

## Expert Analysis

# Balance and improvement in Phuket's legal framework

**R**ecently a noticeable shift has taken place in investment and interest in Phuket's legal market. New law firms have arrived and established firms in Bangkok have opened branch offices in the south, echoing an increase in real estate agents and upward movements in the property market. The arrival of a number of international law firms in Phuket and Koh Samui is welcome as it will certainly raise the standard of legal practice in these regions and can only be a positive development for both individual investors and development companies. An increase in competition between law firms and an increase in legal awareness will lead to certain practices in Phuket becoming defunct and others being recognised as impractical, not commercial or illegal resulting in a cross-section of improvements. This article identifies areas that need improvement and steps that can be taken to facilitate change.

## Title

Bangkok and the provinces have their fair share of title issues. However, Phuket and Samui are really feeling the strain of a positive and ever busier property market. Consequently, what some law firms refer to as 'deep' or 'full' title searches are becoming slower and in some instances more painful. A developer with a well-prepared legal or acquisition team should have a copy of all of its title documents tracing back title from possessory ownership to current status. The critical element here is 'copy'. A busy land office may 'misplace' a file for several weeks which is not conducive to speedy due diligence by a prospective purchaser.

Alternatively, there may be some crucial part of the title jigsaw missing or some correspondence with no conclusion, perhaps relating to National Forestry Land, or the contesting of land ownership

under a will. There can be no substitute for having a pre-prepared title disclosure pack for buyers or banks from whom you wish to secure finance. With the advent of more vigorous title reviews amidst concerns about high profile title problems in large developments over the last five years, developers may take control of the process of proving the legality of their title while the government takes time to catch up with more modern procedures for keeping 'public' records of property title documents.

## Leases

Some premium class developments in Bangkok are selling leases with a clear thirty year term and no option to renew. These leases are still securing investors. Other Thai micro-markets are at a different stage. Foreigners looking for long term investment options and passing on the benefit of their leasehold interests to beneficiaries (or those who are younger than the 'typical' retirement age) are more concerned about the longevity and enforceability of a lease 'option to renew'. Sophisticated developers are setting up structures in which leasehold owners own a share in the ultimate land-owning company which may or may not also be the management company. Class-action disputes in large resort/rental-pool projects in more developed jurisdictions point to the problems that can build up over time in relation to management of an estate or resort when all the owners are expecting certain yields in proportion to their investment and those are not met. Such problems occurring within the "landlord" company shared by leasehold owners could create unpredictable results when the developer moves onto new pastures.

The more clients who have already become involved in such structures elsewhere and encountered problems that come to look at Hua Hin,

Pattaya, Phuket and Samui, the more demand there will be for freehold ownership and 'opt-out' from management schemes. Surprisingly, some developers still use leases with termination provisions more appropriate to short term holiday rentals than for investors pre-paying rent for the thirty year period contemplating permanent occupation and uninterrupted use and enjoyment of their property. The lease will not die, but its validity and benefit for purchasers will be seriously challenged in the coming years.

## Forward planning; legal advice for the future

Rent review clauses in commercial leases are a source of much dispute in many jurisdictions, so much so that there are specialists who operate solely in respect of advice on how rent review clauses should operate. Similarly, the influx of lawyers into developing markets will result in more robust and refined advice. Rent reviews in the United Kingdom typically occur every five years, lawyers who intend to practice longer than five years there will justifiably be concerned that their rent review clause is not subject to high profile dispute and examination in the courts. Likewise, contracts being drafted now in Thailand will in some instances be scrutinized by other lawyers (maybe even clients who are lawyers), arbitrators and judges. International law firms with long term strategies and risk management procedures will produce as a collective a better and evolving form of contract taking into issues that may arise even in the distant future.

Lawyers acting for Thai and international banks will demand better title reports, better contracts protecting developers or leases which offer more concrete security. Additionally, lawyers in different jurisdictions now operating in Thailand will be able to slowly educate and develop their client base to

bring them in line with international practice where such practices will be beneficial in the long term.

## Bespoke or 'tailored' contracts vs commodities

Setting up a Thai company with a protected structure is a commodity exercise for a law firm. If effected properly with full translations, tweaking of details, due and proper attention to shareholders and directors meetings then the process is labour intensive with application of the intended purpose of the company made at the outset prior to inception. Such practices will become the norm in a developing legal market. However, the discrepancy between the quality of contracts and negotiation of contracts will remain random until law firms arriving in new areas have worked their way through the precedent banks of developers. Often such precedent banks are out of date, suited to a different non-Thai jurisdiction or possibly unfair in parts or without reference to the relevant provisions of Thai law.

Sophisticated law firms will have their own precedent banks, but will equally have risk management and good practice procedures ensuring that precedents are not simply rolled off the printer - but rather amended, crafted and tailored with due consultation with the client and the entire legal team prior to issue. For example, Phase I of a development will have a set of contracts that may not suit at all Phase II of a project. Equally, in Hong Kong or Singapore where title is not viewed as precarious as in Thailand by investors and also where off-plan purchases are less predominant - a less 'balanced' contract might be viewed as acceptable by an investor. In a new developing market, with some title issues, doubt on the enforceability of leases, worries about the completion or non-completion of the project - investors will balk at unfair or ill-thought out contracts.

Contracts will therefore, inevitably, improve to meet market demand and to help

secure what may become more elusive sales in a rising but eventually levelling property market. A variety of law firms and lawyers working opposite one another or together on sophisticated transactions will encourage this diversity and development.

## Who am I doing business with? Shelf companies.

Credit checks and investigative procedures are now being demanded by investors in the Thai property market. There is a huge influx of "brand" marketing with Stock Exchange listed company logos splashed over brochures and great emphasis on the previous success of other developments "completed" by what may often be one key figurehead running a large operation albeit with credible third party backing. After hours of deliberation over the terms of a contract, an investor's advisers may eventually obtain public financial information which may be a) late and b) incomplete or non-reflective of the company's true financial position and have to report to their client accordingly.

Joint venturers will want to know about the credibility and status of their prospective business partners and property investors will want to know about their chosen developer's depth and quality. Incredibly, investors are still signing contracts under which they are handing over significant sums of money to companies incorporated off the shelf with little or no trading history or supported by huge loans. Suing such a company for breach would most likely be a complete waste of time and effort. Any cash obtained from sales would not necessarily be in the hands of the shelf company and may well be off-shore. Market practice will develop whereby guarantees are offered or demanded and guarantees must be offered by companies with a good trading record. ■

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