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OBSTACLES ARISE WHEN TENANT IS A FOREIGN STATE[1]

As we commemorate the anniversary of the September 11 atrocities, we are still learning how to cope with the stresses and challenges occasioned by the terrorist war which will be with us for the foreseeable future. Although the preponderant burdens of this war are and will be borne by our society at large, there are certain hardships inherent in the conflict that will unavoidably impact predominantly or uniquely upon particular individuals, entities or groups within the community. Landlords have found themselves numbered among those specially burdened segments of society, as they are suddenly confronted with the prospect of either incurring liability, or losing the value of their property, as a result of having tenants with actual or perceived connections to terrorist activities, or conversely, having tenants who are actual or perceived targets of terrorist activities. This article will explore the means available to landlords to remedy, or at least alleviate, such problems.

Grounds For Action

In the unusual situation where a tenant has clear and documented ties to a terrorist organization or entity, and can be shown to use the leased premises for illegal activities in connection therewith, the remedy is simple: section 231(1) of the New York Real Property Law, NY CLS Real P § 231(1), voids any lease where the premises thereunder are used for any illegal purpose, and provides for recovery of possession thereof by the landlord. Further, illegal use of premises is one of the enumerated statutory grounds upon which a summary proceeding to recover possession may be instituted, as set forth at section 711(5) of the Real Property Actions and Proceedings Law, NY

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CLS RPAPL § 711(5). However, such a clear-cut situation is not among the more likely scenarios to occur. Far more probable is the situation where a tenant can be shown, by virtue of its known connection, association, or affiliation with a terrorist entity, sponsor or facilitator, to pose a risk to the security of the premises and/or to disturb the quiet enjoyment of the premises by other tenants, to the extent that the presence of such tenant unreasonably interferes with the landlord's full enjoyment of its rights in the subject property. Such interference may be proven by documented harassment, threats, vandalism, or violence occurring at the subject premises which are directly attributable to the subject tenant.

In such a situation, the landlord may have recourse to a standard clause, commonly contained in commercial leases, prohibiting anything being done or maintained in the leased premises that would constitute either a public or a private nuisance. The violation of such clause may be asserted as a default, warranting the landlord to terminate the lease and institute a proceeding to regain possession and recover the damages incurred thereby. In addition to damages normally recoverable for breach of lease, such damages may also include diminution of the value of the property resulting from the alleged nuisance.

Alternatively, the landlord may opt not to terminate the lease and seek recovery of possession of the premises (indeed, as discussed infra, it may be precluded from doing so), and instead may exercise its rights pursuant to another standard commercial lease clause, which allows a landlord to remedy a tenant's default at the expense of such defaulting tenant. Such remedy may include the implementation of additional security measures and the hiring of additional security personnel to safeguard against the dangers posed by the presence of the subject tenant. The costs of such remedy would be chargeable to the subject tenant as additional rent. An example of a case in which this remedy was utilized is The League of Arab States v. 4 Third Avenue Leasehold, LLC.,

Index No. 124079/01 ("League"), currently pending in Supreme Court, New York County.[2] In League, the tenant, which is a voluntary association of Arab states, including states with documented ties to terrorist organizations and entities (but which is not itself a state, governmental body, or instrumentality thereof), became the recipient of numerous severe and credible threats of violence in the aftermath of the September 11 attacks. The landlord deemed the resulting threat to the security of the building to be a violation of the nuisance clause of the tenant's lease, which provided in relevant part:

> Section 5.02
> Tenant shall not suffer or permit the Demised Premises or any part thereof to be used in any manner, or anything to be done therein, or suffer or permit anything to be done therein, or suffer or permit anything to be brought into or kept in the Demised Premises which would in any way....
> (iv) constitute a public or private nuisance.

The landlord accordingly took appropriate steps to implement increased security, and charged the costs of same to the tenant, relying upon the following clause of the lease which provided in relevant part:

> Section 18.01
> If Tenant shall default in the observance of performance of any term or covenant on its part to be observed or performed under or by virtue of any of the terms or provisions in any Article of this Lease, Landlord, without being under any obligation to do so and without thereby waiving such default, may remedy such default for the account and at the expense of Tenant.

The costs incurred pursuant to the foregoing Section were charged to the tenant as additional rent, pursuant to section 3.03 of the lease which provided in relevant part that "[a]ll costs and expenses, adjustments and payments, which Tenant . . . . is obliged to pay to Landlord pursuant to this Lease

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[2] The Kucker & Bruh, LLP firm, of which the author is a member, represented the landlord 4 Third Avenue Leasehold LLC in that case.

. . . . shall be deemed additional rent." The tenant, however, refused to pay such additional rent, and instead commenced the League action seeking, inter alia, injunctive relief preventing the eviction of the tenant for such non-payment (a so-called "Yellowstone injunction"). Cross-motions for summary judgment are now sub judice and await a judicial resolution which may clarify the right of a landlord to be compensated by a tenant for providing unanticipated emergency security services occasioned by such tenant on an exigent basis.

Limitations On Remedies With Respect To Sovereign Or Diplomatic Entities

However, even where a tenant is clearly in breach of a material term constituting a default warranting the termination of its lease, such tenant may not be subject to eviction if it is has diplomatic accreditation – a not unlikely scenario for a situation where the tenant's breach stems from its alleged connection to terrorist activity. To begin with, the jurisdiction of the courts of the United States and of the several states over a foreign state, its agencies and instrumentalities is governed by the Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1602- 1611 (the "FSIA").[3] The FSIA affords foreign states (defined to include the agencies and instrumentalities thereof) sovereign immunity from the jurisdiction of American courts, subject to certain exceptions, most significantly where the foreign state has waived such immunity, and with respect to actions based upon commercial activities carried out by the foreign state within the United States. 28 USC §§ 1603, 1604 and 1605. Similarly, the FSIA confers immunity upon property of a foreign state within the United States from "attachment arrest and execution" subject to certain exceptions, which again most significantly include waiver of the immunity, and use of the subject property for the commercial activity on which the claim was based. 28 USC §§ 1609 and 1610.

[3] Pub. L. No. 94-583, 90 Stat. 2891 (1976).

Thus, as the leasing of office space arguably falls within the commercial use exception, the FSIA alone would not preclude the exercise of any remedy in respect of a foreign state's breach of its lease, including termination, eviction, and /or an action for damages.

Notwithstanding the foregoing, the analysis of the privileges and immunities of foreign states and their instrumentalities begins, but does not end, with the FSIA. The immunities – and, concomitantly, the exceptions to the immunities – conferred by the FSIA are, by the terms thereof, expressly made "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." 28 USC §§ 1604 and 1609. In particular and to the extent here relevant, determination of the privileges and immunities enjoyed by the accredited diplomats (including their families) and diplomatic missions (including ancillary personnel) of foreign states is subject to and governed by the Vienna Convention on Diplomatic Relations (the "Vienna Convention"). [4] Article 4 of the Vienna Convention provides that diplomatic accreditation is subject to the agreement of the receiving state; thus, diplomats (and, by extension, diplomatic missions) whose accreditation has been accepted by the United States, acting through the Secretary of State, are entitled to all the privileges and immunities provided for thereunder. The Diplomatic Relations Act of 1978 (the "Diplomatic Relations Act") [5] further provides for the extension of the privileges and immunities conferred by the Vienna Convention to accredited diplomats and diplomatic missions whose states have not ratified the Vienna Convention, 22 USC § 254(b), and grants the President the discretion, "on the basis of reciprocity and under such terms and conditions as may determine," to confer upon accredited diplomats and missions such privileges and immunities as may

[4] 23 U.S.T. 3227, 500 U.N.T.S. 95 (1961).

[5] Pub. L. No. 95-393, 92 Stat. 808 (1978).

result in more or less favorable treatment than is provided under the Vienna Convention.

The substantive provisions of the Vienna Convention are essentially a codification of the privileges and immunities conferred upon diplomats and diplomatic missions under pre-existing prevailing international practice, custom and usage. To the extent here relevant, Article 22 of the Vienna Convention provides at ¶ 1 thereof that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission; at ¶ 2 thereof imposes a "special duty" on the receiving state to protect the premises of the mission from "any intrusion"; and at ¶ 3 thereof, provides for the premises of the mission to be immune from "search, requisition, attachment or execution." Article 30 of the Vienna Convention extends the foregoing immunities of missions to the private residence of a diplomatic agent. Further, Article 31 of the Vienna Convention grants diplomatic officers immunity from civil and criminal jurisdiction in the receiving state except for (i) actions relating to private real property, unless such property is held on behalf of the sending state for purposes of the mission, or (ii) with respect to actions relating to professional or commercial activity outside of official diplomatic functions. Article 31 § 3 additionally provides for a diplomat's immunity from execution, except as to enforcement of actions allowed within the foregoing exceptions to immunity, "provided that the measures concerned can be taken without infringing the inviolability of his person and residence." Article 32 of the Convention provides for the waiver of the foregoing immunities, but only if expressly made by the sending state specifically and separately as to jurisdiction and execution, respectively.

The immunities conferred by the Vienna Convention upon diplomats and their missions can have dire consequences for their landlords, as illustrated by the case of 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 988 F.2d 295 (2d Cir. 1993)

("Zaire"). In that case, the landlord sued the tenant diplomatic mission over non-payment of rent, and obtained summary judgment from the district court awarding money damages for back rent, and recovery of possession of the premises. On appeal, however, the Second Circuit in the Zaire decision reversed the district court's order to the extent that it awarded recovery of possession and directed U.S. Marshals to physically enforce same, holding that the inviolability provisions of Article 22 of the Vienna Convention preclude any involuntary entry upon or seizure of mission premises whatsoever. 988 F.2d at 302. Apparently recognizing the harshness of this result and the abuses of diplomatic privilege that might be sanctioned if not encouraged thereby, the Zaire court noted that both Congress and the President, under the provisions of the Diplomatic Relations Act, possess the power to limit the immunities of the Vienna Convention, if they deem it appropriate, stating that "[o]ur sister branches of government may more appropriately initiate whatever revision, if any, of the Vienna Convention is deemed necessary." Id at 302-303. The Zaire court upheld the district court's award of monetary damages – but only on the basis that "[t]he Zairian Mission has not raised any challenge to the district court's authority to award monetary damages in favor of the landlord." Id. Thus, the issues of immunity under the Vienna Convention from judicial jurisdiction and execution were not raised or addressed by the court in Zaire.

Also not raised or addressed in the Zaire opinion is the issue of the uncompensated taking of the landlord's private property right to possession of its leased premises, for the claimed public benefit of maintaining favorable diplomatic relations and obtaining reciprocal favorable treatment for United States diplomats abroad. Arguably, the expense of such ostensible public benefit should have been borne as a public burden, for which the landlord should have received public compensation under the factors delineated by the Supreme Court for determining when governmental interference with private property rights amounts to a compensable taking. Connolly v. Pension

Benefit Guaranty Corp., 475 U.S. 211 (1986); see also Florida Rock Industries, Inc. v. United States, 18 F. 3d 1560 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995). The Zaire court's omission of any consideration of this issue has been the subject of critical commentary. See Jesse A. Lynn, Case Comment, Caveat Lessor? The Takings Clause and the Doctrine of Mission Inviolability: 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 76 B.U. L. Rev. 399; David Foster Bartlett, Note, 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire: An Uncompensated Governmental Taking. Nonetheless, the Zaire decision is dispositive authority precluding the eviction of accredited diplomats or diplomatic missions. Further, the availability of state compensation for the loss of such remedy has since been placed in doubt by the decision in 767 Third Avenue Associates v. United States, 48 F. 3d 1575 (Fed. Cir. 1995), in which the court held that the government's actions in closing and seizing the assets of tenant Republic of Yugoslavia's mission did not amount to a compensable taking of the landlord's leasehold rights, opining that the landlord had no "reasonable investment-backed expectation . . . that its leases to the [tenant] would proceed totally without interference by the government." 48 F. 3d at 1581.

Available Remedies and Ameliorative Measures

Finally, what remedies are available to a landlord faced with a tenant that poses unreasonable risks and/or burdens on the property arising from or related to terrorist activities, or connections with terrorist entities? First, as to existing tenants, absent evidence of illegal conduct sufficient to warrant statutory eviction for illegal activity, the available remedies will be limited to those contained in the existing lease, to the extent applicable. As the lease provisions relied upon by the landlord in the League case are of a fairly common and standard nature, it is likely that the approach

taken and remedies utilized in that case would be available to most landlords in similar situations. Further, if the tenant is not an accredited diplomat or diplomatic mission, a landlord asserting the breach of and default under the nuisance clause of a lease may opt at the outset to seek eviction of the tenant, rather than curing the default by hiring additional security at the tenant's expense, as was done by the landlord in League.

As the considerations raised under Zaire are implicated if the tenant is an accredited diplomatic agent or mission entitled to diplomatic immunity, it is necessary at the outset to determine if that is in fact the case. Such status is not always obvious, and should not automatically be inferred from the fact that a given tenant may appear to represent a foreign government or claimed sovereign entity, or that it has apparent documentation to that effect from such government or entity, or even from the United Nations. As discussed infra, diplomatic accreditation is subject to, and only validly obtained with, State Department approval, which can be verified by checking with the Office of Foreign Missions of the Department of State. For example, the Palestine Liberation Organization ("PLO") was evicted from its Washington, D.C. offices last April for non-payment of rent, despite its claim to be the diplomatic mission of the Palestinian Authority ("PA"), an entity with United Nations observer status, and its false representation of the head of that office as being an "ambassador", since, as was noted by a State Department official, "[t]he PLO office in Washington is not an embassy, nor has it ever been accorded any of the immunities or privileges of a diplomatic mission. The question of rental payments and related matters between the PLO office and its landlord is not subject to our regulation." Article, PLO Evicted From Its Washington Office, The Jerusalem Post, April 11, 2002.

If, however, it is conclusively determined that the tenant has valid diplomatic accreditation, then the option of eviction and recovering possession of the premises would not be available under

Article 22 of the Vienna Convention, as construed by the Zaire court. (The landlord may, in such case, bring an action seeking compensation from the United States for the taking of its right to regain possession, if it wishes to incur the obvious burden and expense of fighting such an uphill battle). Realistically, however, the landlord would be limited to an action for damages. Even if the landlord were to prevail in such action, the collectability of a money judgment against a foreign sovereign entity is difficult and uncertain (the FSIA and Vienna Convention present significant obstacles to such collection, raising a number of issues which must be left to be addressed in a future article). Accordingly, when a landlord first enters into a lease with a foreign sovereign or accredited diplomatic entity (if it is still inclined to do so, given the pitfalls herein discussed), it should take ameliorative measures at the outset to improve its position and increase the number and effectiveness of its available remedies. Such measures should include:

• Obtaining express and specific written waivers, executed by the sending state as well as the individual diplomats, of all privileges and immunities to the fullest extent that may permissibly be waived under both the FSIA and the Vienna Convention. These should include the waiver of both sovereign and diplomatic immunity from the jurisdiction of the courts of the United States; the waiver of both sovereign and diplomatic immunity from attachment arrest and execution of property within the United States; and the waiver of the inviolability of the mission under the Vienna Convention (i.e., the express consent to the lawful entry upon the premises of the mission for the purposes of enforcing any legal remedy of the landlord with respect to the possession thereof). If possible, the landlord should also obtain an opinion of counsel certifying the authority of the signatory or signatories to execute the waivers on behalf of the sending state.

• Obtaining the irrevocable appointment of an agent for service of process for any action arising from the lease transaction or matters ancillary thereto, which will obviate the need of

satisfying the cumbersome and burdensome provisions for overseas service upon the foreign government which are otherwise required by the FSIA absent such appointment. The appointment should expressly provide that it survives the lease term.

• Obtaining either a security deposit or letter of credit, which by its terms would survive the lease-term, to secure all obligations of the tenant under the lease, and /or all liabilities arising therefrom.

• Requiring the tenant to acquire property damage and liability insurance naming the landlord as an additional insured.

• Where the proposed transaction is the acquisition of a residential co-operative apartment by a foreign sovereign or diplomatic entity, obtaining an occupancy and escrow agreement. The occupancy provisions should restrict the use of the apartment to the residence of only the named diplomat and his immediate family, and the escrow provisions should permit the use of escrow funds to cover any and all charges and assessments of the co-operative. (It should be further noted that the acquisition of co-operative apartments by foreign diplomats requires the approval of the State Department, and the Office of Foreign Missions of the Department of State should be consulted to ascertain if this has been granted).

Finally, it should be noted that, in drafting new leases, regardless of whether the proposed tenant is a foreign sovereign or diplomatic entity or not, thought should be given to crafting new lease provisions directly and unambiguously providing the substantive right to terminate the lease relationship in situations where a tenant's connections to a terrorist-related entity have been established, or where a tenant is shown to be a security risk to the building, for whatever reason. Sadly, this is one of the new burdens uniquely imposed upon landlords in this unfortunate new era in which we find ourselves.