

Selling a real estate lease in Thailand – caution, it is not just a matter of “assigning” it

“Assignment” and “Novation” are lofty sounding legal terms frequently used by consultants and lawyers. In Phuket these terms are used especially often in relation to lease agreements. Therefore, it is important that the legal meaning and effect of novation and assignment are clearly understood by anyone considering their use and to do this the starting and ending point must be understanding what they actually mean under Thai law. However, recently in a Thailand English news publication, assignment and novation were discussed and, unfortunately, inaccurately described. The concepts of assignment and novation were explained there as “viable options when it comes to resale of a lease”. In this Article we will explain the legal concept of assignment and novation and whether these are actually “options” from which the parties are free to choose.

The term “assignment” is not directly mentioned in the Civil and Commercial Code of Thailand (CCC). Rather, the CCC, in Book II Chapter IV, refers to the “Transfer of Claims”. Section 303 CCC states: “A claim may be transferred unless its nature does not admit of it”. Important is to understand that it is a “claim”, or in common parlance a “right”, that may be transferred in accordance with Chapter IV. An example of such a claim is the repayment of a loan. The lender is entitled to “transfer” such claim. An authorization by the borrower is not legally required to execute this “transfer of claim” in a legally binding manner; notice to the debtor by a specific creditor is sufficient (Section 306 CCC).

In a lease relation the parties to a lease agreement have reciprocal “claims” towards each other. At a minimum the lessor “claims” the lease payment, the “rent”, and the lessee “claims” possession the leased object. Generally these claims are “transferable”. However, it should be noted that Section 544 CCC restricts the lessee’s right to transfer possession property under the lease agreement to a new lessee “unless

otherwise provided in the contract". Thus, it is generally highly advisable for lessees entering into a long-term lease agreement to receive such transfer rights.

Novation, on the other hand, is regulated in Chapter V – Extinction of Obligations – Part IV of the CCC". Section 349 CCC explains that "[w]hen the parties concerned have concluded a contract changing the essential elements of an obligation, such obligation is extinguished by novation". Section 350 CCC specifies that "[a] novation by a change of the debtor may be affected by a contract between the creditor and the new debtor, but this cannot be done against the will of the original debtor."

Taking our example above of a lease agreement, the following reciprocal obligations exist in a lease relationship: the lessor is obligated to provide possession of the property and the lessee is obligated to make the lease payments. Therefore, in a lease relationship, the lessee is the debtor with regard to the lease payments and the lessor is the debtor with regard to the provision of possession of the lease object. Thus, it is always important to investigate what obligation, or which debtor of what obligation, will be "novated".

In a typical "lease sale" example a lessee would "sell" his lease to a third party. The lessee has the right to "claim" the possession of the property from the Lessor. Such right he will need to "assign" in accordance with Section 303 ff CCC (Transfer of Claims) to the third party/the new lessee.

However, the lessee is also subject to an "obligation" and is the "debtor" relating to the lease rental payment. Thus, a novation agreement between the lessor and the third party with approval of the lessee in accordance with Section 350 CCC is also required. Both of these legal elements are required for the third party/new lessee to "step into the shoes" of the original lessee. The parties in a contractual relationship with typical reciprocal rights and obligations are, therefore, not free to choose between a novation and an assignment in a typical "sale" of a lease.

*Based on the foregoing then, what is such a "sale" legally? Answer: it is an assignment **and** a novation, **not** an assignment or a novation.*

In closing, it should be noted that, once both the rights and obligations of a party to a contract have been transferred and novated to new party, a new contract comes into being. This fact is particularly significant if the contract in question is a lease in

Thailand because if they remain lease term that is assigned to then new contract is over three years, then such term will only be enforceable up to three years, unless the new contract is registered at the relevant land office.

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