

The Costs of Commercial Property Lease – Polish Law vs. Market Practice

The practice of entering into double net or triple net lease agreements has become fairly common in the modern commercial property market in Poland. This means that a significant majority of the costs of the upkeep of the leased property are shifted to the tenant.

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How many times net?

The double and triple net principle, which has migrated to Poland from the Anglo-Saxon legal culture, is, in fact, a reversal of the rules set out in the Polish Civil Code which governs the commercial property lease. Under Polish law, rent is the essential financial obligation of the tenant, while any other expenses are to be incurred by the tenant solely in cases specified in the agreement. Although the tenant is also obliged to cover the so-called minor expenses, this refers to small works performed by the tenant himself and

are two main models used to describe the costs covered by tenants in lease agreements. In one of them, all the costs that are not expressly specified in the agreement fall on the landlord. In consequence, the agreement contains a very detailed list of those costs that will be borne by the tenant. The other model – favoured by landlords – consists in listing in the agreement only those costs that are to be incurred by the landlord, while all the remaining costs which are not expressly specified in the agreement fall on the tenant. Naturally, the first method is more advantageous to the tenant as in that case the tenant, from the very beginning, knows what kind of costs will be borne by him. This is of particular importance if, during the term of the agreement, new costs arise that were not taken into account when the parties entered into the agreement. This may be the case with new taxes and charges. For instance, many local governments in Poland have levied, or intent to levy, the so-called rain tax, i.e. a charge for using the storm drain system. For the parties to the lease this means introducing, during the term of lease, a charge for the service that has thus far been gratuitous. In the case of the first model, unless the parties have provided for such a charge when signing the agreement, the new charge will be paid by the

a divergence of interests frequently leads to unnecessary conflicts between the tenant and the landlord, the risk of which may be mitigated by a properly worded agreement.

Therefore, it is so crucial to both parties to include additional provisions securing their interests in the lease agreement. Landlords usually allow tenants to carry out an audit of the costs to verify the accuracy of their calculation. Sometimes, in addition to such a verification, an audit enables the tenant to analyse the costs for their market value. In such events, the tenant has the right to question the expenses that are not adequate to local market prices. When applying the “market value” clause it is important, from the landlord’s perspective, to define precisely the prerequisites for the application of such a clause by the tenant to avoid its abuse.

Modern commercial property lease agreements (for office, logistics or retail space) are often long-term contracts with limited possibilities of termination by the parties. Therefore, defining the costs that will be covered by either of the parties is necessary before entering into the lease. However, a reliable assessment is not possible without a carefully worded agreement which should include not only provisions on the costs incurred by the tenant on the day of signing the agreement but also solutions regarding the costs that might arise in the future. What is required to eliminate those and other risks related to entering into a lease agreement is not only a skilful application of the provisions of law but also the knowledge of the local market and the accepted practices. Therefore, as a rule, entrepreneurs negotiating such agreements ask experienced legal advisors for assistance.

	GROSS	SINGLE NET	DOUBLE NET	TRIPLE NET
major renovations	landlord	landlord	landlord	landlord
day-to-day upkeep of the shared property	landlord	landlord	landlord	tenant
real estate tax	landlord	landlord / tenant (depending on the agreement)	landlord / tenant (depending on the agreement)	tenant
insurance	landlord	landlord	tenant	tenant
utilities	landlord	tenant	tenant	tenant
rent	tenant	tenant	tenant	tenant

not to the costs incurred by the landlord which the tenant is subsequently obliged to reimburse. Naturally, in accordance with the freedom of contract principle existing in Poland, the parties may structure a lease agreement in almost any manner they wish, so there are no legal obstacles to wording an agreement in such a fashion that it is based on the double or triple net principle. However, as Polish law provides for a gross lease principle, it is worth specifying clearly in the agreement which model we intend to adopt.

The table below provides a general outline of the costs incurred by the parties to a lease agreement in various models of cooperation:

What is a rule and what is an exception?

As the boundaries between the double net and triple net model are not accurately defined and, in practice, we may also encounter hybrid solutions, it is necessary to specify precisely the rights and obligations of the parties to an agreement. There

landlord and in the other model – by the tenant as he bears all the costs that are not expressly shifted to the landlord.

The pitfalls of the “open book”

Whereas the costs of utilities (electricity, water, heat) may be based on meter readings indicating the actual consumption by the tenant, in the case of the costs of management and upkeep the “open book” principle is usually applied. According to that principle, the tenant covers the costs on the basis of the so-called recharge invoices, which means that the landlord does not have the right to charge the tenant with an amount higher than that specified in the invoice issued by the provider of specific services. The problem is that the landlord may not be interested in keeping such costs at the minimum level and for some landlords it may even pay to incur the highest possible costs of the upkeep of the property. This is the case if the charge for property management paid to the landlord is a percentage of the general costs of upkeep. Such

Wiewiórski Law Firm specialises in providing comprehensive legal services relating to the real estate sector, including advisory for tenants and landlords. We specialize in advising on long-term office space tenancy agreements for outsourcing & offshoring sector as well as on contracts regarding large warehouse and commercial spaces. Our Clients include, inter alia, 3 of the largest BPO centres operating in Wrocław. Wiewiórski lawyers advised on numerous real estate transactions, including commercialization of one of the largest commercial centres in Poland and comprehensive services related to the long-term lease of 46,000 sq.m warehouse space (for a single tenant). Wiewiórski services for real estate sector cover also all other aspects of property acquisition, financing, construction process and disputes resolution.

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