



## **2016 Primerus Global Conference** **October 13 – 16, 2016**

### **Commercial Leasing – Cross-Border Considerations**

Thursday, October 13, 2016 (4:30 p.m. – 5:30 p.m.)

**Presented by:**

**J. Thomas Archer – Fidelity National Financial (St. Louis, MO)**  
**Richard B. Cohn – Earp Cohn P.C. (Cherry Hill, NJ/Philadelphia/PA)**  
**George A. Guthrie – Wilke, Fleury (Sacramento, CA)**  
**Caroline Berube – HJM Asia Law & Co LLC (Guangdong, China)**  
**Gary Lozoff – Tactix Real Estate Advisers, LLC (Philadelphia, PA)**

I. US Commercial Leasing - Selected Topics for the Non-US Based Client

Eastern US Exemplar – Richard B. Cohn

Western US Exemplar – George A. Guthrie

- From the Landlord's Standpoint
  - Patriot Act
  - Credit Issues
- From the Tenant's Standpoint
  - Who is the tenant?
  - Local Law Considerations
- Other US Peculiarities
  - Components of Rent ("Net" Lease v. "Gross" Lease):



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- Fixed Rent
- Operating Expenses & Real Estate Taxes
- Electricity and other utilities
- Other charges payable by tenants in some jurisdictions (U&O tax)
- Insurance required to be carried by tenant
- Permitted use – not automatically guaranteed by landlord that tenant's use will be permitted. Need to review local zoning laws.
- Subordination to Mortgages/SNDA
- Relocation
- Americans with Disabilities Act (ADA)
- Environmental Provisions
- Brokerage
- Title/Recording
- Term Limitations



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#### II. Selected Non-US Leasing Topics for the US Based Client (Caroline Berube)

- Lease Preparation Practices
- Basic Terms and Definitions
- Use
- Recording Issues
- Local Regulations
- Insurance
- Casualty
- Defaults and Remedies
- Other

#### III. Current Leasing Market Considerations and Related Terms (Gary Lozoff)

- Transaction Timeline – as it relates to outside date for exercise of renewal option under existing lease; or, if none, term expiration date. Need to develop credible move options and execution strategy to accommodate each.
- Space program – Has the Tenant identified a vendor-of-choice to perform architectural, design and engineering services? If so, what are programmatic requirements that will drive the real estate search?



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- Who is the Landlord? Confirming financial capability to execute a build-out, etc.
- Zoning/Land Development/Environmental –challenges to deal execution.
- Local tax law considerations (choice of location has substantial operating overhead and tax consequences) – these include realty transfer tax, real estate tax, business improvement district assessments, and other local levies such as use and occupancy tax, business revenue and net income tax, gross receipts taxes.
- Space control rights – expansion, contraction, extension, early termination rights; contractual purchase rights
- Brokerage – confirm broker team’s familiarity with Tenant’s space program, geographic, economic and other search limiters, and Tenant’s internal decision-making process, et al.
- Lease Surrender Issues - decommissioning, holdover, etc.

#### **IV. LEASEHOLD TITLE INSURANCE AND CLAIMS (J. THOMAS ARCHER)**

- **COVERAGE AND PRINCIPAL TERMS – US v. NON-US**
- International title insurance policy forms have many similarities to ALTA-US forms with adjustments for specific local practices and customs.
- The international title process is generally more akin to an abstracting process than an insurance underwriting process based on contents of Public Records.
- You may not be able to obtain leasehold or title coverage in various locales. Some underwriters, including Fidelity, do not place international title coverage in many jurisdictions. Others do.



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- ALTA no longer offers separate leasehold title insurance policies. In 10/01 ALTA adopted instead the ALTA 13 Leasehold Owner's Endorsement and ALTA 13.1 Leasehold Loan Endorsement.
- The most important change from the former policies to the endorsements concerns the measure of loss. The main criticism of the leasehold policies was that the primary element of loss was the difference between fair market rent and the rent payable under the insured lease.
  - PREPARATION, RECORDING AND VALIDITY OF NON-US COMMERCIAL LEASEHOLDS
- Commercial leases in the US are generally prepared by counsel and often a memorandum of lease or the entire lease may be recorded. This does not impart any presumption of validity.
- In Civil Law jurisdictions – much of Europe and Latin America, e.g. – Civil Law Notaries (generally specialized attorneys) can have sovereign power delegated to act in a quasi-judicial role to ensure that parties are competent to act. Unlike the US notary role, Civil Notary approval can carry a presumption of validity.
- Civil Law Land Registries are different than US recorder of deeds offices. Instruments accepted into a Civil Law Registry can obtain a status of presumed validity because they have been officially examined and approved. While the Land Register is often a public register, access can be limited to parties having a legitimate interest in reviewing it. However, a legitimate interest is often assumed where serious negotiations for a lease or an acquisition are taking place.
- Some nation's laws require, permit or even forbid registry of a particular leasehold instruments. It is quite common for longer term leases to be required to be placed in the Land Registry. Failure to do so if required can have significant consequences for a



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tenant who may only retain an equitable right to possess the property. Mortgage, sale and assignment of a long term lease may also prove impossible if it is not properly registered.

- **CROSS-BORDER TITLE LEASEHOLD INSURANCE CLAIM TOPICS**
- Many of the same issues that are customary for US-based title insurance claims also pertain to Non-US claims, e.g.:
  - Prompt or sufficient notice, cooperation and subrogation rights
  - Contents of the policy
  - Insurability of claimed title interest
  - Do the circumstances fall within a covered risk
  - Do exceptions or exclusions apply
  - Jurisdiction and enforcement provisions
  - Specific loss or damage provisions



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#### **SUPPLEMENTAL MATERIALS –**

- I. US Commercial Leasing - Selected Topics for the Non-US Based Client
  - A. Eastern US Commercial Lease Exemplar
  - B. Western US Commercial Lease Exemplar
- II. Selected Non-US Leasing Topics for the US Based Client
- III. Current Leasing Market Considerations and Related Terms
- IV. US and Non-US Leasehold Title Insurance and Claims
  - A. ALTA Leasehold Loan Policy (1992)
  - B. ALTA Leasehold Owner's Policy (1975)
  - C. ALTA Leasehold Owner's Endorsement
  - D. ALTA 13.1 Leasehold Loan Endorsement

# **Commercial Leasing – Cross-Border Considerations**

Presented by:

J. Thomas Archer – Fidelity National Financial (St. Louis, MO)

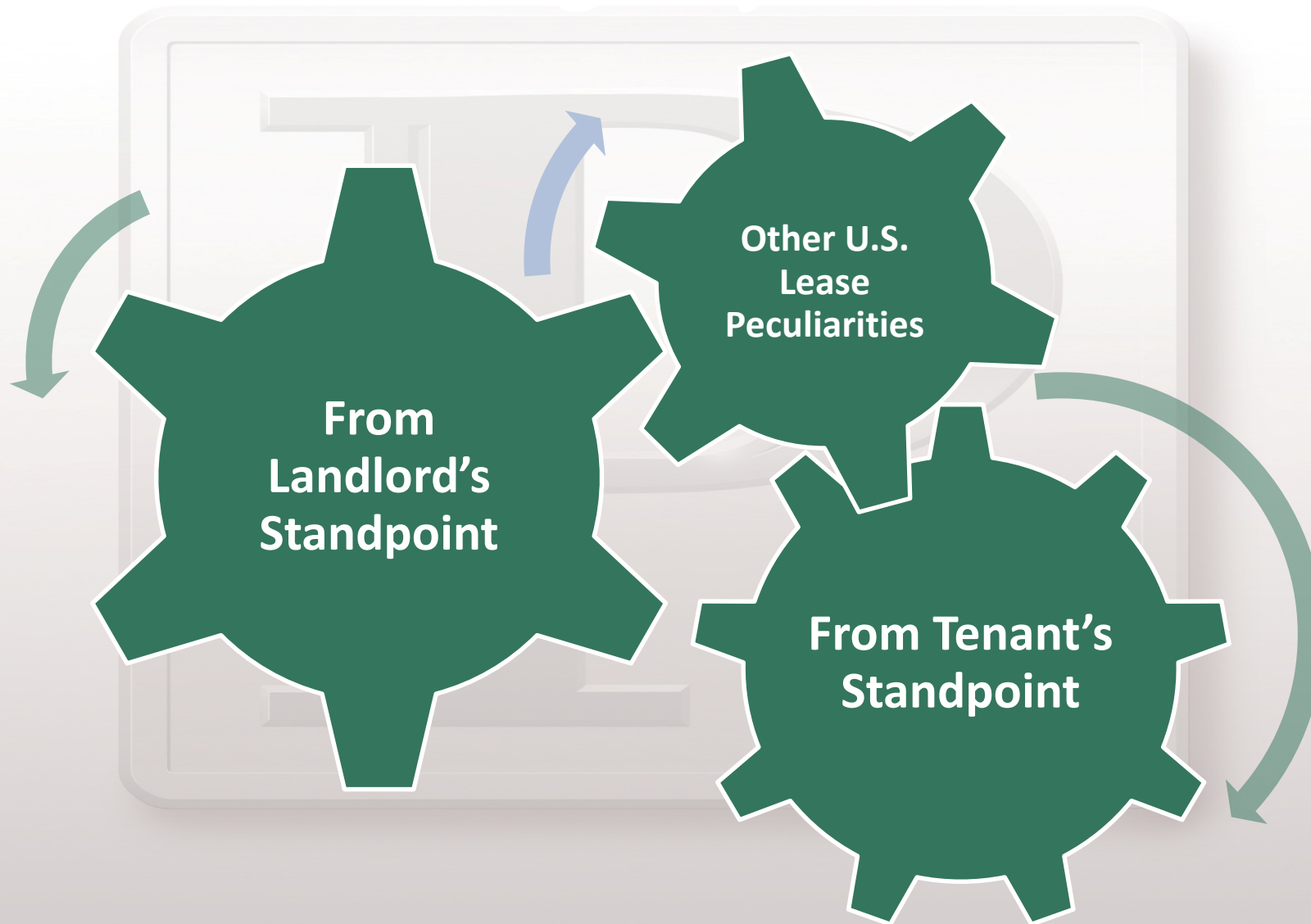
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# I. From Landlord's Standpoint



A. Patriot Act – Screening of tenant entity

B. Credit of Tenant – Making sure have entity/assets to pursue in case of default

C. Indemnity and Insurance Concerns



## **C. Indemnity and Insurance Concerns**

**Shifting Risk: Tenant, Contractors and  
Subcontractor**

# Shifting Risk to Tenant: Indemnity

Indemnity for LL  
Negligence?

- Typically allowed
- Include Passive and Active Negligence

Gross Negligence  
or Sole  
Negligence?

- Consult a local attorney

LL Indemnity  
Obligation

- Shift Risk to Insurers
- Prefatory language “Except to the extent covered by Insurance, . . .”

# Shifting Risk to Tenant: Indemnity

Require Tenant's contractors to indemnify LL and/or name as additional insured

- Beware of Anti-Indemnity Statutes.
- Consult with Local Attorney.

Anti-Indemnity Statutes

- Typically, contracts collateral to or affecting contracts for construction.

LL Negligence?

- Generally, you cannot be indemnified for your own negligence.

Additional Insured ?

- Some states allow AI endorsement to insure for LL's negligence.

# Shifting Risk to Tenant: Insurance

## Require Tenant to Carry Multiple Coverages

Payment and Performance Bonds – Tenant and/or Contractors

Builder's Risk Ins./Course of Const. Ins. (incl. Collapse) - Insures projects under construction

Add LL as and Additional Insured

# Shifting Risk to Tenant: Insurance

## Require Tenant to Carry Multiple Coverages

### All Risk Property Insurance

- Coverage for Tenant Alterations and Pers. Property
- Include Business Interruption Coverage

Add LL and Lender as Additional Loss Payee

## Shifting Risk to Tenant: Insurance

Require Tenant to Carry Multiple Coverages

Commercial General Liability Insurance

- Include Contractual Liability Coverage

Add LL as Additional Insured



## Shifting Risk to Tenant: Insurance

Require Tenant to Carry Multiple Coverages

Workers' Compensation  
Insurance

Employer's Liability Insurance

# Tenant Insurance “Primary”

“Any insurance maintained by Tenant shall provide primary coverage to Landlord and shall not require contribution by any insurance maintained by Landlord, when any policy issued to Landlord provides duplicate or similar coverage, and in such circumstance Landlords’ insurance shall be excess over any of Tenant’s insurance policies. These insurance requirements are material to Landlord’s and Tenant’s allocation of risk.”

## II. From Tenant's Standpoint

A. Who will be the tenant entity? Foreign company? U.S. subsidiary?

B. U.S. is comprised of 50 states – all have different laws governing leases

C. Other U.S. Lease Peculiarities

## II. From Tenant's Standpoint

### A. Who will be the tenant entity?

Foreign company?

U.S. subsidiary?

## II. From Tenant's Standpoint

B. U.S. is comprised of 50 states – all have different laws governing leases.

Should have attorney/broker familiar with laws/customs of lease location.

Lease provisions/laws that may vary from state-to-state include:

Remedies: Some states allow confession of judgment (PA, VA) (accelerated automatic entry of judgment against tenant upon a default).

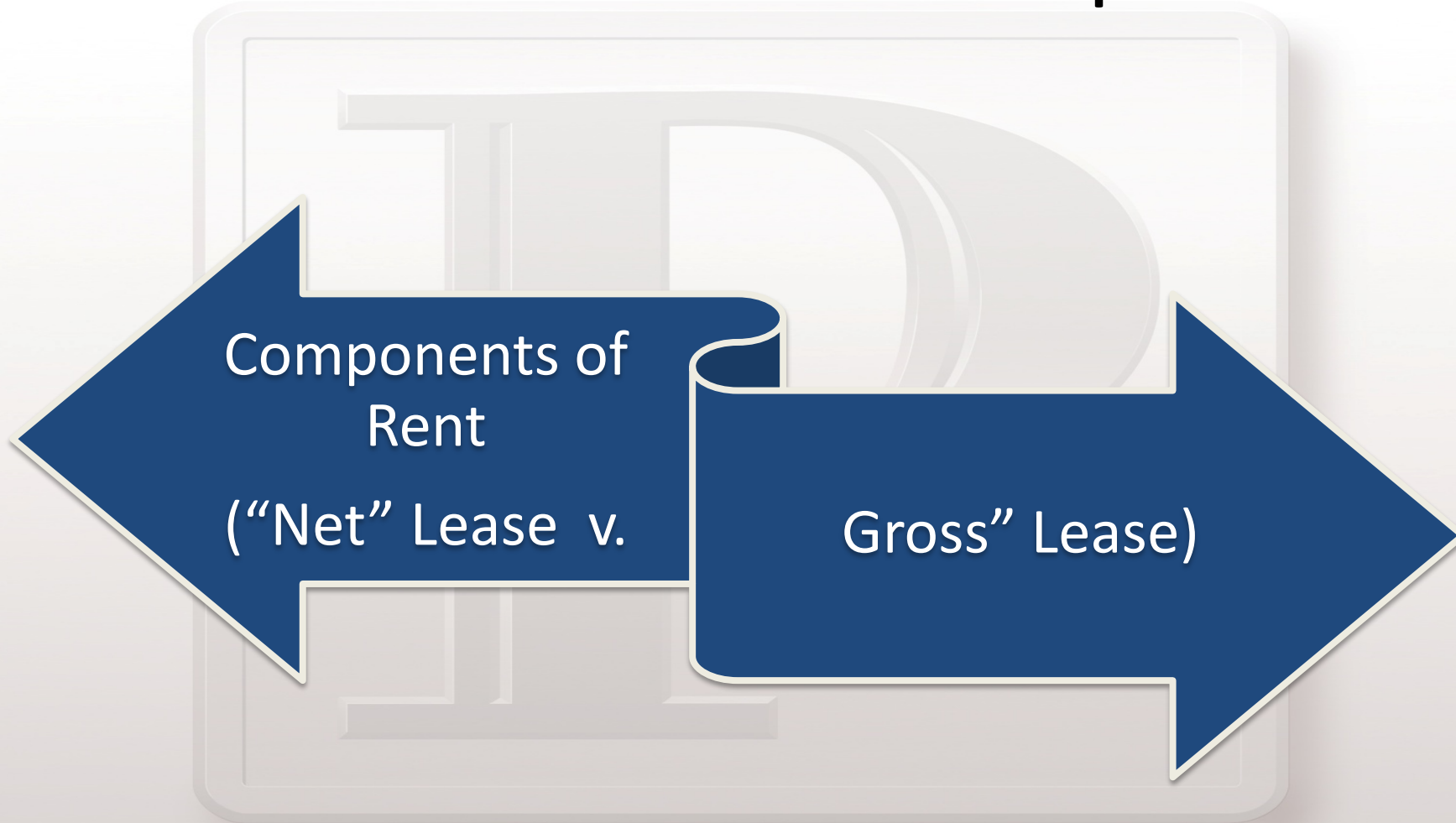
Security Deposit – Some (not all) states require to be held in separate account.

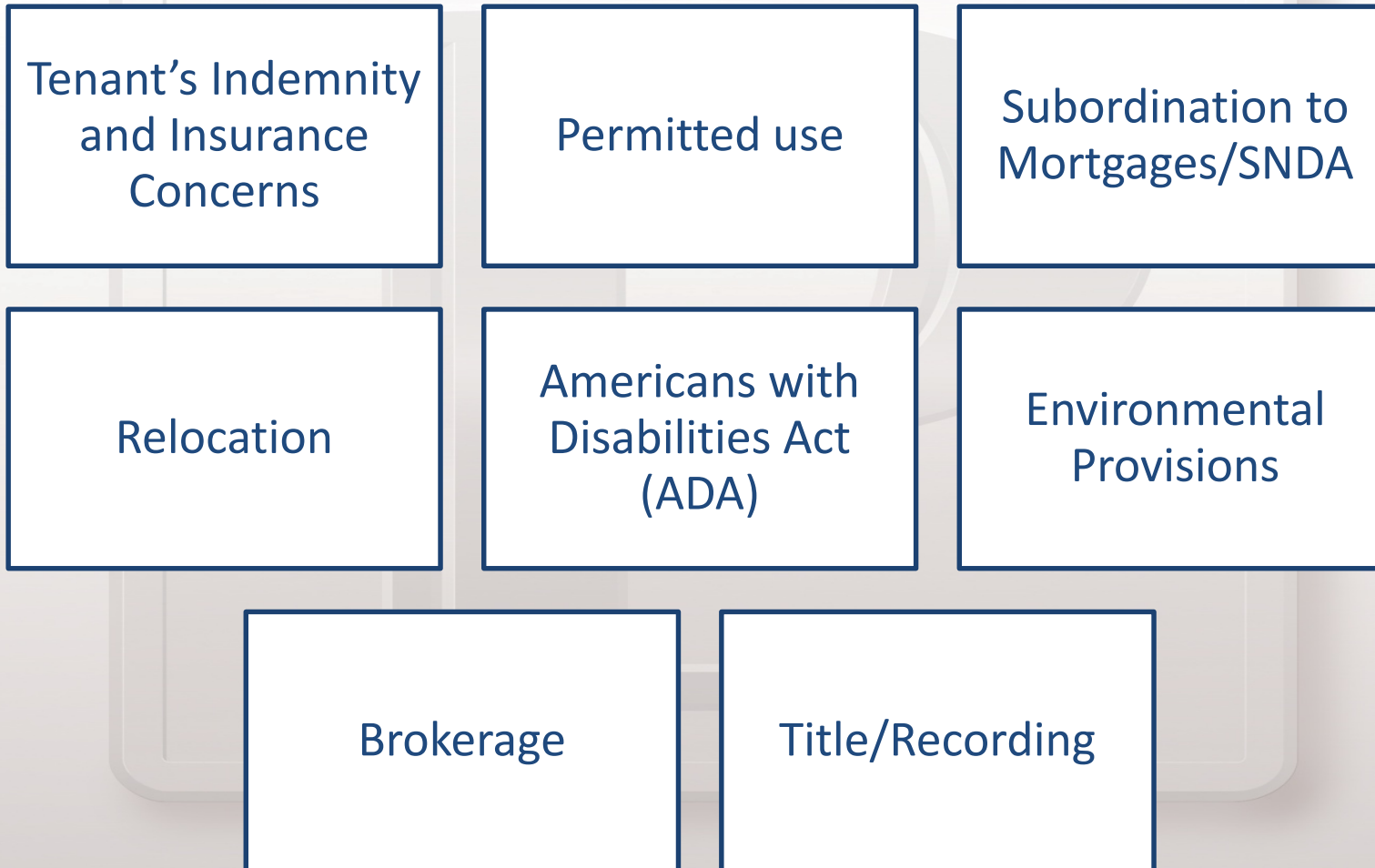
# II. From Tenant's Standpoint

## C. Other U.S. Lease Peculiarities

- Components of Rent ("Net" Lease v. "Gross" Lease)
- Tenant's Indemnity and Insurance Concerns
- Permitted use
- Subordination to Mortgages/SNDA
- Relocation
- Americans with Disabilities Act (ADA)
- Environmental Provisions
- Brokerage
- Title/Recording

## II. From Tenant's Standpoint







# Tenant's Indemnity and Insurance Concerns

## Limiting LL Indemnification Requirements

Avoid Indemnifying for LL's Negligence

Require Affirmative LL Indemnification of Tenant Provision (LL's Sole and Gross Negligence and Willful Misconduct)

Tenant Indemnification, only to extent not covered by insurance

Require Contractors to Name Tenant as Additional Insured

# Tenant's Indemnity and Insurance Concerns

## Insurance Coverage Issues Limiting LL Indemnification Requirements

Avoid the Tenant's Insurance "Primary" Language

Tenant as Additional Insured on LL's Liab. Policy

Tenant as Additional Insured on Contractor's Liab. Policy

Require Payment and Performance Bonds from Contractors

Is the existing  
building compliant  
with the ADA?

- **New York**

- LL to bear risk as of date of Lease, except as result of use or alteration by Tenant

- **California**

- LL to bear risk to date of occupancy, unless alteration required by Tenant's particular use (e.g. change to a Public Accommodation)

Is the existing building compliant with the ADA?

- **California (cont.)**
  - CCP § 1938 – California requires that LL state if property inspected by a Certified Access Specialist (CASp), if so did it 55.53 access standards.
  - Avoid risk – Tenant can have access/ADA specialist inspect the property.

## Pitfalls and key clause for a commercial lease in China

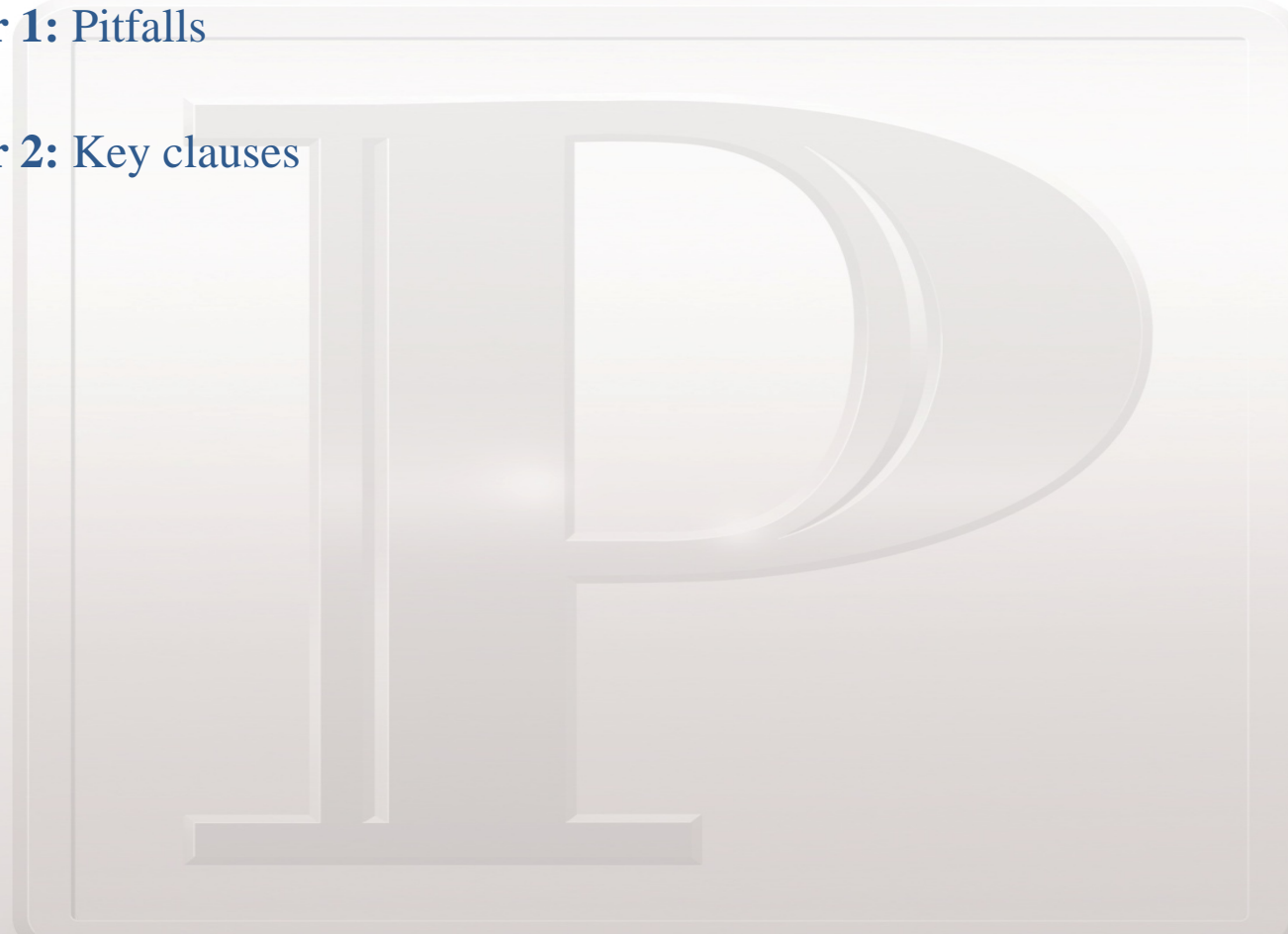
**Caroline Berube**  
**Partner**

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# Roadmap (1/1)

- **Chapter 1:** Pitfalls
- **Chapter 2:** Key clauses



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Shanghai



Singapore



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# Chapter 1: Pitfalls

- Duration

Maximum 20 years (**Article 214** of Contract Law)



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# Chapter 1: Pitfalls

- Registration or Filing of the Commercial lease with the local housing management bureau

Since the streamline administration and institute decentralization is implemented in China, the local governments has loosened the requirements on the registration of the commercial lease.

Please find requirements of the four main cities of China as below:

City	Requirements
Beijing	Registration
Shanghai	Filing
Shenzhen	Filing
Guangzhou	Filing

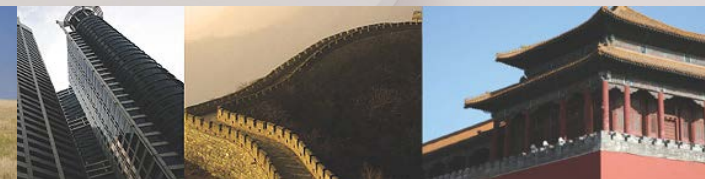


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Shanghai

Singapore





# Chapter 1: Pitfalls

- Chinese version required?

Yes, for filing purposes

- English or Chinese Prevailing: Either!
- Business address: official registered address/Local template to use as required by the local housing management bureau.



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# Chapter 1: Pitfalls

- Relevant tax

The landlord is responsible to pay relevant tax in relation to the lease



# Chapter 1: Pitfalls

- Documents required from the landlord

In order to register a company, a commercial lease is required. When setting up a company, the landlord must also provide the following documents to the tenant documents are required from the landlord:

S/N	Document name	Numbers of copy
1	Property right certificate	Two original copies
2	Fire protection acceptance	Two copies
3	Certificate of incorporation of the landlord if it is a legal person or ID card/Passport of the landlord if he/she is an individual	Two copies
4	If the leaser is not the landlord a. The lease contract between the landlord and the leaser will be required; and b. The certificate issued by the landlord to prove its consent of the sublease	a. Two copies affixed with the landlord and the leaser's company seal; and b. One original copy



# Chapter 2: Key Clause

- Is Subleasing possible?

Yes, if the consent from the landlord is provided



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# Chapter 2: Key Clauses

- Payment clause

1. Management fee
2. Electricity fee
3. Utilities fee
4. Wifi fee
5. Mail services
6. Access to phone system
7. Cleaning service



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# Chapter 2: Key Clauses

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- Payment term

When and how the rental will be paid.

Landlord to provide a fapiao, official receipt



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# Leasehold Title Insurance And Claims

- Coverage And Principal Terms – US V. Non-US
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