

THE REAL ESTATE  
LAW REVIEW

TWELFTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

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John Nevin

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# PREFACE

This time last year the world's focus was still on the covid-19 pandemic as the dominant issue affecting us all. Tragically, just as we were starting to see light at the end of the tunnel, the much-hoped-for fresh start was stopped in its tracks by the war in Ukraine. The past 12 months have been dominated by war in Eastern Europe and the ensuing global humanitarian, economic and political fallout. The stability and certainty craved by all currently remains a distant hope.

Following on from COP26 in Glasgow, this year the focus was on Sharm El Sheikh for COP27. Once again, some key world leaders were notable by their absence and there remains the sense that more could and should have been achieved. This year, a further focus was acknowledging the developed world's contribution to the climate problem, and a new loss and damage fund was agreed upon to help meet the climate change costs suffered by the world's poorer nations. It has been accepted that something needs to be done, and that includes in the property industry. The built environment accounts for at least 25 per cent of the UK's greenhouse gas emissions, and significant changes are necessary if net zero targets are to be met. To date, the focus has been on high-profile new developments with eye-catching environmental, social and governance credentials. How to deal with the much larger stock of older, lower-value and underperforming buildings remains a bigger challenge.

A great deal has happened since the first edition of *The Real Estate Law Review* appeared in 2012; Brexit seems but a distant memory, as a pandemic was swiftly followed by war in Europe and a cost of living crisis. These have truly been unprecedented times. This 12th edition of *The Real Estate Law Review* will, perhaps more than ever, continue to prove its worth by giving readers an invaluable overview of how key markets across the globe operate and how they react to major world events. The covid-19 pandemic and the war in Ukraine have both served as stark reminders that it is not 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 25 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 effects 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.

Covid-19 has not gone away but we have learned to live with it. The pandemic's legacy will be its lasting effect on how we live, work and play, and on each and every aspect of the global real estate market. More immediate headwinds include the very real risk of a long and deep recession, soaring inflation, rising interest rates, the withdrawal of government



lockdown support, failing consumer confidence, increasing costs, a critical shortage of labour and materials as well as ongoing supply chain problems. On a more positive note, the property industry has traditionally proved to be resilient, and covid-19 demonstrated its ability to adapt to difficult and challenging times. The United Kingdom will be anxious to maintain its position at the top of global shopping lists as investors look for relatively safe havens for their investment capital. London and the regions seem certain to remain attractive to overseas investors looking for investment opportunities, both in the traditional real estate investment markets and also the rapidly evolving alternative asset sectors. The next few years will undoubtedly be challenging as we continue on the journey to recovery, but opportunities will arise, and real estate will remain a key part of global investment strategies. Knowledge of the global real estate markets will prove key to identifying and making the most of buying opportunities.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this 12th 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 2023 and beyond.

**John Nevin**

Slaughter and May

London

February 2023

# THAILAND

*Tananan Thammakiat, Susumu Hanawa, Piyawanee Watanasakolpunt,  
Namita Tangpitukpaibul, Tanyamai Thanissranont and Chaveeporn Vithayanupong<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 forms a component part of the land. Real estate is mainly governed by the Civil and Commercial Code (CCC) and the Land Code (Land Code). Joint ownership of real estate is also allowed under the CCC. The fundamental forms of real estate and the corresponding differences between the types of ownership and the title documents are outlined below.

#### *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 a 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.

#### *Buildings*

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 the form of a 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

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

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.

### ***Condominiums***

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 features 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 registration 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. A 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 PFPOs.

Over the past decade, Thailand's property market has experienced 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).

who have 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. The Thai real estate market was heavily impacted by the spread of coronavirus (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 Thai 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 have been 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 venture 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 issuing bonds or trust units via the establishment of publicly listed REITs 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, foreign participation is not generally allowed if the share capital held by the foreign investors exceeds 50 per cent. 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 by which it is obligated to abide. 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 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, minimum capital requirements, technology transfer programmes 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 structures 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 ventures**

As stated in Section III, a foreign entity is restricted from owning land in Thailand unless it qualifies for certain exemptions. In addition, a foreigner engaging in an immovable property business 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 an immovable property business in Thailand.

An investor who does not qualify for an exemption and seeks an approach to overcome such a 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 Eastern Economic Corridor**

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), the business must dispose of the land, otherwise the Director-General of the Land Department shall be empowered to dispose of it. However, if a non-Thai national business operator who is granted authorisation to own land under the IEAT scheme dissolves its business or its business is transferred, the land must be disposed of to IEAT or the transferee within three years of 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 (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 REITs**

After the collapse of the Thai property sector in 1996, a contributing factor to the Tom Yum Kung Crisis in 1997, the government attempted to stimulate the Thai economy through the 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 investment 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 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 buildings 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 (EIA) 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 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 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 the 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 (EHIA report), which is 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 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. For the first two tax years (which is the transitional period), a 90 per cent reduction was granted to all taxpayers due to the covid-19 pandemic. In 2022, the tax rates for each type of property were officially launched. The rates vary depending on the value of the property, which range from 0.01 to 0.7 per cent of the value of the property. However, a local subdistrict administrative organisation may set the rates for its own subdistrict higher than those specific rates but not higher than the tax ceilings provided in the land and building tax act.

#### ***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 the lease of land or buildings is 0.1 per cent of the rental fees throughout the term of the lease and the rate for the transfer of land or buildings is 0.5 per cent of the 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 commercial transfers. 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 the Thai language, clearly indicating the mortgaged amount in baht and registered with a competent official.

Prior to 2016, there was no specific law governing the granting of leasehold rights over real property as 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.

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

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.

Since 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 has 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 terms**

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 deposits and fees**

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 tend 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 a rate of 1 per cent of the total rental throughout the lease term and stamp duty at a 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 BOI investment promotions**

On 8 August 2022, the BOI issued Notification No. 6/2565 re: criteria for approval for an investment promoted foreign entity to own land for office and residential purposes. Under such Notification, a foreign entity receiving BOI investment promotions and having at least 50 million baht registered and paid-up capital can own land for office (not more than 8,000 square metres) and residential (not more than 16,000 square metres in the case of residences of management personnel or specialists, and not more than 32,000 square metres in the case of residences of workers) purposes. The land used for office and residential purposes can be located in the same or different locations and must be used by the promoted entity only. In other words, the promoted entity cannot use the land for commercial purposes, for example, sell or lease the land, office or residence. In the case that the investment promotions are cancelled or terminated, the foreign entity must dispose of the land within one year. The Notification is effective from 13 June 2022 without an expiry date.

**ii Tax privilege for REIT buy-backs**

The introduction of REITs with a buy-back condition (REIT buy-back) in February 2021 supported real estate operators who suffered from the impact of the covid-19 pandemic because the REIT can invest in assets with a buy-back condition from property owners. In July 2022, the Revenue Department and the Department of Lands supported the REIT

buy-back by issuing regulations granting tax privileges and reducing registration fees on the relevant sale transactions under the REIT buy-back scheme in order to speed up the recovery of real estate investments.

The Royal Decree issued under the Revenue Code Governing Exemption of Taxes and Duties (Royal Decree)<sup>17</sup> was published in the Royal Thai Government Gazette to exempt all relevant taxes (i.e., corporate income tax, value added tax, special business tax and stamp duty) from the sale of assets under REIT buy-back transactions, that is, sale of assets to the trustee of a REIT with a buy-back condition by a property owner, and sale of assets to a property owner by the trustee of the REIT with a buy-back condition.

The Notification of Ministry of Interior Re Criteria on Special Reduction of the Registration Fee of Rights and Juristic Acts under the Land Code for the Transfer of Immovable Property between a Company or a Juristic Partnership and a Trustee of a REIT with a Buy-Back Condition in accordance with the Criteria prescribed by the Council of Ministers (Notification) was published in the Royal Thai Government Gazette to reduce the registration fee for the transfer of immovable property between a property owner and a trustee of a REIT with a buy-back condition, that is, sale of assets to the trustee of a REIT with a buy-back condition by the property owner, and sale of assets to the property owner by the trustee of the REIT with a buy-back condition.

### iii Sap-Ing-Sith

As previously mentioned, 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 projects 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*, a new type of right to utilise real estate, has been adopted in recent years. The Sap-Ing-Sith Act<sup>18</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 and inheritable, and may be mortgaged. A *Sap-Ing-Sith* holder also has the right to alter the underlying asset

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17 The Revenue Code Governing Exemption of Taxes and Duties (No. 753), BE 2565 (2022).

18 The Sap-Ing-Sith Act, BE 2562 (2019).

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*.

In 2022, the development of *Sap-Ing-Sith* has been slow, and there has yet to be notable precedent in *Sap-Ing-Sith* cases. A leasehold structure is still commonly implemented to overcome the foreign restriction on land ownership due to its simplicity and straightforward structure to undertake real estate development projects in Thailand.

## VIII OUTLOOK AND CONCLUSIONS

Since the amendment to the National Environmental Quality Promotion and Preservation Act on EIA chapter in 2018,<sup>19</sup> ONEP has continuously launched several improved sub-regulations of the EIA. Especially this year, almost 10 updated regulations on criteria, requirements and guidelines of EHIA, EIA and IEE reports have been enforced, together with the introduction of an electronic submission system for those reports. The regulations also include additional qualifications and requirements for EIA consultants to regulate them more thoroughly. These requirements directly affect EIA consultants, not real estate developers. However, developers must be more careful when engaging a qualified EIA consultant to ensure that the relevant reports have been properly prepared.

On a related note, the government is now working on a new draft National Environmental Quality Promotion and Preservation Act to introduce new concepts and mechanisms for environmental protection and pollution control in order to boost the efficiency of the Act, and comply with the international agreements of which Thailand is a member. Based on the draft provided in the public hearing process during the latter part of 2022, the new Act will have significant impact on the operation of industries. It will be beneficial to keep an eye on the final draft to see if there is any interesting impact on real estate projects.

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19 The National Environmental Quality Promotion and Preservation Act (No. 2), B.E. 2561 (2018).

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