



### Legal clinic: Questions and answers on Thailand property legal issues

BY DESMOND HUGHES AND INGO MULLER

# Re-sales

**Q.** I am buying my off-the-plan property purely to re-sell it between 12 and 24 months from completion. How do I ensure that my property is attractive to a prospective purchaser with an optimum legal structure for transfer of ownership interest, appropriate to Thailand? - Hans Muller, Frankfurt, Germany

**A.** The method, through which you purchase, if you are the first purchaser, may not have to be the method through which you re-sell. In a properly structured managed estate, the legal framework for investment into a property by a foreigner will provide a primary leasehold interest of a legal registered term of 30 years together with normally two renewal periods of 30 years – the equivalent to a lifetime interest in the property. In addition to this interest, a construction or purchase agreement should provide you with an interest in the building itself which will eventually be formalized through issuance of a house or unit registration book; and a set of rules and regulations which could be managed estate rules governed by a privately formed owners committee or, in a condominium building, utilisation of legally prescribed condominium rules and regulations implemented by the condominium juristic person owners committee.

If you enter into these contracts in your own name, sale of your legal interest would be conducted through a series of legal transactions in Thailand with taxable events in Thailand. If you structure your investment properly, ensure that for the original transaction the correct and proper taxes and duties have been paid to the Thai authorities, then you may utilise a foreign company to acquire the lease; construction and to be a member of the owners committee. In order to sell your interest, you would simply sell your company through share sale. This means that the sale of the foreign shares occurs in a foreign jurisdiction and you must pay tax to your home tax domicile authorities. Of course, you should compare the tax rates of both countries before making the decision. Certain nationalities of person and entity are stated as being taxed by their government regardless of where their transactions take place.

If you proceed with the share sale route then a purchaser and its lawyers will want to see a full share sale and purchase agreement, and all the documents relating to the assets in Thailand. You should not overlook the fact that there will still be a due diligence exercise in relation to the physical property to which the legal structure relates – a structural survey; building and environmental regulation compliance audit, quality of management of the estate – and legal due diligence of the legality of the history of the land forming the land title under the project ought to be on the purchaser and it's lawyers checklist of actions to undertake.



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If you have not proceeded with the foreign entity route, then the transfer of your interests should be governed by a sale and purchase agreement in Thailand, through which the interest in the lease will be assigned by the landlord to the new 'lessee'; an accession to the rules and regulations of the estate including the owners committee; and a transfer of the interest in the building. Relevant registration fees and taxes should be paid, and there will normally be an 'assignment fee' due to the landlord on account of the administrative burden of facilitating the transfer of your lease. The lease provisions should be checked for any other obligations that ought to be complied with. A prudent purchaser will want evidence that all management fees and sinking fund contributions have been made and are up to date, and that the timing of occupation of the unit coincides with an apportionment between seller and buyer of the utilities and any other property expense payments.

**Q.** My plan for investment into my property was to generate rental income and capital appreciation. When I tried to rent out my property, my agent informed me that the finishing quality of my unit placed it into a lower category of rental return than I first imagined. I also note that my property management fees have risen each year. This has caused some unexpected deductions which I now wish to mitigate through rental return. I have recently been offered a tenant, on a 3 year fixed rental, which is unusual and I might not see this opportunity again. What legal and practical steps should I take to protect my position in a real estate market which will invariably change over the next 3 years and ensure that I can still re-sell my unit? - P. White, Singapore

**A.** When committing to letting your unit out at a fixed rent when variable costs could increase, you may wish to consider a rent review at the end

of each period, and in the event of a disagreement on the review, the opportunity for you to break the lease, legitimately, with the tenant. Alternatively, you could ensure that the tenant is liable for all variable costs throughout the lease term, in addition to the fixed rental. If you believe rents will increase as the area surrounding your property becomes more attractive and demand increases, you should still allow for a break clause in the lease. In non-holiday markets, you would expect to have a 3 to 6 month rent deposit, a security deposit and thereafter collection of rent in arrears. However, in a holiday rental market, it is more plausible to demand larger portions of the rent over the term than monthly arrears. This is because it is more likely that your tenant will vacate notwithstanding the lease term remains unexpired.

Your rent deposit should be set at a level more than adequate to cover a change of heart by a holiday renter, because you will not be able to recover 'loss of opportunity' against the renter simply because you may have chosen a more reliable tenant, albeit at a lower rent, had you known that your renter was fickle. It is not possible to eliminate all risk, but you can manage the risk in the documentation and through deposits to minimize risk to an optimum level.

If you are letting the property through an agency, carefully review the agents' terms to see how much liability the agent is and is not willing to accept when managing your property. Make sure that the agent will not be paid their commission for simply handing over the keys, but that there will be other obligations throughout the lease term to justify the premium you will pay as the landlord to the agent for its service.

You should always ensure that you have an appropriate period of time to 'break' the lease, in the event you need to sell the property to realize your capital appreciation. This period should be balanced against the deposits paid by the tenant, and to afford adequate time for vacating the property, and preparing it for handover to a buyer. Finally, you should also be prepared to sell 'with tenant' in the event that the purchaser should like to reap the benefit of the guaranteed income. Appropriate disclaimers should be made in the re-sale documentation to make sure that you are not liable for the ongoing behavior of the tenant, post re-sale.

This legal clinic was co-written by Desmond Hughes (Partner) and Ingo Muller (Senior Associate) based in the Phuket offices of Belmont Limcharoen which also has offices in Bangkok and Koh Samui with a new office in Ho Chi Minh City, Vietnam, opening soon. [www.belmontlimcharoen.com](http://www.belmontlimcharoen.com)