Global Corporate Real Estate Guide - Hong Kong

Leases

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# What are the usual forms of leases?

Fixed term and periodic tenancies

Tenancies are either fixed-term tenancies or periodic tenancies.

In a fixed-term tenancy, the term of the tenancy is for a stated period. On expiry of the period, subject to any security of tenure, the tenant must leave. However, domestic leases created before 9 July 2004, and domestic tenancies of certain buildings are subject to separate regulatory regimes.

A periodic tenancy is granted for a certain term (usually a week or a month), which is automatically renewed for a term of the same duration after the expiry of the previous period. A periodic tenancy can be terminated by the landlord or tenant serving on the other a notice of the same duration as the periodic term. The landlord and tenant may expressly agree on the length of the notice period.

A periodic tenancy may be impliedly created. For example, a monthly tenancy may be created where a tenant remains in the premises after the expiry of the fixed-term tenancy and continues to pay the monthly rent.

A domestic tenancy of subdivided unit which exists on or after 22 January 2022 and which the tenant is natural person is subject to a separate protection regime.

Domestic and business tenancies

There is a distinction between domestic tenancies and business tenancies.

The distinction is based on the purposes for which the premises are let. A tenancy under which the premises are let for use as a dwelling is a domestic tenancy. A tenancy under which the premises are let for other kinds of uses is a business tenancy.

The distinction between domestic and business tenancies is relevant as most of the statutory protection given to tenants are given to tenants of domestic tenancies. The importance of the distinction, however, has been substantially diminished in recent years because of the abolition of statutory rent control and tenure protection for a domestic tenancy not involving a subdivided unit.

Public and private sector tenancies

There is essentially no difference between a tenancy granted by or to a public authority and a tenancy granted by or to a private individual or entity. Tenancies granted by the government or certain public authorities are generally not subject to statutory protections to tenants.

# Are lease provisions regulated or freely negotiable?

In general, save for certain protected tenancies, the parties are free to agree on the terms of the lease. However, for a lease to have the sufficient degree of certainty to be legally enforceable, it must contain the parties, the premises, the commencement and duration, and the rent.

In common law, certain obligations are implied into a lease. These obligations, however, may be excluded by an express agreement between the parties. For example, the landlord must give the tenant quiet enjoyment of the premises and must not derogate from his/her grant; and the tenant must pay rent and rates. In domestic tenancies, certain terms are implied by the Landlord and Tenant (Consolidation) Ordinance, such as: (i) the tenant must pay rent on the due date; (ii) the tenant must not cause unnecessary annoyance, inconvenience or disturbance to the landlord or to any other person; (iii) the tenant must not make any structural alterations to the premises without prior written consent of the landlord; and (iv) the tenant must not use the premises for an illegal or immoral purpose.

# Is there a maximum term for leases? Can these be extended?

Real estate in Hong Kong are leaseholds granted by the government. A letting of premises by a “landowner,” who is essentially a tenant of the government under the land grant, is actually a subletting. Under common law, the term of a sublease must end before the expiry of the term of the head lease. If the term of a sublease ends at the same time as the term of the head lease, the purported subletting will be deemed to be an assignment of the head lease.

An option to renew may be granted to the tenant. If an option is granted, it will usually be provided in the lease itself and such lease shall be lodged for land registration for protecting the priority of such option against the subsequent registrable land interest. After completing the land registration process, the registered lease will become a public document. The recent trend is to include the option to renew in a separate memorandum for land registration instead of registering the full lease so as to protect the confidentiality of other commercial terms as contained in such lease.

# What are the usual lease terms?

Subject to the principles regarding subletting mentioned in “Is there a maximum term for leases? Can these be extended?”, the duration of the term is a matter for commercial negotiation. Tenants will usually ask for a longer term where the tenant has to incur substantial expenses in the fitting out and decoration of the premises concerned.

# Are there instances where tenants may demand an extension of the lease?

A tenant may only be entitled to extend the lease if he/she has an option to renew and the option has been properly exercised. Otherwise, a tenant has no right to renew or extend a lease under general law.

# On what grounds may a lease be terminated?

A lease will usually terminate under any of the following circumstances:

The fixed term of a fixed-term tenancy expires

A notice to quit is served in the case of a periodic tenancy

Either the landlord or the tenant exercises any express right of termination in the lease

Either the landlord or the tenant fundamentally breaches the lease

The tenant surrenders the tenancy to the landlord with the landlord's agreement

The provision for re-entry or forfeiture is triggered

For leases of domestic properties created after 9 July 2004, as well as business properties, the parties can freely negotiate and agree between themselves on how the lease will be terminated. However, domestic leases created before 9 July 2004, and domestic leases which exist on or after 22 January 2022 and involve subdivided units and natural persons as tenants, are subject to their respective separate regulatory regimes.

# Must rents be paid in local currency?

Rent is often specified in Hong Kong dollars. Unless specified otherwise in the lease, the tenant has to pay rent in Hong Kong dollars.

# Is rent paid on a monthly basis? Is it required to be paid in advance?

The manner of payment of rent is a matter which the parties are free to agree. Rent is usually paid on a monthly basis.

# How is rent reviewed? Are there limits to the increase in rent?

Leases often contain a rent review clause. Rent review will generally be carried out at contractually specified intervals during the term or towards the end of the term for determining the rent for the renewed term in cases where the tenant exercises its option to renew.

The general purpose of a rent review clause is to ascertain the level of market rent. A rent review clause will usually provide for the new rent to be agreed between the parties, and in the event that the parties fail to reach an agreement, the rent will be determined by an independent valuer (a valuation surveyor, usually) as expert.

# What are the basic obligations of landlords and tenants?

Some basic obligations of a landlord include the following:

Permit the tenant to have quiet possession and enjoyment of the premises during the lease term

Deliver the premises to the tenant in a condition consistent with the agreed handover condition

Pay property tax in respect of the premises

Some basic obligations of a tenant include the following:

Pay rent in accordance with the lease

Pay all rates and outgoings in respect of the premises, except those for which the landlord is liable

Use the premises for permitted use under the lease

Keep and maintain the premises in good clean tenantable and proper repair and condition

Allow the landlord to enter the premises at reasonable times to view the state of repair or to see if repairs need to be carried out

Do not do anything to prejudice the title of the landlord

Return vacant possession of the premises at the end of the lease term in the conditions as when leased to him/her or in such other conditions as the parties may agree in the lease

Indemnify the landlord for the loss or damage caused by defective or damaged condition of the premises or owing to spread of fire or smoke or leakage of liquid

Effect and maintain comprehensive insurance cover in respect of the premises against damage by perils and also public liability insurance cover

# What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

A leasehold is an interest in land which is freely alienable. The most typical types of transactions relating to a leasehold interest are assignment of the interest and subletting.

Practically speaking, a lease will almost invariably restrict the tenant’s freedom to deal with the leasehold interest, although the extent of such restriction varies from agreement to agreement.

# What happens in the event of destruction of the leased premises?

Usually, a lease will contain an abatement of rent clause, which provides that the rent or a fair proportion thereof shall be suspended from the occurrence of damage or destruction or order until the premises or the building shall again be rendered fit for occupation or accessible, or until the demolition order or closing order is lifted (as the case may be), and in the event that the premises or the building have not been reinstated within a pre-determined period, either party has the right to terminate the lease.

# Who is usually responsible for insuring the leased premises?

There is usually an express provision in a lease which specifies the tenant’s obligations to insure the non-structural interiors of the leased premises and third party liabilities. A typical Hong Kong lease is usually silent on the landlord’s obligations to insure the leased premises. However, the landlord may wish to insure the structure of the leased premises for the landlord’s own benefit.

# Will the lease survive if the owner sells the leased premises?

A lease will generally survive a subsequent sale of the leased premises. However, for leases exceeding three years, section 3(2) of the Land Registration Ordinance requires registration of such leases. All registrable leases which are not registered within one month of its execution may be void against a subsequent bona fide purchaser for valuable consideration of the premises.

# Will the lease survive if the leased premises are foreclosed?

The answer depends on whether the lease was created before or after the mortgage.

Lease created before the mortgage

An existing lease is generally binding on the mortgagee. As such, a sale by the mortgagee will have to be subject to the lease.

Lease created after the mortgage

Normally, the mortgage deed will require the mortgagor to obtain the mortgagee’s consent before creating the lease. In practice, a subsequent lease will not be challenged if the mortgagee’s consent is obtained.

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