

PROPERTY REPORT

legal



Legal Clinic: Questions and answers on Thailand property legal issues

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Timing in real estate contracts

Q. I am supporting my off the plan property purchase with a mixture of finance from overseas and personal savings. What are the normal risks I would expect to be contained in the sales contract? What normally happens if I am late in making a payment?
- *Ingólfur Arnarson, Iceland*

A. An off the plan sales agreement could relate to a villa/house in a regulated development which is subject to a real estate development licence; a villa/house in a non-regulated managed estate; an apartment; or a condominium, which is regulated by the Condominium Act and other consumer protection legislation. In each case there is a different answer to your question. In regulated developments and condominiums, regardless of the provisions which a developer may attempt to place into its contracts, consumer protection provisions require that monies paid cannot be simply forfeited if the consumer has difficulty making payments. Interest can be applied on the late payments, and default time periods exist which allow for reasonable periods of time to 'make-up' for a late payment. For example, in a condominium purchase, the Condominium Act stipulates that a the Seller may terminate a contract, where less than 24 installments are agreed, if the Purchaser defaults on 12.5 per cent of the purchase price. If a contract contravenes this provision, the contravening provision is null and void.

In unregulated developments, which are more frequently used in relation to real estate products targeted at foreign investors which are not condominium developments, there is no specific regulation on the contract terms, the civil and commercial code and general provisions apply. This means that contracts should be scrutinized carefully to determine the consequences of late payment. Immediate termination and forfeit of payments, without any opportunity to cure a default during a reasonable period of time, should be strongly resisted.

Q. I understand from some friends of mine that when buying off plan, I need to be careful about the delivery time stipulated in the sales contract. Surely if the delivery date is stipulated, shouldn't this be quite straightforward? - *Rebecca Linares, New York*

A. There are a large number of different ways of expressing time obligations in relation to delivery in a contract. Where construction milestones exist, a developer could, depending on how the contract is

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written, utilize a delay on an early construction milestone, to justify a delay on subsequent milestones. However, if an express long-stop date is provided, then this time stands as definitive delivery regardless. The use of a term such as 'Practical Completion' without any further detail in a contract can create an ambiguous loop, which could be utilized to present that for all intents and purposes completion has been reached, in the subjective opinion of the developer. A method of limiting potential disputes over such issues is to have clear definitions of the final stages of completion being 'lock up' – when the unit can be locked, with the roof and all doors and windows sealable; practical completion, and finishing to 'handover'. Handover should be when the purchaser approves the unit and accepts it is complete. A contract should actually prevent an unreasonable refusal of a unit's completion, and that is why the defined terms are critical. All these stages occur at different times, and therefore payments can be split over these times. To avoid disputes over de minimis items such as door handles and light switches, a cap on the value of a disputed item at handover should be included in the contract. If the unit is not reasonable accepted within a certain period of time, penalty rates can apply as there will be a final payment attached to 'handover'.

In relation to the extension of a defined 'Delivery Date', prospective purchasers should be aware

of the legal concept of 'force majeure' or 'events beyond the control of the parties, is a legitimate reason for a developer delaying delivery. Events such as natural disasters, interfering weather conditions, and civil commotion can affect the contractor's work to the extent it must delay, to make sure that the property quality is maintained and to cope with changing conditions. In order to make sure that this clause is simply not used as a shield for all types of late delivery, close attention to the definitions is necessary. For example, 'inclement weather conditions' is a vague term in a tropical country. Clauses now exist where 'excessive rainfall' is actually expressed and defined in a contract by referent to cubic millimeters of rain over the year, to avoid a developer or contractor simply blaming normal rainy season conditions for late delivery.

In summary, timing is not simply a case of writing a 'date' into a contract.

Q. I am purchasing in a mixed use development with a large emphasis on the sports and recreation facilities. I plan to spend Christmas in my new villa and play tennis with my friends over the New Year period. How can I ensure that I absolutely can use my villa but also the facilities at the delivery date?
- *L.Harris, Singapore*

A. Most sensible developers will not pick Christmas and New Year as a delivery time. You correctly note that there is a difference between delivery of the unit, and delivery and timing of delivery of the common facilities in a real estate project. However, if this has been selected, and your purchase is motivated by the benefits you describe, you should obtain either an amendment to the contract, or a side letter, providing you with alternative accommodation and access to precisely the same facilities, in the event of late delivery through the fault of the developer. This way you still have your holiday, if the property happens to be delivered late, and your property will be handed over at a time when it is properly finished.

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