

PROPERTYREPORT legal



Legal Clinic: Questions and Answers on Thailand Property Legal Issues

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Unforeseen Events

Q. I purchased an off the plan property which was due for completion in November 2008. I have been contacted by the developer and informed that the event of civil commotion at the international airport has delayed completion by 2 months. However, the serious events only appeared to last a few days. In my contract there is a 'force majeure' clause, how much can the developer rely upon this clause in relation to late delivery? Are there any steps I should take to protect my position? - *Robert Jason, England*

A. The force majeure clause is something that a developer can rely upon legitimately in the circumstances you have described. However, if the clause is written clearly, then there should be no doubt that the length of delay should be directly related to the interfering event, and such delay cannot be extended beyond the time appropriate to deal with such a delay. There are consequential matters which may relate to the interfering event, which may legitimately have impacted on the delay date – such as delay in supply of materials, thereby denying the labour on site the opportunity to complete the unit with those materials. As soon as the materials are delivered, the labour has to be remobilized, and then a new timeframe set. In order to secure your position under contract, you should agree with the developer a force majeure event addendum, in which the event is described, the consequences of the event set out, so that additional matters which should not be effected by the force majeure event, such as the quality of your property, are not later on linked to the event erroneously. The addendum should set a new precise handover date, and the inspection procedures and all other protections that ought to have been included in your original contract, should remain in full force and effect.

Q. My property was due for handover in July 2008. Up until the end of October, the reasons for the lateness of the unit provided to me by the developer varied from change of contractors, heavy rainfall and one late payment I made out of a series of 6 payment installments. Most recently, the developer has now intimated that the global pressures on the financial markets, and the civil troubles in Bangkok (my property is in Phuket) are responsible for further delays. I am now seriously



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doubtful about the developer's integrity and ability to complete my property. I have also heard that this particular developer may be unable to pay its debts to its contractors. Is there anything I can do to secure my position? - *J Richards, California*

A. If it is clear that there are no legitimate extensions under the contract, and that the reasons for delay are not genuine, then you should consult with your lawyers and consider serving a default notice on the developer. There will normally be a 'cure default' period, during which the developer can remedy the default. If this period expires, then you should instigate proceedings and register your legal interest as a 'claimant' in the court, or if the contract requires arbitration proceedings, in the relevant arbitration institute. If you have a concern that the developer is unable to pay any of its debts, then it is very likely that your concerns may be shared by a group of buyers, and if that is the case then you also have commercial options available, which could include applying for the company to be placed into administration or liquidated. Such measures are severe, would impinge seriously upon the value of the assets as they become 'distressed' assets, and in the event that your property is very close to completion, you may wish to consider less drastic procedures of 'takeover' of the relevant segment of the project in order to complete the unit yourself.

If the property is subject to a mortgage, then this will more likely require the filing of a claim. Retaining a line of communication with the developer

is important, provided that the developer remains committed to answering questions honestly about financial status, so that there is not a manufactured and unproductive 'stand off' between the parties, which will result in increased legal costs and sometimes inefficient communications on matters which might be disclosed more quickly with direct communication. A project management approach should be applied to when and how you apply legal services to this matter.

Q. I signed a contract over a year ago to purchase a sea view condominium which included in the marketing materials a furniture package and branded television and kitchen. However, the developer tells me that due to financial pressures the package has been downgraded and the brands we were expecting for the television and kitchen will be less attractive. This isn't what was represented to me at the point of sale. What can I do? - *Chris O'Reilly, Ireland*

A. As you were purchasing in a condominium, you are protected not only by consumer protection law, but also by the Condominium Act. The Act was recently revised in July 2008, to impose more stringent restrictions on condominium developers in relation to representations made in sales and marketing material being fulfilled in delivery to a purchaser. Prior to the revised laws, the principles of protection were still consumer protection oriented. A letter referring to these rights should be sent to the developer, but you should also commercially consider that if the developer is in financial difficulty, that you may wish to demand delivery of the unit at the balance of the purchase price you owe, less the cost of you fitting out the unit with your own furniture, television and kitchen. If the developer seeks advice on the matter, it ought in the circumstances you describe, to be advised to accept such a proposal rather than proceed along a more litigious path.

This legal clinic was co-written by Desmond Hughes (Partner) and Christian Glanville (General Manager) based in the Phuket and Koh Samui offices of Belmont Limcharoen respectively, which has also offices in Bangkok and with a new office in Ho Chi Minh City, Vietnam, opening soon. www.belmontlimcharoen.com