

Real Estate

Contributing editor
Joseph Philip Forte



2018

GETTING THE
DEAL THROUGH

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Real Estate 2018

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Thailand

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General

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

Thailand is a civil law jurisdiction. Thus, although Thai Supreme Court decisions do have significant persuasive effect on lower courts, they do not have any precedential value.

Injunctions (or 'temporary measures' as they are referred to in the Civil Procedure Code) are available. However, they are very rarely granted. There is no distinction between 'law' and 'equity' in Thailand.

Thailand does not have a parole evidence rule and, therefore, such evidence would generally be admissible.

Thai courts are required to decide each case based on the relevant statutory law. Decisions are made by judges, generally either a panel of one, two or three and there are no juries in Thailand.

Thailand is generally a 'free contract' jurisdiction and oral contracts are enforceable. However, some contracts must be evidenced in writing (and some must also be registered) to be enforceable, such as:

- leaseholds of immovable property for more than three years;
- sale and purchase of immovable property; and
- mortgages.

All of Thailand's laws are national in scope and most of its investment related laws are modelled on counterparts from developed jurisdictions particularly in Europe and the United States. However, with some exceptions, there are significant restrictions on foreign business, labour and immigration.

Thailand's courts are separated by subject matter jurisdiction, the main ones being:

- civil courts;
- criminal courts;
- bankruptcy courts;
- tax courts;
- labour courts;
- the Intellectual Property and International Trade Court; and
- the Administrative Court.

All courts have at least one automatic level of appeal, either to a supreme court or to an intermediate appellate court.

Litigation in Thai courts is often costly. For a foreign investor this is largely due to the fact that generally all documents and testimony must be translated into Thai, and even though the hearing dates are scheduled to be successive, they are often not completed within the time scheduled and postponed for weeks or months. Civil trials rarely take less than two years to complete from filing to judgment, often taking longer. Completing the appellate process often takes five to 10 years.

Arbitration is an advisable alternative for foreign investors in Thailand. Thailand is a signatory to the New York Convention and its Arbitration Act is based on the UNCITRAL Model Law (1985).

2 Land records

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Yes. A transfer of immovable property must be registered at the land department and a sale of immovable property is void unless it is so registered.

A leasehold for more than three years is not enforceable beyond three years, unless it is registered at the land department.

A mortgage agreement is not valid unless registered at the land department.

The law also recognises preferential security rights in immovable property for:

- (i) preservation of;
- (ii) work done on; and
- (iii) the sale price plus interest of an immovable property.

If registered (i) and (ii) may be exercised in preference to a mortgage; (iii) may be exercised if registered at the time of the contract of sale is registered and takes precedence over any mortgage registered after that time.

3 Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

All such transactions are recorded at the local land department with jurisdiction over the relevant immovable property.

The parties to such transactions must provide the documents for the relevant transaction, as detailed by the land department. Pursuant to the Licensing Facilitation Act (2015), the land department is now required to specify what documents must be provided for each transaction in advance. To complete the relevant registration, the parties must also pay applicable government taxes and fees. Where the registration is for the transfer of ownership of land or structure or both the applicable taxes and fees are as follows:

- land department transfer fee equivalent to 2 per cent of the officially appraised value of the property;
- income tax (payable as withholding tax) being either:
 - an amount equivalent to 1 per cent of the land department appraised or the actual transaction value of the property (whichever is higher) if the seller is a juristic person. This is a withholding tax and it is credited to (ie, deducted from) the company's income tax payable for that year; or
 - an incrementally applied personal income tax sliding scale from zero to 35 per cent equivalent percentage of the officially appraised value of the property adjusted based on how long the property is owned or based on the actual profit margin, if the seller is an individual; and
- stamp duty equivalent to 0.5 per cent of the official appraised or the actual transaction value of the property (whichever is higher); or
- specific business tax and Local Development Tax, being a total amount equivalent to 3.3 per cent of the officially appraised or the actual transaction value of the property (whichever is higher).

In general, the stamp duty will apply if the land has not been transferred within the last five years, otherwise the specific business tax and Local Development Tax will apply.

For leases that are registered, there is a registration fee and stamp duty equal to 1.1 per cent of the total rental amount of the term actually being registered (ie, not including any renewal terms).

A mortgage over land or structure or both can be granted to secure the performance of any obligation, including foreign individuals. The mortgage registration fee is 1 per cent of the amount declared in the mortgage agreement (with a maximum fee of 200,000 Thai baht). If the mortgage is to secure a loan it is subject to a stamp duty of 0.05 per cent of the amount declared in the mortgage agreement (with a maximum duty of 10,000 baht).

4 Foreign owners and tenants

What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction?

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

As a general rule, ownership of land by foreign entities or individuals is restricted. However, exceptions to this rule may be applicable for foreigners who make an investment that the government wishes to encourage.

Foreigners are allowed to own up to 49 per cent of the floor space of a condominium. However, the money to purchase the condominium unit must be brought into Thailand in foreign currency for this purpose or held in a foreign currency account in Thailand.

Foreigners may own immovable structures on land outright.

There are no specific restrictions on a foreigner's leasehold rights.

Because of the restrictions on foreign ownership rights and limitations inherent in leasehold rights under Thai law, there is some variety of investment structures marketed to foreigners. Before investing, a foreign party should consider carefully the security and tax implications of any such structure.

5 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Foreigners can send essentially as much foreign currency into Thailand as they would like. However, unless the receiving account has been set up to hold a foreign currency, such as the US dollar, the amount sent will be converted into baht at the then current exchange rate of the receiving bank. If a transfer is equal to or exceeding \$50,000 or equivalent, it must be reported to the Bank of Thailand by submission of a foreign exchange transaction form.

Outward remittances of baht in unlimited amounts are permitted with specified documentation for purposes such as payment of invoice for goods or services and sale proceeds. However, outward remittances for other purposes require the authorisation of the Bank of Thailand.

Foreign currency may also be purchased in Thailand and sent out under the same conditions. However, any purchase for such purpose equal to or exceeding \$50,000 equivalent will require of a foreign exchange transaction form.

6 Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

There are no non-tax legal liabilities specific to ownership of real estate in Thailand. A new owner may be held liable for property tax liability.

A selling owner is liable to the purchaser for certain defects in the property delivered. If the property delivered is more than 5 per cent less or more than contracted for, the buyer may either reject it or accept it and pay the proportionate price. However, if the difference is less than 5 per cent, the buyer must accept the property and pay the proportionate price, unless the buyer would not have originally entered the contract had he or she known of the difference.

A seller is also liable for any defect in the property that impairs its ordinary use, unless the buyer knew or should have known of the defect prior to delivery.

And a seller is liable to a buyer, if the buyer is evicted from the property or if the property's value, fitness, or benefit is impaired by reason of a third party's right over the property. The same applies between a lessor and tenant.

Tenants do have specific liabilities to the owner of a property and any relevant provisions of their rental contract.

A tenant is required to use the property for ordinary purposes or those provided for in the rental contract. A tenant must also take ordinary care of the property, including doing such maintenance and petty repairs, as such care would dictate. If the tenant does not, the lessor may order the tenant to comply with such requirements. If the tenant fails to comply the lessor may then terminate the rental contract.

The tenant is liable for any resulting damage if they fail to advise the lessor of the following and the lessor is unaware that the rented property is:

- in need of repairs by the lessor;
- a preventative measure is required to protect the property; or
- a third person is encroaching on or claiming a right over the property.

A tenant may not alter the property without the permission of lessor. If a tenant does so he or she must return the property to its original condition and he or she is liable for any damage.

A real estate lender does not have specific legal liability unless the lender's loan agreement provides for such.

And, as a general matter, tortious liability is applicable to anyone who commits a 'wrongful act' as detailed by the Civil and Commercial Code. Anyone who wilfully, or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person has committed a wrongful act and is bound to make compensation to the injured party.

If the damage is caused by defective construction or insufficient maintenance of a building, whoever is in possession of the building is liable, unless the possessor has used proper care to prevent the damage, in which case the building owner is liable.

7 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

The parties to a contract of sale of immovable property may agree that the seller shall not incur any liability for defects of eviction. However, unless such agreement specifies otherwise, such agreement does not exempt the seller from the repayment of the sale price. Such a non-liability clause cannot exempt the seller from the consequences of his or her own acts or of facts that he or she has concealed.

The standard range of property insurance is available and offered by both local and internationally recognised brands. In more limited instances title insurance may also be available.

8 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Unless the parties have contracted otherwise, the governing law of a transaction involving properties in two jurisdictions is determined by the Conflict of Laws Act (1938), which provides that law of the place where the property is located shall govern form required for the validity of a contract, document or other juristic acts relating to the property. Accordingly a choice of law provision providing for a law other than Thai law to govern property in Thailand would not be enforceable by a Thai court.

9 Jurisdiction

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Real estate disputes may be submitted to the civil court where the property is located or to the civil court where the defendant is domiciled. However, if the dispute involves a criminal matter, such as trespass, that matter must be filed in criminal court.

There are no parties that must be joined to a claim before it can proceed. However, the Civil Procedure Code does allow a party, with the approval of the court, to interplead as an additional claimant. The Code also allows a claimant to request that the court to join an additional defendant. The court may also join an additional defendant on its own if it deems such appropriate.

Service of process must be completed before a case can move forward. For domestic parties this is generally done by service by the court to the defendant's domicile or place of business or by the defendant accepting such service.

Where a defendant is outside of Thailand, the plaintiff must request that the court deliver a copy of the complaint and summons to the defendant. The plaintiff must provide a deposit for the expenses that the court expects to incur to complete such foreign process service. The plaintiff must also provide certified translations of the service documents in the official language of the destination country or English. The court will then order that the service documents be sent by international express mail, courier or through diplomatic channels to the defendant abroad.

Although a party need not be qualified to do business in Thailand to enforce remedies, Thai courts do not recognise foreign court orders and judgments. However, foreign court judgments are often used as evidence in Thai court proceedings.

Arbitration tribunals may also have subject matter jurisdiction over real estate disputes in Thailand. Thailand is a signatory to the New York Convention (1958) and the Arbitration Act (2002) closely follows the UNCITRAL Model Law (1984). Thus, Thai courts will generally quickly and efficiently enforce arbitration awards based on law or fact with only limited procedural ground available to refuse enforcement.

10 Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

In general there is no distinction under Thai law between commercial and residential properties.

However, the Hire of Immoveable Property for Commerce and Industry Act (1999) does create some distinctions with regard to leasing commercial property. A lease that qualifies under the Act as 'commercial' must be:

- for a commercial or industrial purpose, as defined by the Act;
- of a property located in an area designated by the Act; and
- registered.

A commercial lease may be leased for up to 50 years. However, 30 years is the maximum rental term for a residential lease.

A lease under the Act may also be mortgaged as security for a loan, which is not available for a residential lease.

Unless a residential lease provides otherwise, it is not inheritable and terminates upon the tenant's death. However, a commercial lease under the Act is automatically inheritable by the tenant's heir.

Finally, a residential tenant may not sublet or transfer any rights under the lease without the lessor's prior consent. But a commercial lease may be sublet or transferred without the lessor's prior consent.

11 Planning and land use

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Thailand has three principal land use laws:

- the Building Control Act (1979), which prescribes requirements for structures;
- the Town and City Planning Act (1975), which prescribes what type of construction may be built in various zones; and
- the Enhancement and Conservation of National Environmental Quality Act (1992), which limits construction and use of land.

All three of these laws are nationwide laws. However, they are made applicable on periodic and regional bases.

There are also various other laws that might restrict the use of land in some locations, such as the Marine and Coastal Resources Management Act (2015) and the National Reserved Forest Act (1964).

12 Government appropriation of real estate

Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Yes, the Immoveable Property Expropriation Act (1987) prescribes the compulsory purchase and condemnation of real estate. When land is to be expropriated for public purposes, a royal decree is issued under the Act, which details the officer in charge, purpose, and location (with attached map) of the expropriation.

Surveys are then conducted and a committee composed of three national and one local officials is set up to appraise the price to be paid for the real estate. The government then attempts to negotiate a purchase of the real estate for a price no higher than that set by the committee. If a price can be agreed, the price is paid. If not, the owner or possessor of the land may appeal the price. In that case the original price is deposited pending the outcome of a decision on a final price.

Once all necessary surveys have been completed and final prices determined, a new Act is issued. Upon promulgation of the new Act, the land is legally transferred to the relevant state agency. Once payment for the land is made the transfer of ownership is registered on the title deed at the land department.

Owners and tenants of land and buildings are compensated.

Owners of perennial plants on demolished land are also compensated.

Owners of a right of way for access or utilities who lose their right of way because of the expropriation are also eligible for compensation.

Lenders are not directly compensated. Lenders are, however, notified of the expropriation and are then entitled to claim compensation from the real estate owner within 60 days. If the parties agree, the officer charged with the expropriation is entitled to pay any portion of expropriation price directly to the lender.

13 Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Under Section 33 of the Penal Code (1956), the court has the power to forfeit any property used or possessed for use in the commission of an offence or acquired by a person through the commission of an offence.

14 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy matters in Thailand are under the exclusive jurisdiction of the Bankruptcy Court. The Central Bankruptcy Court and Regional Bankruptcy Court are the courts of first instance. Appeal of any order or judgment is made directly to the Bankruptcy Division of the Supreme Court.

Bankruptcy matters are prescribed by the following laws:

- the Bankruptcy Act (1940);
- the Establishment and Procedures for Bankruptcy Court Act (1999) (Bankruptcy Court Act); and
- the Regulations for Bankruptcy Cases (2006) (Regulations).

The Bankruptcy Act provides for bankruptcy and (in the case of certain juristic entities such as a private or public company limited) reorganisation. The basic test for a party to qualify for either is insolvency. A debtor is considered insolvent if that debtor's debts are greater than the debtor's assets. The Bankruptcy Act presumes that a debtor is insolvent under certain conditions.

A debtor may be forced into bankruptcy if he or she owes 1 million baht (2 million baht if a debtor is a juristic entity) or more to one or more creditors. In a bankruptcy proceeding the court takes possession of all of the debtor's remaining assets, distributes them to the debtor's creditors, and then discharges the debtor free of any debt.

A qualifying juristic entity may file for or be forced into a reorganisation, if the entity owes at least 10 million baht to one or more creditors. In a reorganisation proceeding a reorganisation plan is prepared and then approved by the court with input from the creditors. The plan administrator then oversees the reorganisation including the ongoing operation of the debtor's business. During reorganisation legal action involving the debtor's assets may not be brought and any such pending action is suspended. The reorganisation plan groups the debtor's creditors in to categories (eg, secured, unsecured, etc). Under the plan each category of creditor is entitled to receive a certain percentage of the debt owed to them by the debtor.

Upon a successful reorganisation all creditors will have been repaid the percentage of the debt owed to them provided by the plan, the debtor's business will be running in good order and solvent, and the court will discharge the debtor from reorganisation without any remaining debt.

15 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The most common investment entity is a private company limited. Investments may also be made in juristic partnerships, and public companies limited, and mutual funds such as real estate investment funds (REITs). Partnerships and private and public companies are subject to Thai corporate income tax. Mutual funds, however, are pass-through entities not subject to Thai income tax.

16 Foreign investors

What forms of entity do foreign investors customarily use in your jurisdiction?

By far the most common investment entity is a private company limited. A private company limited requires a minimum of three shareholders and an investor's liability is limited to the amount of capital paid in by that investor.

17 Organisational formalities

What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

A Thai company limited may be set up within one to two days. First an available and acceptable name for the company must be reserved. Then the company's statutory meeting is held among (a minimum) of three promoters and the business of the company is then handed over to the company's director. The company's memorandum of association (its objectives) and its articles of association (its by-laws) are then filed with the Ministry of Commerce. The company is then registered and its affidavit issued. The company is then considered a legal juristic entity.

A Thai company limited must hold an annual general meeting (AGM) of shareholders within four months of the end of its fiscal year and submit its AGM meeting minutes and previous fiscal years audited financial statement within one month of its AGM. A company that does not hold the AGM within the time permitted is liable to a fine of 20,000 baht and in such case the director may also be fined up to 50,000 baht. Failure to timely file the audited financial statement is also subject to a fine of 20,000 baht for the company and 50,000 baht for the director.

It is also important to note that with exception of manufacturing, export, and hotel management, almost all businesses are prohibited to foreigners and under the Foreign Business Act (1999) or other industry specific legislation. In general a Thai limited company is considered a foreign entity, if a non-Thai person or juristic entity owns half or more of its share capital. Under the Act, such a foreign company must obtain a foreign business licence or certificate in order to do business in Thailand. Conducting business without such licence or certificate may result in imprisonment for up to three years, a fine of up to 1 million baht, or both. It should also be noted, however, that some exception to the foreign ownership restrictions are available under certain treaties and trade agreements, as well as, investment promotion legislation.

A Thai company limited is taxed on its worldwide income. Any foreign entity doing business in Thailand is taxed on the income it derives from its business in Thailand. The current Thai corporate income tax rate is 20 per cent. Dividends are subject to an additional 10 per cent withholding tax, which may be treated as final tax.

18 Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

The preferred land title in Thailand is the 'Chanote' because it is the only true ownership title in Thailand. Chanotes are issued for land in accordance with the Land Code (1954) and for condominium units in accordance with the Condominium Act (1979). Chanotes issued under the provisions of these acts are registered with the land department and state the ownership, boundaries, area measurements, and encumbrances (such as mortgages or servitudes) with particularity. Land Chanote title has been formally surveyed and the land department places permanent land survey markers indicating the land plot boundaries. The purchaser of a Chanote is registered as the owner of the land or condominium with the land department at the time of transfer.

There are also three basic types of possessory right documents for land still in use. They are the 'Nor Sor 3 Gor', the 'Nor Sor 3', and the 'Sor Kor 1'. Of the three, the Nor Sor 3 Gor is the preferred. This document contains an accurate location of the land and boundaries (but no survey markers are placed by the land department) along with verification of the utilisation of the land in the past. A Nor Sor 3 is similar to the Nor Sor 3 Gor except that the measurements and boundaries of the Nor Sor 3 Gor are more accurate. Further, a Nor Sor 3 requires a 30-day public notice period before the transfer whereas these changes can be registered with a Nor Sor 3 Gor immediately.

The least preferable is the Sor Kor 1. This document is an unregistered form stating a claim by an occupant of land that the land belongs to him. The measurements are vague or missing and can be easily disputed. Also, a Sor Kor 1 requires a 30-day public notice period before the transfer. And encumbrances, such as a mortgage, can only be registered on Chanote, Nor Sor 3 Gor, or Nor Sor 3 titles. However, it is possible to upgrade a Sor Kor 1 to a Nor Sor 3 Gor or a Chanote title.

Other rights that are common rights include:

- leasehold;
- usufruct;
- habitation;
- superficies; and
- servitude.

Leasehold is a contractual right while the others are real rights under the Civil and Commercial Code.

Land, structures and any part of either may be leased. The maximum lease term is 30 years and the Civil and Commercial Code provides for an additional renewal lease term of up to 30 years.

Leases for industrial or commercial purposes have a term of up to 50 years. This again is renewable for a period of 50 years. However the availability of industrial or commercial leases is significantly limited.

The Civil and Commercial Code provides that any extant lease is enforceable against a new owner of the property who becomes the new lessor under the original lease terms. However, because any additional lease term is a 'renewal' (and not an 'extension') a clause providing for a renewal term is enforceable as against the original lessor but not against a new lessor.

Any lease of more than three years must be registered or it will not be enforceable for any term beyond three years.

A usufruct gives the grantee the right to possess, manage, and exploit a property. It can be either for the life of the grantee or a period of time up to 30 years with the possibility to renew it for up to another 30 years. The rights of a usufruct may be transferred. However, in any case a usufruct ends with death of the original grantee.

A habitation is a right to occupy a building for either the life of the grantee or up to 30 years with a possible renewal term of up to 30 years. Unless otherwise prohibited, the grantee's family may occupy the building with the grantee. However, a habitation is not transferrable in any way.

A superficies is the right to own freehold title to a building on someone else's land. A superficies may be granted for the life of the grantee or up to 30 years with the possibility of a renewal term of up to 30 years. Unless prohibited by the act creating it, a superficies is fully transferrable by the grantee.

A servitude binds the owner of a 'servient' property to suffer certain acts or refrain from certain rights inherent in his ownership for the benefit of another 'dominant' property. This right commonly granted for purposes of physical or utilities, access or for both. The rights and obligations of the dominant and servient property owners travel with the two property deeds in perpetuity.

A charge is similar to a servitude, however, it is a personal right which gives the grantee a specified use or enjoyment of the property (such as access across the land). A charge may be granted for the life of the grantee or up to 30 years with the possibility of a renewal term of up to 30 years. A charge is only transferrable if so specified by the act creating it.

19 Pre-contract

Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?

In complex transactions parties will sometimes exchange and execute non-binding memorandums of understanding, heads of terms, or letters of intent. However, this would be the exception, not the rule.

Thai courts will only enforce an agreement that the parties intended to be binding and Thai law does not recognise non-binding 'agreements'. In fact, if the parties wish for a document to be non-binding they should be sure to clarify that with particularity in the document and not simply rely on the court interpreting a 'memorandum of understanding' to be non-binding.

It is customary in Thailand to enter a reservation agreement under which a deposit, which would be credited to the purchase price, is paid. Typically there is a reservation period under this agreement of sufficient length for a purchaser to conduct due diligence into the property and for the parties to negotiate a sale and purchase agreement. Should the purchaser fail to purchase the property the deposit is usually non-refundable except in case of negative due diligence findings.

20 Contract of sale

What are typical provisions in a contract of sale?

Typical provisions of a contract of sale include:

- party and property details;
- price and payment terms;

- closing formalities;
- allocation of responsibility for transfer taxes and fees;
- warranties as to ownership and non-encumbrance of the property by the seller; and
- annexed copies of the parties legal identification documents, the property title, and building permits (if any).

It should also be noted that the term of some contracts of sale, such as those between a licensed housing or condominium developer, are prescribed by law.

21 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Section 96 of the Enhancement and Conservation of National Environmental Quality Act (1992) makes the owner or possessor of any point of source of pollution or contamination that causes death, bodily harm, or health injury to any person or which causes damage to the property of any private person or of the state liable to pay compensation or damages for such harm. The compensation or damages also includes all cost incurred by the government in cleaning up the pollution or contamination.

Section 96 imposes strict liability on such an owner or possessor. Thus, the liability applies regardless of whether the pollution or contamination was the result of a wilful or negligent act by the owner or possessor, unless one of the following exceptions applies and pollution or contamination was the result of:

- *force majeure* or war;
- an act done in compliance with a government or state order;
- an act or omission done by a person who sustained an injury or damage in the course of such; or
- an act or omission of any third party.

Thai law does not recognise clauses surviving the term of the contract. Clauses regarding long-term environmental liability and indemnity are enforceable for as long as the parties intended them (and thus contract containing them) to remain in force.

Typical general covenants would include a seller's warranty that he or she has complied with all relevant environmental laws regarding the property and indemnification of a buyer for any breach of such warranty and the buyer's indemnification of the seller for any environmental law liability caused by any act or omission of the buyer. Remedies for either party would be contractual damages.

22 Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typically sellers will covenant that the property is not encumbered and that the seller will not encumber the property in any way, including by leasehold, prior to close.

However, if a lease does exist, the lease survives and a buyer will become the new lessor under the same lease terms upon close. Thus, in such case a seller will typically warrant that lease has not been breached and indemnify the buyer for any breach of the lease by the seller prior to close.

Sellers' representations do not typically cover brokerage agreements.

Estoppel certificates from tenants are not customarily required as a condition to the obligation of the buyer to close under a contract of sale.

23 Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease that is registered after a mortgage has been registered on the property is subordinate to the mortgage and the lease registration will be erased from the register where its existence prejudices the rights of the lender on the enforcement of the mortgage.

Where a lease is registered prior to a mortgage, or with the consent of the lender, the lease remains in effect for its full legal term including upon any enforcement of the mortgage by the lender.

Lenders do not typically require that a tenant agree to assign the lease and that a landlord borrower agree to assign rental payments, in the event of default.

Thai law does not treat head leases differently from other commercial leases.

24 Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Security deposits are very common and typically required to be paid in cash prior to and as a condition of handover of possession of the property.

Commercial leases do typically provide for periodic rent resets or reviews.

Residential leases are typically short-term and rent is the subject of any renewal negotiations. For residential leases that are long-term, typically 30 years, with one or more renewal periods of 30 years, the entire rent for all terms is paid up front.

25 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Title searches are common. There have been wrongly issued titles found in Thailand that can be identified through a title due diligence.

The usual due diligence comprises searches at the local land department, local administrative organisation, local forest resource management office, local natural resources and environment office, local public works and town and country planning office, civil courts, bankruptcy courts, and the department of legal execution.

The priority of interest in the estate is basically established through the sequence of registration at the land department. No acquisition by a juristic act of immovable property or of real rights appertaining thereto is complete unless it is made in writing and it is registered. Cancellation of such registration will be granted only if the transferee did not act in good faith and the person making the request can prove that he was in a position to have his right registered prior to the challenged registration.

It is not customary to obtain government confirmation; however, it is customary to obtain a legal opinion regarding the legal use and occupancy of the property.

26 Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Typically due diligence includes a legal opinion with regard to the relevant land use law, including environmental law, applicable to the area in question.

Engineering and environmental reviews are customary only in large-scale projects. Thus, typically the purchasers receive a corresponding representation and indemnity.

Environmental insurance is available in Thailand.

27 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lawyers usually review leases.

Lease issues that are frequently addressed are:

- requirement of registration of leases with a term exceeding three years;
- the maximum lease term of 30 years (or 50 years for certain commercial and industrial purposes and locations respectively);
- rights to sublet or transfer the lease;
- inheritability of the lease;
- rent increase provisions;
- termination provisions;
- liability limitations;
- property tax liability; and
- separation of 'lease' from 'services' for tax purposes, particularly in commercial office leases.

28 Other agreements

What other agreements does a lawyer customarily review?

Other ancillary agreements that are customarily reviewed by lawyers are:

- construction or structure sale and purchase contracts;
- service or facility management contracts; and
- in the residential context lawyers will also commonly review a housing estate or condominium regulations and rental pool contracts.

29 Closing preparations

How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Typically lawyers prepare for such by:

- reviewing of corporate documents and shareholder resolution, board resolution, or both approving the purchase;
- reviewing the translation of those documents in the case of a non-Thai purchaser;
- reviewing the identifying documents of the parties;
- reviewing the title documents to verify accordance with agreement (eg, absence of encumbrances);
- reviewing structure registration documents in case of building;
- reviewing the translation of a lease agreement into the Thai language, if executed in a different language and if lease requires registration;
- reviewing the owner's consent in case of lease assignment or subletting;
- arranging closing details and timing with any finance party;
- in case of registration of a lease term exceeding 30 years on a property exceeding 160,000m² under the Hire of Immoveable Property for Commerce and Industry Act (1999), reviewing the approval of director general of the land department.

30 Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Closing is usually done at the land department by the parties' representatives under power of attorney without the parties being present. Upon closing the land department approves the transaction by registering the transfer, lease, mortgage, other real right or combination thereof on the title deed of the property. Final payment is made at closing, typically by handover of a cashier's check.

31 Contract breach

What are the remedies for breach of a contract to sell or finance real estate?

The relevant contracts and the Civil and Commercial Code govern contractual breaches.

Courts can enforce the contract itself. Other usual remedies are rescission of agreement and damages for loss incurred as a result of such breach.

32 Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

The contract can be enforced through the courts.

The Civil and Commercial Code governs the 'lease' or hire of immovable property as a specific contract. Such provisions apply to all lease agreements (if not otherwise regulated or waived in the lease agreement itself). The Civil and Commercial Code allows a termination of the lease by a tenant in case the property is delivered in a condition not suitable for the purpose for which it is let. Further, it is considered a breach of the specific contract conditions outlined in the Civil and Commercial Code, if a landlord does not reimburse a tenant for any necessary and reasonable expenses incurred by him or her for the preservation of the property hired (except ordinary maintenance and petty repairs).

The Civil and Commercial Code allows a termination of the lease by the landlord:

- in case of non-payment of rent (notice requirement of not less than 15 days, if rent is payable in monthly or longer intervals); or
- after having provided notice to comply in case the tenant is using the property for purposes other than those ordinary and usual or agreed in the contract; or
- after having provided notice to comply in case the tenant fails to take care of the property as a person with ordinary prudence would do.

Eviction of a tenant requires an eviction order by the court against such tenant. After having obtained such order, the landlord will request the appointment of an execution officer who will then have the power to take possession of the premises.

There is no difference in remedies for commercial leases and residential leases.

33 Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction.

Mortgages are used by commercial banks and private lenders to secure an obligation without having the borrower deliver the property to the lender. The contract of mortgage must contain, in Thai currency, either a certain sum or a maximum amount for which the mortgage property is assigned. The mortgage will be recorded on the title of the property in question at the land department.

A mortgage is enforced through auction. In addition, foreclosure is permitted if there is no other mortgage or preferential rights on the same property, in lieu of sale by public auction if:

- the borrower failed to pay interest for five years; and
- the lender has satisfied the court that the value of the property is less than the amount due.

Recently a new way of creating security has been established through the Business Collateral Act (2015). A comprehensive range of assets can now be used as collateral under this new Act. Real estate is included in the list of collateral that can be provided, however, only if the collateral provider is engaged in a real estate business. Only certain licensed financial and insurance institutions (and other, as yet to be named parties by ministerial regulation) may receive such collateral under the Act. A party that receives collateral under the Act is considered a secured creditor under the Bankruptcy Act (1940) and would have priority over unsecured creditors.

The Business Collateral Act requires that the borrower or the provider of the security and the lender, who will receive such assets as collateral against the loan provided enter a business collateral agreement. During the term of such agreement, the collateral provider remains in possession of the collateral provided and is able to use it for commercial purposes. The collateral must be detailed in writing and registered with the department of business development.

It should be borne in mind that the Business Collateral Act is new. How it will be implemented as a practical matter by the government and to what extent it will be utilised by the business community is as yet uncertain. Thus, for the time being mortgages will remain the most frequently used real estate security instrument in Thailand.

34 Leasehold financing

Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Yes, financing is available for leases. However, only a lease under the Hire of Immoveable Property for Commerce and Industry Act (1999) can be used as security against payment of an obligation by means of a mortgage. Where the Act is applicable, the same provisions that apply to a mortgage of land also apply to a mortgage of a lease. The only difference between these instruments is the collateral provided. Alternatively, where the Act does not apply, finance parties may accept a conditional lease assignment agreement as security.

35 Form of security

What is the method of creating and perfecting a security interest in real estate?

In the context of a loan agreement, the lender and the borrower (or the third party owner of the property) must enter into a mortgage agreement in writing. This mortgage agreement must specify the property mortgaged and contain, in Thai currency, either a certain amount or a maximum amount for which the mortgaged property is assigned as security.

A mortgage agreement is void if it is contrary to the enforcement provisions outlined in our answer to question 39 below.

The mortgage agreement must then be registered at the land department.

Such mortgage will not extend to buildings erected upon the land after the date of the mortgage. In order to include such newly erected buildings it is necessary to include a corresponding clause into the mortgage agreement to that effect.

In the context of a business collateral agreement under the Business Collateral Act (2015), the lender and the collateral provider must enter into a business collateral agreement in writing. The agreement must be registered to be enforceable under the Act. Please see further details in our answer to question 33 above.

36 Valuation**Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?**

Lenders only occasionally require third party real estate appraisals. There is no law governing the certification of real estate appraisers. However, appraisers are certified by professional organisations such as the Securities and Exchange Commission, the Valuers Association of Thailand, and the Thai Valuers Association.

37 Legal requirements**What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?**

There are no specific ramifications for a foreign lender. A foreign juristic person that is merely providing a loan secured with a mortgage is not considered to be doing business that is regulated by the Financial Institution Business Act (2008) and does not require permission to provide such a loan under the Act.

Any mortgage must be in writing and registered at the land department. See further details in question 33.

Any juristic person receiving a mortgage is required to be permitted under its own constitutional documents to receive a mortgage.

38 Loan interest rates**How are interest rates on commercial and high-value property loans commonly set (with reference to Libor, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate**

Commercial banks commonly use their own set of published lending rates, such as the minimum-lending rate, to base the on-shore loan on such reference.

However, with regard to parties to commercial loans it should be noted that Thailand has recently enacted the Prohibition of Interest Collection at an Excessive Rate Act (2017), under which any interest rate over a general maximum interest rate of 15 per cent as outlined by the Civil and Commercial Code will be considered void. At best the court may decide to award statutory interest rate of 7.5 per cent. The Act also provides for criminal liability for anyone violating said legal lending rate restrictions.

Legally applicable interest may be higher in some circumstances under specific legislation in the finance and banking sectors.

Interest, fines, service charges, any other related fee must be included in the interest calculation for some personal loans but not those related to real estate transactions or security.

39 Loan default and enforcement**How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?**

To enforce a mortgage, a secured lender must notify a defaulting borrower in writing to perform his or her obligation within a reasonable time (which shall not be less than 60 days from the date the borrower has received the notice). If the borrower fails to comply with such notice, the secured lender may enter an action in court for a judgment ordering the mortgaged property to be seized and sold by public auction.

If the defaulting borrower's property is secured by a third party's property mortgage, the secured lender must then also deliver such notice to that third party within 15 days from the date of delivery of the notice to the defaulting borrower. If the secured lender does not notify a third party who has provided such security of such within 15 days,

then the third party is discharged from any interest due, and all accessory charges due by the defaulting borrower from that point forward.

If there is no other registered mortgage or preferential right on the same property, the defaulting borrower has the option to notify the secured lender in writing to carry out sale of the mortgaged property by public auction with no requirement to enter into an action in court. The secured lender can then carry out sale of mortgaged property by public auction within one year from the date of receiving such notification. However, if the secured lender fails to carry out the sale of mortgaged property by public auction within that period, the defaulting borrower is discharged from any interest due, and all accessory charges due by the defaulting borrower from that point forward.

Foreclosure, in lieu of sale by public auction, whereby the secured lender would take ownership of the property, is permitted only if:

- there is no other mortgage or preferential rights on the same property;
- the defaulting borrower has failed to pay interest for five years; and
- the secured lender has satisfied the court that the value of the property is less than the amount due.

The enforcement of the collateral under the Business Collateral Act (2015) can be carried out by public auction without court proceedings. The Act provides for security enforcement through foreclosure if:

- the value of collateral is less than the amount due;
- no interest was paid for at least five years; and
- no other preferential rights registered on the collateral.

40 Loan deficiency claims**Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?**

If the proceeds of a public auction pursuant to mortgage enforcement do not cover the amount due to a secured lender, the secured lender is not entitled to recover the balance from a defaulting borrower unless the mortgage agreement provides otherwise.

In case of mortgage enforcement by way of foreclosure, if the estimated value of the property is less than the amount due, the defaulting borrower is not liable to the secured lender for the balance.

Where a third party has mortgaged property as security for performance by a defaulting borrower, the third party is not liable for the deficiency.

In case of a third party who guarantees the performance of an obligation, such guarantee must clearly specify the duration and the amount guaranteed and guarantor's liability is then limited to the obligations specified in the guarantee.

A defaulting borrower remains liable for any balance where a guarantor does not perform the whole of his guarantee obligation.

The time limit on a lender seeking a deficiency judgment is 10 years.

41 Protection of collateral**What actions can a lender take to protect its collateral until it has possession of the property?**

Thai law does not provide secured lenders with options to protect collateral. Thus, such borrowers are typically required to sufficiently insure their property and assign the secured lender as the beneficiary under the terms of a loan and mortgage agreement.

It should also be noted that if the mortgaged property is damaged, resulting in an insufficient security, the lender can enforce the mortgage at once if such damage is not repaired or another property of sufficient value is not offered to be mortgaged.

Where the security is provided under the Business Collateral Act (2015), the lender has the right to inspect the collateral after providing sufficient notice. The borrower is required to preserve the collateral, maintain, repair it, and is liable for any damage, loss or depreciation of the collateral's value.

42 Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

If the liability is in excess of the net proceeds, in case of an auction, (or the estimated value, in the case of foreclosure), the defaulting borrower is not liable for the balance, unless the mortgage agreement specifies otherwise.

Where a third party provides the mortgaged security for a defaulting borrower, any agreement that causes that third party to be personally liable in excess of the value of the mortgaged property, or that may cause that third party to be personally liable as a guarantor is void. However, this is not the case where the defaulting borrower is a juristic person and the third party who has provided the defaulting borrower's security is a party who controls the defaulting borrower's business and such third party has contractually guaranteed the defaulting borrower's debt.

A secured lender is entitled to be paid out of the mortgaged property in preference to ordinary lenders.

The same applies to the Business Collateral Act (2015) where the sale of collateral by public auction provides an amount less than the debt owed by the defaulting borrower, the secured lender is only allowed to pursue the balance where the collateral provider is the defaulting borrower.

43 Cash management and reserves

Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Banks typically require specific bank accounts to be utilised for receiving payments and distribution of payments. Reserves are usually not required.

44 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Financial institutions in Thailand commonly use guarantees.

Previously the lenders requested the guarantor to guarantee all amounts that are owed by the borrower at any time. This is not possible anymore. In 2015 the Civil and Commercial Code was revised such that all guarantees must now clearly state the:

- purpose;
- type;
- amount;
- period of the guarantee; and
- obligation or head agreement that is being guaranteed.

Furthermore, the guarantor may now be liable only for the amount covered under such guaranteed obligation or head agreement.

Contractual assignments are also used as security enhancement, such as the proceeds of an insurance policy or rental income under a lease agreement. And retainage is also common in certain contexts, particularly in construction agreements.

45 Loan covenants

What covenants are commonly required by the lender in loan documents?

Typically a lender will require restrictive covenants, which limit asset disposal or encumbrance.

A lender may also require:

- that a borrower does not have nor will have any class of creditors whose claims against the borrower will rank legally senior to the indebtedness represented by the loan agreement, or other *pari passu*-type obligations;

Update and trends

The only property taxes in Thailand currently consist of two outdated locally administered taxes: the House and Land Tax (1932) and the Local Development Tax (1965). Thus, for several years there have been proposals for Thailand to implement a modern centrally administered property tax. In recent years this movement has even produced draft bills; but having met with opposition those were withdrawn. However, the current draft bill of the new property tax is now with the Council of State who is anticipated to propose it to the National Legislative Assembly shortly. If, as expected, the Assembly approves the draft bill by the end of this year, it will become law and likely go into effect in late 2018.

The draft bill, would create four categories of property:

- property used for agricultural purposes, with a ceiling tax rate of 0.2 per cent of the property's official value and an exemption for property valued at less than 50 million baht;
- property used for residential purposes, with a ceiling tax rate of 0.5 per cent of the property's official value and an exemption for a first residential home valued at less than 50 million baht;
- property used for other purposes including commercial use, with a ceiling tax rate of 2.0 per cent of the property's official value; and
- unused property, with a ceiling tax rate of 5.0 per cent of the property's official value.

If enacted the new property tax will also abolish the House and Land Tax (1932) and the Local Development Tax (1965).

- limitations on taking on any additional credit;
- restrictions on merger and change of management; and
- inter-company financing and dividend payments.

46 Financial covenants

What are typical financial covenants required by lenders?

Maintaining financial ratios such as shareholder equity, debt ratio, debt-to-equity, cash flow coverage. Lenders also typically require periodic financial reports and may require borrowers to agree to being audited at the lender's discretion.

47 Secured moveable (personal) property

What are the requirements for creation and perfection of a security interest in moveable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Mortgage and pledge are the relevant security interests under Thai law.

Apart from immovable property, the following moveable properties can be mortgaged:

- ships of five gross tons and more;
- floating houses;
- beasts of burden; and
- certain machinery.

A mortgage must be in writing and must be registered.

A pledge is an agreement whereby a party who wishes to pledge his or her moveable property in return for a loan delivers such property to the lender as a security for the loan. The requirement of delivery is a significant limitation on this form of security as Thai courts have interpreted that to require the lender to not only receive but also maintain possession of such property. Thus, a party who pledges property as security for a loan cannot use that property in (eg, in his or her ongoing business).

A pledge does not have to be created in writing and is not required to be registered. However, if the pledged property is a right represented by a written instrument, the pledge is void unless such instrument is delivered to the lender and the party who has to perform the obligation created by the right is notified in writing.

Any pledge of non-bearer shares, is not enforceable against the company or a third party unless it is entered into the company's share registration book.

Finally the Business Collateral Act (2015) allows for a wide range of assets (eg, accounts receivables, inventory, raw materials and

intellectual property) to be used as collateral. See further details in question 33.

48 Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

SPEs are not commonly used in Thailand and are usually not required by lenders. There is no specific statutory law for SPEs. There is also no concept of an independent director of SPEs under Thai law.



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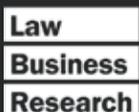
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