

CLIENT BRIEFING

DANISH REAL ESTATE LAW

A BRIEF INTRODUCTION

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This brief introduction to the main aspects of Danish real estate law is intended to provide our international clients with a useful overview when structuring Danish real estate transactions.

General

Like the United Kingdom, the Kingdom of Denmark is constitutional monarchy with a democratically elected parliament and government. The Danish legal system is a civil law system very similar to the legal systems in other continental European countries. It is predominantly based on civil law and has the typical characteristics of a Scandinavian country with a mixture of civil law and elements of common law. A large part of Danish legislation is based on EU legislation. Denmark has an excellent record of timely implementation of EU Directives.



Real Estate

Land Registration

All Danish properties are registered in the Land Registry (Tingbogen), kept centrally by the Land Registration Court (Tinglysningsretten), and all properties are identified by a property number. The register is fully computerised, and grants online access to the registered information. The Land Registry provides information about the land owner's identity, all registered mortgage deeds and other property related rights. In most cases, all other easements and encumbrances such as rights of way, local restrictions on construction etc. will also be recorded. The registration of security interests over Danish real property takes place in a mature and well-developed legal framework based on stable and clear registration principles, which have been modernised to take full advantage of a digital recordation system.

Registered Land

The Danish cadastre forms the basis for all land registration in Denmark. The cadastral map is a digital legal map displaying the registered property boundaries and rights of way and is updated daily as a part of the registration of cadastral changes. Any plot of land in Denmark is mapped in the Cadastral System (Matrikelsystemet) and designated with a title number. The title number is used in the Land Registry, where the rights and claims on a title number are ordered by rank. Subject to limited exceptions, all rights over real estate, of any kind, have to be centrally recorded in the property sheet in the Land Registry to be protected against third parties. The ranking is based on the principle of public registration and on a "first in, first in right" principle provided that the holder of the right is in good faith about any prior right which is not registered. As the registration requires that a security interest be registered to become effective towards third parties, the Land Registry is publicly available. The respective ranking of security interests on a property is recorded in the Land Registry. Each registration is made subject to a judicial examination by the Land Registration Court as to certain formal matters. In a default scenario, the publicly registered ranking will determine the order of execution of the registered security interests.



Ownership Rights

Ownership in land is considered freehold and is in principle an unlimited property right of the registered owner. The ownership of land generally entitles the owner to dispose, transfer, encumber or to rent out the property. The rights of the owner are limited by certain private and public law limitations, e.g. easements, restrictive covenants, zoning and planning regulations. Danish property law does not generally apply the distinction between freehold and leasehold, there is either the legal owner or the tenant. However, the tenant is granted certain statutory protections by virtue of the Rent Act and the Business Rent Act to use the rented property. Such statutory rights include certain rent protection and eviction restrictions which may impede on the legal owner's proprietary rights.

Unregistered Rights

While unregistered rights over real estate are valid and recognised, publicly registered security takes precedence over unregistered security provided that the holder of the registered security is in good faith about any prior right which is not registered. The registration of a mortgage in the Land Registry is a necessary perfection requirement for mortgages.



Transfer of Ownership

Transfers of real estate must be registered with the Land Registry in order to be valid in relation to third parties. When purchasing real estate, the parties to the agreement usually sign a purchase agreement and a deed of conveyance electronically. The purchase agreement contains the entire agreement and a copy is kept by both each of the parties, while the deed of conveyance only contains the material provisions of the transfer agreement and is used for the purpose of registering the conveyance with the Land Registry. A buyer must respect any third parties' rights registered with the Land Registry, but is ordinarily not obligated to respect any rights that have not been duly registered of which the purchaser has no prior knowledge. Certain rights do not require registration to enjoy the protection that the registration with the Land Registry provides. Such rights may include usual rights of usage as well as certain claims by tax authorities and other public authorities. The registration of deeds of conveyance or mortgages is subject to a registration fee and stamp duty.

TENANCIES IN DENMARK

Danish landlord and tenant law is generally very restrictively applied in favour of the tenant, especially in relation to residential tenancies. The Rent Act (Lejeloven) as well as the Business Rent Act (Erhvervslejeloven) together with the relevant case law are generally complex and impose several mandatory provisions which cannot be deviated from to the detriment of the tenant, whether the premises are rented for residential or for commercial purposes.

Commercial Tenancies

The Business Rent Act has however introduced a high degree of contractual freedom for commercial tenancies. Almost all terms and conditions of commercial leases are subject to negotiation between the parties, including terms and conditions regarding rent, adjustment of rent, maintenance obligations, right of assignment, subletting, etc. However, with respect to the landlord's termination and payment of damages/compensation, the Business Rent Act provides extensive protection of the tenant. The parties are free to agree how the rent is to be adjusted and paid. Usually, the rent is paid monthly or quarterly in advance. It is also commonly agreed that the annual rent shall be adjusted (sometimes only increased) annually in accordance with e.g. certain changes in official Net Price Indices. According to the Business Rent Act, the rent may be adjusted (increased or decreased) on the basis of the market rent. The adjustment cannot take place until four years after commencement of the lease. These provisions in the Act can be set aside by express and unambiguous agreement in respect of both parties' access to demand rent adjustments, or it can be agreed that only the landlord (or the tenant) is entitled to demand adjustment to the market rent.



Protected Commercial Leases

In commercial tenancies a distinction is made between 'business-protected leases' and 'non business-protected leases'. A 'business-protected lease' is defined as a lease where it is of material importance to the business that it stays in the property. These are typically shops or restaurants whose customers frequent the particular business because of the location and the customer goodwill built up by the tenant. These leases are subject to certain restrictions on the landlord's ability to terminate the lease for good cause and may entail compensation payments to the tenant in the event of termination. The restrictions are intended to protect the business goodwill created by the tenant. With respect to the so-called 'non-business-protected leases', i.e. leases where the customers frequent the business because of the nature of the business, but not based solely on location, the parties can agree that the landlord may require a change in the terms and conditions of the lease and to allow the landlord to terminate the lease if the parties fail to negotiate an agreement on future lease terms. The tenant, however, is protected from such changes to the terms for eight years following the commencement of the tenancy.

The tenants's statutory rights are protected against the landlord's creditors and any purchaser of the property. Consequently, a purchaser of a property and the creditors must respect the tenants's rights under the Act. If rights granted to the tenant exceed the minimum statutory rights, extracts of the lease agreement must be registered in the Land Registry to obtain third party protection. Registration of the agreed terms will ensure that a subsequent purchaser or a creditor will be bound to observe the tenants's rights under the rent agreement.



REGULATIONS AND PERMITS

Since 2012, property information has been made available in centralised and digital form to all users in the form of a property data report (Ejendomsdatabaserapport) to centralise information from various registries and authorities in terms of public permits and public property registrations. The report contains information on approximately fifty data from various public registries, such as zoning plans, building applications, technical information, oil tanks, economy, e.g. property taxes, public debt, ground rent, etc., water, pollution, and various building limitations and restrictions.

Zoning

The Planning Act (Planloven) sets up the national framework governing zoning in Denmark. The Planning Act provides for a municipal zoning plan to be enacted by each municipality. The municipal zoning plan includes the guidelines for the various zones for planning purposes over a 12-year period. The local council of the municipality enacts the municipal zoning plan pursuant to the procedure set out in the Planning Act subject to the provisions set out on a national level while taking all matters set out in the Planning Act into consideration, e.g. environmental protection, groundwater protection, etc. Based thereon, the municipality enacts local zoning plans in accordance with the municipal zoning plan and the provisions of the Planning Act. This is referred to as the local plan. Once a local plan has been duly enacted, it cannot subsequently be changed by reference to a new municipality zoning plan.

Building Permits

Based on the general provision of the local plan, a developer must submit a building proposal within the framework of the local plan for any proposed development of a property to obtain a building permit. The conformity of the building proposal will then be examined by the municipality and a building permit would be granted on that basis. The approval of the building permit is, of course, also subject to the building permit application being in compliance with the provisions of the Building Act (Byggeloven). The building permit is a central permit for each property. Following the construction of a property and the filing of the technical documentation, the conformity of the property with the building permit will be examined and inspected and a building attestation (Bygningsattest), also referred to as an occupancy permit (Ibrugtagningstilladelse) will be issued by the relevant municipality.



ENVIRONMENTAL LIABILITY REGULATION

Denmark has implemented the EC Directive on Environmental Liability. The purpose of this Act, is to protect specified endangered species, international areas of protection, nature conservation, the aquatic environment, and soil against environmental damage. Its rules regulate the investigation, prevention, control and remedying of environmental damage. A person or company responsible for an industrial or commercial activity causing damage to the threatened species etc. will be liable to pay any expense incurred in repairing the damage. The regulation imposes strict liability on the polluter. Most Danish environmental regulation is based on EU directives as implemented through a number of acts, such as the Environmental Protection Act (Miljøbeskyttelsesloven), the Soil Contamination Act (Jordforureningsloven), the Nature Protection Act (Naturbeskyttelsesloven), and the Planning Act (Planloven).

Soil Contamination

The Soil Contamination Act protects public health and ground water resources. It aims to combat soil pollution, by registering contaminated areas and by giving the environmental authorities a broad authority to order investigative and remedial action taken against soil and groundwater pollution.

The Danish Government maps soil contamination that may harm groundwater or public health to know where these may be located. Possibly contaminated soil is classified as knowledge level 1 (V1) and contaminated soil is classified as knowledge level 2 (V2). If a V1 property is in an area with valuable groundwater resources, then the property will be investigated by the authorities and if nothing material is found, then the property is declassified. If something material is found, then V2 is applied and if the owner has contaminated the property, then the authorities will evaluate whether a clean-up order should be imposed in accordance with the polluter pays principle. The general rule in Danish law is that the polluter pays. If the owner is not the polluter, then generally there will be no order imposed to investigate or to clean-up potential or actual soil contamination. If the owner has caused the soil contamination, then an order for investigations or clean-up may be considered. Properties are usually only cleaned up to the extent that the contamination is a risk to groundwater or public health. A classification as V1 or V2 may not impede the use or the financing of a property unless there are pending orders against the property in question.



Environmental Liability

The Danish Environmental Liability Act (Miljøskadeerstatningsloven) imposes a specific liability scheme for environmental damage caused by particularly polluting enterprises, by introducing a regime of strict liability in respect of certain listed and prescribed activities. Expenses of the environmental authorities incurred in relation to the restoration of the environment are covered by the Act. Companies carrying out activities requiring environmental permits must carry out a "baseline study" mapping out contamination, and subsequent operators may be liable for any contamination that does not appear from the "baseline study" report, regardless of whether the operator was the actual polluter.

A central part of environmental protection relates to the mapping of contaminated areas and this is usually performed by the regional authorities. The results of these mappings decide whether the soil may be used for habitation or business, or whether an order to clean up the contamination should be issued. In case of contamination of real estate, Danish law generally applies a "Polluter Pays" principle.

OTHER LIABILITIES OR OBLIGATIONS

Compulsory Acquisition

Any property in Denmark may at any time be compulsorily acquired by the Government of Denmark in connection with proposed redevelopment or infrastructure projects subject to compensation on the value of the owners' and tenants' proprietary interests at the time of the expropriation by reference to the statutory compensation code. There may be a delay between the compulsory purchase and the payment of the compensation depending on the agreement on the open market value of the property which may negatively affect cash-flow.

Fire Regulations, Environmental Health, Health and Safety, and Disability Access

The relevant regulations require frequent inspections which may result in requirements or recommendations being issued. A failure to comply could result in a business being carried on at a property being closed down with resulting loss of profit and potential breach of contract claims. Costs of undertaking required works to meet updated regulations may be significant such as requirements to make premises and services accessible to disabled visitors and customers which may involve an obligation to undertake building works in certain circumstances.



FOREIGN OWNERSHIP OF REAL ESTATE

It is generally not possible for non-resident persons or foreign legal entities to purchase real estate in Denmark unless they get permission from the Ministry of Justice or fall into certain exempt categories, including legal entities lawfully established in, or with their registered offices in, another EU/EAA country, if the entity has established an agency or branch in Denmark or is going to provide services in Denmark. The Land Registry checks compliance with the rules when registering a deed of conveyance to a foreign person or foreign legal entity.

Foreign Ownership of Real Estate in Denmark

Foreign companies not domiciled in Denmark can only purchase real estate in Denmark with the permission of the Danish Ministry of Justice. EU companies, however, may purchase real estate directly in Denmark without permission from the Ministry of Justice when certain requirements are met, if the property is a prerequisite for operating the purchaser's own business or for supplying services. The restrictions do not apply to a Danish company with foreign ownership.

SECURITY INTERESTS IN DENMARK

Denmark is a creditor friendly jurisdiction. The Danish system of foreclosure by auction (Tvangsauktion) ensures that the mortgagees can enforce security interests in a default scenario. A foreclosure will be administered by the local Bailiff's Court (Fogedretten) in accordance with the Administration of Justice Act (Retsplejeloven). The foreclosure system in Denmark is standardised and effective, and foreclosure generally occurs within six months from the date of declared default. The provisions governing the borrower's position and the enforcement in a default event are set out in the standard mortgage deed. A creditor may consult with a defaulting borrower and request an open market sale before requiring full foreclosure. More than half of the court applications for foreclosure are withdrawn due to a voluntary sale in the open market. The average timescale from the service of a formal default notice to foreclosure is on average six months. The proceeds of the foreclosure accrue to the holders of the security rights in the order of priority of their registered security interests, irrespective of the priority of the secured creditor that initiated the foreclosure. If all outstanding claims are satisfied, the remaining foreclosure proceeds are paid to the mortgagor. If any secured creditors remain unsatisfied, they retain a full right of recourse for the remainder against the borrower as general unsecured creditors.



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