



Embracing the new Code of Conduct for Leasing Retail Premises

The new Code of Conduct for Leasing Retail Premises

On 26 March 2021, the Singapore Business Federation (SBF) introduced a new **Code of Conduct for Leasing Retail Premises** (the “Code”) which aims to provide landlords and tenants a clear set of guidelines on fair retail tenancy negotiations.

Prior to the introduction of this new Code, the tenancy practices in Singapore were guided by the **Fair Tenancy Framework** developed by the SBF in 2015. However, the Framework was not widely embraced as the adoption was voluntary and lacked support from the private landlord. The long-standing tensions on tenancy issues were further exacerbated during the COVID-19 crisis. This prompted the formation of the **Fair Tenancy Pro Term Committee**, comprising members from the landlords and tenants, government, industry experts and academia, which drafted the Code.

The Code will be **effective from 1 June 2021** and applies to lease agreements involving Qualifying Retail Premises entered into on or after 1 June 2021 with a tenure of at least one year. It comprises **11 Leasing principles** (Principles) which include best practices and mandatory requirements.

While the Code provides a documented framework as a basis for lease negotiations, there may potentially be discrepancies in the interpretations of the Code, particularly at the beginning stage of the adoption. Furthermore, there are some Principles which allow certain exceptions to be made with mutual agreements by both parties. It is anticipated that the government may turn the Code into legislation in the future. The Fair Tenancy Industry Committee (FTIC) will also conduct a close monitoring of the incidence of non-compliance by the landlords or tenants.

It is important for organisations to familiarise themselves with the Code and assess the impact of new scenarios that may arise as a result of the latest Code. This will help avoid potential disputes and future complications between landlords and tenants.

We highlight several key changes brought about by the Code and puts into perspective how landlords and tenants can navigate through the Code.



Key changes

1. Compliance with the Code

Landlords are responsible to ensure that the provisions in the lease agreements are consistent with the leasing principles set out in the Code.

The Code states that for the preparation of the lease agreement, no legal or administrative fees shall be payable by tenant to landlord if there are no amendments to the landlord's standard lease template which is compliant with the Code. If the tenant requests for amendments to be made to the landlord's standard lease template which is compliant with the Code, the legal costs or administrative costs (but not both) should be borne by the tenant. However, if the tenant requests to change the landlord's standard lease template to address any deviation from the Code, the legal costs or administrative costs (but not both) should be borne by the landlord.

2. Pre-termination by landlords

The Code sets out that the only circumstance where the landlords can pre-terminate the lease is if they intend to carry out substantial redevelopment, asset enhancement or reconfiguration works to the building or part of the building ("redevelopment works") that require vacant possession of the premises.

Landlords are not entitled to pre-terminate the lease solely for the purposes of changing the tenant mix without carrying out any redevelopment works or if such redevelopment works can be carried out without requiring vacant possession of such premises. If the initial lease term is pre-terminated due to the redevelopment works, the landlord is entitled to pay the tenant a compensation sum.

The Code also highlights that where the landlord has obtained Written Permission from Urban Redevelopment Authority (URA) for any asset enhancement initiative (AEI) works, the landlord must inform the tenant of such works prior to the signing of the lease agreement. If the lease is pre-terminated due to the proposed redevelopment works without doing so, an additional compensation sum is payable by the landlord to the tenant.

3. Pre-termination by tenants

The Code allows the tenants to pre-terminate the lease under the occurrence of either of the two exceptional conditions:

- The business principal of the goods and/or services from which the tenant has obtained the right to sell and/or provide which is being retailed at the premises is insolvent.
- The tenant loses the distributorship or franchise rights to sell the goods and/or provide the services which are being retailed at the premises for reasons that are not due to non-performance or breach of the distributorship or franchise agreement by the tenant.

The tenant has to give no less than 6 months' prior notice to the landlord or opt to pay 6 months gross rent in lieu of the 6 months notice period to the landlord.



4. Rental structure formula

As a general rule, the rental formula must be based on a single rental computation throughout the lease term, unless mutually agreed between the landlords and tenants. This means that the previously common “either/or, whichever is higher” formula is no longer allowed as the rental structure. For example, the rental structure can no longer be the higher of a fixed rent per square feet or a fixed share of the gross turnover (GTO) but can be fixed at the combination of the two elements.

In addition, sales audits are necessary only if the rent payable to the landlords comprises the variable component based on the tenant’s GTO. In the case where the tenant’s POS system is integrated into the landlord’s POS system, instead of submitting an annual audited sales report, the tenant can now provide an upfront monthly undertaking by their director or Certified Public Accountant.

The Code also states that landlords who collect sales data from tenants as part of the GTO Rent structure would have to share the sales data metrics by trade category on a one-on-one basis before signing of the lease agreement. Such metrics should also be shared on a bi-annual basis for existing tenants. The sales data metrics includes information such as the period, trade category, number of units, total monthly sales turnover of category, total floor area occupied by category and average sales per floor area.

5. Dispute resolution and enforcement

The Code allows certain exceptions to be made based on the mutual agreement of the contracting parties. Even for the mandatory requirements of the Code, deviations are allowed in lease agreements as long as both parties mutually agree on such deviations and jointly indicate their acknowledgements in the Checklist.

Any non-compliance with the Code during lease negotiations may be reported to the FTIC. After signing the lease agreements, any non-compliance may be escalated to the Singapore Mediation Centre (SMC) within 14 days of the signing of the lease agreement.

Qualifying retail premises

- Restaurant, bars, pubs and nightclubs
- Retail shops and services (e.g. supermarket, departmental store, gift store, salons, tailors, etc.)
- Medical, dental, aesthetic and veterinary clinics
- Commercial schools (e.g. tuition centres, child care/infant care centres, dance school, etc.)
- Gyms, sports club and fitness centres
- Entertainment centres (e.g. cinema, arcade centre and bowling alleys, etc.)



The way forward

Going forward, how can landlords and tenants navigate through these changes brought about by the new Code?



For landlords

1

Embrace the new Code early

- The responsibility lies with the landlords to make necessary changes to the lease agreements to be compliant with the Code.
- Ideally, the preparatory work should be conducted before 1 June 2021.
- This will not only help landlords to reduce time spent during the onboarding of new tenants, but also enable companies to save on legal or administrative costs during lease negotiations.

2

Use legal technology tools to assist in preparation of new lease agreements

- Some companies may have a master template for lease agreements and there will not be any retrospective application to lease agreements entered prior to 1 June 2021. However, it may be helpful for landlords to review past agreements to identify if any additional clauses required adjustments prospectively.
- The use of legal technology (legal-tech) can help make the process of contract review more efficient and save resources. These tools can process a large number of contracts and search for provisions based on keywords, significantly reducing the time spent on reviewing contracts.

3

Tailor the pre-termination clauses to reduce risks of potential disputes

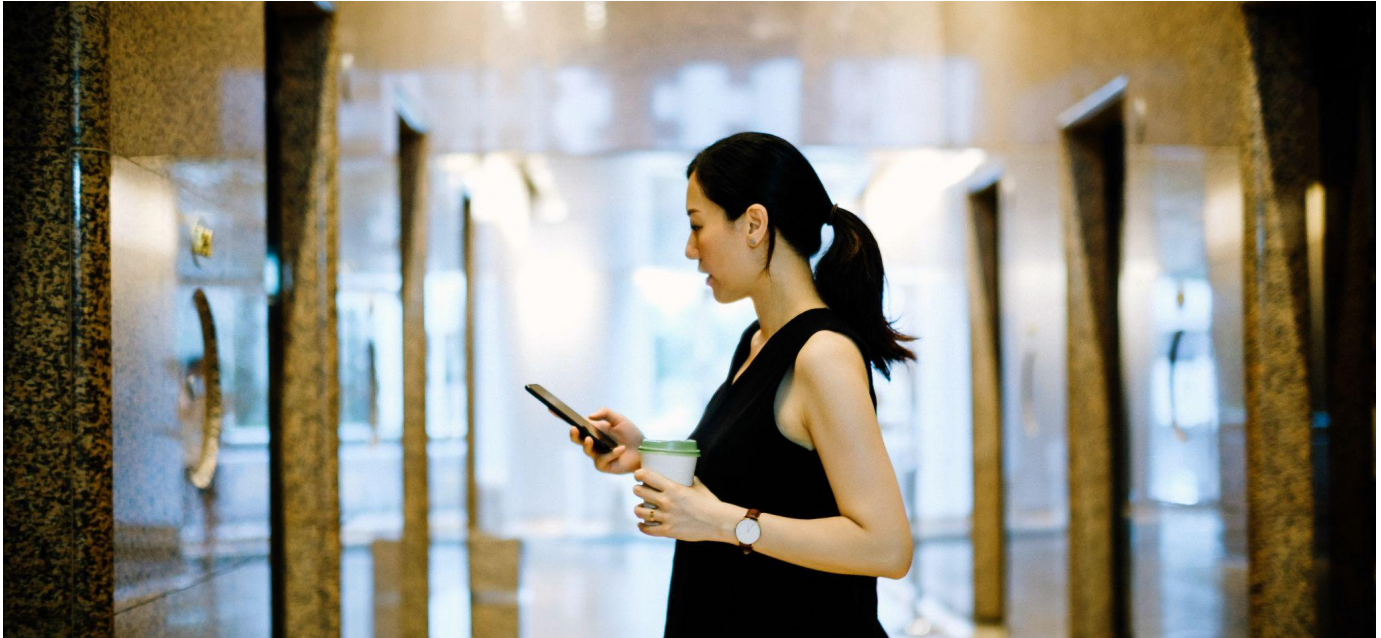
- For pre-termination by the landlord, ambiguity around substantial redevelopment works could potentially lead to disputes in the future.
- There are different scenarios that may constitute substantial redevelopment works. For example, painting of a shopfront may not be considered a substantial redevelopment.
- It is therefore important to assess such clauses and include clear definitions of the redevelopment works in the lease agreements.
- Both parties will have to agree with such provisions.

4

Determine a fair and balanced rental structure

- With the removal of the common “either/or, whichever is higher” rental structure, companies need to offer different types of rental structure to their tenants.
- Companies will have to assess and determine whether a fixed rent, a share of the GTO or a combination of both would be the most suitable, fair and balanced for both parties.
- As has been identified during the change of LIBOR linked contracts, a decision of this nature can be influenced by many factors, hence requires careful analysis.





For tenants

1

Perform thorough due diligence and review before signing the lease contract

- The lease agreement is binding on both landlords and tenants once signed.
- Certain exceptions can be made to the Code as long as both parties mutually agree to such deviations and indicate their acknowledgement in the Checklist.
- It is imperative for tenants to carry out due diligence or engage a specialist to assist in the review, so that any deviations can be highlighted promptly and rectified during the lease negotiation process.

2

Understand the pre-termination rights

- It is key that tenants understand the pre-termination entitlement for both landlords and themselves.
- As landlords can pre-terminate the lease due to redevelopment works, tenants have to ascertain if the categories of substantial redevelopment works have been clearly set out in the agreement and if these categories are reasonable.
- Tenants should also ensure that provisions on the pre-termination by the tenants are included in the lease agreement.
- Tenants should also take note that it is their responsibility to inform the landlords promptly upon the occurrence of the exceptional conditions to pre-terminate the lease.

3

Familiarise with the dispute resolution processes and monitor the performance of the contract

- The Code has set out a clear dispute resolution framework.
- In the event before signing the lease agreement, the tenant can report non-compliant practices of the landlord to FTIC.
- Even after signing the lease agreement, if there is non-compliance in the lease agreement by any party with respect to the Code, both parties can escalate the matter to the SMC to resolve the disagreement.
- The Code also highlights that if both parties cannot reach an agreement on the additional compensation sum payable by the landlord for his re-development works, the matter can also be escalated to the SMC.
- Tenants need to monitor the performance under the contract and events that may trigger disputes so that disagreements can be resolved amicably.

Conclusion

The Code has been introduced 3 months ahead of its implementation, providing companies sufficient time to make the necessary adjustments. Whilst the adoption of the new Code was voluntary, all government landlords and major landlords have committed to adopting the Code.

As the authors of the Code are promoting its provisions to become market practice in the future, landlords and tenants are encouraged to understand the Code and its implications for their business. Ultimately, honesty, fairness and transparency are key in building and maintaining a long term, dynamic and positive partnership between parties.



Contact



Michael Peer

Disputes Advisory Leader,
PwC South East Asia Consulting
+65 9663 9089
michael.peer@pwc.com



Daniel Fu

Director
PwC South East Asia Consulting
+65 9627 4568
daniel.j.fu@pwc.com



Christine Soon

Senior Manager
PwC South East Asia Consulting
+65 9620 7135
christine.ly.soon@pwc.com



<https://www.pwc.com/sq/en/services/consulting/forensics.html>

© 2021 PricewaterhouseCoopers Consulting (Singapore) Pte. Ltd. All rights reserved. This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.