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BRIEFING

THAILAND'S NEW TENANT PROTECTION
LAWS CHALLENGE THE LUXURY
CONDOMINIUM SECTOR

MAY 2018

- THAILAND'S INAUGURAL TENANT PROTECTION LAWS CAME INTO FORCE ON 1 MAY 2018 IN THE FORM OF A NOTIFICATION UNDER THE CONSUMER PROTECTION ACT



Thailand's inaugural residential tenant protection laws came into force on 1 May 2018 in the form of a notification¹ under the Consumer Protection Act ("Notification"), which regulates the business of renting residential buildings in order to protect the rights of individual tenants which were previously close to non-existent.

Apartment buildings in the spotlight

This Notification applies to persons operating a business renting residential premises to individuals in exchange for rent, but only if they have five or more residential premises leased. Under the terms of the Notification residential premises include individual rooms, houses, condominium units and apartments. The intended targets of the Notification are owners of apartment buildings, although a person leasing five individual rooms in a single house to separate tenants would also fall under the jurisdiction of the Notification; as would a person leasing five separate houses or condominium units to residential tenants.

Work arounds and unintended consequences

The Notification's main purpose is to bring an end to what was perceived as a widespread practice of landlords charging a premium on utilities, locking tenants out of the premises for minor delays in paying rent, and failing to return security deposits.

¹ Notification of the Contract Committee Re: Residential Building Lease as a Contract-Controlled Business, dated 16 February 2018

“THE NOTIFICATION SHIFTS THE BALANCE OF POWER... IT WILL NOT BE SURPRISING IF LESSORS QUICKLY SEEK A WAY AROUND THEM.”

There are two areas in which the Notification may need to be updated: (i) landlords are likely to “work around” the restrictions in the Notification and return to former practices and (ii) the Notification has the unintended consequence of disrupting the well-established practice of “sale by leasehold” in which certain types of residential properties which cannot be transferred at the land office, can be granted to a “buyer” in the form of a long term registered lease. These properties include prestigious properties in Thailand.

Essential elements in the lease agreement

The Notification requires lease agreements to be written in Thai, and imposes minimum character sizes for the text. Provisions of the lease agreement which give the lessor the right to terminate must be highlighted in red, bold or italic. The Notification also requires necessary elements to be set out in the lease agreement, for example, the details of the lessor, the tenant and the leased property, the rate of rental payment and the utility fees together with the method for calculating utility fees.

The Notification shifts the balance of power so far in favour of tenants on some matters that it will not be surprising if lessors quickly seek a way around them: (i) the lessor can ask for no more than one month’s rent in advance; (ii) the security deposit cannot exceed one month’s rent; and (iii) the lessor cannot terminate the lease unless the tenant is in breach and has failed to remedy the breach within 30 days.

The Notification places lessors in a losing position if a tenant fails to pay the final month’s rent and leaves at the end of the term without paying for utilities. Even if the Lessor retains the security deposit in lieu of rent, it would need to commence legal proceedings against a defaulting tenant to recover monies for unpaid utility bills and damage caused by the tenant.

The Notification also enables tenants to terminate the lease agreement early on 30 days’ written notice if there are “reasonable grounds”, but does not express clearly what constitutes reasonable grounds.

This is likely intended to give effect to “expat clauses” which enable expatriates to terminate their lease if they are relocated to another country, but the wording in the Notification is much broader and could enable tenants to terminate on any number of social grounds, and again would leave the lessor with very little recourse other than to commence legal proceedings against tenants that leave without making full payment under the lease.

Work-arounds for apartment buildings

Sensible lessors will make sure that their lease agreements comply with the mandatory provisions in order to avoid the penalties (imprisonment of up to one year and fines of up to 100,000 Baht) for breaching the Notification. Strict adherence to the Notification may result in lessors increasing monthly rental in order to factor in the cost of preparing new agreements and the risk of tenants leaving the lessor with expenses greater than the tenants’ deposit, but some lessors may be prompted to look beyond the lease agreement to reduce the financial impact of a defaulting tenant.

Apartment lease agreements are already often split into three separate agreements, rental of building premises, rental of furniture and the provision of services. The

“THE NOTIFICATION ALSO PROVIDES MORE PROTECTION TO THE TENANT...”

Notification may lead to a new model in which tenants are required to enter into a furniture rental contract with a separate company which would not be bound by the Notification and which could insist on deposits in excess of the limits imposed by the Notification. Unless the scope of the Notification is expanded to include affiliates of a lessor, it would be straightforward for lessors to establish subsidiary companies which act as furniture hire companies for tenants, and which require deposits exceeding one month's rent.

According to the Consumer Protection Act, failure to include the required provisions in the lease agreement will result in the lease agreement being deemed to contain and incorporate all provisions required by the Notification, so that it is not possible for both lessor and tenant to form their own version of the lease agreement without including these required provisions.

Prohibited provisions

The Notification also provides more protection to the tenant by prohibiting the lease agreement from containing certain terms which are unfavourable to them such as the waiver of limitation of the lessor's liability, the ability to amend the rental payment or utility fees, the right to confiscate the deposit or advance rental payment or any request from the lessor for payment for the purpose of the lease extension.

According to the Consumer Protection Act, any lease agreement which contains any of the prohibited provisions under the Notification will be treated as if it does not contain those prohibited provisions, and the lessor will be liable for criminal sanctions (imprisonment of up to one year and a fine of up to 100,000 Baht).

Airbnb and individual lessors are unlikely to be affected

Homeowners renting out their own residential premises on a daily basis (for example through Airbnb) are unlikely to be affected by the Notification, unless they are renting out five or more properties.

However, since Thai's land office does not provide any online database to search the property owner, it is difficult to find out whether the lessor has five or more residential premises for lease, the tenants renting a private house or condominium or investment property owned by an individual will in many cases not be able to benefit from the protection under this Notification.

Long term leases now a problem

Some of Bangkok's prime real estate is administered by the Crown Property Bureau and it is important to note that such land is not available for sale. Instead, a long term lease over the land is granted to developers, who in turn market and offer units under a long term leasehold structure, often in the form of a 30 year lease with successive rights of renewal. The long term structure typically requires the acquirer to pay the entire amount of rent payable over the life of the lease in advance, a sum which can often be comparable to the purchase price of a similar property. The long term lease model does not contemplate that the acquirer would terminate the lease.

In addition, condominium units are very attractive to foreign buyers as they are one of the most straightforward ways of navigating Thailand's foreign ownership restrictions to obtain an ownership deed in the name of a foreign buyer. Condominium developers nevertheless face the problem that they cannot sell more than 49% of the condominium units (by area) to foreign buyers, and once the first

“CONTRACTS FOR LONG TERM LEASES FOR SOME OF THAILAND'S MOST PRESTIGIOUS DEVELOPMENTS MAY NEED TO BE PUT ON HOLD...”

49% of the foreign quota units have been sold, developers offering the remaining stock to foreigners often do so by using a long term leasehold structure.

The Notification makes no distinction between year-to-year leases and long term leases, and the Notification in its current form would effectively prohibit long term lessors from requiring advance payment of the full term's rent, as the Notification prohibits the collection of more than one month's rent as advance payment.

The Notification would also open the door to “buyers” seeking a refund by exercising their rights to terminate the lease agreement early on 30 days' written notice on “reasonable grounds”.

In conclusion

Contracts for long term leases for some of Thailand's most prestigious developments may need to be put on hold while the impact of the Notification is considered in further detail. Many long term lease developments are undertaken by listed companies whose directors would be reluctant to assume the criminal and financial penalties which would arise from issuing lease agreements that do not comply with the Notification.

Looking forward, it would be a reasonable result if long term leases could be carved out from the Notification, as the problems which the Notification seeks to address are seldom encountered in a long term lease scenario.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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