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Thailand

Cynthia Pornavalai and Ahmet Yesilkaya

Tilleke & Gibbins

TRANSFER OF REAL ESTATE

1 Legal system

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

Thailand is a civil law system. Emergency orders and temporary injunctions are theoretically possible at any time before judgment is entered, but they are rarely granted. The court must be satisfied that the complaint is justifiable and that sufficient extenuating circumstances exist. Equity is not separated from law, nor does it have that name. The doctrine of strict compliance with judicial precedent does not apply, and there is no jury system in Thailand. Discovery procedures are not yet a part of the legal environment. Oral testimony is not sufficient, and some written evidence of an agreement signed by the liable party is required to enforce the following contracts:

- agreement to sell or buy property, which must be registered by a competent official;
- sale of moveable property where the agreed price is 20,000 baht or more;
- loan of a sum exceeding 2,000 baht;
- suretyship;
- compromise; and
- insurance.

All other contracts for which the law does not specifically provide forms may be executed orally.

2 Conveyance documentation

What are the legal requirements for documents recording conveyance?

All land transactions should be recorded in a written document, have valid title documents and be registered. The land office in the province where the land is located is the proper registration location for land transactions. For land located in the Bangkok area, the proper registration locations are the district land offices.

The fees involved are:

- transfer fee equivalent to 2 per cent of the officially assessed value of the land, which the Land Department issues from time to time;
- stamp duty equivalent to 1 baht for every 200 baht for any transaction other than for commercial purpose or for profit;
- specific business tax (SBT) payable by the seller, equivalent to 3 per cent of gross receipt before deduction of any expenses, if the sale is made in a commercial manner or for profit. If the operator pays SBT, he or she is exempted from paying stamp duty; and
- withholding tax calculated according to the number of years the seller has owned the land. Withholding tax has a ceiling of 20 per cent of the selling price, except where the transaction is conducted in a commercial manner or for profit.

Unless otherwise agreed, parties shall be equally responsible for the transfer fees and stamp duties. All other taxes are passed to the account of the seller, but the burden may be passed on to the buyer by contract.

3 Foreign investors

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

Foreign individuals and foreign companies are prohibited from owning land in Thailand. Companies incorporated in Thailand that are at least 51 per cent Thai-owned may legally own land. If a company has significant foreign equity, it will be investigated by the Land Department to determine whether or not a foreigner is the true owner of the land before the company is allowed to register a purchase of land.

Exceptions to the foreign ownership rule apply to:

- Board of Investment (BOI) and Industrial Estate Authority of Thailand (IEAT) projects under which special privileges are given to foreign-owned companies to own land for business operation and residential purposes for management and employees;
- foreign oil companies that meet the requirements of the Petroleum Act; and
- foreigners who have brought in money for investment in an amount fixed in the Ministerial Regulations (no less than 40 million baht) for the purchase of land for use as residence with an area not exceeding one rai (1,600m²), subject further to the permission of the Minister of Interior.

Foreigners may own buildings on land that is leased, because there are no restrictions on building ownership. Foreigners can thus lease land and construct a building, office tower, apartment or house on the leased land and own the structure. Foreigners may also own condominium units directly, provided that the foreign ownership does not exceed 49 per cent of the total area of all condominium units in the relevant condominium building. A foreigner acquiring direct title to a condominium unit must also be able to present correct and complete documentation and evidence as required by the Land Department, such as evidence of bringing foreign currency into Thailand, or evidence of withdrawal of money from a baht account of a non-resident or withdrawal of money from a foreign currency account in an amount not less than the price of the unit to be bought.

4 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues? What about repatriation of capital?

Unlimited amounts of Thai baht or foreign currency may be brought into Thailand; however, as a general rule, such foreign currency must be sold or converted into baht to authorised dealers (authorised banks, authorised companies or authorised persons) located in Thailand

or deposited into a foreign currency account, with authorised commercial banks or authorised companies located in Thailand, within 360 days from the date of acquisition or importation. Funds remitted into Thailand for the purchase of condominium units must be in remitted in foreign currency.

Commercial banks are authorised by the Bank of Thailand to approve outward remittance, in its name, including:

- remittance of an unlimited amount in repayment of a foreign loan and payments of accrued interest and other related fees and cost, net of all taxes, having proper documentary evidence;
- unlimited remittance of proceeds from a sale of shares having required documentary evidence; and
- remittance of an unlimited amount in payment of certain types of service fees, including transport and communication, having appropriate documentary evidence.

When purchasing foreign currency for one of these purposes in an amount exceeding US\$20,000 or its equivalent, a foreign exchange transaction form must be submitted to authorised banks, together with appropriate supporting documentary evidence. Foreign exchange transactions involving amounts in excess of the above limitations, or for purposes other than those mentioned above, require the approval of the Bank of Thailand.

5 Legal liability

What types of liability does an owner of real estate face? Is there a standard of strict liability and can there be liability to subsequent owners? What about tort liability?

The seller is liable for any defect of sold property that impairs either its value or its fitness for ordinary purposes, or for purpose of contract, except in the following circumstances:

- if the buyer knew of the defect at the time of sale or would have known if such care as might be expected from a person of ordinary prudence had been exercised;
- if the defect was apparent at the time of delivery and the buyer accepted the property without reservation; or
- if the property was sold by auction.

If the buyer has discovered defects in property sold, he or she is entitled to withhold the price or part thereof unless the seller provides proper security. The buyer is also entitled to withhold the price, in whole or in part, if he or she is threatened, or has good reason to believe that he or she is about to be threatened, with action by a mortgagee or by a person claiming property sold, until the seller causes such threat to cease or gives proper security.

In a sale of immovable property where the total area is specified and the seller delivers the property for less or more than he or she contracted for, the buyer has the option to reject or accept it and pay the proportionate price. If the deficiency or excess does not exceed 5 per cent of the total area so specified, the buyer is bound to accept it and pay the proportionate price, provided that the buyer can rescind the contract if the deficiency or excess is such that had he or she known of it he or she would not have entered into the contract.

Action for liability for defect or liability on account of deficiency must be taken within one year after delivery. The seller is liable for consequences of any interference with the right of peaceful possession of the buyer by any person having a right over property sold, except where the buyer knew at the time of sale that the right of the person causing disturbance existed.

Under the Wrongful Act doctrine of Thailand's Civil and Commercial Code (CCC), a party who unlawfully injures another as a result of wilful or negligent conduct is said to commit a wrongful act. The injuring party is liable to compensate the injured for damages resulting from that act. If damage is caused by reason of the defective construction or insufficient maintenance of a building or other structure, as well as in the planting or propping of

trees, the possessor of such building or structure is bound to make compensation. However, if the possessor has used proper care to prevent the occurrence of the damage, the owner is bound to make compensation. If there is also some other person who is responsible for the cause of the damage, the possessor or owner may exercise a right of recourse against such person.

6 Protection against liability

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

An agreement for exemption of liability for defects or disturbance is enforceable. Unless the non-liability clause specifies otherwise, such clause does not exempt the seller from the repayment of the price. Furthermore, a non-liability clause cannot exempt the seller from consequences arising from his or her own acts or facts that he or she knew and concealed. Environmental problems are generally excluded from all-risk insurance.

7 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?

Under the Thai conflict of law rules, the law of the country where a property is situated governs the form required for the validity of a contract, document or other juristic acts relating to immovable property.

8 Jurisdiction

Which courts 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?

There is no specialised court in relation to real estate disputes. Where a dispute is a civil action, it may be commenced by filing a complaint (known as a plaint) with the court of first instance having territorial jurisdiction. A civil case in connection with a criminal offence may be brought either in the court where the criminal case is being tried, or in a court competent to try civil cases. Two or more persons may join in an action as joint plaintiffs and may be joined as joint defendants where there are common interests in the subject matter of a suit.

At time of filing the complaint, the plaintiff must deposit court fees in an amount determined by the nature of the action and the amount of relief requested. For claims, the court fee is 2.5 per cent of the claimed amount but shall not exceed 200,000 baht.

Within seven days from acceptance of the complaint, the plaintiff must request the appropriate officer to serve a summons to answer, with a copy of the complaint, on the defendant. Service may be made on the defendant at his or her domicile or place of business, in court or by the defendant's acceptance of service. When service cannot be made, the court may issue an order for substituted service, by posting, advertisement or otherwise, and service is effective 15 days after completion of such substituted service.

In actions against a non-domiciliary defendant, service is made by sending process to the defendant's foreign office or domicile. In the absence of contrary provisions in an international treaty to which Thailand is party, the plaintiff must provide a translation of the summons and complaint and other documents to be served in the official language of the country in which service is to be made or in English, together with certification of accuracy of translation and deposit for expenses to be fixed by the court. Again, in the absence of international agreement providing otherwise (Thailand is not party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965),

the court will arrange service through the Ministry of Justice and Ministry of Foreign Affairs. Service will be effective 60 days after the date of such service. Where the non-domiciliary defendant conducts business in Thailand, directly or by agent, or by written agreement has designated an agent for service in Thailand, service may be sent to the defendant, his or her business or his or her designated agent at the location of the business of the defendant or the agent's residence. Service on a non-domiciliary defendant is effective 30 days after date of such service.

A party need not be qualified to do business in Thailand to enforce remedies in Thailand. However, as Thailand is not party to any treaties or conventions on enforcement of foreign judgments, foreign judgments are not enforceable. Authenticated copies of foreign judgments may be received in evidence at trial. Thailand is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Geneva Convention for the Execution of Foreign Arbitral Awards (1927). A final foreign arbitration award rendered in a proceeding wholly or mainly in a foreign country, reciting all matters required by applicable convention, may be recognised and enforced if it is not contrary to public policy or morality. The court may refuse enforcement on proof of defences such as:

- annulment, invalidity or lack of finality of award;
- lack of adequate notice during arbitration proceedings;
- an award beyond the scope of, or not disposing of, issues submitted under an arbitration agreement; or
- an arbitration proceeding conducted other than in accordance with the agreement of the parties or the law of the country in which the arbitration took place.

9 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?

Currently, the only investment vehicle with pass-through characteristics available is a Thailand Property Fund for Public Offering (PFPO). In October 2010, the Thai Securities and Exchange Commission approved a new regulatory framework for establishing REITs in Thailand, but to date the relevant laws and regulations have not yet been enacted. A PFPO is structured as a mutual fund while a REIT is managed as a trust transaction. The investment units in a PFPO and a REIT must be listed on the Stock Exchange of Thailand. Both PFPO and REIT are not deemed tax entities, and hence are not subject to income tax. However, holders of REIT trust certificates, as well as unit holders of a PFPO, will be subject to income tax upon receipt of dividends from a REIT or a PFPO, as the case may be.

10 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

Foreign investors customarily use private limited companies, as the shareholders' liability is limited to the amount invested (and any outstanding payment owing on shares).

See question 3 regarding limitations.

11 Organisational formalities

What are the organisational formalities for creating the above entities? What requirements does your jurisdiction impose on a foreign entity? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The formation of a private company is governed by the CCC. Registration at the Ministry of Commerce's department of business development proceeds as follows:

- name reservation;
- filing of memorandum of association;
- full subscription of shares;
- calling of a statutory meeting by the promoters to formally bring the company into existence;
- promoters hand over the business to the director(s); then
- the company is registered as a legal entity (or juristic person).

The process of forming a limited company generally takes about one to three working days.

Companies and juristic partnerships organised under Thai law are subject to taxation on their worldwide income, both from Thailand and from foreign sources. Companies and juristic partnerships organised under foreign laws are subject to taxation only on income from sources within Thailand. A foreign company is deemed to be carrying on business in Thailand if it has an employee, representative or go-between in Thailand to carry on its affairs, and thereby derives income or gains here. Therefore, a foreign company that establishes a branch office and derives income or gains therefrom in Thailand is deemed to be carrying on business in Thailand and thus is subject to corporate income tax for its branch office net profit. Wholly owned subsidiaries of foreign companies established as companies or juristic partnerships under Thai law are deemed Thai, not foreign, and are subject to corporate income tax. Reduced rates at the progressive rates of 15 per cent to 30 per cent are granted to small and medium-sized enterprises.

12 Documentation

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?

It is not customary for parties to execute a form of non-binding agreement, such as a letter of intent, before the execution of a binding contract of sale in transactions of smaller values and where terms are less complicated. Under Thai law, as long as the parties have not agreed upon all points of a contract upon which, according to the declaration of even one party, agreement is essential, the contract is, in the event of doubt, not concluded. In addition, an understanding concerning particular points is not binding, even if they have been noted down.

13 Contract of sale

What are typical provisions in a contract of sale?

A contract of sale typically contains the following provisions:

- definition of property;
- payment terms;
- representations and warranties of the seller;
- title transfer date; and
- liability for transfer fees and taxes.

The typical down payment is 10 to 20 per cent of the purchase price. An escrow arrangement is not common. Good title is evidenced by a copy of the title document certified by the Land Office. Title search is generally done by the purchaser at his or her cost, unless the seller agrees otherwise.

Typical general representations and warranties given by the seller are:

- the seller's valid title to the property;
- that the property is clear from all forms of encumbrances, such as mortgages, security interests, claims, charges, liens, leases, tenancies, licences or other rights of occupation, options, or other agreements affecting the same; and

- that no investigation, action, suit or proceedings are pending before any court or by any governmental body that seeks to restrain, prohibit or otherwise challenge the sale of the property.

Unless otherwise agreed, parties shall be equally responsible for the transfer fees and stamp duties. All other taxes are to the account of the seller, but the burden may be passed on to the buyer by contract.

See question 2 for details of taxes and fees.

14 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?

Under the Enhancement and Conservation of National Environmental Quality Act 1992, the owner or possessor of the point source of leakage or contamination causing death, bodily harm or health injury of any person or damage in any manner to the property of any private person or of the state shall be liable to pay compensation or damages. This liability exists regardless of whether such leakage or contamination is the result of a wilful or negligent act of the owner or possessor. Exceptions to this liability are available if it can be proved that such pollution leakage or contamination is the result of:

- force majeure or war;
- an act undertaken in compliance with an order of the government or state authorities; or
- an act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly responsible for the leakage or contamination.

The compensation or damages to which the owner or possessor of the point source of pollution shall be liable include all the expenses actually incurred by the government service for the clean-up of pollution arising from the incident.

Typical seller's covenants would include warranties for compliance with environmental laws and absence of claims, and indemnities against breach thereof. Typical buyer's covenants would be compliance with environmental laws and indemnities thereof for claims against the seller. Remedies for breach would be typical claims for contractual breach (ie, court action and claims for damages).

15 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?

The law stipulates that a lease over an immoveable property is not extinguished by the transfer of ownership of the property hired. The transferee is entitled to the rights and subject to the duties of the transferor towards the tenant. Typical covenants made by sellers of property with existing leases would be indemnities against defaults, no renewal or amendment of the current lease without the consent of the buyer, no third-party liability, such as brokerage fees, etc. Estoppel certificates from tenants are not customarily required.

16 Leases and mortgages

Is a lease generally subordinate to a mortgage pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a mortgage upon foreclosure? Do lenders typically require subordination and non-disturbance agreements?

At foreclosure, the mortgagee has priority over the mortgaged property. If the lease was registered with the consent of the mortgagee, it shall not be extinguished by the transfer of ownership arising from enforcement of the mortgage. However, if the lease was registered after the registration of the mortgage without the consent of the mortgagee, the mortgage has priority over the lease and such lease will be erased from the register where its existence prejudices the right of the mortgagee on the enforcement of the mortgage. Lenders typically require conditional assignment of lease from a borrower who is a lessee, conditional assignment of rental from a borrower who is a lessor, or both.

17 Delivery of security deposits

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

Security deposits are common in the form of cash. Leases customarily have periodic rent reviews.

18 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? Does your jurisdiction provide statutory priority for recorded instruments?

Title insurance and legal opinion letters are not common. Recently, however, title searches conducted by lawyers on behalf of buyers or by buyers themselves have become commonplace, especially with respect to transactions of larger value. Typical methods of title searches include examination of land documents at the relevant land office, bankruptcy searches, searches at the Legal Execution Office and relevant courts and corporate searches (in cases where the owner is a corporate entity).

19 Structural and environmental reviews

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

Due to the costs involved, an engineering and environmental review would usually be arranged only with respect to larger transactions and property development projects. It is customary to get representations or an indemnity. Environmental insurance is not common. A zoning report or legal opinion is advisable, although this is typically arranged only in relation to new development projects or where the buyer intends to build new structures or have specific purposes for the property.

20 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?

Leases are usually reviewed by lawyers as well as on the business side. Where the clients are the lessees, we generally point out the following:

- leases of more than three years are enforceable only for three years, unless they are made in writing and registered with the competent authorities;
- any increase in rentals may be capped;

- it is the lessor's liability to pay land and house tax (12.5 per cent of the annual rental) and any other income-related taxes and stamp duties;
- ownership of constructions and other improvements over the leased property;
- free rent during the fitting-out period; and
- lessee's termination rights without penalty in certain circumstances.

21 Other agreements

What other agreements does a lawyer customarily review?

Other agreements and documents usually reviewed by lawyers are:

- service agreements and other ancillary agreements, as it is customary for lessors to divide the lease into lease of premises and service and agreement for tax reasons;
- title documents; and
- rules and regulations where the leased premises are in a building or a property development.

22 Closing of transaction

How does a lawyer customarily prepare for a closing?

The list of deliverables at closing would principally include:

- executed lease and ancillary documents;
- lessee's and lessor's authorisations, corporate documents and personal identifications, where relevant;
- copy of title documents; and
- keys and access cards to the leased premises.

Where the lease is financed, the financing source would typically require conditional assignment of the lease and the landlord's consent thereof, valid insurance over the leased property with the financing source named as a beneficiary and assignment of rental in the event that the lessee subleases the leased premises.

FINANCING

23 Form of lien

What is the method of creating and perfecting liens?

The forms of security under Thai law are limited. Basically only mortgage of immoveable property and certain types of machinery and ships, pledge and guarantee are available under Thai law. Floating charges are not yet recognised. Other types of security, such as assignment of receivables, hire purchase, conditional sales, escrow arrangements, etc, are available contractually.

24 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?

A foreign person, natural or juristic, is qualified to make a loan secured by collateral in Thailand without having to qualify to do business in Thailand. Any of the forms of security as discussed in question 23 may be created in favour of the foreign person. With respect to a juristic person mortgagee, the land office would require that the mortgagee be permitted under its constitutional documents to take mortgage over the land as security for the loan.

To be valid and enforceable under the law, a mortgage must be in writing and registered with the relevant authorities (ie, the land office). The registration fee is 1 per cent of the amount of mortgage up to the maximum amount of 200,000 baht. There is no such maximum amount for mortgage of a condominium unit. Stamp duty is also levied at the rate of 1 baht for every 2,000 baht up to

a maximum of 10,000 baht. Mortgages are transferable by way of registration at the land office and payment of the registration fee and stamp duty as mentioned above.

25 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 unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

The maximum rate of interest chargeable by the international financial institutions of which Thailand is a member, banks or financial institutions registered and located in foreign countries, is currently 20 per cent per year. The maximum rate of interest chargeable by other persons and entities is 15 per cent per year. In the event that the interest rate applicable under an agreement exceeds the maximum rate of interest permissible under Thai law, all interest accrued but unpaid may not be recoverable by the lender. Payment of fees, expenses, charges and penalties payable to the lender may be reclassified as income similar to the interest on a loan and therefore may be subject to the withholding tax. Offshore loans typically set interest rates in reference to international interest rates indices. Local interest rates are set in reference to the minimum lending rate (MLR) of a specific bank or the average MLR of a number of local banks.

26 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?

Enforcement of mortgage under Thai law takes two forms: by foreclosure and by entering action in court. Foreclosure is instituted when the debtor has failed to pay interest for five years, or the mortgagor is not satisfied that the mortgaged property's value is sufficient to pay the indebtedness, or when there is no other encumbrance on the mortgaged property. Other than the above conditions, mortgage can be enforced only by entering an action in court for a judgment ordering the mortgaged property to be seized and sold by public auction. As foreclosure is rather cumbersome, it is hardly ever resorted to. In most cases, mortgage is enforced by filing a case in court and getting a court judgment for sale of the mortgaged property by public auction. Enforcement through judicial procedure is treated as any civil litigation and could take one to three years in the first court.

27 Protection of collateral

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

Thai law does not recognise the concept of mortgage in possession.

28 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 filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged property or additional financing encumbering the mortgaged property or ownership interests in the borrower?

In a mortgage, if the estimated value of the property (in cases of foreclosure) or the net proceeds (in cases of auction) are less than the amount due, the debtor of the obligation is not liable for the difference. In this respect, the mortgage agreement must specify that in the event of enforcement of the mortgage, if the net proceeds realised from the sale by public auction of the mortgaged property

are less than the outstanding amount payable by the mortgagor, the mortgagor shall, until all such amounts shall have been actually paid in full to the mortgagee, remain liable to promptly pay the deficient amount to the mortgagee. With respect to pledge, the law stipulates that in the event of enforcement, if the proceeds are less than the amount due, the debtor remains liable for the difference. In the context of bankruptcy, a secured creditor may file a claim for repayment of the debt on the following conditions:

- when he or she agrees to surrender the asset afforded as security for the benefit of all creditors, he or she may claim for the full amount of debt;
- after he or she has already enforced his or her claim against the asset given as security, he or she can claim for the balance of the debt remaining unpaid;
- when he or she has asked the receiver to sell by public auction the secured assets, he or she can claim for the balance of the debt remaining unpaid; and
- when he or she has appraised the secured asset, he or she can claim for the balance remaining unpaid.

29 Cash management systems

Is it typical to require a cash management system and do lenders typically take reserves?

Lending banks typically require borrowers to maintain certain accounts for various purposes into which all monies, revenues and receipts received or recovered by the borrower must be deposited and distribution of which shall be according to an order of priority specified by the bank.

30 Credit enhancements

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

In a real estate transaction, letters of credit are not common. Holdbacks and guarantees may be required with respect to construction defects or environmental problems, or in an extended closing. Payment guarantees may be required but sellers would generally prefer escrow arrangements. In smaller value transactions, sellers would generally have security in the form of deposit, instalment payments and contractual provisions of forfeiture of such payments in the event closing does not occur.

31 Loan covenants

What covenants are commonly required by the lender in loan documents? What is the difference depending on asset classes?

Loan covenants typically follow international practice and include proper authorisations, compliance with laws, pari passu ranking,

negative pledge regarding creation of security interest over any of the borrower's assets, not to incur any financial indebtedness subordination of connected party loan, no change of business, no merger or acquisition, payment of taxes, maintaining certain accounts, etc.

32 Financial covenants

What are typical financial covenants required by lenders?

Financial covenants typically follow international practice and include debt-service coverage ratios, gearing ratios, financial reporting requirements and ongoing periodic or on-demand appraisals.

33 Bankruptcy

Briefly describe the bankruptcy system in your jurisdiction.

Under Thai law, bankruptcy is an involuntary act whereby the law causes the property of a company or debtor to be distributed among its creditors. Creditors may place a debtor in involuntary bankruptcy if the debtor is indebted to one or more plaintiff creditors for at least 1 million baht (in the case of a natural person), or 2 million baht (in the case of a juristic entity), and such debtor must be insolvent. Creditors have the right to receive repayment of the debt only when they file their claim with the receiver within the specified period.

In 1998, the Bankruptcy Act was amended to provide for restructuring or reorganisation of a company in a manner similar to the US chapter 11 provisions. Automatic stay is recognised in the context of business restructuring or reorganisation. On the day the court makes an order accepting the petition for business reorganisation, an automatic stay also commences. The automatic stay prevents creditors from commencing or continuing lawsuits against the debtor, filing dissolution or bankruptcy petitions, enforcing payment of debt against the security asset (in the case of secured creditors) without the approval of the court, carrying out the execution of a judgment over the assets (in the case of judgment creditors), seizing or selling the debtor's assets, etc.

A lender cannot collect rent during a bankruptcy unless there has been a prior assignment of rent. However, such form of assignment is treated as a contractual obligation under Thai law. Therefore, the interest that an assignee has in an assigned property under an assignment agreement is not that of a secured creditor. The effect of an assignment is, subject to the limitations under bankruptcy laws (ie, cancellation of prior dispositions by a bankrupt), to transfer the rights and claims into the ownership of the assignee.

See question 28 with respect to the impact of bankruptcy on secured creditors.

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34 Secured assets

What are the requirements for creation and perfection of a security interest in non-real property assets? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Security interest on non-real property is limited to pledge or mortgage of certain types of machinery and vessels. Pledge requires delivery of the pledged property to the pledgee or a third party agreed by a custodian. Where the pledged property is a share in a company, recordation of such pledge in the share registry of the company is required. Mortgage requires registration with the competent authority.

35 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 filing, has the concept been upheld?

It is not typical for lenders to require that each borrower be an SPE. An SPE is typically established as a private limited company. There is no concept of an independent director of SPEs formed as a private limited company in Thailand.



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