

Real Estate

Contributing editor
Joseph Philip Forte



2016

GETTING THE
DEAL THROUGH

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DEAL THROUGH 

Real Estate 2016

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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 has 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;
- lease of immovable property for more than three years;
- mortgage;
- 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 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?

Thailand only has a system for the registration of interests, and failing to register the transfer of ownership makes the transaction void.

In cases of failing to register a lease of property with a lease term of more than three years, the lease term is automatically reduced to three years. Leases with a term of three years or less do not require registration.

Failure to register the mortgage will void the transaction.

Failure to register security interests will not void the transaction between the parties, but the security interests will not be enforceable against third parties.

The registration of an ownership, a leasehold, or a security interest with the relevant Land Office guarantees both title and priority to the registering party.

3 Registration and recording

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

Legal requirements for registration of conveyances, leases and real estate security interests include execution of a land sale, lease or security interest agreement with the relevant Land Office, and payment of the applicable fees and taxes at the Land Office.

The rules for registration are the same for each province, but their application may differ slightly from land office to land office, since the interpretation of the rules is at the discretion of the competent official.

Fees and taxes to be paid for conveyance of title are:

- a transfer fee: at the rate of 2 per cent of the price of the land as appraised by the relevant land office;
- income tax: generally, property must be transferred at a price not lower than its market value (ie, the price as appraised by the Land Department). Capital gain, if any, derived from the transfer of assets is subject to corporate income tax. Corporate income tax is generally imposed at the rate of 20 per cent of net profits (accounting period 2014-15). Reduced rates of 15 per cent are granted to small and medium-sized enterprises (companies with paid-up capital not exceeding 5 million baht) with net profits not exceeding 1 million baht;
- withholding tax: a corporate withholding income tax of 1 per cent of the selling price or the price as appraised by the Land Department, whichever is greater, is imposed on the transfer of immovable assets. The transferee is obliged to withhold this tax and remit the same to the competent official at the time of registration of rights and juristic acts. This 1 per cent withholding tax is regarded as an advance tax payment that can subsequently be used by the transferor as credit against the corporate income tax payable;
- specific business tax (SBT): the transfer of immovable property is subject to SBT imposed at the rate of 3.3 per cent (this rate includes municipal tax) of the selling price or the price as appraised by the Land Department, whichever is greater; and
- stamp duty: the transfer of immovable property is subject to stamp duty of 5 per 1000 baht (0.5 per cent) of the selling price or the price as appraised by the Land Department, whichever is greater. If SBT has already been paid for the transfer, the transfer will be exempt from stamp duty.

Fees and taxes to be paid for the registration of a lease are:

- registration fee: at the rate of 1 per cent of the total rental fee for the whole lease period; and
- stamp duty: the lease of immovable property is subject to stamp duty of 1 per 1000 baht (0.1 per cent) of the selling price.

Fees to be paid for the registration of a mortgage are:

- registration fee: at the rate of 1 per cent of the mortgage amount with a maximum of 200,000 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?

In general, foreign nationals cannot own land in Thailand. Under Thai law, a 'foreigner' is defined as:

- a natural person who is not of Thai nationality;
- a juristic entity that is not registered in Thailand;
- a juristic entity incorporated in Thailand with foreign ownership accounting for half or more of the total number of shares or registered capital; or

- a limited partnership or ordinary registered partnership whose managing partner or manager is a foreign national.

Buildings and any other structure on the land may be owned, and separate title registrations over such buildings are possible. Thai law also allows foreign nationals (individual or corporate) to directly own up to 49 per cent of the aggregate unit space of a condominium building. In addition, foreign majority-owned companies located in an industrial estate or that have received investment promotion from the Board of Investment may be allowed to own land for their business.

These restrictions do not apply to foreign tenants, since foreign nationals are allowed to lease property in Thailand under the same rules as Thai nationals.

5 Exchange control

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

Unlimited amounts of Thai baht or foreign currency may be brought into Thailand; however, as a general rule, such foreign currency must be sold to or converted into baht by 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 costs, net of all taxes, with proper documentary evidence;
- unlimited remittance of proceeds from a sale of shares with the required documentary evidence; and
- remittance of an unlimited amount in payment of certain types of service fees, including transport and communication, with appropriate documentary evidence.

When purchasing foreign currency for one of these purposes in an amount exceeding US\$50,000 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.

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?

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 immoveable 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.

A tenant is liable to the lessor for any injury resulting from a delay in informing the lessor if:

- the property is in need of repairs;
- a preventive measure is required for avoiding danger; or
- a third person encroaches on the property or claims a right over it.

A tenant is also liable to the lessor for any loss or damage that may result from alterations or additions to the property the tenant made without permission of the lessor, as well as for any damage caused to the property by his or her own fault or by the fault of persons living with him or her or by his or her subtenants.

There are no specific liability rules for lenders on real estate.

7 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.

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?

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 immoveable property. Contractual choice of law provisions pertaining to properties located in Thailand that choose the law of a different country are not enforceable.

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?

There is no specialised court or other tribunal 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 a certification of accuracy of translation and deposit for expenses to be fixed by the court. Again, in the absence of an 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 the 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.

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?

Generally, Thai law treats commercial property and residential property in the same way. There are, however, the following differences between leasing residential and commercial property (provided the lease has been properly registered as a lease for commercial or industrial purposes with the competent officer):

- The maximum lease term for a residential property is 30 years, whereas it is 50 years for a property for industrial or commercial purposes.
- A residential lease can generally not be mortgaged as a security for financing, whereas a lease for industrial or commercial purposes can be mortgaged as a security, under application of the mortgage rules for immoveable property *mutatis mutandis*.
- A residential lease terminates upon the death of the lessee, whereas a lease for industrial or commercial purposes can be inherited by the heir of the lessee.
- Transfer of the lease right to third parties or sublease of a residential property requires the consent and cooperation of the lessor, whereas the lessee of a property for commercial or industrial purposes has the right to sublease or transfer the right to lease, wholly or partly, to

a third person, unless it is specifically stated otherwise in the lease agreement.

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?

The Building Control Act and the Town and City Planning Act regulate development, construction, and the permissible uses of land in different zones. This zoning regime is specified in greater detail through ministerial regulations issued under the above-mentioned laws. Additional restrictions on the use of real estate can originate from environmental laws, such as the Enhancement and Conservation of National Environmental Quality Act or the Forest Act.

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?

In case the state needs to acquire any immoveable property for the provision of necessary public utilities or national defence, for the acquisition of natural resources, for town and city planning, for the development of agriculture, industry or land reform, or for other public purposes, if the transfer of ownership of such immoveable property is not agreed upon otherwise, a property can be expropriated under the Immoveable Property Expropriation Act. A royal decree on demarcation of the area to be expropriated is then enacted prior to the expropriation. A survey of the land to be expropriated is performed and within 30 days of completion of the survey, a committee is appointed, comprising of a representative of the expropriating office, a representative of the Land Office, a representative of another state agency, and a representative of the local assembly, in order to appraise the estimated price of the immoveable property to be expropriated and the amount of compensation to be paid.

The following persons are entitled to receive compensation:

- the owner of, or the person who is legally in possession of, the land to be expropriated;
- the owner of tenements or other constructions that cannot be demolished and existed on the land to be expropriated on the date the Royal Decree comes into force or constructed later by permission of the officer;
- the lessee of land, tenement, or other constructions on the land to be expropriated, but the lease contract shall be made in writing prior to the date the Royal Decree enacted under section 6 comes into force or made later upon the permission of the officer and such contract still is valid on the date the officer or his entrusted person takes possession of that land, tenement or construction. The compensation in this case shall merely be paid to the lessee who has to leave that land, tenement or construction prior to the termination of that lease contract;
- the owner of perennial plants on the land on the date the Royal Decree comes into force;
- the owner of tenement or other constructions that are able to demolish and existed on the land to be expropriated on the date the Royal Decree comes into force, but that person is not required to demolish that tenement or construction upon request of the land owner. Compensation shall be paid only for demolition, relocation and reconstruction; and
- any person who lost his or her right of way or his or her right to lay down water pipeline, drainpipe, electricity line or the like through the land to be expropriated but only in the case that the person pays considerations in return for the use of that right to the owner of the land to be expropriated.

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?

According to the Thai Penal Code, the court can order the forfeiture of a property that was used or possessed for use in the commission of an offence or acquired through the commission of an offence.

14 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency 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 42 with respect to the impact of bankruptcy on secured creditors.

Investment vehicles

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?

Investment can be made in limited companies, public limited companies, partnerships as well as mutual funds and other similar vehicles. Generally, companies and partnerships are subject to corporate income tax. Mutual funds, such as general mutual funds, infrastructure funds and real estate investment funds are pass-through-entities for Thai corporate income tax purposes.

16 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).

17 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); and
- the company is registered as a legal entity (or juristic person).

The registration of the incorporation of a limited company can be completed within one day provided that all documents have been properly signed by the promoters, directors and shareholders.

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 out 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 20 per cent with a tax exemption for the first 300,000 baht of the net profits are granted to small and medium-sized enterprises.

Acquisitions and leases

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 categories of ownership and occupancy are:

- Freehold ownership: can be held perpetually and inherited by heirs or sold and transferred by the registered owner.
- Lease: regulated in Thailand under the rules for hire of property, and therefore not a real right such as a leasehold, as understood in common law jurisdictions, but a mere contractual tenancy right against payment of a rental fee. It needs to be registered on the title deed if the lease term exceeds three years and it cannot be inherited or transferred without the consent of the owner. The lease ends upon the death of the lessee.
- Usufruct: this is the right of a person (the usufructuary) to use, manage, and occupy land owned by another person, for a term of up to 30 years. It needs to be registered on the title deed and it cannot be inherited or transferred. Usufruct ends upon the death of the usufructuary.
- Superficies: this is the right of a person to own buildings, structures, or plantations upon or under the land owned by another person, for a term of up to 30 years. It needs to be registered on the title deed and it can be inherited, unless otherwise provided in the act creating it.
- Habitation: this is the right of a person to occupy another person's building as a dwelling place without having to pay rent, for a term of up to 30 years. It needs to be registered on the title deed and cannot be inherited or transferred.
- Servitude: this is a non-possessory right on land that usually involves two or more separate plots of land, one of which (called the servient property) is burdened while the other (called the dominant property) benefits from the servitude. Common examples of servitudes include using an access road over adjoining land plots or laying irrigation ditches, pipelines, or utilities over neighbouring plots. A servitude

must be registered on the title deed and extinguishes in the case of non-usage for 10 years or by total destruction of the dominant or servient property.

All the above-mentioned interests can only be created by being registered in one of the following land title documents:

- Nor Sor 4 Jor (also called Chanod), which is the only land title deed certificate granting full private ownership of land. The land can be subdivided and there are no general restrictions. The exact boundaries of land under a Chanod title have been accurately surveyed and plotted by GPS.
- Nor Sor 3, which is not a full ownership title deed, but only certifies a right of possession. The land boundaries under a Nor Sor 3 have not been accurately surveyed yet. Once they have been surveyed, the document will be called a Nor Sor 3 Gor or Nor Sor 3 Khor.

There are a multitude of other land documents and certificates issued by the Land Office or other government offices, but they cannot be used for registration of any benefits or encumbrances on real estate.

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?

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 it has been noted down.

20 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.

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?

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 injury to 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).

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?

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.

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?

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. Ground (or head) leases are not treated differently from other commercial leases in this regard.

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

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.

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).

Interests registered first have priority. The priority among interests can only be reordered by registration, not by mere contract between the parties.

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? 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.

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?

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

- 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.

28 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.

29 Closing preparations

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

The list of deliverables at closing would principally include:

- executed agreement and ancillary documents;
- the parties' authorisations, corporate documents and personal identification, where relevant;
- copies of title documents; and
- keys and access cards to the premises.

In the case of a financed ordinary lease, 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. If the lease period exceeds three years, the lease must be registered with the competent Land Department.

In the case of a financed purchase of property or a financed lease under the Act Governing Leasing of Immoveable Property for Commercial and Industrial Purposes, the financing source would typically be required to have been registered as the mortgagee on the land title deed.

The timing between the contract and closing varies widely and depends on the circumstances, but usually takes around three to six months. The timing of the closing and the funding is usually simultaneous.

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?

The closing is done in person with all parties present, or by their representatives who are authorised by power of attorney, and are present at the competent land office. The transaction must be registered in the title deed by the land officer, after he or she has obtained the executed official form agreement of the transaction (eg, sale or lease agreement) and the required fees and taxes.

31 Contract breach

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

The remedies for a breach of a real estate sales or financing contract depend mainly on the content of the contract. In real estate sales contracts, it is common for any deposits made by the buyer to be forfeited and the contract terminated if the purchaser does not remedy his or her breach within a certain period of time. Purchasers or sellers are able to make a claim for damages against the defaulting party, but must sue in court and obtain a judgment first. The contract cannot be specifically enforced without a prior judgment by the competent court.

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?

The tenant can demand reimbursement of reasonable expenses incurred for necessary repairs, or terminate the lease contract if the property is not in a condition suitable for the purpose it was hired for.

If the tenant uses the property for purposes that are not provided for in the contract, or fails to take the necessary care in the ordinary maintenance or the petty repairs of the property, the landlord may notify the tenant, and, in the case of non-compliance, terminate the contract. The same applies in the case of the tenant failing to pay the rental fee after having been put on notice to do so.

In enforcing the rights of eviction, a civil case needs to be instituted. In such an event, the provisions of the Civil Procedure Code of Thailand shall apply. If the judgment debtor (ie, the tenant as possessor of the property) fails to comply with an eviction order, the judgment creditor is entitled to file an ex parte application to the court for an order appointing the executing officer to procure the judgment creditor to take possession of the property. The court has the power to order the arrest and detention of the judgment debtor, entrust the whole or part of the property to the judgment creditor, and, where necessary, allow the obstructive matters that prevent possession to be destroyed.

Land eviction can be a time-consuming process, as it involves lengthy court proceedings, and it may take more than a year to complete.

The specific contract rules of the CCC about hire of property apply to a lease of immoveable property.

Financing

33 Secured lending

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

In Thailand, mortgages are used to create a lien on real estate to secure indebtedness. The mortgagor assigns a property to the mortgagee as security for the performance of an obligation without delivering the property to the mortgagee. The mortgagor may also mortgage his or her property as security for the performance of an obligation by another person.

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?

Financing for ground (or head) leases is available in Thailand, depending on the disposition of the financial institutions. The difference between financing for land ownership transactions and financing for leases is that in the case of a land ownership transaction, a mortgage on the land can be registered as the collateral, whereas for a lease, the right to lease can only be used as a security if the lease is registered under the Act Governing Leasing of Immoveable Property for Commercial and Industrial Purposes. For ordinary leases which do not fall under this act, only the assignment of the lease can be used as collateral.

35 Form of security

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

Security interest in immoveable property is limited to the mortgage under Thai law. A mortgage is created by contract whereby the mortgagor assigns a property to the mortgagee as security for the performance of an obligation without delivering the property to the mortgagee. A contract of mortgage must be made in writing and registered by the competent official.

A mortgage over land does not extend to the buildings. The mortgagee may sell the buildings with the land but can exercise his or her preferential right only against the price obtained for the land. A mortgage over buildings erected or constructions made upon or under the land of another person does not extend to such land, and vice versa.

36 Valuation

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

Third-party real estate appraisals are required by lenders if the size and expected value of the property is great enough to justify such a requirement. It is recommend to use appraisers that are licensed by the Securities Exchange Commission (SEC) or are certified by a professional organisation such as the Valuers Association of Thailand (VAT), the Thai Valuers Association (TVA) or the Royal Institution of Chartered Surveyors (RICS).

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?

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 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.

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 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.

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, the mortgagee must notify the debtor in writing to perform his or her obligation within a reasonable amount of time which must not be less than 60 days from the date the debtor has received such notice. If the debtor fails to comply with such notice, the mortgagee may take court action to request a judgment ordering the mortgaged property to be seized and sold by public auction.

Special rules apply if the mortgagor has mortgaged his or her own property as security for the performance of an obligation by another person. In that case, the mortgagee must send the said notice to the mortgagor within 15 days of the date of sending the notice to the debtor. If the mortgagee does not take any action within the 15-day period, the mortgagor shall be discharged of the liability on interest and compensation owed by the debtor, together with encumbrances that are accessories of the said debt, all of which occur from the lapse of the 15-day period.

For enforcement of the mortgage, the mortgagee is entitled to claim foreclosure, if there are no other encumbrances on the same property, under the following conditions in lieu of sale by public auction:

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

Update and trends

In August 2015, the Business Collateral Act was approved covering a broader range of assets that could be used as security. A new type of contract called a business collateral contract will be introduced under the Act. The security provider grants security over property for the performance of an obligation to the security receiver. The security provider stays in possession of the collateral and is entitled to use, exchange, dispose, transfer and mortgage the asset that is collateral. The types of collateral include, inter alia, moveable property, intellectual property, a business and a claim. The security provider can be an individual or a financial institution whereas the security receiver has to be a financial institution or any other person under the Act. The business collateral contract requires written form and has to be registered with a competent officer. Implementing regulations, for example, regarding the secured assets list and registration procedure, are required before the Business Collateral Act becomes effective. The associated amendment of the Civil and Commercial Code awaits royal assent and announcement in the Royal Gazette.

In addition to the above, public sale of the mortgaged property can also be achieved without taking an action in court. The mortgagor is entitled to send a notice to the mortgagee at any time after the debt is due to proceed with the sale by public auction (if there are no registered mortgages or preferential rights on the same property). The mortgagor's notice serves as a letter of consent for sale by public auction. The mortgagee shall then proceed with the sale by public auction within one year of the date of receipt of such notice. If the mortgagee fails to do so, the mortgagor shall be discharged of the liability on interest and compensation owed by the debtor, together with encumbrances that are accessories of the said debt, all of which occur from the lapse of the said period.

As foreclosure is rather cumbersome, it is rarely resorted to. In most cases, a mortgage is enforced by filing a case in court and obtaining a court judgment for sale of the mortgaged property by public auction. Enforcement through a judicial procedure is treated as any civil litigation and could take one to three years at first instance.

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 any limitations on the amount or method of calculation of the deficiency?

Unless otherwise agreed by the parties in the mortgage agreement, if the estimated value of the property (in the case of foreclosure) or the net proceeds (in the case of auction) are less than the amount due, the borrower is not liable for the difference.

The mortgagor who has mortgaged his or her property as security for the performance of an obligation by another person is not liable to the obligation exceeding the value of the mortgaged property. Any agreement to the contrary is invalid. However, this rule does not apply in the case where the primary debtor is a juristic person and the mortgagor has managerial power to control the operations of the primary debtor, and the mortgagor has guaranteed the primary debtor a debt in a separate suretyship agreement.

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 recognise the concept of mortgagee in possession.

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?

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. However, this does not apply to the mortgagor who has mortgaged his or her property for the performance of an obligation by another person (see question 40). 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 remaining unpaid debt;
- 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.

43 Cash management and reserves

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

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.

44 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.

45 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.

46 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.

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?**

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. If the pledged property is a right, it has to be represented by a written

instrument that has to be delivered to the pledgee and the pledge has to be notified in writing to the debtor of the right. 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.

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?**

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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