of tenant's or purchaser's negotiations with respect to the condition of the property, is, through their attorneys, to insist on certain written "covenants", "warranties" and "representations", which are formal statements of the existence or absence of a state of facts, or promises with respect to particular aspects of the condition of the transaction or the real property that is the subject of the transaction, or other similar protections for their clients. Thus, if a purchaser or tenant wants to be sure that it will acquire a space that is in the condition which is appropriate and required for the conduct of its business, those conditions must be specified, must be agreed to and "represented" or "covenanted" or "warranted" to by the seller or landlord, and, in all cases, must be made part of the written agreement or lease. Such expected conditions must also then be confirmed and proven by investigations, testing and proper "due diligence" studies and efforts. This principle applies as well with respect to the type of business that the tenant or purchaser expects to conduct at the property. It is possible for there to be limitations on the uses to which a property may be put or even prohibitions against specific uses. These limitations on use may found in the deed by which the property is transferred or in applicable zoning laws, or both. There may even be a restriction in the deed (or other conveyance) on a particular piece of property being used for a particular stated purpose even though it is permitted by law. The tenant's or purchaser's real estate attorney, architect or zoning specialist should be the resource to which the tenant or purchaser turns to find all of this out -- it should in no event rely on the assertions of the seller or the landlord. Moreover, and as discussed further below, the seller's or landlord's assurances or representations, whether they concern the physical or legal aspects of the property, will not be of any real value to the tenant or purchaser unless that have been put in a form that is enforceable, and, in the appropriate circumstances, secured by collateral.

The principle of caveat emptor is also applicable in transactions that involve brokers and the commissions they can earn for finding a property as well as the services they offer with respect to the property and the process of establishing the prices of those services. A licensed commercial real estate broker, being bound by a code of ethics unique to that profession and subject to the oversight of governmental authorities, is required to disclose to a prospective tenant or purchaser of property

whether it represents the landlord or any other client whose interests are adverse to or competitive with the prospective tenant. Although dual loyalty of a broker may be permitted under the applicable ethical guidelines, the reality is that the level of loyalty that will be shown to a prospective tenant or purchaser will pale against that provided to the property owner. Consistent with caveat emptor, the prospective tenant or purchaser will not know the level of loyalty it will be getting from its broker unless it asks before retaining the broker as to the existence and scope of any relationship with the landlord and others.

Before the broker is retained is also the time to find out if the broker is representing clients who are competitors of tenant or purchaser, or if there is any other situation existing that would dilute the broker's exclusive loyalty to tenant. The dangers of retaining a broker who also represents a competitor are far from theoretical. The broker, as part of understanding the space needs of the company, can't help but be aware of its long-term strategic expansion plans, financial and operating budgets, and sometimes even more. Understand that while brokers are required to act within certain ethical parameters, brokers are not bound by the same confidentiality constraints as lawyers; there is no "broker-client" privilege. A client's proprietary or other information will not be protected as "confidential" unless the written brokerage agreement specifically provides that is the case. Consider a situation where the unique needs of a product line require an equally unique "special use" property, of which, by definition, there can be only one. Certainly, the knowledge of the availability of such a property is very valuable and it is information that should not be shared with a competitor. Thus, the goal for the tenant or purchaser must be to get the broker's exclusive loyalty in addition to the broker's expertise. Put another way, if the tenant or purchaser wants the exclusive loyalty of the broker, it must be bargained for, and the written brokerage agreement must so state. This notion of bargaining for exclusive loyalty of the commercial real estate broker is another peculiarity of the real estate transaction in the United States. The amount of the commission that the broker earns for "finding" a property for the tenant or the purchaser and when and how it is to be paid is also subject to negotiation and is often highly negotiated.

Negotiating is similarly necessary and appropriate when the tenant or purchaser attempts to ascertain, select and price the level of services it wants from its broker. In the United States, there are no "standard" prices for brokers' services; they are established by the give and take of negotiation. Although formulas for calculating the prices for brokerage services do exist (for example, the "Lehman formula") the resulting calculations can vary widely depending on various factors. While the fundamental nature of the services offered by many brokerage firms may appear similar, each firm has its own unique way of packaging, and thus pricing, its services. And while the broker may advise as to the availability of services generally, the process of negotiation is truly the only sure way for the tenant or purchaser to get exactly the services needed and to pay what is, in fact, appropriate. The process of negotiation is also an effective way to establish a long-term brokerage relationship which would include services (and prices for them) which address long- term needs, such as those pertaining to relocations and exit strategies, all of which should be incorporated into the written brokerage agreement. Having a successful long-term relationship with a broker can be valuable on a number of levels; an experienced broker that has been with the company as it has grown can also provide valuable input in the process of developing a company's long term geographic expansion strategy.

It is not unusual for tenants and purchasers to unknowingly forfeit their ability to negotiate, and thereby give up all the advantages that will come with it, including the chance of making a good deal and obtaining the best information and levels of services. This can happen all too easily. Initiating the process -- even informally – of looking at properties, meeting people and/or discussing the prevailing or customary pricing or terms offered by the owner may in all likelihood trigger the commencement of a legal business relationship regardless of the intentions of the purchaser or tenant. Thus it becomes essential that all discussion of employment, commission, services and

pricing be designated as such and that all of these subjects are covered in appropriate depth and detail before the business relationship is formalized, otherwise there is the very real possibility of unintentionally employing a broker on the terms that may have been stated during such discussion, and those terms may turn out to be for the lowest level of loyalty and the highest commission rate with the highest price for the lowest level of services.

As a general rule, it is wise to recognize that the notion of caveat emptor remains fundamental to law and business in the United States, although with respect to certain specific and highly regulated areas, it has become somewhat less so. Today, in nearly every aspect and phase of a real estate transaction the United States -- the physical condition of the property, the quality of ownership, priority of rights, levels of brokerage services, to name just a few -- caveat emptor still applies in some way, depending on the jurisdiction of the transaction.

The Necessity for Complete Written Agreements

In the United States, in general, and in real estate matters in particular, a legal document, whether it is a contract or a lease, is drafted to explicitly set forth and articulate all of the rights and responsibilities of the parties with respect to the particular real estate transaction and property interest at hand. The document is expected to address and to cover all foreseeable eventualities. It will be the first place to which the parties turn to clarify a perceived ambiguity or to resolve a difference of opinion with respect to the transaction. A good rule to remember is this: If the issue is important enough to discuss, it is important enough to be included in the document.

This approach is very different from the prevailing approach in Spain, where comparable legal documents in a real estate transaction are generally perceived as and drafted to be an overview, executive summary or a broad outline of that transaction. For example, in Spain it is not unheard of for a commercial lease to be not much more than a page or two; in the United States it is not unusual for a commercial lease to be 80-to-100 pages -- without counting various schedules and appendices and ancillary large reference documents, all of which relate to and affect the rights and responsibilities set forth and embodied by the commercial lease itself.

This Spanish approach, so effective in Spain, will not be effective in the United States. There are significant consequences in the United States of having a document that does not carefully and thoroughly address all issues or concerns of the parties, or one that contains any significant ambiguity. Relying on such a document can result in the disputed items being resolved through litigation, which is an unpleasant, expensive and time-consuming process. Litigation may result, in the worst case, in the dispute being “resolved” in court by a judge who may fill any gap or ambiguity in the documents with reference to common or case law, which, often, due to the influence of caveat emptor, is unfavorable to a purchaser or tenant.

In addition, in the United States since nearly all documents in a real estate transaction are very heavily negotiated, there is yet another departure from common Spanish practice. In the United States, the custom and practice is that the first draft of a document will in nearly all cases, be drafted by the landlord’s or seller’s lawyer, and be drafted to strongly favor the drafter. (In fact there is much case law in the United States concerning the rules of construction or interpretation of written contracts or other documents, that stands for the proposition that because of this usual practice, judges will consider any differences of opinion as to the meaning of the final document in a light least favorable to the drafter, who is presumed to have had more control over its wording.) What this means for the prospective tenant or purchaser (and its counsel) is that the first draft of a contract of sale or lease will have a significant bias towards the drafter and will not necessarily represent the deal as the parties have negotiated it – in fact, it may be very far from what was discussed between the parties. This tactic can also be used as a very effective negotiating strategy.

Other drafting techniques can also be part of the negotiating strategy, and some can have a very bad affect on and even eliminate rights that have been bargained for. For example, under accepted

principles of contract drafting, the later occurring or written and more specific reference will be deemed to modify or overrule the earlier and vaguer one. These drafting techniques are common in the negotiations and drafting of the deal. Thus, a right referred to early on can be wiped out by specific reference that appears later in the document. Experienced commercial real estate practitioners are familiar with this technique and will be able to spot it and effectively neutralize it.

Depending on the approach and attitude of the individuals involved, it is not unusual for there to be many rounds of drafts until the deal as originally understood and agreed on by the parties is accurately reflected in the documents. While the landlord's attorney customarily does the drafting -- historically the most time consuming and therefore expensive part of the transaction -- a tenant, or its counsel, who does not understand or have experience with this common practice in commercial real estate and thus, has not developed a strategy and tactics to counter it, can easily waste a lot of time and money reviewing and attempting to negotiate multiple drafts without either significant progress or any favorable result for its client. Today widespread use of computers and word processing in the legal profession has eliminated much labor intensive activity associated with the landlord or owner's cost of negotiation, such as typing and retyping a document, with the result that the landlord's or owner's cost of negotiating have gone down significantly.

Litigation as the Principal Dispute Resolution Mechanism

Business persons from Spain as well as those from other countries often remark on what has been described as the "litigious" nature of society in the United States. The frequent resort to the courts to resolve disputes in the United States represents a different approach than the more amiable and informal manner in which business conflicts in Spain are usually resolved. Accordingly, it is crucial when doing business in the United States to keep and maintain scrupulous records and careful documentation of any and all agreements, representations and the like, since an agreement based on "a handshake" is not generally sufficient to be enforceable in the courts. (The biggest and most meaningful and most potentially dangerous exception to this principle is the ability to orally employ a broker, which we have discussed earlier.) Generally, in order to be able to enforce the rights contained in them that have been bargained for, agreements must be in writing and signed by the parties, and they must conform to certain specific legal formalities. If those agreements contain "representations", these representations must be in writing as well, and, as a practical matter, they are often secured or collateralized.

The significant differences in approach that distinguish a real estate transaction in the United States from one in Spain should not in any way imply that most individuals in the United States are less than reliable or trustworthy. In our experience we have found people in the United States, for the most part, to be straightforward. But invariably, disputes will arise, and when they do, whether the dispute arises as a result of intentional or unintentional circumstances, in the United States the mechanism that is relied on as being the best and most effective way of enforcing broken promises or resolving disputes is the court system. And the courts will look for clear and complete written and signed documents and factual authenticity in their adjudication of disputes.

Conclusion

As a result of the unique and particular ways in which the legal and business conditions in the United States interrelate in commercial real estate transaction, successfully initiating and concluding a commercial real estate transaction is very different in the United States from the way it is in Spain. Understanding those differences and avoiding the problems that they potentially present is indeed a challenge. However, armed with the appropriate knowledge and experienced advisors who will insist on legal and commercial protections, the Spanish company can avoid the obvious as well as the not-so-obvious pitfalls, and complete a commercial real estate transaction that will successfully establish its presence in the United States.

III. Finding Your Broker and Finding Your Property

To find the property or rental space that is right for your business, you will, in nearly all cases, require the services of a commercial real estate broker. Brokers can provide their clients with access to their inventory of available properties or space, as well as to provide them with valuable information as to the financial and non-financial terms with respect to the prevailing commercial real estate transactions in a particular market. It should be noted that Brokers can greatly assist in the inspection and engineering review of candidate properties and provide feasibility analysis and comparisons not only on efficiencies and conditions, but on the financial impacts long term so as to compare the candidates more uniformly. Brokers also can model or analyze the financial implications of the real estate transaction, from the initial costs to the projected long-term costs of holding the space. This information and analysis is crucial to understanding the transaction and how it relates to the tenant's or purchaser's business plan.

Brokers are regulated by governments, and must be duly licensed by the jurisdiction (the state, and/or municipality) in which they are operating. Licensing is the government's way of ensuring that the broker has met certain prescribed standards of education, experience and knowledge, and is committed to function on a specified ethical level. In addition, the broker is subject to the oversight of the state licensing authority, so that in the event there is a dispute between the client and the broker, there is a clear process available to resolve any such dispute and to enforce the mandated resolution.

Assembling the Team

Finding a suitable commercial real estate broker is a very important part of assembling the team that will participate in the selection and preparation of the new space. In fact, assembling the team is a really part of the planning phase of the space search process, which also includes getting prepared and educated before going out to the real estate market. The team also needs to target the location of operations as well as the use needs for the space. The team should be headed by a representative of the business entity that is looking for the space who knows and understands the criteria for the space decision. The space criteria should be determined by the business that is looking for the space in advance of assembling the team. The Facilities Manager, responsible for the space needs of the business, including space planning, use layout and technological and other service capacities, must provide the general, operational and crucial input.

In addition to a broker who is experienced in the market area where the business is to locate, the team should include, at a minimum, a real estate lawyer who is familiar with commercial leasing (or acquisitions, as the case may be) and with the local real estate market and the laws of the area; an architect who is familiar with local laws and building codes, the facilities manager, if any, or a project manager, an engineer, and if there is a technical aspect to the project, and whatever other additional consultants may be necessary, based on the space criteria previously determined for the project.

What the Broker Does:
Finding, Negotiating and More

The most important function of the broker is to put the tenant or purchaser together with a property that is suitable for the particular needs of the project or business seeking to acquire the space. The broker can screen out the properties to exclude those which do not meet the tenant's or purchaser's criteria. The broker is "key" because in the world of commercial real estate, Landlords or Sellers of property do not always list all of their properties in a way that may be accessed directly by the tenant or purchaser. The broker can provide an entrée to properties that the tenant or purchaser would not have otherwise had the opportunity to see, or even know of. The experienced professional broker also brings knowledge of market conditions, including the reputations and history of landlords and sellers and their properties. Even if a tenant or purchaser is lucky enough to find what appears to be an "appropriate" property without a broker, an experienced professional broker can and will help the tenant or purchaser and its lawyer in negotiating the transaction, since these brokers are familiar with issues that are typically concerns of a commercial tenant or purchaser.

Most commercial landlords or sellers -- certainly the larger ones -- will have brokers (and lawyers) of their own, and it is very often the case in the United States that the principals do not negotiate face-to-face at the inception of the deal. In fact, it is often the brokers, each with their respective "wish lists" supplied by their respective clients, who begin the negotiations by preparing a written "term sheet" or "letter of intent". This is a self-proclaimed non-binding document that serves to establish the broadest outlines of the transaction. Sometimes each side will prepare a term sheet; often they will not match up. But, whatever the form, the term sheet stage is where the negotiation process begins in earnest.

Less frequently used, but often adopted by larger commercial users of space with commensurately larger bargaining power, is the Request For Proposal, or "RFP" process. This can be a very effective method by which a strong tenant or purchaser initiates serious negotiation. In its simplest form, the tenant, through its broker and in consultation with its architect, engineer, lawyer and other members of its team, provides to various landlords its requirements with respect to the space it needs, e.g., the type of space, duration of the proposed lease, a range of acceptable rentals etc. Landlords respond to such a request with what they call their "best offer", which the tenant may select as a starting point for negotiations. Brokers, with their experience and knowledge, are important participants in this process as well.

In the United States it is customary for the landlord or seller to pay the fees or commission of the purchaser's or the tenant's broker. These fees can be considerable, and are generally calculated by applying an agreed-upon percentage against the amount of each year's rent (or, in the case of a purchase, the purchase price). Not surprisingly, brokerage fees, too, are subject to negotiation, and where they are substantial, they can be highly negotiated. Negotiated reductions in brokerage fees may be applied against and reduce the costs of other brokerage services.

An effective broker can and will do more than finding and negotiating for a space or property for a tenant or purchaser. Many larger brokerage firms are "full-service firms" that also provide, for additional fees (that are, once again, negotiable) certain additional specialized services in addition to finding and negotiating space or property. For example, brokerage firms may offer services to monitor and manage the construction of the new space, assist in planning the move to the new space, and assist in monitoring and/or auditing certain ongoing financial and or contractual aspects of the transaction such as lease charges or other obligations. These services can be very valuable, especially if the leasing or purchasing entity (or its parent) does not have a facilities management department, or has one that is not experienced in the management of space in the United States. Retaining a full-service brokerage firm can be an effective way of helping an existing facilities management department in understanding and learning the techniques of how properties in the United States are managed.

Finding Your Broker

The commercial real estate lawyer can be very helpful with the selection and employment of the broker. As seen through the example at the beginning of this booklet, the law concerning the employment of a broker is not at all intuitive, and, as a result, it is all too easy -- even for experienced business persons -- to find themselves in situations that they did not at all intend. Since real estate brokers can be employed orally, such oral employment of a broker can and will generate problems in addition to the obvious issues relating to the uncertainty of what the terms of employment are. For example, merely by having multiple conversations it is possible to inadvertently employ multiple brokers, and, as a result, create liability for commissions to each and every broker so employed. Obviously, this can have disastrous consequences since no landlord wants to incur responsibility for multiple brokerage commissions, which can make a transaction too expensive to ever come into existence. As discussed earlier, landlords will protect themselves from the possibly of liability for multiple brokerage commissions with respect to the same transaction in the contract of sale or the lease by requiring that the purchaser or tenant indemnify it if any such claims are asserted and "hold it harmless" from the related costs and expenses.

The search for the "right" real estate broker is one that can be effectively orchestrated and managed by the experienced commercial real estate lawyer either through recommendations based on personal experience, or through the RFP process, the same process that was discussed earlier as being a sound methodology for finding property to purchase or to lease. In managing the RFP process, the experienced commercial real estate lawyer will help to develop and communicate the search criteria to certain select brokers, which are of an appropriate size and scope to be considered for employment by the prospective tenant or purchaser. Those search criteria will take into account what services the tenant or purchaser will need (such as project management or engineering) in addition to having the broker find and negotiate the purchase or lease of the property. The purchaser or tenant, through its lawyer, will request various candidate brokers to offer their specified services at specified fees, all of which will be subject to negotiation in the brokerage agreement that the lawyer subsequently drafts. In this manner it will be absolutely clear under what set of specific services a broker is being retained, including the amount and timing of the commission, and which services will be provided and for what price. Since fees are negotiable, depending on what is needed and in what volume, it may be possible to negotiate substantial discounts. In addition to discounts on pricing, the written brokerage agreement will be negotiated by the real estate lawyer to provide appropriate legal protections for the tenant or purchaser, such as indemnifications in cases of claims by other brokers, which is an all too frequent occurrence. A written agreement is also a way of ensuring that the broker is obligated to and will work together with the attorney, architect, engineer and other members of the tenant's or purchaser's team. This will help to secure the broker's participation during the "due diligence" investigation period, which is the time provided to the purchaser to investigate any issues concerning the property, as well as with respect to any physical investigation of the space itself.

Using a the experienced commercial real estate lawyer to locate a suitable broker and contract for appropriate services may be done by the lawyer acting on behalf of its client, but without disclosing the client's identity at such time, a technique which may be very effective especially with respect to larger entities which want more control over when they publicly disclose the existence of their plans for expansion or other sensitive information.

No matter which technique is employed, searching for an experienced commercial real estate broker and contracting for its services is a process that should be undertaken and completed well in advance of looking at properties. In this way, the purchaser or tenant can be assured that its property needs will be addressed confidentially and to its exact specifications, and no unforeseen liabilities will occur.

Finding Your Property: Space Criteria and Costs

The initial criteria for space may have been carefully developed by the business entity and its parent; however, there may be refinements and other considerations that need to be taken into account in moving these criteria to the final form in which they will be used by the broker in the search for the space. These criteria will include the location, the permitted use(s) for the property and the type of space required. For example, for a retail tenant, it will need to consider whether to consider, among other venues, space in a large regional mall, strip mall or downtown shopping center. If the decision is to be downtown, the next choice is ground floor or second floor. If the decision is to be in a mall, other questions for consideration are whether the tenant wants to occupy an "anchor" position, be near or away from competitors or to be a non-anchor tenant or even to be a "stand-alone big box".

In addition to refining location criteria, which will result in differing financial impacts, there are other considerations affecting the space criteria where the financial impact can be dramatic, not all of which are always immediately apparent. These considerations relate to the condition of the property; the effect of applicable zoning and use regulations as well as the effect of alterations either mandated or limited by applicable law. Certainly, the condition of the property is crucial and will also have considerable financial ramifications. For example, upon a visual inspection the observer can see whether a space appears nearly ready for tenant's occupancy and the conduct of its business, or whether it will need more than just a paint job to put it in shape. However, while a property may appear to look good, without a thorough engineering and architectural inspection, there is no way to tell whether there may be latent (or other hidden) defects in or affecting the space, such as "floor load" or other structural issues, or whether there is asbestos or other hazardous material that is required to be remediated (a highly costly process) or whether electrical wiring must be replaced, or whether or to what extent other work must be done to bring the space into compliance with applicable safety, fire, insurance or other applicable law. (This latter assumes that the tenant or purchaser will be responsible for conditions in the space which pre-existed its presence, an obligation the commercial real estate lawyer will negotiate hard to remove. Nonetheless, it is possible, depending on the way the lease is negotiated, to require that the landlord deliver the property to the tenant or the purchaser in a "delivery condition" that is in compliance with applicable law, as well as providing that applicable building systems servicing or at the premises are in good condition and working order. The tenant's or purchaser's subsequent alterations, however, may uncover hidden problems which can trigger a different level of compliance under the lease or applicable law, with a considerable increased expense, or even prevent the intended use of the space. This is the reason why a thorough inspection by the architect and engineer (and maybe even an environmental hygienist) is essential before making a decision to take the space. Understanding the condition of the property will help a tenant or a purchaser to make informed choices and enable the lawyer to negotiate the lease and ancillary documents so that they will not create unexpected financial or other surprises once construction of the space begins. The complex and multiple issues surrounding the condition of the property become particularly important inasmuch as most properties, whether for lease or sale, are offered in a condition described "as is/where is". Accordingly, it is crucial to understand exactly what that means, both literally and financially, in all circumstances.

Zoning and use regulations can prohibit the tenant's or purchaser's intended use of the space. Even if that use is permitted at the time the lease or contract of sale is signed or possession of the property is taken, it is still possible for a subsequent law to be enacted after tenant takes the space that would in fact stop the tenant from using the space for the purpose which it intended. Generally, such a scenario would not affect the tenant's rent obligation under its lease nor its obligation to go forward with the transaction -- whether it is a purchase or a sale -- unless its lawyer has insisted on the appropriate legal protections in the transaction documents which will operate to prevent the tenant or purchaser from getting "stuck" with a property from which it is unable to conduct its

business. Another effective way for the tenant to protect itself from this problematic and financially devastating situation is to have the Landlord do the construction or built-out of the premises as a "turn-key" or "build-to-suit" space, as will be discussed later in this booklet. Both of these terms have the effect of putting the responsibility for compliance with applicable zoning and other laws squarely on the Landlord.

Laws such as the Americans With Disabilities Act, which, for the benefit for individuals with disabilities, prescribe (among other things) exact dimensional requirements with respect to ingress and egress of a space as well as other related requirements within the space, or landmarks' preservation laws, which require that changes to designated "landmark" buildings or buildings within designated "landmark" neighborhoods may not be significantly altered without prior approval of a designated governmental agency, and may make every detail of such an alteration subject to the prior approval of that governmental authority. These and other such laws can have significant financial ramifications and need to be understood before making any decision on a property.

IV. Construction and Alterations: How to Plan for and Make Changes to Your Property

Generally, in commercial leasing, it is most unusual for a tenant to simultaneously sign its lease and get possession of the property. This is because often at the time the lease is signed, the space may be occupied by another tenant whose lease is yet to expire, or because work must be done in the space to prepare it for tenant's occupancy. It is highly unusual, if not downright impossible, for a tenant or a purchaser to find a space that, without some further changes or alterations, perfectly meets the physical requirements that the tenant or purchaser has for its business. The new space may just need some "cosmetic" sprucing up, like a new paint job, or it may need extensive repairs or even to be totally demolished and reconfigured and specifically fixtured, so that the space can meet the requirements dictated by the specific business to be conducted in that space.

Landlords understand this, and accordingly, part of what is negotiated in a lease is what construction or other alteration work will be done in the space, and by whom. This division of responsibilities and the related economic information about initial alterations is found in specific lease sections and, in addition often found in a detailed addendum to the lease known as the "work letter". All of this is highly negotiated.

In general, once a tenant and its team have done the due diligence investigation and understand the economic implications of the nature and condition of the space, and, having this information, decide to take that space, the negotiation process begins again. It is at this time that the lawyers take their most active out-front role in the lease negotiation and drafting process especially with respect to the work letter.

The Work Letter: A Roadmap for Construction

The Work Letter will specify in great detail the nature of the construction that will go on in the space. Among other things, it will provide a detailed description of what will be in the space (referred to as the "core and shell" or the "base building") when it is delivered by the landlord. This would include, among many other things, the extent of electricity, heating, ventilation and air-conditioning ("HVAC"), waste pipes, alarm, fire/safety, sprinkler and other building system services that are to be delivered to the space. It will also specify who is paying for the construction being done in the space and exactly how such payment is being made. Payment is often made by way of a "tenant allowance", or an amount that is provided by landlord and gradually paid out by the landlord as the construction progresses and the requirements contained in the lease are met. This, as well as every aspect of the work letter is highly negotiated. This is because every aspect of the work letter translates directly into an economic effect; conceptually, there is, by definition, a direct and consequential financial impact built into each item. The landlord will generally offer the space "as is/where is", while the tenant will try to negotiate that the space be delivered in the condition which minimizes both the construction work required to be done by the tenant, and the tenant's potential liabilities. Any negotiations concerning the work letter must include consultation with and input from the tenant's accountant and tax advisor inasmuch as there are significant tax implications depending on how the tenant's allowance is structured.

Depending on what has been negotiated, the construction will usually proceed in accordance with one of two negotiated scenarios: Either the landlord or the tenant may do the construction. If the tenant does the construction, the space will be delivered to the tenant in the agreed-upon condition often called "delivery condition" and the tenant, utilizing its tenant allowance, will construct the space in accordance with tenant's plans and specifications that have been previously approved by the landlord. If the landlord does the construction, it will deliver the space, fully built out in accordance with plans and specifications agreed to by the tenant, and ready for the tenant to move into and begin to operate its business. This latter scenario is often referred to as a "turn-key".

The date the rent obligation under the lease (the "rent commencement date") begins is established based on who is responsible for the construction in the space. Most simply put, when the landlord constructs the space, the rent commencement date will begin once the Landlord has notified the tenant that it has completed the construction. If the tenant is doing the construction, it is given a period of time during which the construction must be completed. The dates are subject to "landlord delays" and "tenant delays" both of which are carefully defined and highly negotiated. Also highly negotiated are abatements of or special lower rates of rent or electricity to be effective only during the construction period.

Generally, in the case of larger properties, it is most usual for the tenant to do the construction and for the landlord to provide the tenant's allowance. In the case of smaller tenants and smaller properties often the landlord itself will do all of the construction of the space. Which scenario is negotiated is a function of economics and related experience; smaller tenants often find it easier and more economical to have the landlord deal with the construction and absorb the financial results of delays from unforeseen events during the construction period. Larger tenants may be more experienced with and thus better equipped to deal with the construction process and the risks involved, as well as with their own special and often unique construction needs with which landlord has little or no familiarity. Great attention should be paid to the details of the construction process, since construction is a place where there can be numerous hidden costs and liabilities. The services of an architect, engineer and project manager are invaluable here.

For example, while the cost of constructing and building out a space to accommodate and office or retail store can be considerable, it will be increased many times over if the tenant does not understand, before the construction commences, whether it has sufficient air conditioning or electric power in the space to accommodate the occupants and equipment, or whether it will be faced with the necessity of later installing, at its own expense, supplemental air conditioning units. If tenant finds out too late, (that is, during the construction period after the lease is signed), that it will have to install supplemental air conditioning, it may not have negotiated required permission from the landlord for such an installation. In addition, the tenant may not have bargained for sufficient electrical capacity to operate such supplemental units, and it may not have budgeted for the costs involved, both immediate and annually or more frequently occurring. Furthermore, the tenant would be unprepared for the delays in construction resulting from this new-found knowledge, which would not suspend its obligation to begin paying rent on the space in accordance with the terms of the lease. Careful inspection by tenant's architect and engineer – before the lease is signed – will insure that the tenant understands that its construction or subsequent alterations may unearth violation conditions, or even worse, conditions that may turn into violations as a result of the new construction being initiated. While no tenant can reasonably expect to be fully protected from unforeseen events, the consequences of these unforeseen events can be understood, and protections for the tenant or purchaser can be negotiated by the lawyer and built into the lease or purchase documents so that unpleasant and costly surprises will be minimized, if not eliminated altogether.

The Construction Team and What it Does

If the tenant is going to be responsible for building out the space, the tenant will need a construction team. The tenant's construction team must include, at the very least, its architect and designer, broker, commercial real estate lawyer, and project manager and or facilities manager. The facilities manager is usually found in-house in the tenant entity or some corporate affiliate; the project manager is generally an "outside" person; however, their function is the same. The facilities manager or project manager is the point of coordination of the project. The importance of the project manager of facilities manager cannot be understated. The facilities manager or project manager has been trained to understand space needs and adapt space so it will most efficiently function for the user and the occupants. The facilities manager will also integrate applicable technology into the space. Accordingly, the skills, knowledge and experience that the facilities manager or project manager brings to the project enables that person to appropriately review, evaluate and suggest appropriate modification of the plans and specifications that have been developed by the architect and designer. This review and evaluation will ensure that the plans and specifications accommodate all of the needs of the tenant's business operation, including compliance with appropriate laws relative to zoning, safety and landmark preservation, as applicable. If the tenant has no in-house facilities manager, or does not have one with sufficient experience in real estate in the United States, many brokerage firms offer project management services for a fee. As discussed earlier in this booklet, these scope and cost of these services may be negotiated for as part of the process of retaining the broker.

Once this review and evaluation of the tenant's plans and specifications is completed and the tenant's construction team is satisfied with the plans and specifications, they must be submitted to the landlord, where the plans and specifications will then be reviewed by the landlord's construction team. This review by the landlord may also generate changes which may need to be resolved through negotiation. Note that all of this review (and any resulting negotiation) should take place before the lease is signed. After the lease has been signed by the parties and the tenant is legally committed to the space, the tenant automatically loses most of its bargaining power.

Once the plans and specifications are approved by the landlord, the tenant will send them out for bid by contractors which the tenant will consider to perform the construction work. Often the broker and the commercial real estate lawyer can provide meaningful input from their own experiences with particular firms as well as such firms' reputations in the market. Usually a construction manager or general construction consultant will also assist with this initial selection process. The tenant's team will compare and evaluate the bids and the tenant will decide on a construction firm to execute the final approved plans and specifications. Usually the landlord will want to approve the tenant's choice of construction company or general contractor. This is because the landlord is understandably concerned about the experience and reputation of whomever will be working in its building. Moreover, if there are disputes with the general contractor (or its subcontractors) even though the landlord may not be a party to whatever agreement the tenant has, the general contractor (or its subcontractors) have legal recourse against the landlord's building, as well as against the tenant, and can (as permitted by New York statutory law) assert a "mechanic's lien" on the building, which will have significant legal implications for the landlord, including the possible judicial foreclosure of that lien.

The tenant's plans and specifications (and required drawings) will also be submitted to the department of buildings of the municipality in order to obtain the required permits. No construction may commence without the required permits. In addition, the municipality will require certain inspections at the conclusion of construction, and will issue various documents, such as the "Certificate of Occupancy", which may be temporary or permanent, without which the tenant cannot occupy the property as altered.

The lawyer again becomes quite actively involved drafting and negotiating the appropriate agreements between the tenant and the general contractor. Often these are "form" agreements prepared by the American Institute of Architects, but they are still negotiable. The tenant's lawyer will build into the agreement the best protections that can be negotiated for the tenant to minimize the risks of construction. To the extent there are subcontractors, they will have their own contracts with the general contractor, with which they have a legal relationship. They generally have no legal relationship with the tenant.

Of course, no construction can begin until the lease is signed and the tenant's insurance that has been negotiated for in the lease, is in place and tenant has provided appropriate evidence of such insurance to the landlord. The lease will provide that the tenant is required to provide a variety of types of insurance policies, depending on the nature of the property and the scope of the project, to cover various eventualities, including claims and damages with respect to the tenant's own property (first party liability) and claims and damages with respect to the property or person of others (third party liability). In addition, there are particular types of insurance policies or bonds that the landlord will insist on to cover the period during construction. The landlord will specify in the document the types of policy and the amounts of coverage as well as the criteria to be met by the tenant's insurance carriers. In addition to any review or evaluation made by the tenant's lawyer during the lease negotiation, this section, as well as the sections of the lease that cover the tenant's indemnifications (which are expected to be covered by the tenant's insurance) should be carefully reviewed by the tenant's (in-house) risk manager or insurance consultant, to make sure that the insurance requirements stated in the lease are appropriate to the tenant and the scope of its project, and will coordinate with any existing insurance coverage that tenant already has.

Timing and Coordination

It is clear that the process of getting a property, negotiating a lease and developing plans is a complex and multifaceted one; each aspect of this process has a lot of "moving parts" and each has considerable expense associated with it. As noted above, the process of drawing up plans and getting approval from the landlord – which is not inexpensive – needs to be accomplished before the lease is signed, so it takes place simultaneously with the lease negotiations. Therefore, it is essential that early on, before fully committing resources to a piece of property or a space, the tenant evaluates -- on an ongoing basis -- the likelihood that the deal will be actually be brought to fruition before the tenant goes too far and commits significant resources with respect to any of the space planning and lease negotiating issues. This can be accomplished by the tenant involving its team early on. The interaction of the team on their various issues will quickly cause "deal-breaking" issues to surface, and once that happens, the business decision of whether to commit to the property, or to consider another one can be made quickly and any losses can be minimized enabling the tenant to move on to something better suited to its needs and financial parameters.

Finally, the Move In

This final step in the project -- the move-in -- is no less complex than the steps which preceded it. Depending on the geographical factors (that is, the "from/to" part of the equation), the number of persons involved and the extent of furniture, fixtures and equipment, not to mention retail stock, many tenants consider the move-in as a virtually separate project. Accordingly, many tenants (with sufficient budgets) hire a separate move-in coordinator to coordinate the movement of people and equipment over the applicable period of time. Other tenants utilize the project manager or facilities manager for this function. In addition, larger entities may also look to their in-house corporate communication resources to coordinate the communications to employees about the move and, if appropriate, their public relations resources, to communicate information about the move, and the entry into this new market, to their various public constituencies outside the company. Brokerage

firms may also provide this move-in service; the pricing must be addressed at the time when the firm is considered for employment.

The acquisition of space in the United States is a process that must be carefully managed and monitored by a deliberately chosen experienced and professional team. However, the most important message that this booklet offers is that the process of entering the United States real estate market and beginning a business in the United States is sufficiently complex to not be left to chance. In addition to understanding the dimensions of the process and the project, careful planning must inform the entire project from beginning to end in order to help ensure a successful entry of the Spanish business into the United States.

V. Corporate Structuring for U.S. Based Operations

Planning and Structuring to Enter the U.S. Market

As has been discussed in the earlier sections of this handbook, when the business decision is made to enter the U.S. market, structuring to limit liabilities to the operating assets to be exposed and deployed for the U.S. venture is properly implemented at start up of entry and at commencement of operations in each location in the U.S. Pre-planning and attention to and accommodation of the various state laws and the federal requirements should also occur at this point. In addition to limiting liability for operations by selecting a proper limited liability entity for incorporation or formation, segregation of commercial assets such as trademarks, patents, copyrights and long term real property assets which are not to be exposed to operations liability would be prudent. These valuable assets can be held in non-related entities to the operations ownership and leased or licensed to the operating companies on a commercially comparable basis.

In order to limit risk and minimize liability with respect to operations or resulting from disaster or other casualty, a commercially responsible insurance program should be implemented to deal with operations risks, products liability and losses of real assets from fire, casualty or other disaster. While the concepts of insuring operations and protecting persons and assets through acquisition of proper types and amounts of insurance such as Commercial General Liability, Directors and Officers and Fire, Casualty and Legal Liability Policies are beyond the scope of this handbook, counsel can assist in the selection of insurance risk consulting advisors and insurance brokers as well as selection of the best insuring companies and types of policies. Insurance tends to be an after thought by many companies and seriously considered first when required by third parties such as landlords, banks other contracting parties when entering into transactions. However, insurance is best considered in the formation stage as a companion to other strategies to appropriately limit liability and secure operations and assets.

The following sections will introduce and compare the types of limited liability entities available for consideration such as Limited Partnerships, Limited Liability Companies and Corporations and also discuss some differences in benefits and treatments from the legal, accounting and tax perspectives.

Operating Entities and Limitation of Liability

The major business consideration (as opposed to tax consideration) in choosing the form of a business entity is to limit to the entity itself all liabilities arising out of the operation of the entity's business or the assets it uses in its business, including the office or facilities that it leases. The result of this is that if an appropriate limited liability entity is chosen and it is managed properly, neither its owners nor its management should be at risk for the entity's liabilities. Various state laws allow limitation of liability to corporations, limited liability companies and passive partners in certain forms of partnerships.

A Spanish company that decides to conduct business in the U.S. should consider establishing a wholly owned U.S. entity, through which to conduct the business. Depending upon the type of business the Spanish company intends to conduct in the U.S., there are several types of entities to

choose from. Just as under Spanish law, the sole owner of a sole proprietorship (unipropietario) has unlimited personal liability for all the debts and obligations of the business, and income from the sole proprietorship is reported on the owner's personal tax returns.

Ordinarily, a general partnership (sociedad colectiva) does not have limited liability under state law. As under Spanish law, the partners are jointly and severally liable for all debts and obligations of the partnership business.

One way to circumvent the personal responsibility of a partner in a general partnership is to form a limited partnership (LP) (sociedad en comandita por acciones). A limited partnership limits liabilities for some partners but not others. A limited partnership must have at least one partner who is a general partner with personal liability for all the debts of the limited partnership, and at least one partner must be a limited partner with limited liability. The personal liability of the general partner in a limited partnership can theoretically be limited if the general partner is a corporation, which has limited liability (see below). Generally limited partners are investors in the partnership, but are not actively engaged in the management of the partnership's business which is the responsibility of the general partner.

Certain professionals (for example lawyers, architects, dentists and doctors) may organize themselves as limited liability partnerships (LLPs) which in terms of structure are general partnerships with the tax attributes of a general partnership. However, in general, the LLP partners are not personally liable for the debts, liabilities or obligations of the partnership, except for their own professional malpractice. In addition to LLPs, professionals may organize themselves into professional corporations (PCs), and professional limited liability company (PLLC). Like an LLP, these entities insulate their owners from business debts and liabilities, but not from liability for professional's malpractice, or depending on state law, certain other acts of partners.

Generally the owners of the corporation or a Joint Stock Company (sociedad anónima) incur no personal liability for the actions of the corporation unless the corporate veil is pierced or transfers of funds or assets are made to the owners rending the corporation insolvent, and then, under certain circumstances, the owners of the corporation can become personally liable for the corporation's debts and obligations.

A limited liability company (LLC) (sociedad limitada) takes advantage of both the benefits of a corporation and a partnership. An LLC is not considered to be a separate tax paying entity so profits or losses can be passed through to the owners without taxation of the business itself and all the owners are protected from personal liability.

Some Legal Factors to Take into Account When Starting a Business in the U.S.

Typically Spanish companies choose to conduct business in the United States through wholly owned corporations incorporated in one of the states of the United States. The corporate form of legal entity has tax and legal advantages. A U.S. corporate subsidiary will normally shield its Spanish parent from liability for federal and state income taxes. A corporate subsidiary also offers its parent a degree of flexibility in determining where income will be recognized for tax purposes through, subject to the Internal Revenue Service's rules on transfer pricing, sales of goods and services to and from the subsidiary, charging the subsidiary license fees for technology, or charging the subsidiary for management services.

Corporations are also the favored vehicle for conducting business in the U.S., because there is a time tested body of corporate law to guide corporations with respect to management structure and business governance. Delaware is the favorite state for incorporation. It is the home for most publicly held companies in the U.S., and therefore its statutory and case law is comprehensive and up to date. Also, Delaware does not have a corporate income tax, and with good planning the annual Delaware Franchise Tax and related fees payable by a U.S. subsidiary can be as low as $60 per year.

To ensure that the parent will be protected as fully as possible from claims arising out of the U.S. subsidiary's business, it is imperative that the U.S. subsidiary be operated separately from the Spanish parent. It should have its own board of directors responsible for corporate policy decisions. Transactions between the U.S. subsidiary and its Spanish parent should be on arms length commercial terms. If the U.S. subsidiary is operated as a separate entity, except as noted below, the Spanish parent will not be legally responsible for the liabilities of the U.S. subsidiary, even if the U.S. subsidiary becomes insolvent.

However, a Spanish parent should be very cautious about walking away from an insolvent subsidiary. In a bankruptcy proceeding creditors of the subsidiary will examine very closely all funds transfers from the subsidiary to the parent, whether for purchases of services or goods, license fees, amortization of loans, dividends, interest or otherwise, with a view to obtaining a court order voiding such payments and compelling repayment by the parent for the benefit of the creditors. Spanish manufacturers selling goods or equipment through their U.S. sales subsidiaries are subject to products liability claims by individuals who are killed or injured while using the products, even if the products were sold by the U.S. subsidiary. Products liability exposure should be taken very seriously, as manufacturers may be liable for very large amounts as damages even in cases where the products are "state of the art" and no negligence is shown in connection with the design, manufacture or operation of the products (i.e., strict liability).

Following is a check list of items that should be considered in connection with setting up business inside of a corporate subsidiary.

THE PURPOSE OF THIS CHECKLIST IS TO BRING TO YOUR ATTENTION SOME OF THE FACTORS THAT SHOULD BE TAKEN INTO ACCOUNT WHEN STARTING A BUSINESS IN THE UNITED STATES. IT DOES NOT PURPORT TO BE COMPLETE AND IS NOT INTENDED TO RENDER LEGAL OR TAX ADVICE, WHICH SHOULD ONLY BE OBTAINED ONLY FROM QUALIFIED EXPERTS FAMILIAR WITH ALL THE FACTS AND CIRCUMSTANCES RELEVANT TO YOUR PARTICULAR SITUATION.

A. Statutory Regulation.

1. Product Design. As is the case in Europe, the United States and many of the states have laws specifying safety or health standards that classes of products must meet, such as the Flammable Fabrics Act which sets flammability standards for fabrics and the Food and Drug Act that regulates the sale of pharmaceuticals. If your product has to comply with statutory standards in Europe, be sure to check whether there are similar standards in the United States. Unfortunately the European and U.S. standards are frequently different, which may require specially designed versions of your product for the U.S. market. There are also U.S. laws that have labeling requirements that companies starting a business in the U.S. should take into account.

2. Protection of Employees. The United States has laws that govern safety in the workplace (e.g., The Occupational Safety and Health Act), provide for minimum hourly wages and mandatory overtime pay and protect employees against discrimination in the workplace. There are laws that protect employees and applicants for employment against harassment or discrimination based upon race, color, ancestry, marital status, religion, sex, sexual orientation, national origin, citizenship status, pregnancy, age, medical condition or disability. Many companies develop employee manuals that contain the rules governing their workers and workplaces to ensure that all employee related matters are dealt with legally and in a consistent manner. Compared to many European countries, it is easy in the United States to terminate a person's employment. Unless there is a contract of employment, people are employed on an at will basis. An employer is free to terminate an at will employee at any

time for any reason that is not covered by the anti-discrimination laws referred to above. Unless an employer has a severance pay policy, there is no legal requirement that an employer make severance payments to a terminated employee. Except for Social Security which provides a modest income for retirees, the United States does not have any mandated pension or retirement plans. Some larger companies have defined benefit or defined contribution pension plans. Many employers have deferred compensation arrangements known as 401(k) Plans, which permit participants to make tax deductible contributions to the Plan. Many 401(k) plans also provide for employer matching contributions. An individual's interest in a 401(k) plan is taxed as he/she withdraws from the plan during retirement. The Employee Retirement Income Security Act provides for standards that employee health and retirement plans, including 401(k) plans, must meet.

3. Taxes. Every U.S. entity is required to obtain a taxpayer identification number from the Internal Revenue Service prior to the commencement of business. It is imperative that a newly organized subsidiary be guided by an experienced tax accountant from the outset to ensure that it collects and pays federal and state income taxes required to be withheld from employees' wages and social security and Medicare taxes, that it pays its employer taxes for social security, and that it pays its estimated income taxes when due. Failure of companies to pay withholding and payroll taxes can result in personal liability for company officers. Companies that sell goods at retail will have to register with the states in which their retail outlets are located and collect and remit sales taxes collected on their sales. The United States does not have a V.A.T.

B. Insurance.

1. Business Insurance. Consult with an experienced business insurance broker about establishing an insurance program for you new corporation. The business will require insurance covering (1) losses, damage and destruction to owned or leased property from fire, casualty and theft, (2) liabilities for death, personal injury and property damage arising from occurrences on the new corporation's business premises or otherwise resulting from its business activities, (3) death, injury or property damage caused by it automobiles and trucks, (4) products liability arising from claims based on death, injury or property damage caused by the new corporation's products (i.e., product liability insurance), (5) business interruption, and (6) directors and officers liability. As mentioned above, a parent corporation is subject to lawsuits for products liability claims. Therefore, product liability insurance should also cover the parent company. Given the large judgments often rendered in the United States in products liability cases, it is also recommended that the parent company confirm that the amount of its excess liability insurance is sufficient.

2. Legally Mandated Employee Insurance. Most states require businesses to cover their employees with worker's compensation insurance for job related injuries, unemployment insurance to provide payments to employees who are terminated or laid-off and short term disability insurance for employees who are unable to work due to a disabling accident or illness.

3. Other Employee Insurance. It is typical, but not legally required, for U.S. companies to have group life, medical and long term disability policies covering their employees. Many companies require their employees to pay part of the premiums for these coverages.

C. Immigration.

1. Visas. If you intend to send someone from Spain to manage the U.S. business, he/she will have to obtain a visa that permits him/her to work in the U.S. and to bring his/her family members to reside with him/her in the U.S. Normally the visas are issued outside the U.S., so it is recommended that the question whether employee visas will be required be assigned a high priority before personnel transfers are made and that guidance on dealing with visa issues be obtained prior to setting up the U.S. operation.
2. Employment of Illegal Immigrants. It is estimated that there are about 11,000,000 illegal aliens in the United States. An illegal alien is a person who (a) is not a U.S. citizen and (b) is in the United States without a valid visa. Many menial jobs in the U.S. are done by illegal aliens. Many illegal aliens have counterfeit identification cards and work permits, so it is not always obvious what a person's legal status is. It is against U.S. law for an employer to knowingly hire a person who is not a U.S. citizen. U.S. employers are required to check to make sure that all their employees are allowed to work in the U.S. As indicated above, some visas permit work in the U.S. The Immigration and Naturalization Service also issues work permit to certain aliens. It may be necessary for the new corporation to consult a lawyer to ensure that when it begins to hire it is complying with the immigration laws.

D. Written Contracts – Their Importance.

As indicated in the discussion on commercial leases, contracts in the United States go far beyond just describing the business terms of a transaction. Contracts in this country are used to shift risk from one party to the other or to share risk where in the absence of a contract it would fall solely on one party. Also, as indicated in the commercial lease discussion, the United States is a culture where caveat emptor still applies in many types of transactions, so the contract is an instrument by which parties protect themselves by requiring representations and warranties and indemnities from the other parties. In sum, in American business a good contract protects a party by spelling out in detail the parties' obligations during the term of the contract under all circumstances that are likely to occur instead of leaving it to them to work out issues on an ad hoc basis as they arise. One reason for this approach is that when things go wrong in a business transaction, litigation is likely to ensue. Litigation is very expensive, time consuming and emotionally draining. It should be avoided if possible. A good contract is one way to avoid it.

The United States legal system is largely derived from the British common law with sprinklings of French law (e.g. Louisiana) and Spanish law (e.g., California, Arizona and New Mexico). The laws of the United States consist of statutes enacted by the federal and state legislatures and a large body of case law. Case law is law derived from written judicial decisions applying and interpreting statutes and/or prior cases with reference to the matter then before the court. Case law has the same force and effect as statutory law. Contracts are often negotiated partly with reference to avoiding or mitigating the effect that statutory or case law would otherwise have on the transaction. For example, the Uniform Commercial Code, which has been adopted by all the states with slight variations, provides that in a sale of goods there is an implied warranty from the seller to the buyer that the goods are merchantable and fit for a particular purpose. Typically these implied warranties are disclaimed in the standard terms and conditions of sale used by sellers and the seller's own warranties, including the duration of the warranty period and remedies the specified by the seller, will apply.

Depending on the nature of your business, you should consider meeting with your lawyer before you start up to review the advisability of preparing contract forms for use in your business. These might include employment agreements, confidentiality and non-competition agreements for employees, invention rights agreements for employees, terms and conditions of sale for your

products, installment sale contracts, security agreements, equipment leases, technology and software licenses and sales rep agreements. These contract forms can enable a company to exercise a degree of risk management over its business relationships and transactions instead of having statutory or case law determine the outcome when things go wrong.

VI. Sensitivity to Taxes and Treaties when selecting Real Estate Holding Entities

Effective Tax Planning for the Ownership of U.S. Real Property Interests

The organizers of a new business entity must decide on the most beneficial structure from both a tax and legal perspective at the time that the venture is created. While the approach from a legal perspective is reduce or minimize exposure to liabilities, other legal considerations must also be taken into account. They may include future transfer considerations, equity ownership and financing, term of existence, as well as state and local reporting and complexities.

However, the income tax planning of a new venture is of significant interest to an investor who is not familiar with the considerations under the U.S. income tax code.

There are two general choices for the ownership of real estate interests in the United States. Realty interests can be owned in either an unincorporated entity or in the form of a corporation. There are variations to these two general choices, but ultimately the choices reduce to those two. The tax rules of operations, and the filing requirements are different depending on the choice.

The use of an unincorporated entity has several variations as well, depending on the number of owners, and the desire to obtain limited liability for the venture. An unincorporated entity that has more than one owner, is referred to as a partnership, which can be constructed as a general partnership, a limited partnership or a limited liability company. Limited partnerships are referred to as LPs. Limited liability companies are referred to as LLC's. There is no designation for entities created as general partnerships. General partnerships provide no limit on the liability of the owner. Risk of loss is not limited to the assets of the venture; the owners are totally liable for any potential loss. LPs provide limited liability to the limited partners of which there must be at least one. This structure requires that there be a general partner, who has no limit as to risk of loss.

In the late 1990s, there emerged a new form of ownership referred to as the LLC. The LLC is a hybrid form of entity. It operates under the tax code as an unincorporated entity but provides insulation from liability to the same extent as a corporation. The LLC does not require more than one owner, unlike either form of partnership. Such LLCs are referred to as single member LLCs. Single member LLCs are often used by a single owner who may own multiple properties. By holding only one property in each LLC the liability risks are further isolated.

The most significant trait of an unincorporated entity in any of the above forms is that the entity does not pay tax on profits derived from operations or gains from sale. The owners are responsible for the income taxes imposed on profitable transactions. Unincorporated entities are referred to as either pass-through or conduit entities. Entities that have more than one owner are required to file income tax returns for partnerships, and to apportion the tax attributes to the partners. Thus general partnerships, limited partnerships and multi owner LLCs are all required to file an income tax return for the venture. Single member LLCs are considered to be disregarded entities under the tax code and the tax attributes are reported directly by the sole owner.

Alternatively, real estate interests can be held in regular corporate form. U.S. corporations are referred to as C Corporations under the U.S. tax code. The issue of taxation for corporations that own real estate interest directly ultimately becomes the same as ownership using unincorporated entities,

since profits or gains from those forms of ownership pass through to the owner and the tax is paid at the owner level. Thus a corporation that owns real estate interests, either directly, or through either a partnership or single member LLC, pay the same tax on profits or gains. Realty interests owned by foreign corporations, either directly or through any of the pass-through entities are subject to taxation under a different tax scheme than U.S. Corporations.

In the event a US Corporation is owned "upstream" by a foreign entity which provides capital or debt financing, there are commonly known tax considerations for review of the interest rates associated with such funding or loans referred to as "Earnings or Income Stripping" and experienced tax advise should be sought out for the planning of the loans or capital funding and coordinating of offshore treaties and tax laws with tax requirements and laws in the United States.

Much is written about the capital gains tax under the U.S. tax code. However, to U.S. corporations, there is no difference in tax rates for income derived from operations, referred to as ordinary income, or derived from gains on sale referred to as capital gains. Ownership of real estate interests in U.S. entities are taxed at the same rates as non real estate activities. State tax considerations need also be taken into account as the rules of taxation vary from state to state in the United States.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, please be advised that any U.S. federal tax advice contained in this booklet and work (including any attachments) is not intended or written to be used or relied upon, and cannot be used or relied upon, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. While this work is intended to raise issues to be addressed when entering the U.S. market to conduct operations and business, it is not intended to be tax or legal advise and the authors advise seeking experienced tax and legal counsel with respect to all matters discussed in this booklet.

Further Resources

This booklet was designed to be an introductory resource for the "cross-border" company attempting to acquire its first real estate location for its first successful entry into the U.S. markets. It will also be useful for those companies whose first entry was not everything that they expected. It describes, in narrative form, the process surrounding the acquisition of space, whether by purchase or leasing, in the United States, as well as the multiplicity of issues generated by it.

After the first narrative section is a Glossary of Common Real Estate Terms, which should make any conversations about real estate easier to understand. Also provided are various Checklists, which may be used to raise issues to be explored during the planning and structuring phase of the effort to inter the United States market. At the end is an exhibit of the jurisdictions in the U.S. and their view on reasonableness of actions, consents and fair dealings in commercial transactions.

Internet searches also can provide other valuable resources. We particularly recommend the "New York City Commercial Leasing" websites at www.leasingnyc.com and www.officeleasingusa.com for additional resources, market information and publications and seminars on the subjects covered in this work.

For an extensive treatise on the subject of drafting and negotiation of commercial leases, we recommend the two-volume (approximately 2,000 pages) reference work Negotiating and Drafting Office Leases, published by Law Journal Seminars-Press, October 1995, (Library of Congress ISBN 1-58852-061-7) which is also available at www.officleasingusa.com. The treatise is up-dated two times per year by supplements and is in current use as course book for several classes at the New York University Graduate School and Real Estate Institute. However, this is only recommended for the advanced practitioner, commercial broker/institutional property manager or legal counsel.

Also available on the www.leasingnyc.com and www.officeleasingnyc.com websites, is a book entitled Navigating the Dangerous Shoals of a Commercial Lease – For Beginners. It is able to be ordered by clicking on the tab "Leasing for Beginners". It was written by John Busey Wood, Esq. for The National Geographic Society when that not-for-profit organization was contemplating relocating some of its considerable operations in New York City. The book was provided to the Society to assist the facilities manager there in dealing with the complexities of New York City real estate commercial leasing. This book is used as a course textbook in the Schack Institute for Real Estate Studies at NYU and it is a quantitative, conceptual, and operational guide for people trying to learn the ropes in a difficult area. The work was also used for approximately 10 years and published by the New York University Graduate School Real Estate Institute in courses dealing with real estate valuation and commercial lease negotiation.

Common Real Estate Terms

Abatement of Rent or Additional Rent – Delayed commencement of rentals or relief for periods of time of the obligation to pay rentals such as during the initial preparation of leased space or during a fire or casualty or loss of use.

Acceleration of Rent Obligations – A contractual remedy for failure to perform by a tenant or purchaser when in default of obligations or as a condition event agreed to by the parties when future obligations to pay rent and possibly additional rentals become immediately payable.

Additional Rentals – Additional payment obligations in addition to the Fixed or Base or Annual Rent specified in the Lease. Additional rents or other charges called additional rentals may be payments to reimburse the landlord for costs to prepare the leased premises, operate the property or leased space or such costs as insurance and taxes.

All-in Costs - Common usage is for planning or budgeting and conveys the understanding that all costs, including "soft costs", "planning and design costs", "hard costs" or rather materials and equipment and fixturing" as opposed to labor or professional costs, and generally any other expenditure when all added together with the items anticipated fulfill the delivery of the property or commissioning thereof into intended use. Additional costs include construction terms of art such as "supervision", "over-head" and "contractors or managers profit" and landlord's add on assessments sometimes referred to as "loads".

Alterations – Any changes to property or space. These can be repairs, additions, replacements or improvements. Alterations can be cosmetic, decorations or significant additions or demolitions and reconfiguration to property. Alterations can be structural which means changing certain load bearing components of the building structure. Alterations can not only change the appearance and structure but can also impact on a particular use or character of planning or zoning regulation of the building or improvement causing legal and regulatory impacts and compliance with building and use laws as well as fire and safety laws.

Allocation – The formulation of attributing a portion of an amount, payment, cost or expense to different categories, benefits or persons or properties.

Area, Floor Area, Carpetable Area, Allocable Area, Rentable or Rented Area and Usable Area – these are easy terms to adopt to compare and differentiate space being purchased or leased in a transaction. Other than the term "Floor Area" which is a zoning and architectural term of art (meaning area counted as space on a floor for purposes of bulk and height building and construction regulation and limitation), the other terms help in the analysis of the financial and operational efficiencies and economies of scale of space when comparing needs to costs and to other comparable candidate properties. For instance "Rentable Area" can be defined to mean the agreed to measurement of the square foot area to be paid for and it may be a fictional or designated area or one "deemed to be" for purposes of applying rental rates. The actual "Rentable Area" might well be the space demised to the tenant or purchased by the buyer when measured under agreed to space measurement protocols or prevailing methodology standards of computation in the region of the property or space. "Carpetable Area" might be considered by some to be the portion of the "Rentable Area" that can be actually stood upon or walked upon and carpeted. "Usable Area" may be the "Carpetable Area" plus areas like shelf space over setbacks of buildings which can not be walked on

but maybe cables, wiring or even books can be placed upon. Areas that benefit the space leased for instance but found elsewhere in a property rather than within the leased space may be allocated to the leased property as providing a service or benefit to that leased space along with the costs associated with that "Allocable Area" and even rent costs applied to such space. Breaking down and understanding the various areas and measurements of space in a property for purchase or lease is very helpful to do and dangerous to ignore when comparing candidate properties for occupancy and needs of operation or financial or operational suitability or feasibility.

Arbitration – An alternative method of dispute resolution mechanism in a forum other than a governmental judicial system or court. Also sometimes referred to as ADR or alternative dispute resolution.

"As-Is" "Where-Is" – The conceptual disclaimer of representations with respect to condition or legal compliance of the leased space or property for sale and all contained in it. The concept of "as-is" is generally taken to mean "as you see it" or "as it exists at a given time whether seen or discoverable" or rather a disclaimer of responsibility by the seller or lessor for the general operation status or condition of the item. The concept of "where-is" when coupled with "as-is" is particularly dangerous to a purchaser or lessee of property since it implies the possibility of location non-conformity or non-compliance with legal requirements as well as disclaimer of general condition of the improvement, fixture or contents of the property or leased space. It can also be a disclaimer of the legality of the entire building or structures in relation to other structures, land placement and even to the general area such as a use which was allowed or a location of fixtures which were allowed by laws no longer applicable and even in violation of newer laws.

Assignment – The transfer of the rights to the lease or property or contract by the possessor of the rights. The transfer does not necessarily relieve the transferring party of its contractual obligations nor confer all benefits to the transferee.

Audit Rights – Rights of a party to review and confirm costs or expenditures of another party. In many jurisdictions the tenant or purchaser does not have the audit right or right to confirm the costs and expenditures or even investments in the property of the other party unless granted expressly and completely in the contractual document.

Brokerage Article or Provision – A provision in a contract of sale or lease representing the parties dealing with or employment of a real estate broker or salesperson and the assignment of the obligations to pay such brokers. The provision generally contains a representation by each or just one of the parties that there have been no other dealings or employments of others than the listed broker and an undertaking or indemnity to protect the other from other brokerage claims for compensation with respect to the sale or leasing transaction. The indemnity can be for reimbursement for duplicate commissions or fees as well as legal defense costs or loss of transaction impacts. These are very serious and dangerous clauses and must be reviewed carefully and understood.

"Build to Suit" or "Turnkey" – is the general term of art for delivery condition of a property or leased space in conformity with specifications of functionality, physical and operational performance and legal compliance. The parties generally in many jurisdictions intend to have a seller or landlord construct or alter a property or space so completely to the needs and specifications of the purchaser or lessee so that the purchaser or tenant can literally "turn the key in the lock" and move in to a property or space that fits the needs of the occupant and functions as required and is permitted and legal in all respects specified in the lease or contract of sale.

Business Interruption and Rent Insurance – relates with insurance for loss of use of a property or space and the impact on the occupants operations and income with respect to the business interruption insurance and the loss of rental income for a lessor with respect to the owners rent insurance coverage.

Common Area Maintenance or CAM – charges or expenditures for maintaining, repairing, operating and in some cases improving areas of a property used in common by all occupants.

Capital Costs and Disbursements – Disbursements of funds for or relating to a building structure or its major systems serving the building, such as elevators, heating and cooling systems, ventilation systems, wiring, electrical, communication and monitoring systems, fire and safety systems, plumbing and sewer and piping systems. Capital disbursements are an accounting characterization of funds disbursed for long term alterations or additions to improvements and properties which are materially large in amount and for items which have a life of benefit to the property exceeding the current annual period. Generally these disbursements better or improve a property or , if a repair or replacement, are of significant enough amount or scope as to be a reconditioning of the component of the property. These types of costs are considered in the accounting community by those without bias towards the benefit of an owner, seller or landlord, to be ownership responsibility costs of the owner/seller or landlord and not undertaken or reimbursed as rentals or otherwise by purchasers or tenants.

Cash Flow, Accrual and Tax Analysis – Different methods of evaluating the funding and timing of payment of costs of property and operations and the impacts on the financial condition and balance sheet reflection thereof. These different types of timing and impact analyses of a real estate purchase or lease are customary for brokerage and institutional management firms to provide and critical for the through understanding of any transaction and for the comparison of alternative candidate transactions and properties over various holding and operation periods.

“Caveat Emptor” - Latin phrase meaning “Let the Buyer Beware.” When considered in relation to applicability to a purchase of property or lease of space and the resulting “papering or documenting of the transaction” a party must be aware that they in many jurisdictions can not rely on any “as-is” or “where-is” conditions being proper, legal or even suitable and that the other party to the transaction may not be under any obligation to provide any information or representations with respect to any aspect of the property. It is also important to understand that the “papering of the transaction” is itself a term of art in many jurisdictions to imply that one of the parties, such as the landlord in a lease and seller in a sale transaction, will document the deal in a light most favorable to itself and its position. It is not uncommon to receive documents for an intended transaction containing all of the rights and benefits conceivable for the benefit of the party “papering” the deal and issuing the documents and few of the benefits and rights of the other party as requested by that party during negotiations. It being the duty and responsibility of the other party to protect its needs through careful review and alteration of the documents for its benefit.

Certificate of Occupancy – a certification , temporary or permanent, of a governmental regulatory entity authorizing the particular use, floor loads and types of operations and density of a building, improvement, land and/or leased space. The permit or certificate to occupy a building, land or space had different effects if each jurisdiction and may be required to be obtained or applied for by an owner in one jurisdiction, an occupier or a tenant or lessee, depending on the legislation, regulation or statute. Architects are the best to review the certificates of occupancy (the “C of O”) and advise the attorney and company of the suitability, legality and alteration ability with respect to the property under consideration. There should be no assumptions make during the feasibility or due diligence review and discovery of the property by the purchaser or lessee since this permitability or suitability and legality of the status of the property can not be assumed or relied upon for candidate properties.

Commencement – the beginning or operative coming into existence of a right, obligation or measurement period under a transaction document. There are many commencements in transaction documents. For instance, commencement of the rental payment obligation, commencement of the erosion of the abatement of rent period, commencement of the obligations and duration thereof and commencement of the insurance of obligations or application of impacts on the terms themselves by other commencements. Some commencements are difficult to appreciate and even gauge, like the beginning of the life of a contract or lease that states it is “made” or effective at or on an “as-of” date.

This may be a date other than the actual day and time that the document(s) is signed. The "as-of" date can relate to a previous period prior to the execution day of the documents and affect the parties obligations even prior to the time they begin negotiations. The results being early erosion of an abatement period, an early payment of rent, an early increase in an obligation or change in term and a responsibility of a party to a transaction for a condition or obligation with respect to the property which was not intended. Commencements of all types in purchase and sale contracts and leases should be carefully analyzed and drawn on a time line so as to ascertain the effect and impact on the party's obligations and timing of discharging them or funding them.

Compliance Article – a provision of a contract or lease which sets forth the status or obligations of the parties with respect to the condition of a property with respect to legal and regulatory requirements and the responsibility for the continued or pre-existing compliance or non-compliance of the property or occupancy at and use of the property. Obligations and rights usually dealt with in such clauses include certificates of occupancy, structural and alterations legal, fire and safety compliance, zoning, types and manner of occupancy and use of the property and environmental issues. These clauses and articles should be fully understood and also sketched on the time line of commencements in order to fully understand the various responsibilities and obligations /rights with respect to the property and space.

Connectable Load - In calculating electrical surcharge expenses, the amount of appliances and machines that are on Premises that can be connected and can consume whether or not these appliances or machines are operational.

Connected Load – the calculation of the electrical energy being needed by the electric consuming appliances and equipment wired or plugged into the electrical system at a space or property. The connected load or consumption can be a variable measurement based on the running, startup or idling needs and use of the connected consuming device. Connectable load is different and sometimes is referred to as the amount of load that can be connected based on capacity of the wiring to deliver or sometimes is used to mean all devices in the space or at the property if working and connected and functioning within specifications of variable operation and use periods. These are terms for engineers to address and to be discovered prior to purchasing the property or leasing the space. Basically it is important to know what can be plugged in or connected or wired to the electrical system of the building within the systems capacity to legally and safely furnish the energy load. "Incremental Connectable Load" is an unusual hybrid of the two definitions and has an extremely unfair utilization and cost impact on a tenant when a survey is done annually of the electric consuming devices found in space and priced by the landlord for additional rent to be paid by the tenant.

Construction Fund, Tenant Fund, Tenant Improvement Fund ("TI Fund") or Allowance(s) – the funds to be provided, utilized or applied by one or more of the parties to the property transaction usually for compliance with a delivery condition or the alteration of the space for the initial occupation of the property by the user. There is no implied or understood expectation by the providing party that the particular fund or allowance is sufficient to accomplish the needed result and such funds and conditions of the property must be understood by the party with the intended needs.

Delivery Condition – the legal, physical, qualitative, quantitative and status of compliance condition of the real property or title or use right with respect to the interest or right in property being delivered or granted. This includes observable and hidden conditions as well.

Ejusdem Generis – a legal or judicial standard or rule of reading and interpretation of writings that provides that "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned" or where words later following which are more specific and detailed may be construed to modify or control the earlier more general text. Leases and contracts of sale can be 100s

of pages long and have exhibits, schedules and related rules and regulations which control them or are controlled by them. Transaction deal terms can be set forth in one location of a document or in another document altogether and be modified or delineated intentionally or by accident. All documents must be read and reviewed to work together to effect the intended result.

Escalations – additional rentals or charges found in a lease which can be increases in amounts by formulae or periods or can be amounts when compared with previous similar amounts from periods to periods. Such as the real estate taxes for the first year of a property lease when compared with tax amounts to be paid for later years. Common charges for operating and maintaining a property when compared year to year can escalate and the increases charged as additional rent operating expenses. "Pass-through" escalations is in many jurisdictions intended to imply that the landlord is just passing through the actual increases in operating costs from the beginning of the measurement period to be defrayed or reimbursed by the tenant. The implication is that the pass-through is calculated comparably from year to year under fair standards and does not include duplicative charges, hidden profits or other fees or benefits to the landlord. In many jurisdictions the implication will not protect the tenant and document language must be included to do so.

Estoppels or Estoppel Certificate – is a document provided required certification of a party, usually a tenant, that certain facts and conditions exist, certain payments have been made and the status of obligations, terms and conditions of the relationship between the landlord and tenant at the time of the issuing of the Estoppel. When issued, the estoppel operates to bind the issuing party and be relied upon by the receiving party and others such as lenders and mortgagees if so provided in the documents and contracts. Estoppels can operate as amendments to existing documents and waivers of rights and terms and therefore are very serious and dangerous certifications.

Floor Loads – a measurement or regulatory limitation of weight bearing ability of floors in structures. The measurement may be by "live load" or "dead weight" and can be by impact of dropping an object from altitude as well. It is important to know the limitations of space and property structurally as well as by regulation (such as certificates of occupancy) to assure the ability of the property to safely and legally house and support the operations of the occupant.

Hazardous Materials and Substances – substances and materials which are dangerous or toxic to the environment and which are typically regulated by states and municipalities as well as the Federal Government by laws such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), the Clean Water Act, the Solid Waste Disposal Act or the Toxic Substances Control Act and Leaky Underground Storage Tank acts.

Holdover Article – deals with the remaining in the leased space or sold property after the right so to do has terminated or expired. These articles and clauses have pricing penalties and indemnification obligations for the defaulting party and must be carefully reviewed.

HVAC - Heating, Ventilating, Air Conditioning – systems providing cooling, ventilation, circulation, air quality and filtration, and heating to a space of entire property.

License Agreement - a lesser right than a lease and generally for a shorter occupancy or use period and generally terminable by the granter of the license at will. This varies from jurisdiction to jurisdiction.

Limitation of Liability or Exculpation Article – a provision which limits a party's liability or directs satisfaction of payment of liabilities from a limited source. Landlords and sellers of properties generally limit their liability for misrepresentation or failure of performance to the property or lease benefits and tenants and purchasers attempt to limit their liability for failure to perform to downpayments, security deposits or entity assets.

Loss Factor – the number representing one minus a ratio of the delineated stated size of the rented or rentable area set forth in the lease divided into the carpetable area. Or rather the % of the area stated as being rented that can not be utilized by the occupant. So if a tenant is leasing 1000 rentable square feet as set forth in the lease and can only occupy and walk on 800 square feet, there

is a 20% loss factor. Loss factors in New York City for multi-tenanted floors approaches or exceeds at times 50%! Caveat Emptor!

Nondisturbance, Subordination and Recognition Agreement – is a document contained relationship among a tenant and those parties with superior rights of title ownership or occupancy to the tenant and the arrangement and contracting for the preservation of the tenant's occupancy and possession of its lease rights during the term of the lease when a landlord, ground lessor or sublessor lose their title rights to the property or space.

Offset Right or Rent Credit Clause – the right of a tenant or purchaser to exercise self help to credit against monies it is required to pay or offset against rentals it is required to pay, the payments from the seller or landlord to such purchaser or tenant set forth in the transaction documents to be paid to it or as a remedy or protection of the tenant or purchaser to recover default costs and damages caused to the purchaser or tenant by the non-performing landlord or seller.

Operations, Continuous Sales and Open for Business Covenants – are clauses or provisions which require the occupant to be open for business continuously during the prescribed hours and days of operation and conducting the stated use in the space. Sometimes they also specify the amount of area within the space for the type of use.

Operating Expenses and Provisions - most fairly stated, operating expenses and provisions for the payment or reimbursement of such, deal with the recording of all disbursements for the maintenance, repair and operations of the property. They can be on a cash flow basis or on an accrual basis and can also include improvements, betterments, additions and renovations and conversions. Care must be given to these clauses for intended financial impact and concern with respect to ownership types of costs.

Permitted Uses and Mandatory Uses - the restriction or permission to conduct types of use operations in a space or at a property. These restrictions can be contained in Certificates of Occupancy and in lease provisions. They can be mandatory or permissive, but are rarely a representation of ability to use the property under prevailing laws.

Pre-existing non-conforming or non-complying – usually deals with the rights legally to use space or continue to use space for operations when the laws or regulations no longer permit the use. For instance when zoning or building codes change but a certain old use is continuing. The old continuing use is called a "grandfathered use" because it pre-existed the legal change. Sometimes the term is used to describe a non-compliance with a law or a violation of law which a tenant or purchaser does not wish to be at risk for when the law needs to be complied with such as when a new tenant moves in or when someone wishes to make alterations or obtain permits for the building or space which is non-complying or non-conforming. Pre-existing non-complying issues usually cost a lot of money later and the triggering events must be understood as well as the cost when the event occurs.

Premises or Demised Premises – a delineation of the space in the lease agreement or contract of sale. It can be very specific and legal or general or by reference such as a sketch or hand drawing attached to the document. Much care must go into the understanding of the actual portion of the property being demised or conveyed and the rights and obligations inferred from the description or drawing. Many unintended results occur when thought is not given to the description of the property or space and the impact on obligations and rights of the parties to that space and areas around it.

Radius Clause – a limitation on a party with respect to an area around the property under the transaction agreement. A radius clause can require activity or use in a geographic area or prohibit a use or activity in a geographic area. Commonly these provisions are contained in manufacturing and retail sales documents and reciprocal easement agreements among property owners or tenants.

Relocation Article or Clause – a provision that can cause or mandate that a tenant relocate to other space in a building or complex and the election of the landlord and will delineate at which parties cost as well as the time of the relocation. Such clauses can also mandate a continuance of

operations at both locations for a period of time or an interruption of operations. These clauses can have major detrimental impact on parties.

Restoration and End of Term Obligations – provisions that set forth the condition of the property or space at the surrender or end of the term of the lease or use. Great care and attention to these little clauses found very late in the documents or even in the rules and regulations is recommended. If space or property is leased in a demolished condition, the clause can operate to cause the tenant to give the space back in the same condition. If a structural alteration was effected during the term, that alteration may need to be removed and the property restored at very great expense.

Signage, Signs and Directory Listings – rights to have signs on the building, in the building, on the floor, in the elevator , on the door and in a building or complex directory or sign board or pylon. Signage and sign rights or directory rights are very fundamental and essential to operations and laws of many jurisdictions do not imply a right to signage in excess of that set forth in a transaction agreement or lease. Permission in a document does not imply legal rights to signage under zoning, building codes or landmark regulations.

Statute of Limitations – a period within which rights must be enforced under laws. Leases and contracts for sale also have clauses that are referred to as contractual or "mini-statute of limitations" which are contract periods that prescribe when disputes or claims must be made by parties. For instance some clauses state that a bill for additional rent or operating expenses issued by a landlord must be objected to within 20 days or deemed conclusive and correct.

Survival Obligations and Clauses – these are the reverse or opposite of the Statute of Limitations clauses and their operation may cause obligations which might ordinarily end with the expiration or termination of a lease of contract of sale to continue for a period of time or indefinitely. These clauses impact considerably on the liabilities and insurability and must be understood.

Work Letter – differs from Tenant Allowance, Landlord Fund or Tenant Installation Allowance Fund. A work letter is a customary term of art in many jurisdictions which describes the amount and possibly quality and legal compliance of the delivery condition of the space to be delivered by landlord and finished as set forth in the work letter. The work letter can be described by price or amounts of linear or square or cubic feet of work. A favorite technique of a landlord is to provide a certain number of electrical outlets and doors per number of linear feet of partitions to be provided by landlord under the work letter. Elsewhere in the work letter or rules for construction in the building, the landlord may limit the amount of demising and linear partitions which can be contained in an amount of space or per floor of the building. There have been many times that the work letter when read alone seemed to provide the quality and character of space to meet the operation needs of the tenant only to cause a big surprise when the drawings of the tenant were later submitted for the landlord to lay out and build.

Checklist of Broker Services

National or international presence and capabilities

Experience with special use or business needs

Data on regional resources, workforce, education skills

Economist on team

Engineering and architectural staff resources

Construction expertise and project administration

Bulk purchasing volume discounts

Property management expertise and staff

Financial and capital resources

Leasing compliance and administration services

Rentals and additional rentals/escalation audit services

Retail, manufacturing and other permit experience

Tax and governmental benefits applications and programs

Cross-border capabilities and understanding

Business line understanding

Financial data and information analyst

Representations concerning conflicts of interest, competitors, sellers/landlords

Reputation of loyalty and integrity

Checklist of Property Needs

Special location and transportation needs; 24-hour needs; after hours loading, shipping, receiving

Use and zoning as of right: manufacturing, assembly, warehouse, retail and sales, public assembly or teaching

Special floor loads

Electrical needs

Air conditioning special needs

Ability to alter or make improvements

Special uses and use districts

After hours heat and air conditioning

Building Certificate of Occupancy and use

Taxes and special district taxes

Rights for expansion and exit

Rights for affiliates and related companies and “co-producer” occupancy

Communication needs

Landmarks or other limitations on construction and alterations

Environmental issues

Truck or railroad delivery and shipping access (side track)

Highway and trucking access

Additional land improvement areas and access

Landlord or seller integrity and reputation for performance

Exhibit "A"
Reasonableness and Fair Dealing Research

MUST A COMMERCIAL LANDLORD ACT REASONABLY WHEN RESPONDING TO A REQUEST BY A TENANT UNDER A LEASE TO ASSIGN OR SUBLET?

Research by Nazar Kahn (2005-6) for John B. Wood

INTRODUCTION

The common law considered lease to be a conveyance in property and thus subject to property law principles.[1] Under this approach, the tenant held an interest in the property and was responsible for the rents and other obligations for the full term of the lease.[2] A declining majority of states use the conveyance approach in resolving disputes between landlords and tenants. Under the common law approach, a landlord may arbitrarily and unreasonably withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[3] The rationale for this approach is that restrictive covenants against assignment or subletting the leased premises during the term of the lease is a positive indication that the landlord wanted to reserve to himself the right to choose his own tenant, a right which to him might be of great significance or consequence.[4] Such a right would be of no value if the landlord is duty bound to accept a subtenant selected by the tenant for the balance of the unexpired term of the lease.[5] Furthermore, a commercial tenant wishing to soften the effect of this unilateral control can demand to have engrafted on the consent provision "which consent shall not be unreasonably withheld."[6]

In some common law states where the issue, whether a landlord may arbitrarily and unreasonably withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent, has not been litigated, the landlord may arbitrarily refuse consent on theory that the landlord is under no duty to mitigate damages.[7] Since the landlord is under no duty to mitigate damages, he may arbitrarily reject a suitable

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[1] 61 U. Pitt. L. Rev. 559 (2000).
[2] *Id*.
[3] *Gladliz, Inc. v. Castiron Court Corp*., 677 N.Y.S.2d 662 (1998).
[4] *Manley v. Kellar*, 94 A.2d 219, 220 (Del. Super. 1952).
[5] *Id*.
[6] *First Federal Savings Bank of Indiana v. Key Markets, Inc*., 559 N.E.2d 600, 603 (Ind. 1990).
[7] *Enoch C. Richards Co. v. Libby*, 10 A.2d 609, 610 (Me. 1940).

subtenant, sit back and allow the leased premises to remain vacant, and hold the defaulting tenant liable for the entire rent under the lease.[8]

Unlike the common law, a strong and increasing minority of states regard the lease as a contract and subject to the general contract principles.[9] The minority rule, applying different contract principles, prohibits a landlord from arbitrarily withholding consent under an unqualified provision in the lease prohibiting assignment or subletting or the leased premises without the landlord's consent.[10] The rationale for the minority rule is largely based on the contract principles. First, every contract has an implied covenant of good faith and fair dealing.[11] Some minority rule jurisdictions have used this principle and argued that where a lease requires the tenant to secure the landlord's consent prior to any assignment or subletting, the landlord is under a duty to act in good faith and not unreasonably withhold consent to a proposed assignment or subletting.[12] Second, a well established contract principle requires a landlord to mitigate his damages.[13] Some minority rule jurisdictions have applied this principle and held that where a defaulting tenant abandons the leased premises and produces a ready, willing, and suitable subtenant to assume obligations under the lease, the landlord is under a duty to accept the suitable subtenant and mitigate his damages.[14] Third, the Restatement (Second) of Property § 15.2 prohibits a landlord from arbitrarily and unreasonably withholding consent to a proposed assignment or subletting unless such a right is freely negotiated and expressly stated in the lease.[15] Some minority rule jurisdictions have expressly adopted the Restatement (Second) of Property § 15.2 and prohibited landlords from withholding consent unless such right is reserved in the lease.[16] Finally, some minority rule jurisdictions have rejected the common law rule because of public policy reasons.[17] It is argued that a landlord should not be allowed to unreasonably withhold consent to a proposed assignment or subletting because the necessity of reasonable alienation of commercial building space has become paramount in our ever-increasing urban society.[18]

This article examines state laws as they apply to the following issues: (1) May a landlord arbitrarily and unreasonably withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent; (2) Must the landlord's refusal to consent to assignment or subletting be based on reasonable grounds where the lease provides that consent shall not be unreasonably withheld; and (3) Can a tenant freely assign or sublease the leased premises without securing the landlord's consent where the lease has no provision regarding assignment or subletting? Almost all the cases cited in this article are commercial cases or the rulings therein are applicable to commercial leases.

ALABAMA

Under Alabama law, a landlord may not arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the

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[8] *Adams v. Graham Stave & Heading Co*., 135 So. 198, 199 (Miss. 1931).
[9] *Fernandez v. Vazquez*, 397 So. 2d 1171 (Fla. App. 1981).
[10] *Homa-Goff Interiors, Inc. v. Cowden*, 350 So. 2d 1035, 1038 (Ala. 1977).
[11] *Warner v. Konover*, 553 A.2d 1138 (Conn. 1989).
[12] *Kendall v. Ernest Pestana*, 709 P.2d 837 (Cal. 1985).
[13] *Gordon v. Consolidated Sun Ray, Inc*., 404 P.2d 949, 953 (Kan. 1965).
[14] *Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc*., 548 N.W.2d 153, 157 (Iowa Sup. 1996).
[15] Restat 2d of Prop: Landlord & Tenant, § 15.2 (1977).
[16] *Warmack v. Merchants Nat'l Bank*, 612 S.W. 2d 733 (Ark. 1981).
[17] *Funk v. Funk*, 633 P.2d 586 (Ida. 1981).
[18] *Id*. at 587.

landlord's consent.[19] In *Homa-Goff Interiors*, the lease at issue contained a provision restricting the tenant's right to assign or sublease all or any part of the demised premises without the landlord's written consent.[20] The Supreme Court of Alabama rejected the majority rule and held that such a provision in the lease doesn't give the landlord a right to unreasonably and capriciously withhold his consent to a sublease or assignment.[21] The Court rationalized its view by stating that the ever-increasing urban society of modern times requires a reasonable alienation of commercial building space.[22]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent should be based on reasonable grounds judged under a test applying a reasonable commercial standard.[23] Furthermore, a landlord's refusal to consent is arbitrary and unreasonable if the landlord places conditions as prerequisites to the landlord's consent.[24] The reasonableness of the landlord's consent is a question of fact to be determined by the jury.[25]

Alabama has retained the common law rule that in the absence of a restrictive provision in the lease, the tenant can freely assign or sublease the leased premises without the landlord's consent.[26] Restrictive provisions on alienation are disfavored by the law and are strictly construed in favor of the tenant.[27]

Finally, Alabama has adopted the Restatement (Second) of Contracts § 205 which requires an obligation of good faith in the performance or enforcement of all contracts including assignment & subletting.[28] Furthermore, Alabama law gives the landlord the same right to enforce his lien against the subtenant or assignee that the landlord had against the original tenant.[29]

ALASKA

Under Alaska law, a landlord may not arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[30] In *Hendrickson*, the Supreme Court of Alaska held that no-assignment and subletting clauses do not give to the landlord an absolute right to control assignments of his property.[31] Where the landlord's consent is required before an assignment can be made, he may withhold his consent only where he has reasonable grounds to do so.[32] While a restraint on alienation without the consent of the landlord is valid, such consent cannot be withheld unreasonably unless a freely negotiated clause in the lease gives the landlord an absolute right to withhold consent.[33]

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[19] 350 So. 2d at 1038.
[20] *Id*. at 1037.
[21] *Id.* at 1038.
[22] *Id*.
[23] *Id*.
[24] *Chrysler Capital Corp. v. Lavender*, 934 F.2d 290, 294 (U.S. App. 1991).
[25] *Id.* at 293.
[26] 350 So. 2d at 1037.
[27] *Id*.
[28] Code of Ala. § 7-1-304 (2005).
[29] Restat 2d of Contracts, § 205 (1981).
[30] *Hendrickson v. Freericks*, 620 P.2d 205 (Alas. 1980).
[31] *Id*. at 211.
[32] *Id.*
[33] *Id*.

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent must be based on reasonable grounds.[34] In *Norville*, the Supreme Court of Alaska adopted the "commercially reasonable standard".[35] The Court argued that while it is unreasonable for a landlord to withhold consent in order to charge a higher rent than he originally contracted for, withholding consent to a sublease because a proposed subtenant would compete with other businesses in the center and thereby potentially affect the landlord's relationship with other tenants is a reasonable ground for withholding consent.[36]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without requesting the landlord's consent.[37] While the general policy against restraints on alienation of property does not totally prohibit restraints, the validity of such a restraint in a particular case is greatly reduced because the law disfavors and interprets such restraints narrowly.[38] Finally, the Alaska Code[39] imposes an obligation of good faith in the performance or enforcement of all contracts or duties including leases and subleases.

ARIZONA

In Arizona, a landlord may not arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[40] In *Campbell*, the Arizona Court of Appeals departed from the Common Law rule and held that a landlord cannot unreasonably withhold consent to assignment or sublease unless the lease gives the landlord an absolute right to do so.[41] The Court held that in the absence of Arizona authority on an issue, Arizona courts will follow the Restatement of the Law.[42] Thus the Court adopted the rule in section 15.2(2) of the Restatement (Second) of Property (1977) which provides: "A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent".[43]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must be based on reasonable grounds.[44] In *Tucson Medical*, the Arizona Court of Appeals held that a landlord's reason for refusing consent to an assignment or sublease, in order for it to be reasonable, must be objectively sensible and of some significance.[45] The Court stated that good faith reasonable objections may include the subtenant's inability to satisfy the terms of the lease, the subtenant's financial irresponsibility or instability, the subtenant's unlawful use of the premises, or the unsuitability of the subtenant's business for the premises.[46] On

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[34] *Norville v. Carr-Gottstein Foods Co*., 84 P.3d 996 (Alas. 2004).
[35] *Id*. at 1002.
[36] *Id.*
[37] *Hendrickson*, 620 P.2d 205.
[38] 620 P.2d at 210, Restat 2d of Prop: Landlord & Tenant, § 15.2 (1977) (comment a).
[39] Alaska Stat. § 45.01.203 (2004).
[40] *Campbell v. Westdahl*, 715 P.2d 288 (Ariz. 1985), *Tucson Medical Ctr. v. Zoslow*, 712 P.2d 459 (Ariz. 1985).
[41] 715 P.2d at 292.
[42] *Id*.
[43] *Id.*
[44] 712 P.2d at 462.
[45] *Id*.
[46] *Id*.

the other hand, a landlord's refusal to consent to an assignment or subletting because the landlord is unsatisfied with the low rent provided under the existing lease is unreasonable.[47]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[48] The Court in *Tucson Medical* held that in the absence of an express prohibition by lease or statute, each tenant has the unrestricted right to assign or sublet at will.[49] The generally accepted rationale for this rule is that restrictions against alienation are not favored by the law and are strictly construed against the landlord.[50] Finally, the Arizona Commercial Code imposes an obligation of good faith in the performance or enforcement of every contract including assignments and subleases.[51] This rule was emphasized in *Campbell* and *Tucson Medical* where the Arizona Court of Appeals held that in every agreement there is an implied covenant of good faith and fair dealing so that neither the landlord nor the tenant may do anything that will injure the rights or interests of the other to the agreement.[52]

ARKANSAS

Until 1981, Arkansas followed the Common Law rule allowing a landlord to arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[53] This rule was abandoned in *Warmack v. Merchants Nat'l Bank*.[54] In *Warmack*, the Arkansas Supreme Court adopted the Restatement (Second) of Property § 15.2 rule which says: *"A restraint on alienation with the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent."*

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must be based on reasonable grounds.[55] The landlord's refusal to consent is arbitrary and unreasonable if it is made without fair, solid and substantial cause or reason.[56] Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without asking for the landlord's consent.[57] The rationale for this rule is that restraints on alienation of the lease inhibit the maximum use the leased property and are considered against public policy.[58] Such restrictive provisions in the lease are disfavored and are strictly construed against the landlord.[59]

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[47] 715 P.2d at 294.
[48] 712 P.2d at 461.
[49] *Id*.
[50] 715 P.2d at 291.
[51] A.R.S. §47-1203 (2004).
[52] 715 P.2d at 293, 712 P.2d at 261.
[53] *Ft. Smith Warehouse Co. v. Friedman-Howell & Co*., 163 S.W. 175 (Ark. 1914).
[54] 612 S.W. 2d 733 (Ark. 1981).
[55] *Id*. at 735.
[56] *Id*.
[57] Restat 2d of Prop: Landlord & Tenant, § 15.1 (1977).
[58] *Id*.
[59] *Id*.

CALIFORNIA

The majority rule, allowing commercial landlords to arbitrarily and unreasonably withhold consent to an assignment or sublease where there is no express leasehold provision to the contrary, was followed in *Richard v. Degan & Brody Inc*.[60] and *Hamilton v. Dixon*.[61] The Court of Appeal of California in *Cohen v. Ratinoff*[62] and *Schweiso v. Williams*[63] disagreed with the *Richard* and *Hamilton* ruling and held that where the lease provides for assignment or subletting only with the prior consent of the landlord, a landlord may refuse consent only where he has a good faith reasonable objection to the assignment or sublease, even in the absence of a provision prohibiting the unreasonable or arbitrary withholding of consent to an assignment of a commercial lease. Finally, the California Supreme Court in *Kendall v. Ernest Pestana*[64] took note of these conflicting decisions and adopted the minority rule.

The Court in *Kendall* held that where a commercial lease provides for assignment only with the prior consent of the landlord, such consent may be withheld only where the landlord has a commercially reasonable objection to the subtenant or the proposed use.[65] Furthermore, where a tenant has the right to sublet under common law, but has agreed to limit that right by first acquiring the consent of the landlord, the tenant has a right to expect that consent will not be unreasonably withheld.[66]

The *Kendall* Court also held that where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should be based on reasonable grounds.[67] Some of the factors that the jury may take into account in applying the standards of good faith and commercial reasonableness may include financial responsibility of the proposed assignee, suitability of the use for the particular property, legality of the proposed use, need for alteration of the premises, and nature of the occupancy.[68] On the other hand, refusing consent to sublet solely on the basis of personal taste, to charge a higher rent than originally contracted for, convenience, or sensibility is not commercially reasonable.[69]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[70] The *Kendall* Court held that the law favors free alienability of property, and California follows the common law rule that a leasehold interest is freely alienable.[71] Provisions in the lease limiting the free alienation of property such as provisions against assignment are disfavored and must be strictly construed.[72]

Finally, the California Supreme Court in *Kendall* emphasized the rule that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[73] Where a

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[60] 5 Cal. Rptr. 263 (1960).
[61] 214 Cal. Rptr. 639 (1985).
[62] 195 Cal. Rptr. 84 (1983).
[63] 198 Cal. Rptr. 238 (1984).
[64] 709 P.2d 837 (Cal. 1985).
[65] 709 P.2d at 849.
[66] 709 P.2d at 845.
[67] *Id*.
[68] *Id*.
[69] *Id.*
[70] *Id*. at 840.
[71] *Id.*
[72] *Id*.
[73] *Id*. at 844.

contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.[74]

COLORADO

In *Basnett v. Vista Village Mobile Home Park*, the Colorado Court of Appeals adopted the Restatement (Second) of Property § 15.2(2) (1977) and held that a landlord cannot withhold consent to assignment or subletting unreasonably unless a freely negotiated provision in the lease gives the landlord an absolute right to do so.[75] This ruling was reaffirmed in *Cafeteria Operators L.P. v. AmCap/Denver Ltd. Pshp*. where the Colorado Court of Appeals held that Colorado follows the rule that without a freely negotiated provision in the lease giving the landlord an absolute right to withhold consent, a landlord's decision to withhold must be reasonable.[76]

Where a provision in the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must be based on commercially reasonable grounds.[77] Considerations based on personal taste, convenience, or sensibility is arbitrary and is not proper criteria for withholding consent.[78] The test is whether a landlord has reasonably refused to consent to a sublease based on factors that relate to a landlord's interest in preserving the value of the property, and whether a reasonably prudent person in the landlord's position would have also refused to consent.[79]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublet the leased premises without securing the landlord's consent. This proposition is supported by the Restatement (Second) of Property § 15.1 which is adopted by Colorado.[80] Colorado courts have also applied the principle of good faith and fair dealing in cased involving assignments and subleases.[81]

CONNECTICUT

Where a lease contains a provision simply stating that the landlord's consent to an assignment or subletting is required, the landlord may refuse consent and his reason is immaterial.[82] On the other hand, where the terms of the lease also provide that the landlord's consent to an assignment or subletting will not be arbitrarily withheld, the landlord may not arbitrarily refuse his consent.[83] This ruling in *Robinson* was put into doubt by the Connecticut Supreme Court ruling in *Warner v. Konover*.[84] While accepting the common law rule that a landlord can arbitrarily refuse to consent to an assignment under a lease provision requiring prior consent,[85] the *Warner* Court held that the landlord's refusal to consent in such a case could be held unreasonable because of the good faith and

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[74] *Id*.
[75] 699 P.2d 1343, 1346 (Colo. 1984).
[76] 972 P.2d 276, 278 (Colo. 1998).
[77] *List v. Dahnke*, 638 P.2d 824 (Colo. App. 1981).
[78] *Id*. at 825.
[79] 972 P.2d at 279.
[80] Restat 2d of Prop: Landlord & Tenant, § 15.1 (1977).
[81] 699 P.2d at 1346; 972 P.2d at 278.
[82] *Robinson v. Weitz*, 370 A.2d 1066 (Conn. 1976).
[83] *Id*. at 1068.
[84] 553 A.2d 1138 (Conn. 1989).
[85] *Id*. at 1140.

fair dealing doctrine.[86] The Court adopted the Restatement (Second) of Contract § 205 and held that the duty of good faith and fair dealing applies to commercial leases and both the landlord and the tenant is under an obligation to deal with one another in a manner consistent with good faith and fair dealing.[87] Thus under Connecticut law, a landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent. At the same time, arbitrary refusal to consent under such a provision could be held unreasonable because it may violate doctrine of good faith and fair dealing.[88]

Where the lease provides that the landlord may not arbitrarily withhold consent, the landlord's refusal to consent to assignment or subletting must be based on reasonable grounds.[89] While financial reliability of the proposed subtenant may constitute a reasonable ground for refusal to consent, refusing consent in order to charge a higher rent is not considered a reasonable ground to refuse consent.[90] Finally, by adopting the Restatement (Second) of Contracts § 205, the Connecticut Supreme Court imposed an obligation of good faith and fair dealing in the performance or enforcement of all contracts including assignment & subletting.[91]

DELAWARE

Section 5101(b) of the Delaware Code provides all legal rights, remedies, and obligations under any agreement for the rental of any commercial rental unit shall be governed by general contract principles.[92] Furthermore, every duty under the Delaware Code, and every act which must be performed as a condition precedent to the exercise of a right or remedy under the Delaware Code, imposes an obligation of good faith in its performance or enforcement.[93] It could be argued that since the Delaware Code and the general contract principles impose a duty of good faith and fair dealing, a landlord is under a duty to use reasonable care in rejecting a proposed subtenant. This argument, however, contradicts the Delaware case law.

In *Manley v. Kellar*, the lease contained a covenant that the tenant would not assign or sublet the leased premises without the written consent of the landlord.[94] When the tenant presented a ready, willing, and able subtenant to assume the obligation of the lease, the landlord refused consent and rejected the proposed subtenant.[95] The tenant argued that the landlord was under a duty to accept the proposed subtenant and mitigate his damages.[96] The Superior Court of Delaware held that the restriction against the tenant subletting or assigning the leased premises during the term of the lease is a positive indication that the landlord in case of a vacancy caused by the tenant wanted to reserve to himself the right to choose his own tenant, a right which to him might be of great significance or consequence.[97] Such a right would be of no value if the landlord is duty bound to accept a subtenant selected by the tenant for the balance of the unexpired term of the lease.[98] Furthermore, assuming

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[86] *Id*. at 1141.
[87] *Id.* at 1140.
[88] *Id.*
[89] 370 A.2d at 1068.
[90] 553 A.2d at 1141.
[91] 553 A.2d at 1140.
[92] 25 Del. C. § 5101(b) (2005).
[93] 25 Del. C. § 5104 (2005).
[94] 94 A.2d at 220.
[95] *Id*.
[96] *Id*. at 221.
[97] *Id*.
[98] *Id*.

arguendo that the landlord arbitrarily and unreasonably refused to accept the subtenant produced by the tenant, the landlord is not liable to the tenant and is under no obligation to search for and obtain a subtenant in order to mitigate his damages.[99] The *Manley v. Kellar* case has not been overruled and is good law in the state of Delaware.

Applying the general principles of contract, where the landlord and the tenant expressly agree that the landlord will not unreasonably withhold his consent to a proposed assignment or subletting, the landlord is under a duty of good faith to accept a proposed subtenant otherwise acceptable and suitable for the leased premises.[100] Delaware recognized the common law rule that restraints on the alienation of property are not favored and are against public policy.[101] They are strictly construed and not implied unless expressly stated in the contract.[102] Therefore, in the absence of a covenant in the lease restricting assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.[103]

FLORIDA

The first Florida case that squarely addressed the issue of whether a landlord may arbitrarily refuse consent when a lease provision expressly provides that the tenant shall not assign or sublease the premises without first obtaining the landlord's consent was *Fernandez v. Vazquez*.[104] Criticizing the majority approach, the *Fernandez* Court held that where a tenant retains the right to sublet or assign the lease under common law, but agrees to limit that right by first acquiring the landlord's consent, the tenant is justified to expect that the landlord will not withhold consent arbitrarily.[105] Thus for the first time, Florida recognized the rule that a landlord may not arbitrarily and capriciously refuse consent to an assignment or subletting of a commercial lease which provides that a tenant shall not assign or sublease the premises without first acquiring the written consent of the landlord.[106]

The *Fernandez* Court also emphasized the rule that where the lease contains a provision requiring that consent shall not be unreasonably withheld, the landlord's right to refuse consent to an assignment or subletting must conform to commercial reasonableness.[107] Whether the landlord's refusal to consent was reasonable or arbitrary is an issue to be determined by the jury.[108] The factors that may be considered in reaching a decision include the financial responsibility of the proposed subtenant, the legality of subtenant's business, the type of occupancy, the type of business, or the need for alteration of the leased premises.[109] On the other hand, refusing consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for are arbitrary reasons failing the test of commercial reasonableness.[110]

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[99] *Id*.
[100] 25 Del. C. §§ 5101(b) & 5104.
[101] *Tracey v. Franklin*, 67 A.2d 56, 59 (Del. 1949).
[102] *Id*.
[103] *Id*.
[104] 397 So. 2d 1171 (Fla. App. 1981).
[105] *Id*. at 1174.
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*.

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without first securing the landlord's consent.[111] The *Fernandez* Court restated the common law rule that the law favors free alienation of property and a tenant has the right to assign his leasehold interest without the consent of the landlord.[112] Finally, the *Fernandez* Court held that a lease constitutes a contract and is subject to the contract principle of good faith and commercial reasonableness.[113] Thus every lease has an implied covenant that imposed a duty of good faith and cooperation on the landlord and the tenant.[114] Where this duty of good faith and cooperation is violated by the landlord's arbitrary refusal to consent to an assignment or subletting, the landlord has breached the contract and must face the consequences of that breach.[115]

GEORGIA

One of the first Georgian cases that discussed the issue of whether a landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent was *Stern's Gallery of Gifts, Inc. v. Corporate Property Investor Inc*.[116] In *Stern's Gallery*, the Georgia Court of Appeals praised the minority rule of holding the landlord to a standard of good faith and commercial reasonableness.[117] While the *Stern's* Court described and praised, in lengthy discussion, the jurisdictional trend toward adopting the rule that a landlord may not arbitrarily and capriciously refuse to consent to an assignment or subletting of a commercial lease which provides that a tenant shall not assign or sublease the premises without first acquiring the written consent of the landlord, the *Stern's* Court failed to adopt this rule as the law of Georgia.[118] As a consequence, the Georgia Court of Appeals in *Vaswani v. Wohletz*[119] explicitly held that in Georgia a landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[120]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should conform to the standard of good faith and commercial reasonableness.[121] In addition, under the common law rule disfavoring restraints against the free alienation of property, a tenant is free to assign or sublease the leased premises without securing the landlord's consent in the absence of a provision in the lease restricting assignment or subletting.[122] Finally, under the *Stern's* holding, it seems that a lease constitutes a contract and is subject to the principles of good faith and commercial reasonableness.[123]

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[111] *Id*. at 1172.
[112] *Id*.
[113] *Id*. at 1174.
[114] *Id*.
[115] *Id*.
[116] 337 S.E.2d 29 (Ga. App. 1985).
[117] *Id*. at 37.
[118] *Id*.
[119] 396 S.E.2d 593 (Ga. App. 1990).
[120] *Id*. at 594.
[121] 337 S.E.2d at 36.
[122] *Shiver v. Benton*, 304 S.E.2d 903, 906 (Ga. 1983).
[123] *Id*.

HAWAII

Under Hawaii law, commercial leases and covenants therein are governed by the general contract principles.[124] Therefore, it can be argued that the implied duty of good faith and fair dealing embodied in every contract is applicable to covenants in a lease contract. Thus where a provision in the lease prohibits assignment or subletting without the consent of the landlord, the landlord is under a duty to act in good faith and in fair manner when refusing consent to a proposed assignment or subletting. Furthermore, it seems that Hawaii courts have adopted the Restatement (Second) of Property § 15.2 rule which prohibits the landlord to unreasonably refuse consent to an assignment or subletting unless a freely negotiated provision in the lease gives the landlord an absolute right to do so.[125]

Where the lease expressly provides that the landlord shall not unreasonably withhold his consent to a proposed assignment or subletting, the landlord covenants to base his refusal to consent on legitimate commercial grounds.[126] The violation of such covenant gives the tenant the right to sue for damages or terminate the lease.[127] Finally, restraints on the alienation of property are not favored by the law and are strictly construed.[128] The reason for the rule against restraints on alienation is a public policy favoring freedom of commerce in property, and the idea that the free alienability of property fosters economic and commercial development.[129] Therefore, where a commercial lease is silent on the issue of assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

IDAHO

The major Idaho case that addressed the issue of whether a landlord has an absolute right to withhold consent to a proposed assignment or sublease where the lease gives the tenant a right of assigning or subleasing upon the consent of a landlord was *Funk v. Funk*.[130] In *Funk*, the lease provided that the tenant shall have the right to assign or sublet the leased premises provided the consent of the landlord is first obtained.[131] Upon the tenant's legitimate request to sublet the leased premises, the landlord refused to consent under any circumstances unless the tenant agreed to certain modification of the lease.[132] The *Funk* Court rejected the majority rule and held that a landlord may not unreasonably refuse to consent to an assignment or subletting of a commercial lease which provides that a tenant shall not assign or sublease the premises without first obtaining the consent of the landlord.[133] The court justified its ruling by adopting the minority rationale that the necessity of reasonable alienation of commercial building space has become paramount in our ever-increasing urban society.[134]

While the *Funk* Court admitted that there may be legitimate reasons for a landlord to withhold consent, no public policy is served by giving the landlord a right to arbitrary refuse to consent to an

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[124] *Food Pantry v. Waikiki Business Plaza*, 575 P.2d 869, 877 (Haw. 1978).
[125] *Kapiolani Commercial Ctr. v. A&S Partnership*, 723 P.2d 181, 184 (Haw. 1986).
[126] *Id.*
[127] *Id*.
[128] *Association of Owners v. Honolulu*, 742 P.2d 974, 983 (Haw. App. 1987).
[129] *Id*.
[130] 633 P.2d 586.
[131] *Id*. at 587.
[132] *Id*. at 588.
[133] *Id*. at 589.
[134] *Id*.

assignment because of whim, caprice, or to extort a higher rent.[135] Where the lease contains a provision stating that the landlord's consent shall not be unreasonably withheld, the landlord's right to refuse consent must conform to a reasonable commercial standard which does not include the landlord's arbitrary considerations of personal taste, sensibility, or convenience.[136]

A tenant may freely assign or sublet the demised premised in whole or in part in the absence of restrictions placed thereon by the lease provisions or by the statute.[137] This common law right is only limited to prevent the tenant from assigning or subletting the demised premised to be used in wasteful or injurious manner.[138] A lease is a contract containing an implied covenant of good faith and fair dealing.[139] Therefore, a landlord must act reasonably and in good faith in withholding his consent to a proposed assignment or subletting.[140]

ILLINOIS

Under Illinois law, where the lease prohibits assignments or subletting without the prior consent of the landlord, the landlord cannot unreasonably withhold consent to a proposed assignment or subletting.[141] At the same time, whether the landlord's refusal to consent was reasonable or arbitrary depends on whether the tenant tendered a subtenant who was ready, willing, and able to take over the lease and who met reasonable commercial standards.[142] To constitute an arbitrary refusal to consent, the landlord need not expressly refuse to consent since a refusal to even consider a request to a proposed assignment is unreasonable and capricious.[143]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must conform to reasonable commercial standards.[144] Since the financial responsibility of a subtenant is an important factor, the landlord is within reason to refuse a subtenant who is insolvent, of dubious financial responsibility, or has a poor payment record.[145] To show that a landlord unreasonably rejected a proposed subtenant, the burden is on the tenant to prove that the proposed subtenant met reasonable commercial standards.[146]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[147] Restraints on alienation are void even though they are limited in time because such restraints pose social and economic

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[135] *Id*.
[136] *Id*.
[137] *Id*. at 588.
[138] *Id*.
[139] *Cheney v. Jemmett*, 693 P.2d 1031 (Ida. 1984).
[140] *Id*. at 1035.
[141] *Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank*, 433 N.E.2d 941, 949 (Ill. App. 1982); *Arrington v. Walter E. Heller International Corp*., 333 N.E.2d 50, 59 (Ill. 1975); *Reget v. Dempsey-Tegler & Co*., 216 N.E.2d 500, 503 (Ill. 1966); *Scheinfeld v. Muntz TV, Inc*., 214 N.E.2d 506, 510 (1966); *Wohl v. Yelen*, 161 N.E.2d 339, 342 (1959); *Mowatt v. 1540 Lake Shore Drive Corp*., 385 F.2d 135, 136 (1967).
[142] 433 N.E.2d at 949.
[143] *Id*. at 943.
[144] *Id*. at 946.
[145] *Id*.
[146] *Id*.
[147] *Gale v. York Center Community Cooperative, Inc*., 171 N.E.2d 30, 33 (Ill. 1960).

disadvantages to the public and the only benefit that often accrues from such restraints is the satisfaction of the capricious whims of the conveyor.[148]

A lease is a contract subject to the implied covenant of good faith and fair dealing.[149] Since both the landlord and the tenant is under a duty of good faith and cooperation, a landlord's arbitrary refusal to consent violates this covenant and thus the lease.[150]

INDIANA

The major case discussing the issue of whether a landlord can arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises was *First Federal Savings Bank of Indiana v. Key Markets, Inc*.[151] The trial court in this case ruled that a landlord may not unreasonably withhold consent to an assignment or subletting notwithstanding the fact that the lease does not contain a provision stating that consent shall not be unreasonably withheld.[152] The Court of Appeals agreed with the trial court and held that a landlord is under a legal duty not to unreasonably withhold consent in the absence of limiting language in the lease.[153] On appeal, the Supreme Court of Indiana overruled the appellate and trial court rulings and held that absent a provision in the lease stating that the landlord's consent shall not be unreasonably withheld, the landlord is not required to pass the test of reasonableness and may refuse consent without any explanation.[154] Where the lease contains a provision requiring the consent of the landlord, the landlord is in control and has the power to accept or reject a proposed assignment or subletting.[155] A tenant wishing to soften the effect of this unilateral control can demand to have engrafted on the consent provision "which consent shall not be unreasonably withheld."[156]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's consent to assignment or subletting must be based on reasonable grounds.[157] What is reasonable or unreasonable depends on factors such as: (1) the financial responsibility of the proposed subtenant (2) the business character of the proposed subtenant (3) the need for alteration of the leased premises (4) the nature of the occupancy and (5) the legality of the proposed use.[158] On the other hand, personal taste, convenience, sensibility, or demanding higher rent constitutes arbitrary reasons failing the tests of commercial reasonableness.[159]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[160] It is a common law rule that restraints on alienation are not favored and in absence of limiting language in the lease, the tenant has the right to assign or sublet freely.[161] Finally, while Indiana law recognized the general contract covenant of good faith and fair dealing, this covenant is irrelevant in cases involving a

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[148] *Id*.
[149] 161 N.E.2d at 343.
[150] *Id*.
[151] 532 N.E.2d 18 (Ind. App. 1988).
[152] *Id*, at 20.
[153] *Id*.
[154] 559 N.E.2d at 603.
[155] *Id*.
[156] *Id*.
[157] *Id.*
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*.

landlord's refusal to consent to an assignment or subletting in the absence of limiting language.[162] Where the lease does not provide that the landlord's consent shall no be unreasonably withheld, the landlord is not required to pass the test of good faith and reasonableness and could refuse consent without any explanation.[163]

IOWA

It is the establish law of Iowa that when a tenant wrongfully abandons the leased premises, a duty is imposed on the landlord to use reasonable diligence to re-let the leased property and minimize the resulting damage.[164] By implication, this rule dictates that where a tenant's default is imminent and he produces a subtenant willing, ready, and able to assume the obligations of the lease, the landlord is under a duty to mitigate his damages and not arbitrarily refuse such suitable subtenant.[165]

A landlord and tenant may set their obligations in the lease document.[166] Where the lease provides that the landlord shall not unreasonably withhold consent to a proposed assignment or subletting, the landlord is under contractual obligation not to arbitrarily refuse consent to a proposed assignment or subletting.[167] Finally, restraints on the alienation of property are not favored and strictly construed to limit its negative results.[168] Therefore, in the absence of a provision in the lease restricting assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

KANSAS

The law in Kansas is that where a tenant abandons the commercial property and notifies the landlord of the breach, the landlord is under a duty to make a reasonable effort to secure a new tenant and mitigate his damages.[169] Where the landlord seeks redress for the wrong of the tenant, the landlord is required to do whatever he reasonably can and improve all reasonable opportunities to avoid the consequences and to lessen the damage.[170] Where the landlord fails to respond to inquiries in renting the abandoned commercial premises and discourages prospective tenants, the landlord has failed to use reasonable efforts to mitigate damages.[171] The Kansas Supreme Court has acknowledged that the rule in Kansas is in conflict with the majority rule followed in the United States, but that Kansas has so long declared and so consistently followed the minority rule that it has become a rule of property and should not now be overruled.[172]

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[162] *Id*.
[163] *Id*.
[164] *Reinking v. Goodell*, 133 N.W. 774, 778 (Iowa Sup. 1913); *Roberts v. Watson*, 195 N.W. 211, 213 (Iowa Sup. 1923); *Benson v. Iowa Bake-Rite Co*., 221 N.W 464, 467 (Iowa Sup. 1929); *Friedman v. Colonial Oil Co*., 18 N.W.2d 196, 198 (Iowa Sup. 1945); *Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc*., 548 N.W.2d 153, 157 (Iowa Sup. 1996).
[165] *Id*.
[166] *Id*. at 156.
[167] *Id*.
[168] *Prichard v. Department of Revenue*, 164 N.W.2d 113, 119 (Iowa Sup. 1969).
[169] 404 P.2d at 953.
[170] *Id*.
[171] *Leavenworth Plaza Assocs., L.P. v. L.A.G. Enterprises*, 16 P.3d 314, 319 (Kan. 2000).
[172] *Lawson v. Callaway*, 293 P. 503, 504 (Kan. 1930); 404 P.2d at 953.

Kansas recognizes a lease to be a contract and subject to the contract principles.[173] Therefore, where the landlord agrees not unreasonably withhold his consent to a proposed assignment or subletting, the landlord is under contractual duty to base his refusal to consent on reasonable commercial grounds. In addition, a restraint on the alienation of property is against public policy and is strictly construed against the party imposing the restriction.[174] Therefore, in the absence of a clause in the lease prohibiting assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

KENTUCKY

Where the lease provides that the tenant shall acquire the landlord's consent before assignment or subletting the leased premises, the landlord is in control and may refuse consent without giving his reason.[175] Kentucky follows the common law and gives the words of the lease full effect without implying covenants that are not expressly agreed upon by the tenant and landlord.[176] Where a restrictive covenant in a lease requires the tenant to secure consent of the landlord before assigning or subletting the lease and does not say that the landlord shall not unreasonably withhold such consent, the landlord reserves the right to refuse consent for any reason or no reason at all.[177]

Similarly, where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must be based on reasonable grounds.[178] In addition, where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[179] A restrictive covenant contained in a lease against the assignment is not violated by a subletting of the premises, and a limitation upon the right to sublease is not violated by an outright assignment of the lease.[180] Finally, while Kentucky recognizes a lease to be a contract and thus subject to the implied covenant of good faith and fail dealing, this general rule seems not apply where the landlord expressly reserves the right to refuse consent without imposing any limitation on that right.[181]

LOUISIANA

Under Louisiana law, where the tenant is not permitted to sublet without the prior consent of the landlord, such prohibition is not absolute and the tenant may sublet provided he obtains a subtenant acceptable to the landlord.[182] Louisiana courts have consistently applied the Louisiana Civil Code Article 2725 to commercial leases and have held that a tenant has the right to sublet or assign the leased premised unless he contracts away this right by agreeing to secure the consent of the landlord before subletting the leased premises.[183] In such situation, the landlord can refuse to

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[173] *T.R. Inc. of Ashland, Kansas v. Brandon*, 87 P.3d 331, 334 (Kan. App. 2004).
[174] *Bolz v. State Farm Mut. Auto Ins. Co*., 52 P.3d 898, 902 (Kan. 2002).
[175] *Hill v. Rudd*, 35 S.W. 270 (Ky. 1896); *Cities Service Oil Co. v. Taylor*, 45 S.W.2d 1039 (Ky. 1932).
[176] 45 S.W.2d at 1041.
[177] *Id*.
[178] *Id*.
[179] *Id*. at 1040.
[180] *Id*.
[181] *Id*. at 1041.
[182] *Gamble v. New Orleans Hous, Mart, Inc*., 154 So. 2d 625, 627 (La. App. 1963).
[183] *Illinois C. G. R. Co. v. International Harvester Co*., 368 So. 2d 1009, 1013 (La. 1979).

consent for any reason unless such consent violates the Abuse of Rights doctrine.[184] The landlord's refusal to consent violates the Abuse of Rights doctrine if: (a) the predominant motive for the refusal was to cause harm; (b) there was no serious or legitimate motive for refusing consent; (c) the exercise of the right to refuse consent is against moral rules, good faith, or basic fairness; and (e) the right to refuse consent is exercised for a purpose other than for which it was granted.[185] In other words, a landlord can refuse consent for any serious and legitimate reasons.[186] But when a tenant presents a perfectly suitable and acceptable subtenant, the landlord cannot arbitrarily withhold consent.[187]

When a lease contains the additional proviso that the landlord's consent shall not be unreasonably withheld, the landlord's right to refuse consent will not be protected unless the landlord's refusal is based on reasonable grounds.[188] Unless the tenant's right is expressly restrained by the lease provision, the tenant is free to assign or sublet the leased premises without asking the landlord for consent.[189] Finally, a landlord's refusal to consent to proposed assignment or subletting is arbitrary and unreasonable if it violates good faith and fairness.[190] Thus the obligation of good faith and fairness is implied in all contracts and is imbedded in the fabric of Louisiana Civil Code and the Abuse of Right doctrine.[191]

MAINE

While residential landlords are under statutory duty to mitigate damages by making reasonable efforts to re-let the abandoned premises, no such duty is imposed on commercial landlords.[192] In the absence of an agreement to the contrary, a commercial landlord is under no legal obligation to mitigate damages where the tenant defaults in paying rent or abandons the leased premises.[193] Where a tenant has breached the lease and abandoned the leased premises, the landlord may permit the leased premises to remain vacant, refuse to recognize the attempted surrender by the tenant, and bring suit to collect the rent as it comes due.[194] Therefore, where the lease prohibits assignments or subletting without the landlord's consent, and the tenant is unable to perform his obligations under the lease and requests the landlord's consent to assign or sublet the leased premises to a suitable person, the landlord may arbitrarily refuse consent, permit the leased premised to remain vacant, and hold the tenant liable for the breach of the lease.

On the other hand, where the lease provides that the landlord's consent to an assignment or subletting shall not be unreasonably withheld, the landlord is under contractual duty to base his refusal to consent on reasonable grounds.[195] Covenants against assignment or subletting are restraints which courts do not favor and are strictly construed to defeat their effects.[196] Thus a covenant restricting assignment does not prohibit subletting and vise versa. Furthermore, where the lease has

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[184] *Id*. at 1014.
[185] *Truschinger v. Pak*, 513 So. 2d 1151, 1154 (La. 1987).
[186] 368 So. 2d at 1015.
[187] *Associates Commercial Corp. v. Bayou Management, Inc*., 426 So. 2d 672, 674 (La. App. 1982).
[188] 513 So. 2d at 1154.
[189] 368 So. 2d at 1013; La. C.C. Art. 2725 (2004).
[190] 513 So. 2d at 1154.
[191] *Id*.
[192] 14 M.R.S. § 6010-A(2) (2004).
[193] 10 A.2d at 610.
[194] *Id*.
[195] *Dahl v. Comber*, 444 A.2d 392, 395 (Me. 1982).
[196] *Waterville v. Kelleher*, 141 A. 70, 71 (Me. 1928).

no provision regarding assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

MARYLAND

Jacobs v. Klawans[197] was the first case to address the issue of whether a landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent. In *Jacobs*, the lease provided that the tenant shall have no right to assign or sublet the leased premised without the prior written consent of the landlord.[198] The tenant presented several ready, willing, and able subtenants which the landlord arbitrarily refused.[199] The court held that where a subletting or assignment of the leased premises without the consent of the landlord is prohibited, he may withhold his consent arbitrarily, unless the lease provides that consent shall not be arbitrarily or unreasonably withheld.[200] The court rationalized its holding by stating that the right of the landlord to choose a tenant of his own preference to occupy and use his property offsets any evils flowing from the enforcement of the restriction on alienation, and that such restriction is in many cases of minor importance.[201]

The *Jacobs v. Klawans* holding was overruled by the Court of Appeals of Maryland in *Julian v. Christopher*.[202] The *Julian* Court agreed with the Restatement (Second) of Property § 15.2 rule and held that it is in the public interest that when a lease provision gives the landlord the right to withhold consent to a sublease or assignment, the landlord should act reasonably, and the courts ought not to imply a right to act arbitrarily or capriciously.[203] Arbitrary refusal to consent to an assignment or sublease for any reason or no reason would virtually nullify any right to assign or sublease.[204]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must be based on reasonable grounds.[205] What constitutes a reasonable refusal to consent to an assignment or sublease may include factors such as the financial irresponsibility or instability of the subtenant, or the unsuitability or incompatibility of the intended use of the leased premises by the subtenant.[206] On the other hand, what constitutes an unreasonable refusal to consent to an assignment or sublease may include facts that the reasons for withholding consent have nothing to do with the proposed subtenant or the subtenant's use of the leased premised, or the refusal to consent was solely for the purpose of securing a rent increase.[207]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[208] Restraints on alienation are viewed as against public policy, are looked upon with disfavor, and are strictly construed in favor of the tenant.[209] Finally, a lease is a contract and has an implied covenant of good faith and fair

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[197] 169 A.2d 677 (Md. 1961).
[198] *Id*. at 678.
[199] *Id*.
[200] *Id*. at 679.
[201] *Id*.
[202] 575 A.2d 735 (Md. 1990).
[203] *Id*. at 738.
[204] *Id*.
[205] *Id*. 739.
[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id*.

dealing.[210] When the landlord retains the right to exercise discretion, he should act in good faith and in accordance with fair dealing.[211] When the lease document does not specify a standard for withholding consent, the implied covenant of good faith and fair dealing should imply a reasonableness standard.[212]

MASSACHUSETTS

The two major cases addressing the issue of whether the landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent are *Slavin v. Rent Control Board*[213] and *21 Merchants Row Corp. v. Merchants Row, Inc*.[214] While the issue in *Slavin* concerned a residential lease, the court implied that it would not impose a reasonableness standard had it been addressing a commercial lease.[215] Two years later, the Supreme Judicial Court of Massachusetts in *21 Merchants Row* held that a commercial landlord may arbitrarily refuse consent under a lease provision requiring the landlord's prior consent to an assignment or subletting.[216] Where a commercial lease requires the tenant to obtain the landlord's consent before assigning or subletting the leased premises, the Massachusetts law does not impose an obligation on the landlord to act reasonably in withholding consent.[217]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting must be based on reasonable grounds.[218] The parties to a lease are parties to a contract and are free to negotiate their rights and obligations under the lease.[219] Where the lease provides that consent shall not be unreasonably withheld, a landlord who violates such unambiguous provision regarding consent breaks his promise and is in breach of contract.[220]

Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[221] A provision in the lease that prohibits a tenant from assigning a lease without the landlord's consent is intended to protect the landlord's right choose suitable subtenants.[222] Where the landlord fails to impose such restraint on alienation in the lease, he forfeits that right and the tenant is free to assign or sublet.[223] Finally, the bargaining power of commercial tenants at the lease drafting stage is ordinarily greater than that of residential tenants.[224] Since a reasonableness requirement is not implied in the assignment clause of a residential lease, it is logical that such standard will not be implied in commercial leases.[225]

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[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] 548 N.E.2d 1226 (Mass. 1990).
[214] 587 N.E.2d 788 (Mass. 1992).
[215] 548 N.E.2d at 1228.
[216] 587 N.E.2d at 789.
[217] *Id*.
[218] *Healthco, Inc. v. E & S Realty Associates*, 511 N.E.2d 579 (Mass. 1987).
[219] *Id*. at 582.
[220] *Id*.
[221] *Id*. at 581.
[222] *Id*.
[223] *Id*.
[224] 587 N.E.2d at 789.
[225] *Id*.

MICHIGAN

A major case addressing the issue of whether the landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent was *White v. Huber Drug Co*.[226] In *White*, the lease at issue provided that the tenant shall not assign or sublet the leased premised without the prior written consent of the landlord.[227] The Supreme Court of Michigan held that the purpose of such a provision in the lease reserves to the landlord the right to choose who shall occupy his property.[228] Where the right is clearly reserved to the landlord, he may accept or reject a proposed subtenant as he desires.[229] The court will not determine whether the landlord's refusal was reasonable or whether the proposed subtenant would or would not make a good and acceptable subtenant.[230]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should be based on reasonable grounds.[231] Where the landlord agrees not to withhold his consent unreasonably, he breaches an express covenant if he refuses consent based on unreasonable grounds.[232] In the absence of a provision in the lease regarding assignment or subletting, a tenant is free to assign or sublet his interest in the leased premises without first obtaining the landlord's consent.[233] This is true because covenants against assignment or subletting are not favorably regarded by the courts and are liberally construed in favor of the tenant.[234]

MINNESOTA

In *Gruman v. Investors Diversified Services*,[235] the lease at issue contained a provision restricting the right of the tenant to assign or sublet without the prior written consent of the landlord.[236] The landlord refused consent to a proposed subtenant who was the postmaster general of the United States and was considered to be highly satisfactory, desirable, and suitable subtenant.[237] The Minnesota Supreme Court held that the landlord is under no duty to mitigate damages and may arbitrarily refuse to accept a subtenant suitable and responsible.[238] Accepting the majority rule, the court held that "many leases now in effect covering a substantial amount of real property and creating valuable property rights were carefully prepared by competent counsel in reliance upon the majority viewpoint."[239] The landlords are justified and entitled to rely upon the language of the lease and the majority rule holding the tenants to fulfill their duty under the lease.[240] If a tenant wants the right to assign or sublet the leased premises, a clause might readily be inserted in the lease stating

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[226] 157 N.W. 60 (Mich. 1916).
[227] *Id*. at 61.
[228] *Id*.
[229] *Id*.
[230] *Id*.
[231] *Id*.
[232] *Id*.
[233] *Id*.
[234] *Id*.
[235] 78 N.W.2d 377 (Minn. 1956).
[236] *Id*. at 378.
[237] *Id*. at 379.
[238] *Id*.
[239] *Id*. at 381.
[240] *Id*.

that the landlord's consent to assignment or subletting of the leased premises should not be unreasonably withheld.[241]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should be based on reasonable grounds. Since parties to a lease are free to negotiate their rights and obligations under the lease, a landlord who agrees to limit his right to refuse consent only upon reasonable grounds is under obligation to exercise reasonable care and diligence in refusing a subtenant who is ready, willing, and otherwise suitable.[242]

MISSISSIPPI

The common law regards leases as conveyances of property rather than contracts.[243] Under this view, the estate belongs to the tenant for the period of time reserved in the lease.[244] In addition, where the tenant abandons the leased premises and breaches the lease, the landlord is under no duty to re-let the premises and mitigate damages.[245] While the minority rule imposes a duty on the landlord to make reasonable efforts to re-let the premises and mitigate damages, Mississippi has never overruled the common law rule and allows the landlord to sit back, allow the leased premises to remain vacant, and hold the defaulting tenant liable for the entire rent under the lease.[246]

Where a lease provision provides that the landlord shall not unreasonably withhold his consent to a proposed assignment or subletting, the landlord is under a duty not to refuse consent contrary to fairness and commercial reasonableness.[247] This does not mean that the landlord cannot attach conditions to his approval of an assignment.[248] Otherwise, the right to withhold consent would be meaningless.[249] What it means is that the conditions attached to approval of a transfer must be reasonable.[250] Therefore, it is commercially reasonable for a landlord to condition his approval of an assignment requiring the proposed subtenant not to make substantial alterations to the leased premises.

MISSOURI

Under Missouri law, a landlord is under no duty to mitigate his damages by seeking to re-let the leased premises when the tenant breaches a commercial lease by abandoning the leased premises, but may let the premises lie idle and collect the rents as they come due.[251] Where a tenant breaches a commercial lease and abandons the leased premises, the landlord has three options: (1) leave the leased premises vacant, treat the lease as operating and collect rent as it comes due; (2) give notice to tenant, take possession of the leased premises and attempt to re-let in order to mitigate any damages;

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[241] *Id*. at 382.
[242] *Id*.
[243] 61 Miss. L.J. 527, 562 (1991).
[244] *Id*.
[245] *Id*.
[246] 135 So. at 199.
[247] *Wright v. Rub a Dub Car Wash, Inc*., 740 So. 2d 891, 899 (Miss. 1999).
[248] *Id*.
[249] *Id*.
[250] *Id*.
[251] *MRI Northwest Rentals Inv. I, Inc. v. Schnucks-Twenty-Five, Inc*., 807 S.W.2d 531 (Mo. App. 1991); *Hurwitz v. Kohm*, 516 S.W.2d 33 (Mo. App. 1974); *Whitehorn v. Dickerson*, 419 S.W.2d 713 (Mo. App. 1967); *Jennings v. First Nat'l Bank*, 30 S.W.2d 1049 (Mo. App. 1930).

or (3) take possession in its own right and terminate the lease.[252] Thus, in the absence of a provision in the lease to the contrary, a landlord is under no duty to accept a suitable subtenant produced by the tenant or to seek a new tenant when the original tenant breaches the lease and abandons the leased premises.[253]

In the absence of a provision in the lease prohibiting assignment or subletting, the tenant is free to assign or sublet without the landlord's consent.[254] Courts will not imply restrictive covenants in the lease if the parties have either dealt expressly with the matter or have intentionally left the contract silent on the point.[255] Where the landlord is under contractual duty not to unreasonably withhold consent, the landlord breaches the contract if he unreasonably refuses to consent to a proposed assignment or subletting.

MONTANA

While Montana has not expressly adopted the minority rule, it has held that a landlord is measured by conduct of a reasonably prudent person in the landlord's position exercising reasonable commercial responsibility.[256] Thus the landlord will not be exercising reasonable commercial responsibility if he arbitrarily refuses consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent. While the *Brigham Young* case involved a lease clause stating that the landlord shall not unreasonably withhold consent, the Supreme Court of Montana hinted that a landlord might be under a general duty to exercise reasonable care when refusing consent to a proposed assignment or subletting.[257]

A landlord has an absolute right to decide who may occupy his premises and for what purpose should the premises be used.[258] However, where a landlord agrees to a lease provision providing that the landlord shall not unreasonably withhold his consent to assignment or subletting, the landlord promises that he will be governed by principles of fair dealing and commercial reasonableness when refusing consent to an assignment or subletting.[259] Under this standard, arbitrary considerations of personal taste, sensibility or convenience are not proper criteria for refusing consent.[260] On the other hand, the financial responsibility of the proposed subtenant, the character of his business, its suitability for the building, the legality of the proposed use, and the nature of the occupancy are among the proper criteria.[261] Finally, the free alienation of property is encouraged unless expressly agreed otherwise.[262] Where the lease is silent on the issue of assignment or subletting, the tenant has the right to assign or sublet the leased premises without the landlord's consent.

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[252] 807 S.W.2d at 534.
[253] 516 N.W.2d at 37.
[254] *Crestwood Plaza, Inc. v. Kroger Co*., 520 S.W.2d 93, 98 (Mo. App. 1974).
[255] *Medicare Glaser Corp. v. Kimco of Missouri, Inc*., 760 S.W.2d 180, 182 (Mo. App. 1988).
[256] *Brigham Young Univ. v. Seman*, 672 P.2d 15, 18 (Mont. 1983).
[257] *Id*.
[258] *Id*.
[259] *Id*.
[260] *Id*.
[261] *Id*.
[262] *Baker v. Berger*, 873 P.2d 940, 942 (Mont. 1994).

NEBRASKA

Nebraska follows the Restatement (Second) of Property § 15.2 and allows the landlord to impose restrictions in the lease requiring the tenant to obtain the landlord's consent before assigning or subletting the leased premises.[263] Where the landlord fails to reserve for himself an absolute right to withhold consent, the landlord may not unreasonably withhold consent to the tenant's request for assignment or subletting.[264] The Supreme Court of Nebraska in *Newman* held that where a commercial lease does not give the landlord an absolute right to refuse consent but only contains a provision stating that there can be no assignment or subletting without the landlord's prior consent, the landlord may not withhold consent unless he has a good faith and reasonable objection to the proposed assignment or subletting.[265] A lease is a contract and where it gives one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.[266]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should be based on reasonable grounds.[267] Factors that may be considered in determining whether a landlord has acted with good faith and reasonably in withholding consent to an assignment of a commercial lease or subletting include but are not limited to the financial responsibility of the proposed subtenant, suitability of the proposed subtenant for the leased premises, legality of the proposed use, the proposed subtenant's need for alteration of the leased premises, and the nature of the proposed subtenant's occupancy.[268]

Where the lease has no provision regarding assignment or subletting, a tenant may freely assign or sublease the leased premises without securing the landlord's consent.[269] In Nebraska, restrictive covenants in a lease against assignment or subletting are not favorably regarded by the courts and are liberally construed in favor of the tenant.[270] Where a tenant is entitled to assign or sublet under common law and has not agreed to limit that right by first acquiring the consent of the landlord, the tenant is free to assign or sublet and need not ask for the landlord's consent.[271]

NEVADA

Under Nevada law, the covenant of good faith and fair dealing is implied into every contract including commercial contracts.[272] Thus an injured party may recover contract damages for breach of the implied covenant of good faith and fair dealing in a commercial contract.[273] It can be argued that where a lease provision provides that no assignment or subletting shall be made without the prior consent of the landlord, the implied duty of good faith requires the landlord not to arbitrarily withhold consent to a proposed assignment or subletting of the leased premises.

Where a lease provision requires the landlord not to arbitrarily withhold consent to a proposed assignment or subletting, the implied duty of good faith and fair dealing demands that the landlord

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[263] *Newman v. Hinky Dinky Omaha-Lincoln*, 427 N.W.2d 50, 54 (Neb. 1988).
[264] *Id*.
[265] *Id*. at 55.
[266] *Id*. at 54.
[267] *Id*.
[268] *Id*.
[269] *American Community Stores Corp. v. Newman*, 441 N.W.2d 154, 158 (Neb. 1989).
[270] *Id*.
[271] 427 N.W.2d at 54.
[272] *A.C. Shaw Constr. v. Washoe County*, 784 P.2d 9, 10 (Nev. 1989).
[273] *Id*.

demonstrate a reasonable rationale for withholding consent. Finally, provisions restricting the right of free alienation of property are strictly construed and cannot be extended or enlarged beyond the terms in which the restriction is expressed.[274] Thus where the lease is silent on the issue of assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

NEW HAMPSHIRE

A major New Hampshire case that addressed the issue of whether a landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent was *Segre v. Ring*.[275] In *Segre*, the New Hampshire Supreme Court followed the precedent set forth by the Massachusetts cases and held that where the lease instrument contains an unqualified provision stating that the tenant shall not assign or sublet without the written consent of the landlord, the landlord has the right to refuse consent to a proposed assignment or subletting and his reasons for so doing are immaterial and need not be disclosed.[276]

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.[277] Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.[278] This implies that where a tenant agrees to ask the landlord's consent before assigning or subletting the leased premises and does not include a provision in the lease requiring the landlord to not unreasonably withhold such consent, the tenant should not expect the landlord to act reasonably in refusing a request for a proposed assignment or subletting.

NEW JERSEY

One of the first New Jersey cases that discussed the issue of the landlord's right to refuse consent to an assignment or subletting was *Muller v. Beck*.[279] In *Muller*, the Supreme Court of New Jersey held that a landlord who negotiates a provision in the lease prohibiting assignment or subletting without the consent of the landlord reserves for himself the right to choose who will occupy his property.[280] Where a landlord is acting within his right expressly reserved by the lease, he may, for any reason or no reason, refuse to consent to a proposed subtenant.[281]

Over the years, the *Muller* holding has been eroded by subsequent court decision. First, the Supreme Court of New Jersey in *Sommer v. Kridel* held that a landlord is under an obligation to maker reasonable efforts to mitigate damages.[282] Second, the Superior Court of New Jersey in *Jonas v. Prutaub Joint Venture* implied that a commercial landlord may be required to act reasonably in

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[274] *Aikins v. Nevada Placer*, 13 P.2d 1103, 1105 (Nev. 1932).
[275] 170 A.2d 265 (N.H. 1961).
[276] *Id*. at 266.
[277] *Harper v. Healthsource N.H.*, 674 A.2d 962, 965 (N.H. 1996).
[278] *Id*.
[279] 110 A. 831 (N.J. Super. 1920).
[280] *Id*. at 832.
[281] *Id*.
[282] 378 A.2d 767, 769 (N.J. 1977).

withholding consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[283]

Modern authorities agree that New Jersey law prohibits a landlord from arbitrarily withholding consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[284] Furthermore, New Jersey courts have defined a lease as constituting a contract and thus subject to the implied covenant of good faith and fair dealing.[285] Thus a landlord's unreasonable and arbitrary refusal to consent would violate the implied covenant of good faith and fair dealing and would constitute a breach of the lease.

NEW MEXICO

The first New Mexico case that addressed the issue of whether a landlord may unreasonably and arbitrarily withhold consent to an assignment or subletting when the commercial lease agreement provides that the tenant must obtain the written consent of the landlord before assigning or subletting the leased premises was *Boss Barbara, Inc. v. Newbill*.[286] In *Boss Barbara*, the New Mexico Supreme Court held that a landlord may not unreasonably withhold consent to an assignment or subletting of commercial property to a commercially reasonable tenant where the lease requires the landlord's prior written consent.[287]

A lease is a contract and should be governed by the general contract principles of good faith and commercial reasonableness.[288] Therefore, consent should not be refused unless the proposed subtenant is unacceptable, applying the same standard that was used in judging the original tenant.[289] Since New Mexico law requires fairness, justice, and right dealing in all commercial practices and transactions, there is no reason not to apply the same standard to the rental of commercial premises.[290]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should be based on reasonable commercial objectives.[291] Furthermore, restraints upon the alienation of property are not favored and are strictly construed against the landlord.[292] In the absence of such restraints, the tenant is free to assign or sublet the leased premises without the landlord's consent.[293]

NEW YORK

Under New York Law, a landlord may arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the

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[283] 567 A.2d 230 (N.J. Super. 1989).
[284] 397 So. 2d at 1173.
[285] 378 A.2d at 771.
[286] 638 P.2d 1084 (N.M. 1982).
[287] *Id*. at 1085.
[288] *Cowan v. Chalamidas*, 644 P.2d 528, 530 (N.M. 1982).
[289] 638 P.2d at 1086.
[290] *Id*.
[291] 644 P.2d at 531.
[292] 638 P.2d at 1086.
[293] *Id*.

landlord's consent.[294] In *Mann Theatres Corp. v. Mid-Island Shopping Plaza Co*.,[295] the Supreme Court of New York held that where the lease permits assignments or subleases only with the consent of the landlord and does not provide that such consent shall not be unreasonably withheld, the landlord may arbitrarily refuse consent for any or for no reason.[296] The enforcement of such provisions in a lease is reasonable because landlords have a substantial interest in controlling the assignability of leases.[297] In *Herlou Card Shop, Inc. v. Prudential Ins. Co*.,[298] the Supreme Court went further and held that where a landlord has the unqualified right to refuse consent, he can modify the lease and place conditions as prerequisite for consent.[299]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's right to refuse consent should be based on reasonable grounds.[300] Reasonable grounds include factors such as: (1) the financial ability and responsibility of the subtenant; (2) the suitability of the subtenant's business for the particular building; (3) the legality of the proposed use; or (4) the nature of the subtenant's occupancy.[301]

The parties to a commercial lease are free to fix their rights and duties within the limits of the law. In the absence of a restriction on the right of assignment or subletting fixed by the parties themselves, a tenant has the right to assign his or her leasehold interest in the demised premises without the consent of the landlord.[302] The reason for this rule is that provisions limiting assignment or subletting are a restraint on the free alienation of land.[303] They are not viewed with favor by the courts and are strictly construed in favor of the tenant.[304] Therefore, where a commercial lease is silent with respect to assignment or subletting, a tenant need not request consent and may freely assign or sublet the demised property.[305]

NORTH CAROLINA

In *Sanders v. Tropicana*,[306] the Court of Appeals of North Carolina held that consent withheld arbitrary or unreasonably is invalid where the lease prohibits assignments or subletting without the prior consent of the owner.[307] However, the *Sanders'* case involved a board of directors of a

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[294] *Gladliz, Inc. v. Castiron Court Corp*., 677 N.Y.S.2d 662 (1998); *Mann Theatres Corp. v. Mid-Island Shopping Plaza Co*., 464 N.Y.S.2d 793 (1983); *Herlou Card Shop, Inc. v. Prudential Ins. Co*., 422 N.Y.S.2d 708 (1979); *American Book Co. v. Yeshiva University Development Foundation*, 297 N.Y.S.2d 156 (1969); *Dress Shirt Sales, Inc. v. Hotel Martinique Associates*, 190 N.E.2d 10 (1963); *Arlu Associates, Inc. v. Rosner*, 220 N.Y.S.2d 288 (1961); *Singer Sewing Machine Co. v. Eastway Plaza, Inc*., 158 N.Y.S.2d 647 (1957); *Ogden v. Riverview Holding Corp*., 234 N.Y.S. 678 (1929).
[295] 464 N.Y.S.2d 793 (1983).
[296] *Id.* at 798.
[297] *Id*.
[298] 422 N.Y.S.2d 708 (1979).
[299] *Id*.
[300] 297 N.Y.S.2d at 160; *Singer Sewing Machine Co. v. Eastway Plaza, Inc*., 158 N.Y.S.2d 647, 649 (1957); *Ontel Corp. v. Helasol Realty Corp*., 515 N.Y.S.2d 567, 568 (1987).
[301] 297 N.Y.S.2d at 160.
[302] 464 N.Y.S.2d at 797; 297 N.Y.S.2d at 159; *Butterick Pub. Co. v. Fulton & Elm Leasing Co*., 132 Misc. 366, 369 (1928).
[303] 464 N.Y.S.2d at 797.
[304] 297 N.Y.S.2d at 159.
[305] *Id.*
[306] 229 S.E.2d 304 (N.C. App. 1976).
[307] *Id*. at 307.

cooperative apartment refusing consent under a contract which restrained a tenant-shareholder from transferring his lease and stock subscription without the Board's consent.[308] The board of directors' restriction on assignment or subletting applied to corporate stock as well as leasehold.[309] Thus the issue of whether a commercial landlord may arbitrarily withhold consent under a commercial lease provision requiring the prior consent of the landlord before any assignment or subletting was left in doubt.

In *Isbey v. Crews*,[310] the Court of Appeals of North Carolina distinguished *Sanders* and held that a landlord may arbitrarily withhold consent under an unqualified provision in a commercial lease prohibiting assignment or subletting of the leased premises without the landlord's consent.[311] Where the landlord and tenant freely enter into a lease contract and knowingly include a provision allowing the tenant to assign or sublet with the prior consent of the landlord, but knowingly omit a provision that the landlord's consent shall not be unreasonably withheld, the court will not insert a requirement that the landlord not unreasonably withhold his consent.[312]

On the other hand, where the lease states that the landlord's consent shall not be unreasonably withheld, the landlord should have legitimate commercial reasons for refusing consent.[313] Refusal of consent based on arbitrary considerations of personal taste, sensibility, or convenience is arbitrary and unreasonable.[314] Finally, where the lease does not impose any restrictions on assignment or subletting, the tenant is free to assign or sublet without the landlord's consent.[315] Restraints on the alienation of property are not favored and the court will not imply one unless expressly stated in the lease.[316]

NORTH DAKOTA

Under North Dakota law, a landlord is under a duty to mitigate damages that arise out of his tenant's default.[317] The landlord has a duty to make a good faith effort, expending reasonable effort and diligence, to re-let the leased premises.[318] This implies that when a tenant's default is imminent and he presents a ready, willing, and suitable subtenant, the landlord is under a duty to act in good faith and not arbitrarily refuse the proposed subtenant. The burden is upon the tenant to prove that the landlord has acted unreasonably and in bad faith.[319]

Where the landlord and the tenant have made a contract which the tenant has broken, the landlord must make reasonable efforts to render the landlord's injury as light as possible, and the landlord cannot recover from the tenant breaking the contract damages which would have been avoided had the landlord performed such duty.[320] The rationale for imposing such duty on the landlord is that public policy demands that the property be put to some beneficial use, and a modern

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[308] *Id*. at 308.
[309] *Id*.
[310] 284 S.E.2d 534 (N.C. App. 1981).
[311] *Id*. at 537.
[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] 229 S.E.2d at 308.
[316] *Id*.
[317] *Ruud v. Larson*, 392 N.W.2d 62, 63 (N.D. 1986).
[318] *Id*.
[319] *Id*.
[320] *Mar-Son, Inc. v. Terwaho Enters*., 259 N.W.2d 289, 291 (N.D. 1977).

lease is more like a continuing contractual obligation than the purchase of an estate and thus subject to the general contract principle of good faith and fair dealing.[321]

Where the landlord and the tenant enter into a lease contract requiring the landlord not to unreasonably withhold consent to a proposed assignment or subletting, the landlord is under contractual obligation not to refuse consent arbitrarily or unreasonably.[322] As a general rule, unreasonable restraint on the alienation of property is against public policy and therefore invalid.[323] Under this rule, where the lease does not contain a provision regarding assignment or subletting, the court will not imply one and the tenant is free to assign or sublet the leased premises without the consent of the landlord.[324]

OHIO

In *F & L Center Co. v. Cunningham Drug Stores*,[325] the Court of Appeals of Ohio adopted the majority rule and held that where the lease requires the consent of the landlord before assignment or subletting occurs, the landlord may withhold consent for any reason absent a provision in the lease stating that consent shall not be unreasonably withheld.[326] In rationalizing its holding, the court held that the landlord and the tenant are free to negotiate and include in the lease a provision stating that the landlords shall not withhold consent arbitrarily.[327] Where the parties decide not to include such provision in the lease, the court will not imply such provision on its own.[328] An implied covenant of good faith is a covenant that neither the landlord nor the tenant will destroy the rights of the other to receive the fruits of the lease.[329] The duty of good faith must arise from the language of the lease or be indispensable to effectuate the intentions of the parties.[330] Exercising a freely negotiated right under a lease does not violate the implied covenant of good faith and fair dealing.[331]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to assignment or subletting should be based on reasonable grounds.[332] When a landlord negotiates and agrees not to withhold his consent unreasonably, he is under contractual duty to be faithful to his words and use due diligence in refusing consent.[333] Similarly, where the lease has no provision regarding assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.[334] Restrictions against the assignment of leases are restraints against the alienation of property interests and are strictly construed to prevent the restraint from going beyond the express stipulation.[335] The court will not imply such restriction unless expressly stated in the lease.[336]

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[321] *Id*.
[322] *Id*.
[323] *Northwestern Fed. Sav. & Loan Ass'n v. Ternes,* 315 N.W.2d 296, 303(N.D. 1982).
[324] *Id*.
[325] 482 N.E.2d 1296 (Ohio. App. 1984).
[326] *Id*. at 1300; *Shoney's, Inc. v. Winthan Props*., 2001 Ohio 3965 (Ohio. App. 2001).
[327] *Id*. at 1300.
[328] *Id*.
[329] *Conway v. Nissley*, 1995 Ohio App. LEXIS 5390.
[330] *Id*.
[331] *Id*.
[332] 482 N.E.2d at 1300.
[333] *Id*.
[334] *Fairbanks v. Power Oil Co*., 77 N.E.2d 499, 503 (Ohio. App. 1945).
[335] *Id*.
[336] *Id*.

OKLAHOMA

In Oklahoma, where a tenant breaches the lease and abandons the leased premises, the landlord is under no duty to mitigate damages and may let the premises remain vacant and sue the tenant at the end of the lease term for the entire rent.[337] Upon the tenant's breach and wrongful abandonment of the leased premises, Oklahoma gives the landlord three options: (1) the landlord may terminate the lease, enter and take possession recovering accrued rents to the date of entry (2) the landlord may let the premises remain vacant and sue at the appropriate time for the entire term or (3) the landlord may give notice to defaulting tenant of his refusal to accept the surrender and re-let the premises for the benefit of the tenant to mitigate his damages.[338] Oklahoma statute regulating commercial landlord and tenant conduct prohibits the assignment or transfer of a commercial lease without the written consent of the landlord if the lease is for two years or less, at will, or by sufferance.[339] Leases exceeding two years are obviously subject to the express language of the lease contract.

Under Oklahoma law, a lease in writing constitutes a written contract.[340] Thus under contract principles, where the lease provides that the landlord's consent to assignment or subletting shall not be arbitrarily withheld, the landlord violates an express covenant in the contract if he unreasonably refuses consent to a proposed assignment or subletting. Finally, restrictive provisions in a contract run counter to public policy and are strictly construed to defeat their purpose.[341] Therefore, in the absence of a restrictive provision in the lease contract prohibiting assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

OREGON

Under Oregon law, when a lease provision prohibits subletting or assignment of the leased premises without the consent of the landlord, the landlord may arbitrarily withhold his consent for any or no reason, and in granting his consent may impose such conditions as he desires.[342] The law imposes a duty of good faith and fair dealing in the performance and enforcement of every contract including leases.[343] This duty of good faith will be applied in a manner that will effectuate the reasonable contractual expectations of the landlord and tenant.[344] In doing so, only the objectively reasonable expectations of the landlord and tenant will be examined in determining whether the obligation of good faith has been met.[345] The duty of good faith cannot serve to contradict an express provision in the lease, nor does it provide a remedy for an unpleasantly motivated act that is expressly permitted by lease.[346] Therefore, when the landlord and the tenant expressly agree that there shall be no assignment or subletting without the prior consent of the landlord excluding the phrase that such consent shall not be unreasonably withheld, the parties' reasonable expectations

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[337] *Higgins v. Street*, 92 P. 153 (Okla. 1907); *Rucker v. Mason*, 161 P. 195 (Okla. 1916); *Liberty Plan Co. v. Adwan*, 370 P.2d 928 (Okla. 1962); *Carpenter v. Riddle*, 527 P.2d 592 Okla. 1974).
[338] 527 P.2d at 594.
[339] 41 Okl. St. § 10 (2004).
[340] 370 P.2d at 930.
[341] *Lohmann v. Adams*, 540 P.2d 552, 555 (Okla. 1975).
[342] *Abrahamson v. Brett*, 21 P.2d 229, 232 (Ore. 1933).
[343] *Pacific First Bank by Wash. Mut. v. New Morgan Park Corp*., 876 P.2d 761, 767 (Ore. 1994).
[344] *Uptown Heights Assocs. Ltd. Partnership v. Seafirst Corp*., 891 P.2d 639, 645 (Ore. 1995).
[345] *Id*.
[346] *Id*.

have been met and the duty of good faith is not violated if the landlord unreasonably refuses to consent to proposed assignment or subletting.[347]

Where the lease provides that consent shall not be unreasonably withheld, the landlord's refusal to consent to an assignment or subletting should be based on reasonable grounds.[348] When the lease gives the landlord discretion to refuse consent for reasonable commercial factors, the landlord has performed in bad faith if he has used his discretion to refuse consent unreasonably.[349] Where the lease has no provision regarding assignment or subletting, a tenant can freely assign or sublease the leased premises without securing the landlord's consent.[350] While the right of a tenant to assign or sublet may be restricted by the terms of the lease, in the absence of any covenant in the lease to the contrary, a tenant has the right to sublet or assign the leased premises.[351]

PENNSYLVANIA

Under Pennsylvania law, where the lease contains a provision prohibiting the tenant to assign or sublet without the written consent of the landlord, the landlord may arbitrarily refuse consent to a proposed assignment or subletting out of mere caprice or whim and irrespective of the acceptability or suitability of the proposed subtenant.[352] Furthermore, the Supreme Court of Pennsylvania in *Stonehedge Square Ltd Pshp. v. Movie Merchants*[353] held that Pennsylvania follows the common law view that where the tenant breaches the lease and abandons the leased premises, the landlord is under no duty to mitigate damages and my allow the leased premises to stand idle and hold the tenant liable for the entire rent.[354] Re-letting the leased premises is not imposed on landlord as a duty but he may lease it and hold the tenant for the difference.[355]

The parties to a lease may impose appropriate restraints on the alienation of the leased premises, and can eliminate the legal problem of determining what sort of restraint they have created if they use language in the lease which plainly states what they intended.[356] A major problem in contract cases is to determine what the parties intended when they failed to clearly express their intentions.[357] Thus, where a lease provision clearly and expressly states that the landlord shall not unreasonably withhold his consent to assignment or subletting, there is no problem of interpretation and the landlord is under contractual duty to base his refusal to consent on reasonable grounds.[358] Furthermore, contractual restraints upon alienation of property are disfavored and strictly construed in favor of permitting transfer.[359] Thus in the absence of a provision in the lease clearly and properly prohibiting assignment or subletting, the tenant has the right to assign or sublet the leased premises without the landlord's consent.[360]

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[347] 876 P.2d at 767.
[348] *Id*. at 766.
[349] *Id*.
[350] 21 P.2d at 232.
[351] *Id*.
[352] *S. W. Straus & Co. v. B. Lancaster Trust Co*. (Pa. 1926) 40 Lanc L Rev. 125; also reported in 21 A.L.R.4th 188 § 3.
[353] 715 A.2d 1082 (Pa. 1998).
[354] *Id*. at 1084.
[355] *Id*.
[356] *B. C. & H. Corp. v. Acme Markets, Inc*., 19 Pa. D. & C.3d 419, 428 (Pa. 1980).
[357] *Id*.
[358] *Id*.
[359] *Id*. at 429.
[360] *Id*.

RHODE ISLAND

Under Rhode Island law, a landlord claiming injury that is due to breach of lease contract by a tenant is under a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages.[361] This rule prevents the landlord from sitting silent while the damages accumulate.[362] The law requires reasonable efforts and ordinary care in such circumstances.[363] The landlord is not allowed to recover that amount of damages he or she could have reasonably avoided.[364] The tenant has the burden to prove that the landlord failed to exercise reasonable diligence and ordinary care in attempting to mitigate damages.[365] Thus it could be argued that where a tenant is unable to continue his obligations under a lease and requests the landlord's consent to a proposed assignment or subletting, the landlord is under a duty to minimize his damages by exercising reasonable diligence not to reject a suitable subtenant.

Implied covenants are not favored by law and courts are reluctant to imply covenants that are not expressed in the written lease.[366] The rationale for this rule is that when the parties have entered into a written lease agreement that contains their obligations, they have expressed all of the covenants by which they intend to be bound.[367] Thus where the lease has no provision regarding assignment or subletting, the tenant may assign or sublet the leased premises without the landlord's consent.

SOUTH CAROLINA

South Carolina follows the majority rule and allows the landlord to arbitrarily withhold consent to an assignment or subletting in the absence of a provision in the lease requiring the landlord not to unreasonably refuse consent.[368] The Supreme Court of South Carolina expressly rejected the Restatement (Second) of Property § 15.2(2) rule and held that the common law view that consent may be arbitrarily refused is preferred because the judicial function of the courts is to enforce leases as made by the parties and not to re-write or distort the terms of an unambiguous lease.[369] Where the lease document is clear and unambiguous, the court will enforce it regardless of the apparent unreasonableness or the parties' failure to protect their rights carefully.[370]

Where the lease unambiguously provides that the landlord's consent to an assignment or subletting shall not be unreasonably withheld, the landlord is under contractual duty to refuse consent only upon reasonable grounds.[371] Restraints on the alienation of property are not looked upon with favor by the courts and are strictly construed to limit its scope.[372] Where the lease is silent on issue of assignment or subletting, the tenant is free to assign or sublet the leased premised without the landlord's consent.[373]

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[361] *Tamaino v. Concord Oil*, 709 A.2d 1016, 1026 (R.I. 1998).
[362] *Id*.
[363] *Id*.
[364] *Bibby's Refrigeration, Heating & Air Conditioning v. Salisbury*, 603 A.2d 726, 729 (R.I. 1992).
[365] *Id*.
[366] *Aneluca Assocs. v. Lombardi*, 620 A.2d 88, 92 (R.I. 1993).
[367] *Id*.
[368] *Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism*, 454 S.E.2d 347 (S.C. App. 1995); *Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism,* 480 S.E.2d 81 (S.C. 1997).
[369] *Id*. at 84.
[370] 454 S.E.2d at 350.
[371] 480 S.E.2d at 84.
[372] *Spann v. Carson*, 116 S.E. 427, 433 (S.C. 1923).
[373] *Id*.

SOUTH DAKOTA

South Dakota recognizes the rule that a landowner is under a duty to make reasonable efforts to mitigate damages.[374] No damages may be awarded for losses which the landowner might have prevented by reasonable efforts.[375] Under this rule, a landlord who allows the leased premises, abandoned by the defaulting tenant, to remain vacant, may not recover damages that he could have avoided by re-letting the abandoned premises. Furthermore, it can be argued that where the landlord reserves the right to grant or refuse consent to a proposed assignment or subletting, the rule directs the landlord to accept a suitable and responsible subtenant and avoid enhancing the damages.

Where a lease provision requires the landlord not to unreasonable withhold his consent to assignment or subletting, the landlord must demonstrate a reasonable rationale for withholding consent.[376] Otherwise, the landlord will be in breach of the contract and liable to the tenant for damages. Finally, restraints against assignment or subletting are looked upon with disfavor and are strictly construed against the landlord.[377] They are construed with the utmost jealousy and various methods have been used in defeating them.[378] Thus covenant against assignment does not prevent subletting and a covenant not to sublet is not violated by subletting part of the leased premises.[379] Furthermore, where there are no covenants against assignment or subletting in the lease, the tenant is free to assign or sublet the leased premises without the landlord's consent.

TENNESSEE

While Tennessee has not expressly adopted the minority rule, the standard it usually applies in determining whether withholding of consent was arbitrary is a reasonable commercial standard.[380] This standard includes the elements of good faith and fair dealing.[381] Thus it is safe to assume that where a tenant produces a suitable subtenant and the landlord refuses consent out of mere caprice or whim, the landlord has violated the elements of good faith and commercial reasonableness.

The same standard is applicable to a lease provision stating that the landlord shall not unreasonably withhold his consent to assignment or subletting.[382] In such situation, a landlord may not withhold consent because of personal whim or taste or other arbitrary reasons, but must act in good faith and in a commercially reasonable manner.[383] A major factor in determining whether a landlord acted in good faith and in a commercially reasonable manner is the financial worthiness of the proposed subtenant.[384] On the other hand, it is unreasonable for a landlord to refuse consent based on personal taste, convenience, or sensibility.[385] Finally, covenants against assignment or subletting are strictly construed against the landlord.[386] They are looked upon with the utmost

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374 *State Highway Comm'n v. Pinney*, 171 N.W.2d 68, 69 (S.D. 1969).
375 *Id*. at 70.
376 *Wandler v. Lewis*, 567 N.W.2d 377, 386 (S.D. 1997).
377 *Smith v. Hegg*, 214 N.W.2d 789, 791 (S.D. 1974).
378 *Baron Bros. v. National Bank*, 155 N.W.2d 300, 304 (S.D. 1968).
379 *Id*.
380 *First American Bank, N.A. v. Woods*, 781 S.W.2d 588, 590 (Tenn. App. 1989).
381 *Id*.
382 *Id*.
383 *Id*.
384 *Id*.
385 *Id*. at 591.
386 *Woods v. Forest Hill Cemetery, Inc*., 192 S.W.2d 987, 990 (Tenn. 1946).

jealousy, and different methods have been applied for defeating them.[387] Thus where the lease contract is silent regarding assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

TEXAS

The Texas Property Code[388] prohibits a tenant from assigning or subletting the leased premises without the prior consent of the landlord. This provision is applicable to commercial leases and is incorporated into all leases by operation of law.[389] This statutory provision against assignments or subletting without the landlord's consent can only be changed by a clearly expressed provision in the lease document.[390] This restraint against assignment or subletting is for the sole benefit of the landlord.[391] By an express provision in the lease, the landlord may agree not to unreasonably or arbitrarily withhold his consent to a proposed assignment or subletting.[392] Absent such provision in the lease, the landlord is under no duty to act reasonably in withholding his consent.[393] He may withhold his consent arbitrarily and his reason for it is immaterial.[394] Furthermore, Texas courts have rejected the minority view and have held that there is no implied duty of good faith and fair dealing in all contracts.[395] In the absence of a special relationship between the landlord and tenant, there is no duty to act in good faith in an ordinary commercial contract.[396]

Where a lease provision provides that the landlord shall not unreasonably withhold his consent to an assignment or subletting, the landlord is under contractual duty not to unreasonably withhold his consent.[397] Thus it is unreasonable for a landlord to condition consent on a change in the terms of the original lease based on what the landlord finds economically advantageous at the time of the attempted assignment or sublease.[398] Finally, while most jurisdictions oppose and strictly construe restrictive covenants on the alienation of property, Texas statutorily prohibits a tenant from assigning or subletting the leased premises without the landlord's consent.[399] Therefore, in the absence of a provision in the lease prohibiting assignment or subletting, a tenant cannot assign or sublet the leased premises without first obtaining the landlord's consent.[400]

UTAH

In Utah, virtually every contract imposes upon each party a duty of good faith and fair dealing, the violation of which gives rise to a claim for breach of contract.[401] For commercial contracts, a

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[387] *Id*.
[388] Tex. Prop. Code § 91.005 (2004).
[389] *718 Assocs., Ltd. v. Sunwest N.O.P., Inc*., 1 S.W.3d 355, 362 (Tex. App. 1999).
[390] *Reynolds v. McCullough*, 739 S.W.2d 424, 429 (Tex. App. 1987).
[391] *Id*.
[392] *Id*.
[393] *Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth*., 987 S.W.2d 621, 625 (Tex. App. 1999).
[394] *Id*.
[395] *Id*.
[396] *Id*.
[397] 739 S.W.2d at 429.
[398] *B.M.B. Corp. v. McMahan's Valley Stores*, 869 F.2d 865, 869 (U.S. App. 1989).
[399] Tex. Prop. Code § 91.005 (2004).
[400] 1 S.W.3d at 362.
[401] *Oakwood Vill. L.L.C. v. Albertsons, Inc*., 104 P.3d 1226, 1239 (Utah. 2004).

covenant of good faith is statutorily imposed by Utah Code.[402] Under the covenant of good faith and fair dealing, the parties to a commercial lease impliedly promise that they will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the lease contract.[403] This implied covenant of good faith and cooperation prevents either party to the contract from impeding the other's performance of his obligations under the contract.[404] Thus the implied duty of good faith and fair dealing prevents the landlord from arbitrarily and unreasonably rejecting a suitable subtenant where a lease provision requires the tenant to secure the landlord's consent before assigning or subletting the leased premises.

Where a clause in the lease states that the landlord shall not unreasonable withhold consent to a proposed assignment or subletting, the implied duty of good faith and cooperation is violated if the landlord refuses consent out or mere caprice or whim. The landlord in such situation is required to fulfill his obligations under the lease and demonstrate reasonable rationale for withholding consent. Finally, restrictive covenants are not favored in the law and are strictly construed in favor of the free alienation of property.[405] Restrictive covenants must be clearly and expressly stated and will not be implied except under extreme circumstances.[406] Therefore, in the absence of a restrictive covenant against assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

VERMONT

The Vermont Supreme Court in *B & R Oil Co. v. Ray's Mobile Homes*[407] expressly declined to adopt the Restatement (Second) of property § 15.2(2) rule and held that Vermont law gives the landlord the right to arbitrarily withhold his consent to an assignment of a lease where the lease contains a provision prohibiting assignment without the landlord's express consent.[408] In *B & R Oil*, the lease prohibited assignment or subletting without the prior written consent of the landlord.[409] The tenant requested the landlord's consent to assign the lease to a third party who was suitable and wanted to continue to operate the existing retail gasoline station.[410] The landlord had no objection to the third party being a lease holder but refused consent because he wanted to renegotiate the terms of the lease.[411] The court held that the language of the lease is unambiguous and the court will not try to rewrite the lease to include the reasonableness standard therein.[412]

VIRGINIA

Under Virginia law, a landlord's actions under a commercial lease are governed by principles of fair dealing and commercial reasonableness.[413] Thus where a lease prohibits assignment or subletting

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[402] Utah Code Ann. § 70A-1-203 (2005).
[403] *St. Benedict's Dev. Co. v. St. Benedict's Hosp*., 811 P.2d 194, 199 (Utah. 1991).
[404] *Zion's Properties v. Holt*, 538 P.2d 1319, 1321 (Utah. 1975).
[405] 811 P.2d at 198.
[406] *Id*.
[407] 422 A.2d 1267 (Vt. 1980).
[408] *Id*.
[409] *Id*.
[410] *Id*.
[411] *Id*.
[412] *Id*. at 1268.
[413] *Marriot Corp. v. Fischer*, 1994 Va. Cir. LEXIS 901, 3 (1994).

of the leased premises without the landlord's consent, the landlord is under a duty to act fairly and in commercially reasonable manner.[414] The tenant has the burden to prove that the landlord's refusal to consent was arbitrary and unreasonable.[415]

Where a lease provision provides that the landlord shall not unreasonably withhold his consent to assignment or subletting, the landlord must produce valid business reasons for withholding his consent to a proposed assignment or subletting.[416] A reason for refusing consent, in order for it to be reasonable, must be objectively sensible and of some significance and not based on mere caprice or whim or personal prejudice.[417] It is unreasonable to refuse consent in order to improve economic position, personal taste, convenience, sensitivity or personal satisfaction.[418] On the other hand, refusal to consent is reasonable if it is based on reasons such as the character of the business, suitability of the building, legality of the proposed use, the nature of the occupancy and the economic position of the subtenant.[419]

Restrictions on the power of alienation are not favored by the law and are strictly construed against the party imposing the restrictions.[420] A restriction against assignment or subletting is governed by the rule of strict construction, and it does not exist unless clearly and expressly stated in the lease contract.[421] Thus where the lease is silent on the issue of assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.[422]

WASHINGTON

In *Coulos v. Desimone*,[423] the Washington Supreme Court held that a landlord and a tenant may lawfully covenant that no assignment or subletting of the leased premises should be valid without the written consent of the landlord, and an assignment or subletting in violation of such covenant will put the tenant in default of the lease.[424] Where the lease does not expressly require the landlord to act reasonably in refusing consent, the landlord may arbitrarily out of mere caprice or whim refuse consent to a proposed assignment or subletting regardless of the fitness and suitability of the proposed assignee or subtenant.[425]

This issue was revisited in *Johnson v. Yousoofian*[426] where the Washington Court of Appeal agreed with *Coulos* holding and stated that Washington follows the common law and rejects the Restatement (Second) of Property rule.[427] The court held that while there is an implied duty to perform all contractual duties in good faith, the duty of good faith exists only in relation to the performance of specific contract terms and does not obligate a party to accept new obligations.[428]

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414 *Id*.
415 *Id*.
416 *Safeway Inc. v. CESC Plaza Ltd. P'ship*., 261 F. Supp. 2d 439, 463 (U.S. Dist. 2003).
417 *Id*. (Quoting Restatement (Second) of Property § 15.2).
418 1994 Va. Cir. LEXIS 901 at 4.
419 *Id*.
420 *Wainwright v. Bankers' Loan & Investment Co*., 72 S.E. 129, 130 (Va. 1911).
421 *Taylor v. King Cole Theaters, Inc*., 31 S.E.2d 260, 261 (Va. 1944).
422 72 S.E. at 130.
423 208 P.2d 105 (Wash. 1949).
424 *Id*. at 110.
425 *Id*. at 111.
426 930 P.2d 921 (Wash. App. 1996).
427 *Id*. at 925.
428 *Id*. at 924.

Thus if there is no contractual duty, there is nothing that must be performed in good faith.[429] On the other hand, where the lease states that the landlord shall not unreasonably withhold consent, the duty of good faith is violated if the landlord refuses consent out of mere caprice or whim.[430]

Lease covenants requiring the landlord's consent to assignment or subletting are restraints on alienation and are strictly construed against the landlord.[431] Therefore, where the lease is silent with respect to assignment or subletting, the tenant is free to assign or sublet the leased premises or any part thereof without the landlord's consent.[432]

WASHINGTON D.C.

Where a lease provision prohibits assignments or subletting without the landlord's consent, a landlord has the right to arbitrarily refuse consent to a proposed assignment or subletting.[433] A covenant in the lease against assignment or subletting is for the benefit of the landlord because it gives him the right to choose who shall use his property.[434] Furthermore, where the tenant breaches the lease and abandons the leased premises, a landlord is under no obligation to mitigate damages and may allow the leased premises to lie idle and hold the tenant liable for the entire rent due.[435] The landlord is neither required to find a new tenant for the leased premises nor must he accept a suitable subtenant produced by the defaulting tenant.[436] Instead, the landlord has three options how to deal with defaulting tenant: (1) the landlord may accept the abandonment and terminate the lease; (2) the landlord may take possession, re-let, and hold the tenant liable for any deficiency in rent; or (3) the landlord may allow the leased premises to lie idle and hold the tenant liable for the entire rent due.[437]

A lease is a contract subject to general contract principles. Whether a contract is ambiguous is question of law to be resolved by the court. Thus where a contract clearly and expressly states that the landlord shall not unreasonably withhold his consent to a proposed assignment or subletting, the landlord is under contractual duty to not to refuse consent arbitrarily. It is unreasonable for a landlord to refuse consent to an assignment or sublease solely to extract an economic concession or to gain economic leverage.[438]

WEST VIRGINIA

Under West Virginia law, lease agreements are governed by the Uniform Commercial Code.[439] There is imposed upon both parties to a business transaction an obligation of good faith in its performance or enforcement.[440] The test of good faith in a commercial setting is honesty in fact and

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[429] *Id*. at 925.
[430] *Id*.
[431] *Id*. at 924.
[432] *Id*.
[433] *Friedman v. Thomas J. Fisher & Co*., 88 A.2d 321, 323 (D.C. App. 1952).
[434] *Id*.
[435] *Id*.
[436] *Id*.
[437] *Truitt Evangel Temple, Inc*., 486 A.2d 1169, 1172 (D.C. App. 1984).
[438] *1010 Potomac Associates v. Grocery Mfrs. Of America, Inc*., 485 A.2d 199, 210 (D.C. App. 1984).
[439] *Barn-Chestnut, Inc. v. CFM Dev. Corp*., 457 S.E.2d 502, 508 (W.Va. 1995).
[440] *Id*.

the observance of reasonable commercial standards of fair dealing in the trade.[441] Thus where a commercial lease prohibits assignment or subletting without the prior consent of the landlord, it can be argued that the duty of good faith and fair dealing requires the landlord not to arbitrarily withhold consent to a proposed assignment or subletting.

Where a commercial lease requires the landlord not to unreasonably withhold consent to a proposed assignment or subletting, the duty of good faith and fair dealing demands that the landlord demonstrate a reasonable commercial rationale for withholding consent to a proposed assignment or subletting or the leased premises.[442] Finally, covenants in a lease prohibiting assignment or subletting without the landlord's consent are restraints on the free alienation of property, are not favored, and are strictly construed.[443] Thus where a lease has no provision restricting assignment or subletting, the tenant is free to assign or sublet the leased premises without the landlord's consent.

WISCONSIN

Under Wisconsin law, a landlord-tenant relationship requires the parties to deal with each other in good faith and in a commercially reasonable manner.[444] Thus where a lease provision provides that the tenant shall not assign or sublet the leased premises without the landlord's consent, the landlord is under a duty to act in good faith and in a commercially reasonable manner when refusing consent to such proposed assignment or subletting.[445] In order for it to be reasonable, refusal to consent must be objectively sensible and of some significance and not be based on mere caprice or whim.[446] The burden is on the tenant to prove that the landlord's reasons for refusing consent were arbitrary or commercially unacceptable.[447]

Where the lease contract provides that the landlord's consent to a proposed assignment or subletting shall not be unreasonably withheld, the landlord is under contractual duty not to refuse consent for personal or arbitrary reasons.[448] Whether a landlord's reasons for refusing consent are commercially reasonable is a question for the jury.[449] It is not commercially reasonable if the only purpose for refusing consent is to charge a higher rent than the original contract allowed. On the other hand, refusing consent based on the financial irresponsibility of the subtenant is reasonable.[450]

Under common law, the tenant was free to assign or sublet the leased premises unless restricted by the express terms of the lease.[451] Restrictions on the alienation of property were disfavored and strictly construed.[452] Thus where the lease is silent in regards to assignment or subletting, the tenant may freely assign or sublet the leased premises without the landlord's consent.

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[441] *Id*.
[442] *Id*.
[443] *Miller v. Fredeking*, 133 S.E. 375, 377 (W.Va. 1926).
[444] *Morgan Prods. V. Park Plaza of Oshkosh, Inc*., 598 N.W.2d 626, 629 (Wisc. App. 1999).
[445] *Id*.
[446] *Id*. at 630.
[447] *Id*.
[448] *Rock County Sav. & Trust Co. v. Yost's, Inc*., 153 N.W.2d 594, 596 (Wisc. 1967).
[449] 598 N.W.2d at 630.
[450] *Id*.
[451] 153 N.W.2d at 596.
[452] *Id*.

WYOMING

Under Wyoming law, a landlord who is injured by the breach of a tenant must exercise reasonable care and diligence to avoid loss and minimize the resulting damage.[453] Thus where the tenant breaches the lease and abandons the leased premises, the landlord is not allowed to fold his hands and do nothing.[454] The landlord is under a duty to make reasonable efforts to re-let the leased premises and to mitigate his damages. From this rule, it can be argued that where a tenant in default produces a suitable subtenant for the leased premises, the landlord is under a duty to be reasonable in rejecting such subtenant even though the leased provides that no assignment or subletting is allowed without the consent of the landlord.

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.[455] This implied duty is applied by courts to insure a notion of fairness.[456] Thus where a lease provision requires the landlord not to unreasonably withhold consent to assignment or subletting, the covenant of good faith requires the landlord to act fairly and demonstrate a reasonable rationale for withhold consent to a proposed assignment or subletting of the leased premises. Restrictive covenants are not favored, are to be strictly construed, will not be implied, and in case of doubt the restrictions will be construed in favor of the free use of property.[457] Thus where the lease is silent on the issue of assignment or subletting, the tenant has the right to assign or sublet the leased premises without the landlord's consent.

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[453] *Sturgeon v. Phifer*, 390 P.2d 727, 730 (Wyo. 1964).
[454] *Goodwin v. Upper Crust*, 624 P.2d 1192, 1197 (Wyo. 1981).
[455] *Husman, Inc. v. Triton Coal Co*., 809 P.2d 796, 801 (Wyo. 1991).
[456] *Id*.
[457] *Kindler v. Anderson*, 433 P.2d 268, 271 (Wyo. 1967).

JURISDICTIONAL TABLE

	Jurisdiction	May a landlord arbitrarily withhold consent under an unqualified provision in the lease prohibiting assignment or subletting of the leased premises without the landlord's consent?	Must the landlord's refusal to consent to assignment or subletting be based on reasonable grounds where the lease provides that consent shall not be unreasonably withheld?	Can a tenant freely assign or sublease the leased premises without securing the landlord's consent where the lease has no provision regarding assignment or subletting?
1	Alabama	NO	YES	YES
2	Alaska	NO	YES	YES
3	Arizona	NO	YES	YES
4	Arkansas	NO	YES	YES
5	California	NO	YES	YES
6	Colorado	NO	YES	YES
7	Connecticut	NO	YES	YES
8	Delaware	YES	YES	YES
9	Florida	NO	YES	YES
10	Georgia	YES	YES	YES
11	Hawaii	NO	YES	YES
12	Idaho	NO	YES	YES
13	Illinois	NO	YES	YES
14	Indiana	YES	YES	YES
15	Iowa	NO	YES	YES
16	Kansas	NO	YES	YES
17	Kentucky	YES	YES	YES
18	Louisiana	YES/NO	YES	YES
19	Maine	YES	YES	YES
20	Maryland	NO	YES	YES
21	Massachusetts	YES	YES	YES
22	Michigan	YES	YES	YES
23	Minnesota	YES	YES	YES
24	Mississippi	YES	YES	YES
25	Missouri	YES	YES	YES
26	Montana	YES/NO	YES	YES
27	Nebraska	NO	YES	YES
28	Nevada	NO/YES	YES	YES

29	**New Hampshire**	**YES**	**YES**	**YES**
30	**New Jersey**	**NO**	**YES**	**YES**
31	**New Mexico**	**NO**	**YES**	**YES**
32	**New York**	**YES**	**YES**	**YES**
33	**North Carolina**	**YES**	**YES**	**YES**
34	**North Dakota**	**NO**	**YES**	**YES**
35	**Ohio**	**YES**	**YES**	**YES**
36	**Oklahoma**	**YES**	**YES**	**YES**
37	**Oregon**	**YES**	**YES**	**YES**
38	**Pennsylvania**	**YES**	**YES**	**YES**
39	**Rhode Island**	**YES/NO**	**YES**	**YES**
40	**South Carolina**	**YES**	**YES**	**YES**
41	**South Dakota**	**NO/YES**	**YES**	**YES**
42	**Tennessee**	**NO/YES**	**YES**	**YES**
43	**Texas**	**YES**	**YES**	**NO**
44	**Utah**	**NO**	**YES**	**YES**
45	**Vermont**	**YES**	**YES**	**YES**
46	**Virginia**	**NO**	**YES**	**YES**
47	**Washington**	**YES**	**YES**	**YES**
48	**West Virginia**	**NO/YES**	**YES**	**YES**
49	**Wisconsin**	**NO**	**YES**	**YES**
50	**Wyoming**	**NO/YES**	**YES**	**YES**
51	**Washington DC**	**YES**	**YES**	**YES**