

THE REAL ESTATE  
LAW REVIEW

TENTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

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TENTH EDITION

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# PREFACE

Just as the ninth edition of *The Real Estate Law Review* was being published, the world was thrown into total confusion by the rapid spread of a deadly new disease. Covid-19 has affected the global economy like nothing this generation has experienced, with every major jurisdiction forced into a series of lockdowns. However, it must not be forgotten that the pandemic is primarily a human tragedy with more than 93 million cases globally and 2 million deaths. As we begin to see light at the end of the tunnel, the global health crisis will undoubtedly complete its transition into an economic one, with significant global debt and widespread unemployment. Covid-19 will leave its mark on all aspects of how we live and work, including each and every sector of the global real estate market.

A great deal has happened since the first edition of *The Real Estate Law Review* appeared in 2012, but nothing more significant than the covid-19 pandemic, a truly global crisis. This tenth edition of *The Real Estate Law Review* will continue to prove its worth by providing readers with an invaluable overview of how key markets across the globe operate and how they react to major world events. Covid-19 has served as a stark reminder that it is no longer possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of global events, and *The Real Estate Law Review* continues to help its readers to do just that.

This edition extends to 27 key jurisdictions around the world, and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effect on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of their client's own jurisdiction.

In the year that the UK finally left the EU and Joe Biden became president of the United States, the significance of Brexit and American politics have been put into perspective by the covid-19 pandemic. Covid-19 is a truly global issue affecting every jurisdiction and, of course, its real estate market. In the background, and almost forgotten, Brexit and the associated economic and political fallout has continued to be a concern for the UK economy and its real estate markets. Although investment volumes fell off a cliff in the first half of the year, we have started to see interest from both overseas and domestic investors, underlining the continued importance of UK real estate as an investment asset. The world's cache of investment capital is likely to prompt a surge in investment activity once some degree of confidence returns. The UK, and London in particular, seem certain to remain attractive to overseas investors looking for a safe haven for their funds. The next few years will undoubtedly

be challenging as we begin the road to recovery, but opportunities will arise, and real estate will remain a key part of investment strategies.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this tenth edition of *The Real Estate Law Review*. I would also like to thank the members of the Law Review team for their sterling efforts in coordinating the contributions and compiling this edition. Finally, I wish everyone the very best of health for 2021 and beyond.

**John Nevin**

Slaughter and May

London

February 2021

# THAILAND

*Tananan Thammakiat, Susumu Hanawa, Namita Tangpitukpaibul,  
Chaveeporn Vithayanupong and Tanyamai Thanissranont<sup>1</sup>*

## I INTRODUCTION TO THE LEGAL FRAMEWORK

### i Ownership of real estate

Real estate under Thai law includes the land and property permanently fixed to land or forming a component part of the land. Real estate also includes real rights in relation to the land, the property fixed to the land or the property that form a component part of the land. Real estate is mainly governed by the Civil and Commercial Code (CCC) and the Land Code (the Land Code). Joint ownership of real estate is also allowed under the CCC. There are significant differences between the types of ownership and the title documents that can be shown in the fundamental forms of real estate as follows.

#### *Land*

Land can either be freehold land or land with a right of possession.

Title to freehold land is represented by a land title deed. The land title deed is the most secure and marketable title document in Thailand.

Owners of land with the right of possession are permitted to use or occupy the land for specific purposes and under certain conditions as described by the Land Code. The title for the land possession right is issued in different forms such as certificate of utilisation, certificate certifying the usage of the land or claim certificate. Land with a certificate of utilisation is generally recognised as marketable land as it can be upgraded to be a land title deed.

#### *Building*

Generally, the CCC treats land and buildings located on land as a piece of real estate. This is because the buildings are permanently fixed to the land and form a component part of the land. It can therefore be assumed that either the landowner is considered to be the owner of the buildings constructed on their land or that the building owner has the right or is permitted to use the land, for example in a form of land lease. If the building owner does not own or have rights over the land, the land and buildings shall be considered separate and independent real estate and the buildings would not be included as a component part of the land. However, under Thai law the building owner would not be issued with a building title document. In practice, a construction permit or the official building sale contract is prima facie evidence of ownership of a building.

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<sup>1</sup> Tananan Thammakiat and Susumu Hanawa are partners, Namita Tangpitukpaibul is a senior associate and Chaveeporn Vithayanupong and Tanyamai Thanissranont are associates at Chandler MHM Limited.

### ***Condominium***

Ownership of a building registered as a condominium shall be divided into separate parts of ownership comprising exclusively owned individual units and common property shared among the owners of the individual units. The registered rights to ownership of the individual units and common property are the main feature differentiating a condominium from other types of real estate. A title deed of a condominium unit (similar to the land title deed) will be issued to a unit holder as evidence of ownership of such unit. In addition to the CCC and the Land Code, condominiums are also governed by the Condominium Act.<sup>2</sup>

#### **ii System of registration**

As a general rule, Thailand operates on a system of land and building registrations where real estate transactions shall be conducted in writing and registered with a registrar at the Land Department. Nevertheless, this system is subject to certain exceptions under relevant laws. If these procedures are not followed, the transactions shall be valid between the parties but the parties would not be able to assert their rights and titles over the real estate with any third parties. In addition to the registration, certain formalities may be required in accordance with the relevant laws and regulations, for example, a public announcement prior to the registration of certain real estate transactions. The transaction registered with the registrar will be recorded on the title documents of such real estate. The registered particulars and relevant documents are open to public inspection.

#### **iii Choice of law**

The parties can freely choose and specify an applicable governing law in their contracts. However, the Conflict of Laws Act<sup>3</sup> provides that if the subject matter is real estate, the law of the jurisdiction in which the real estate is located shall be the governing law. Therefore, in practice, the parties to the agreement with respect to Thai real estate usually opt for Thai law as property rights in relation to real estate are governed by Thai law.

## **II OVERVIEW OF REAL ESTATE ACTIVITY**

After the Tom Yom Kung financial crisis in Asia, the real estate market gradually recovered. Several measures were launched by the relevant authorities to boost investment in the Thai real estate market. One of the instruments that supported investment into the real estate market is the property fund for public offering (PFPO). The PFPO market has been growing consistently for more than a decade. The success of the PFPO led to another real estate evolution in 2012 with real estate investment trusts (REITs) being launched to replace the PFPOs.

Over the past decade, Thailand's property market has been in a slow but consistent upward trend. A key reason for the upward trend has been the increasing number of foreigners

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2 The Condominium Act, BE 2522 (1979).

3 The Conflict of Laws Act, BE 2481 (1938).

that visited or decided to live in Thailand, whether workers or retirees. Other factors have included a better economic outlook resulting in higher take-up and occupancy rates. However, the market performance differs somewhat between different cities in Thailand.<sup>4</sup>

Since 2019, the real estate market has faced significant changes globally. The office market has been changing with the trend of agile workplaces and co-working spaces. Another example is the shift towards e-commerce and online shopping.<sup>5</sup> Although this trend has reduced the demand for retail space, the demand for warehouses and factories in the Thai market has increased to support online activities. Over the past year, the Thai real estate market was heavily affected during the spread of covid-19 (in part because Thailand relies heavily on tourism and expatriates living in major cities). The new supply of real estate development was reduced by more than 73 per cent in the second quarter of 2020.<sup>6</sup> Most of the leading Thai developers saw a reduction in profits during the first quarter of 2020. As investors from mainland China and Hong Kong have been unable to travel due to travel restrictions, the demand continues to be lukewarm.<sup>7</sup> With such an uncertain environment, concerns about cashflow and supply chains, together with the difficulties buyers face in conducting inspections, have all contributed to a fall in demand for most types of property.

As a result of the financial institutions tightening mortgage lending for property developments, local developers have been driven to source funds by forming joint ventures with foreign partners. Since 2018, there were more than 20 joint ventures formed between Thai and foreign partners to develop residential and commercial projects in Bangkok. More than 75 per cent of the total joint ventures projects in Bangkok were formed with Japanese companies.<sup>8</sup> Fundraising methods that have been widely used in recent years among real estate developers in Thailand include an issuing of a bonds or a trust units by establishment of a publicly listed REIT to the public.

### III FOREIGN INVESTMENT

Certain business activities, including construction businesses, real estate development and trading and other relevant service businesses, are reserved for Thai nationals under the Foreign Business Operations Act (FBOA).<sup>9</sup> Under the FBOA, foreigner participation is not generally allowed if the share capital held by the foreign investors exceeds 50 per cent or more. This foreign capital restriction can be waived if a Foreign Business Licence is granted or such foreigners qualify for an exemption under a treaty to which Thailand is a party or is obligated to abide by. Currently, the only applicable treaty is the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America. In the same manner, land ownership by foreigners is not permitted as a general rule under the Land Code. A company in which foreigners hold more than 49 per cent of the shares, or where more than half of the shareholders are foreigners, is also not permitted to own land in Thailand.

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4 Marcus Sohlberg, 'Thailand Property Market Outlook 2021: A Complete Overview', 10 November 2020, [www.asiapropertyhq.com/thailand-property-market/](http://www.asiapropertyhq.com/thailand-property-market/).

5 CBRE, CBRE Research, *Real Estate Market Outlook 2019 Thailand*.

6 See footnote 4.

7 id.

8 See footnote 5.

9 The Foreign Business Operations Act, BE 2542 (1999).

Nevertheless, some special laws and regulations allow foreigners to hold more than 49 per cent of the shares in a company or own land for specific promoted businesses or in specific areas – for example, investment promotion laws and those related to the industrial estates and the eastern special development zone. In exchange for such privileges, the foreign investors must complete certain requisitions and comply with the post-acquisition requirements, for instance, the minimum capital requirements, technology transfer programme and reporting requirements.

While there is a restriction on foreigners owning land, there is no such restriction on buildings, and accordingly foreigners can acquire and hold ownership rights in respect to buildings located on land under leasehold or other rights (though such foreigners owning the building must hold for their own use and must not offer the building for lease). However, in respect to condominiums, under the Condominium Act, ownership by foreigners is permitted provided it does not exceed 49 per cent of the total saleable area of a particular condominium.

#### **IV STRUCTURING THE INVESTMENT**

There are several choices of investment structure for investing in real estate projects in Thailand. Foreign investors may choose to have a local partner or invest independently in the real estate project, depending on several factors. The main investment options for real estate investment in Thailand are as follows.

##### **i Joint venture**

As stated in Part III, a foreign entity is restricted from owning land in Thailand unless it qualifies for certain exemptions. In addition, a foreigner engaging in immovable property businesses would normally be required to obtain a foreign business licence under the FBOA. However, it is rare for a foreign business licence to be issued for foreigners wishing to engage in the immovable property business in Thailand.

An investor who does not qualify for an exemption and seeks an approach to overcome such restriction can make an investment by setting up a joint venture company with a local developer. This traditional investment structure is one of the most popular structures for real estate projects in Thailand for foreigners. The investment portion of the Thai local partner must not be less than 51 per cent of the total shares in the company for the company not to be subject to the foreign ownership limitation. Local developers have expertise and knowledge in the Thai real estate market, which could also support a foreign investor who has no experience in this type of investment in Thailand. Nevertheless, an investor should bear in mind that there is a limitation under this scheme in terms of decision making as this would normally be mutually agreed by both parties.

##### **ii Board of Investment of Thailand, Industrial Estate Authority of Thailand and EEC**

Alternative investment structures that are widely used for investment in Thailand include an investment promotion scheme from the Board of Investment of Thailand (BOI) and the Industrial Estate Authority of Thailand (IEAT). Incentives offered to promoted entities from both the BOI and IEAT can be categorised into tax incentives and non-tax incentives that include authorisation to own land required for business operations regardless of any other

contrary laws. To obtain such investment promotions, the investor must meet certain criteria – for example, have invested in a type of business included in the BOI promoted business list or have invested in an IEAT industrial estate.

A specific condition of the BOI provides that within one year after the promoted business is terminated or ends (for any reason) such land must be disposed of, otherwise the Director-General of the Land Department shall be empowered to dispose of such land. However, if a non-Thai national business operator who is granted authorisation to own land under IEAT scheme dissolves its business or its business is transferred, the land must be disposed of to IEAT or the transferee within three years from the date of dissolution or transfer as the case may be.

In addition to the above scheme, investment promotions are also granted under the Eastern Special Development Zone Act (the EEC Act).<sup>10</sup> The EEC Act also offers incentives to foreign investors to own land in the promoted zones in Chachoengsao, Rayong and Chonburi provinces (and in other areas, as prescribed by Royal Decree as special development zones, in the eastern part of Thailand), as under the BOI such land must be disposed of within one year after the promoted business is terminated or ends for any other reason.

### **iii Leasing land and owning buildings**

If an investor does not qualify for obtaining an investment promotion to own land under the BOI, IEAT or EEC schemes, they may consider an alternative investment option. An alternative option would be to lease the land and own the building as there are no specific restrictions on the lease of land and ownership of buildings by foreign entities. The maximum lease term must not exceed 30 years as prescribed under the CCC. It is important to be aware that although this scheme can avoid the restrictions under the Land Code, operation of certain businesses may be subject to limitations under the FBOA.

### **iv REIT**

After the collapse of the Thai property sector in 1996, a contributing factor to the Tom Yum Kung Crisis in 1997, Thailand's government attempted to stimulate the Thai economy through implementation of various strategies. In relation to the real estate sector, the Securities and Exchange Commission of Thailand (SEC) supported the sector by adapting existing mutual fund regulations to establish a vehicle for PFPOs. PFPOs attracted investors by enabling them to partially own large real estate projects through the issuance and offer of investment units. Funds raised from investors were used to refinance the existing project and enable the development of new projects, enhancing growth in a shorter time than through traditional property project development.

Nevertheless, PFPOs have some disadvantages. The laws and regulations that were applicable when PFPOs were established focused heavily on investor protection, such as limiting the types of assets in which a PFPO could invest and restricting the debt ratio. This made PFPOs a strictly regulated vehicle for real estate investment. Subsequently, under an SEC Notification in 2012, the REIT was established. REITs are a more commonly and widely used vehicle at an international level involving an immovable property investment system that is easier to use and more transparent. REIT regulations also provide more operational and investment flexibility and opportunity.

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10 The Eastern Special Development Zone Act, BE 2561 (2018).

The main characteristics of the REIT scheme in Thailand are as follows:

- a REITs in Thailand are trust-type schemes based on the Trust of Transactions in Capital Market Act.<sup>11</sup> A REIT in Thailand is not a corporation. Accordingly, the trustee of a REIT is formally the asset holder;
- b the assets invested in consist of:
  - immovable property (freehold rights, leasehold rights or possession rights over the land and the ownership or leasehold rights over the building); or
  - the shares of companies that hold immovable property;
- c the total value of the immovable property invested in must be at least 500 million baht;
- d the trust beneficiary rights units issued for REITs in Thailand must be listed on the Stock Exchange of Thailand. Currently, private placements of REIT units for REIT establishment are not permitted. There are several ongoing discussions on an amendment to current regulations or an issuance of new regulations to support the establishment of private REITs; and
- e there is also a minimum offering amount of at least 500 million baht for trust beneficiary rights certificates.

Another advantage of a REIT is the ability to borrow money and use its assets as collateral. REITs can borrow up to 35 per cent of their total asset value from financial institutions, or 60 per cent if the REIT itself is investment grade. This makes REITs attractive from an investor perspective. REITs can also raise funds by issuing bonds, which are becoming more common in today's market.

## V REAL ESTATE OWNERSHIP

### i Planning

#### *Town planning*

One of the primary laws governing real estate development is the Town Planning Act,<sup>12</sup> which provides regulations in relation to the town planning process. A specific town plan for each province or area is issued separately to govern the area and is updated every five years. The specific town plans provide zoning, floor area ratios (FAR), open space ratios and other relevant requirements for each zone. To motivate developers to develop projects for the public benefit, a special privilege, the FAR Bonus System, was recently introduced. This allows the developer to gain additional FAR ratio if the development falls under the relevant conditions, for example, providing an area for public utilisation or a public park in the project or developing the project following the green building construction concept.

#### *Building construction control*

Under Thai law, construction activities are governed by the Building Control Act<sup>13</sup> as a general law. In addition, regulations issued by each municipality also cover construction in each area. Prior to the construction of a building in a location where the Building Control Act is enforced or where there is a town plan, the developer must obtain a construction licence from

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11 The Trust of Transactions in Capital Market Act, BE 2550 (2007).

12 The Town Planning Act, BE 2562 (2019).

13 The Building Control Act, BE 2522 (1979).



the local administrative office. In addition, certain types of building require a completion inspection by the relevant local administrative office for issuing building certificates. This is required prior to the commencement of the operation of the building.

## **ii Environment**

In response to the increase in concern about the environment, an environmental impact assessment has been introduced as one of the key prerequisites of real estate development projects in Thailand. A real estate development project may be subject to an environmental impact assessment (EIA), depending upon the nature and size of such real estate development project. The criteria are contained in the Enhancement and Conservation of National Environment Quality Act.<sup>14</sup> The project developer could be subject to civil and criminal liabilities if they fail to comply with such requirements.

Developers of small real estate development projects in certain areas of Thailand are not required to prepare the environmental impact assessment report (the EIA report); however, they may be required to prepare an initial environmental examination (IEE), which is the initial stage in the environmental assessment of a project at pre-feasibility level, for identifying and evaluating possible environmental impacts. The conduct of the IEE is less complicated in practice compared to the preparation of the EIA report or the environmental health impact assessment report (the EHIA report), which will be further discussed below.

If the real estate project is required to prepare and submit the EIA report to the Office of Natural Resources and Environmental Policy and Planning (ONEP), the competent authority for approval, the EIA report must be prepared by an EIA consultant authorised by the ONEP and in accordance with the guidelines published by the ONEP. To assess the impact on the environment from the real estate development project, the EIA report typically covers the forecasts of possible impacts that may occur during the course of the real estate development project. This is regardless of whether the impact on the environment is negative or positive. The report also covers mitigating measures as well as monitoring requirements to prevent an undesirable impact from the real estate development project. In addition, there are particular types of real estate development projects (e.g., large scale biomass power plant projects) that may be required to prepare an EHIA report instead of preparing the EIA report. This is because those types of real estate development projects are deemed to potentially have a more severe impact on environmental quality as well on the health of the affected community. Therefore, the EHIA report, for which the process is more complicated compared to the EIA report, is required to cover a health impact assessment as part of the EIA process.

## **iii Tax**

### ***Land and building tax***

In 2019, Thailand launched a new land and building tax law to repeal and replace the previous taxes. The aim of the new tax is to systemise the tax system and penalise the owners of unutilised land. This new tax system changes the tax base and who the taxpayers are. For some, it significantly reduces the tax rate. It imposes different tax rate ceilings depending

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14 The Enhancement and Conservation of National Environment Quality Act, BE 2535 (1992).

on the purpose for which the property is used. The purposes include agricultural purposes, residential purposes and purposes other than the previous two. Unutilised land is also subject to the land and building tax.

Taxable properties under the new land and building tax law are land, buildings and condominium units. Several tax exemptions are granted for specific land and buildings that comply with certain conditions. The specific land and buildings include the following land or buildings that would impact on real estate developers in Thailand:

- a* land and buildings under development as a housing or industrial project under the land allocation law;
- b* land or buildings under development as a condominium under the condominium law; and
- c* land or buildings under development as an industrial estate under the law governing industrial estates.

The new tax collection was implemented in 2020. However, owing to the covid-19 pandemic, a significant tax reduction was granted to all taxpayers. For the 2020 tax year, taxpayers were only required to pay 10 per cent of the assessed tax they were liable for.

#### ***Applicable tax for real estate transactions***

The relevant parties to transactions relating to land and buildings would usually pay income tax. In addition, they would also pay stamp duty. Stamp duty rates vary depending on the type of transaction. For example, the rate for lease of land or buildings is 0.1 per cent of rental fees throughout the term of lease and the rate for the transfer of land or buildings is 0.5 per cent of assessed price or selling price, whichever is higher. However, in a case where such transfer is subject to a special business tax, the stamp duty shall be waived. The special business tax is a fixed rate of 3.3 per cent of the assessed price or selling price, whichever is higher and shall be imposed on the commercial transfer. Certain exemptions shall be granted if the conditions are met.

#### **iv Finance and security**

When banks act as lenders for financing real estate projects, it is general practice to request security over the assets as well as any sponsorship undertakings or guarantees from a parent company.

A form of security interest in real estate is frequently a mortgage that is governed by the CCC. The mortgage agreement must be made in writing in Thai language, clearly indicating the mortgaged amount in baht and registered with the competent official.

Prior to 2016, there was no specific law governing the granting of leasehold rights over real property as a security. Parties usually created security in the form of a conditional assignment. Against this backdrop, the Business Security Act<sup>15</sup> was enacted on 2 July 2016. The security receiver under this act must either be a financial institution or other persons as prescribed in the ministerial regulations. A business security agreement must be registered via an online system with the Secured Transactions Registry Division, Ministry of Commerce.

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15 The Business Security Act, BE 2558 (2015).

Upon the enactment of the Business Security Act, rights and claims under the lease agreement can be placed as security in the business security agreement. Although it is not required by law, the Bank of Thailand requested that financial institutions opt for entering into conditional assignment of lease agreements and use registered business security agreements.

## **VI LEASES OF BUSINESS PREMISES**

As with leases for other kinds of premises, the leases for business premises are governed by the CCC. There are no specific restrictions on leases entered into by foreigners. The key provisions related to the lease of business premises are as follows.

### **i Term and renewal of rent term**

The duration of a lease for land or a building cannot exceed 30 years as a general rule. Given this limitation, the contracting parties may have an agreement in some cases that the lessor grants an option to the tenant to renew the contract after completion of the 30-year period. A lease under some special acts (i.e., the EEC Act and the Lease of Immovable Property for Commercial and Industrial Purposes Act<sup>16</sup>) can have a longer period of up to 50 years.

If a lease period for immovable property is over three years, the lease must be registered with the competent land office. A lease will only be enforceable for three years without registration. A typical term for a lease for commercial space such as retail space, office space or industrial space is usually three years. The agreement may include a renewal option for another three years. If a lease period is three years or less, a tenant can assert its rights under the lease agreement against third parties even without the registration. Prior to the commencement of the lease term, the tenant may request a rent-free fit out period for one to three months for carrying out fit-out activities in the leased premises.

### **ii Rental, security deposit and fee**

Payment of rent is an important element of a lease agreement under the CCC. A lease without a rental fee would not be considered as imposing a lease but other types of real rights may exist, for example, a right of habitation or usufruct – in these cases a different set of rules would apply. The rent can either be a fixed rent or a variable rent based on the turnover achieved by the tenant within the leased premises. Office and industrial rents tend to be fixed rent and retail rents trend to be variable rent.

Lease agreements almost always require the tenant to place a security deposit of one to three months of rent in the form of a cash or bank guarantee. In addition, it is usually agreed in the lease agreement that the tenant must be responsible for the other ancillary costs as well as taxes and other duties. For a lease agreement with a term of more than three years, which is required to be registered at the land office, the costs for the registration include a registration fee at the rate of 1 per cent of the total rental throughout the lease term and stamp duty at the rate of 0.1 per cent, also of the total rental throughout the lease term.

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16 The Lease of Immovable Property for Commercial and Industrial Purposes Act, BE 2542 (1999).

### **iii Maintenance and repair**

Unless the lease agreement specifies otherwise, the tenant is obligated to conduct minor repairs and maintenance and the lessor is obligated to conduct major maintenance. In general, in the case of a long-term lease where the tenant occupies all or a major part of the leased premises, the obligation of the tenant will include major maintenance.

### **iv Transfer and sublease**

Transfer of a lease by the tenant requires consent from the landlord, but generally the parties may agree in advance to allow the transfer of a lease within group companies. The right of a tenant to sublease is also prohibited unless consent from the landlord is obtained.

If the lessor sells or transfers the ownership of the leased property to a third party, the lease is binding on the transferee of the leased premises. The transferee is required to assume all rights and obligations of the lessor and effectively becomes a new lessor in place of the original lessor.

### **v Termination**

If the tenant is in breach of its obligation including failing to pay the rent, the lessor is entitled to terminate the lease and forfeit the security deposit. However, in practice, the lease agreement normally provides a remedy period of from 30 up to 90 days depending on the negotiation. Typically, a lease agreement does not allow the tenant to terminate the lease early prior to the expiration of the lease term. This is unless the lessor is in breach of its obligation or the lease agreement specifies otherwise.

## **VII DEVELOPMENTS IN PRACTICE**

### **i Leasehold structure for real estate development project**

The length of an ordinary lease under the CCC will be agreed between the parties to the lease agreement, up to a maximum limit of 30 years. Therefore, the most common arrangement for a large real estate development project in Thailand would be a 30-year leasehold structure. However, the construction period for a large real estate development project would normally be a few years, depending on the size or complexity of the project. In certain cases, a lessor may allow a lessee to have a reasonable grace period for the construction of the project before the lease term begins. The construction period may be granted by way of granting the right of superficies under the CCC or granting the right to use without consideration as a mechanism to allow a lessee to commence its construction without being subject to the terms of the lease, as well as to allow a lessee to fully develop and utilise its project during a 30-year lease term.

### **ii Current EIA trends**

As previously discussed in relation to environment issues, real estate development projects in Thailand are subject to an environmental assessment process. Most project developers are required to prepare an EIA report. The EIA report will be considered and approved by the EIA committee. EIA committees are appointed for specific types of project, for example, residential projects, industrial projects or petroleum and mining projects. Members of the EIA committee consist of experts on various topics such as environment, town planning, health and sanitation, building control, noise and air pollution. The special expert may be invited to attend the meeting of the EIA committee on a case-by-case basis. Given the

significant increase in real estate development projects, especially residential projects in urban areas during recent years, the EIA committee strictly considers and comments on the EIA reports. Moreover, the conditions and requirements of the EIA process provided under the Enhancement and Conservation of National Environment Quality Act<sup>17</sup> have been upgraded and are more detailed. A matter of interest to the public or the community is one of the major factors for the EIA committee's consideration. Neighbouring landowners to proposed projects have become more active in claiming and protecting their rights. Certain projects have been delayed due to the processing of the EIA report.

### **iii Changes and uncertainty under the law**

Apart from the impact from the covid-19 outbreak in 2020, real estate developers are facing a series of changes and uncertainties, including a new land and building tax system and the pending Bangkok town plan. The latest tax collection system differs materially from the previous one in several aspects. In addition, since the new tax collection system has just been implemented (in late 2020), delayed by eight months from the original deadline, it has not run smoothly for all taxpayers. For example, a tax filing letter should have been sent to each land and building owner; however, this letter was not sent in many cases, which could have delayed the tax payment by the taxpayers or caused them confusion. Also, the interpretation of the land utilisation under this new tax system may need some time to become consistent.

Another significant change in the law is in relation to the Bangkok town plan. The current version of the Bangkok town plan has already been implemented and was due to expire in 2018; however, its expiration date has been extended until the new plan is launched. Relevant authorities aim to make certain changes to the current Bangkok town plan to connect the city centre to suburban areas by achieving closer proximity (e.g., by mass transit), which would make these areas within daily commuting distance. Many real estate project developers have recently become aware of such upcoming changes. As a result, they are likely to postpone their real estate development projects in Bangkok until the new Bangkok town plan is officially announced. Although the details of certain proposed changes to the current Bangkok town plan have been disclosed to the public, such as increasing in the ratio of a building's total floor area to the size of the piece of land upon which it is built in certain areas in Bangkok; certain land zoning controls being modified; and implementation of new measures to support real estate development projects located close to the major mass transit stations, the new Bangkok town plan is still being considered by the competent authority. As a result, the final plan may be different from the disclosed details.

### **iv Real estate-backed initial coin offering**

Over the past few years there has been a significant growth in fintech, and with that an increase in risk involved in this non-traditional form of fund raising. As a result, in May 2018, a legal framework for digital tokens, cryptocurrencies and initial coin offerings (ICOs) was implemented in Thailand by the Royal Decree on Digital Assets Business.<sup>18</sup> This framework is expected to provide more flexibility to the issuer and investors in prescribing unorthodox rights between parties (i.e., any rights as agreed between the issuer and the investors such as profit distribution from the project or rights to receive products or services as agreed) by using

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17 The Enhancement and Conservation of National Environment Quality Act, BE 2535 (1992).

18 The Royal Decree on Digital Assets Business, BE 2561 (2018).

smart contracts. With regard to the decentralised feature of blockchain of not having to have intermediaries, it is also expected to save cost in relation to the offering process. The SEC has also recently revised regulations regarding the offering of digital tokens backed by real estate to better protect the rights of the holders of digital tokens. These regulations came into force and effect in May 2020. They adopt a similar mechanism to REIT regulations, for example, by appointing a trustee to protect digital token interests or having an SEC-approved asset appraiser to appraise the invested assets. Currently, while there are some SEC-approved ICO portals that are ready to support this new mechanism as service providers and scrutinisers of the offering of digital tokens, an SEC-approved ICO issuer offering digital tokens backed by real estate has not emerged in the market yet. It is, however, understood that several real estate developers in Thailand are now preparing registration documents to be filed with the SEC. If this new product is adopted, the Thai real estate industry could be more attractive in terms of investment opportunities to real estate developers and investors domestically and internationally.

#### **v Sap-Ing-Sith**

As mentioned above, foreigners are not permitted to own land in Thailand although there are certain exemptions under the Land Code. To enable foreigners to undertake a real estate development project in Thailand, a leasehold structure is commonly implemented to overcome the foreign restriction on land ownership. However, an ordinary leasehold structure under the CCC still has certain drawbacks; for example, it is a non-transferrable right unless prior consent from the lessor is granted. Sap-Ing-Sith is a new type of right to utilise real estate that has been adopted in recent years. The Sap-Ing-Sith Act<sup>19</sup> was implemented to provide more flexibility and certainty for foreigners investing in real estate development projects in Thailand.

Sap-Ing-Sith is arguably similar to leasehold rights to some extent, but there are several key differences as the purpose of Sap-Ing-Sith is to overcome certain limitations associated with the leasehold structure.

In accordance with the Sap-Ing-Sith Act, Sap-Ing-Sith permits a maximum term of 30 years, which is renewable at the end of the term. The agreement must be made in writing and registered with the competent authority for it to be enforceable. Sap-Ing-Sith rights may be granted to certain permissible types of real estate:

- a* land, represented by a title deed;
- b* land, represented by a title deed, together with buildings constructed thereon; and
- c* condominium units under the Condominium Act.

Only the owner of those types of real estate may grant Sap-Ing-Sith rights to another person (the 'Sap-Ing-Sith Holder'). In general, Sap-Ing-Sith rights are transferrable, inheritable and may be mortgaged. A Sap-Ing-Sith holder also has the right to alter the underlying asset under Sap-Ing-Sith without prior consent of the owner, and the ownership of the buildings constructed on the underlying asset under Sap-Ing-Sith belong to the Sap-Ing-Sith holder for the term of Sap-Ing-Sith.

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<sup>19</sup> The Sap-Ing-Sith Act, BE 2562 (2019).

## **VIII OUTLOOK AND CONCLUSIONS**

On 18 November 2020, the secondary regulations under the Sap-Ing-Sith Act were issued. It is hoped that Sap-Ing-Sith may become a new productive mechanism in addition to current available investment structures for foreigners undertaking real estate development projects in Thailand. The issuance of the regulation regarding the offering of digital tokens backed by real estate in May 2020 has captured tremendous attention, especially among real estate developers in Thailand during the past few months. The offering of digital tokens backed by real estate could become popular for developers who are looking for an alternative source of funds. With respect to real estate development, the upcoming Bangkok town plan, which is expected to be launched in 2021, will be important for real estate developers. In terms of investment, due to the adoption of big data, internet of things, 5G and cloud computing together with the escalation in demand for data storage and processing resulting from increased levels of remote working during the covid-19 pandemic, data centres may be an attractive option for the future investment in Thailand.

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