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## COVID-19 Considerations for Commercial Tenants

As the Thai government begins to gradually lift the restrictions that were implemented to minimize the health risks of the COVID-19 pandemic, the unprecedented economic impact of the disease continues to be felt across multiple sectors of the economy. Businesses have experienced a variety of challenges, including forced closures, supply chain disruptions, and severe declines in revenue as the number of customers has plunged. For the many businesses that lease space for their operations, one additional challenge is simply the ability to pay rent.

Some countries have responded to the problems faced by individual and commercial tenants by enacting temporary relief measures, such as providing funds to property owners to make up for tenants' unpaid rent and issuing temporary moratoriums on lease terminations and evictions. In Canada, for example, the government passed an emergency commercial rent assistance program that provides forgivable loans to qualifying commercial property landlords who agree to reduce rents for eligible small business tenants for April through June. Similarly, Singapore recently passed a temporary act which, among other measures, prohibits a landlord from terminating a non-residential lease for non-payment related to the COVID-19 outbreak.

The Thai government has also moved to provide relief for some commercial tenants. For example, the Ministry of Interior ordered local administrations to help certain commercial tenants on government-owned property by providing discounts on rent or allowing rent to be paid late without penalty. The Mass Rapid Transit Authority of Thailand also announced relief measures for qualifying commercial tenants, under which businesses that were ordered closed by the government will have rental fees waived for two months, while businesses that were not ordered closed will receive a 50% discount on their rent for four months. Similarly, the Port Authority of Thailand announced a 50% discount on rent for commercial tenants for three months.

While these measures are certainly welcomed by tenants

on government-owned property, the Thai government has not yet proposed any relief measures for commercial tenants leasing private property. In the absence of any such government-initiated measures, the discussions regarding potential relief measures have been left to the landlords and tenants themselves. In certain notable cases reported in the Thai press, these discussions have yielded positive results for the commercial tenants. Central Pattana, the TCC Group, Singha Estate Group, Rangsit Plaza Co., and the MBK Group—Thailand's largest mall operators—all provided rent relief for certain commercial tenants in their properties, including by temporarily waiving rental fees for certain stores that were closed and by providing discounts on rent for stores that remained open.

While commercial tenants who successfully negotiate some form of rent relief from their landlords will appreciate the benefit, they should also be aware that this relief will constitute a departure from the terms of the existing lease. For example, the discounted amount of rent or the relaxed new deadline for payment will be different than the terms found in the lease.

Therefore, even though the negotiations between the landlord and tenant were friendly, and even though the two may have a long-standing business relationship, the tenant should ensure that any agreement with the landlord is made in writing. Under the Thai Civil and Commercial Code, there must be written evidence of a lease agreement, and likewise, any revisions to that agreement should also be recorded in writing to be binding. This is to prevent the landlord from later claiming that a tenant abiding by the new terms of a verbal agreement was actually in breach of the written lease. Without written evidence of the agreed-upon discounted rate for the rent, or the new due date for payment, the tenant would have little defense against such a claim.

Some commercial tenants who, as a result of the COVID-19 pandemic, are unable to pay their rent or negotiate an alternative with their landlord may find themselves considering simply not paying their rent. Those whose businesses were ordered closed by the government order may be tempted to claim *force majeure* as the reason for their non-payment under the lease. Any tenant considering doing so, however, should realize that they will very likely risk being sued for breach of the lease. And while the tenant could attempt to raise COVID-19 and *force majeure* in its defense, this will depend on both the language of the lease and the discretion of the Thai court on the issue. As no Thai court has yet addressed this issue with respect to commercial leases in the current pandemic, the much safer option would be to try to come to an agreement with the landlord and to memorialize that agreement in writing. 🏠