

Real Estate 2021

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Real Estate 2021

Contributing editors**Patrick Williams and Devina Rana****Fried, Frank, Harris, Shriver & Jacobson LLP**

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Real Estate*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Finland, Indonesia, Ireland, Spain, United Arab Emirates and Vietnam.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Williams and Devina Rana of Fried, Frank, Harris, Shriver & Jacobson LLP, for their continued assistance with this volume.



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GENERAL

Legal system

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

Thailand adopts a civil law system in which laws are codified in statutes. While the courts can exercise some discretion to achieve an equitable outcome, Thailand does not have separate equity courts.

Before or during trial, it is possible for the parties to request the court to grant an injunction. Provisional seizure is also available.

Thai laws generally have a nationwide effect with regard to real estate.

Oral contracts are generally enforceable unless otherwise required by law to be made in a written form and be admissible in court. The only difference is the relative difficulty of proving the existence of an oral contract in court, but Thailand does not recognise the parole evidence rule.

Land records

- 2 | 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 has a nationwide real property registration system and transactions are generally required to be registered with the competent land office, otherwise it shall be deemed void. Ownership, leasehold (for more than three years) and security interests must be registered in principle.

These property interests must be recorded on a title deed. Registration of property interests can legally guarantee title and priority to the registered parties of the underlying immovable properties.

Registration and recording

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

All registrations and recordings of real estate transactions must be executed at the competent land office where the target property is located.

The rules for registration are universally applicable nationwide. However, the practices and requirements of each land office may vary, as land office registrars may interpret the same regulations differently.

Certain types of transactions are subject to applicable official fees, taxes and expenses. For example, transfer fees, withholding taxes (corporate or personal income taxes), specific business taxes (if any) and stamp duties are required for conveyance, while registration fees and stamp duties are required for registration of a lease or mortgage.

In a sale and purchase transaction, the seller and the buyer shall be bound to pay official fee equally, but this can be agreed otherwise by the parties. The seller normally bears the applicable taxes (specific business taxes, etc.).

Foreign owners and tenants

- 4 | 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?

A foreigner, either in the form of a corporation or an individual, as defined under Thai laws, is generally prohibited from owning land. However, there are certain exemptions and special permissions under some laws, such as the Investment Promotion Act of 1997, the Industrial Estate Authority of Thailand Act of 1979 and the Eastern Special Development Zone Act of 2018.

Nevertheless, foreigners can lease land and own construction on such land. They can also own a condominium unit, provided that the total aggregate unit space owned by them must not exceed 49 per cent of the total condominium space of the building.

Exchange control

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

Other than the regulatory reporting requirement at the time of outward remittance and mandatory conversion requirement to Thai baht for inward remittance, generally there are no material foreign exchange control issues relating to direct investment in Thai real property by a non-resident.

Legal liability

- 6 | 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?

In principle, an owner or tenant may face tortious liability for direct damage resulting from a wrongful act whether intentionally or negligently committed. Thus, an injured party may claim damages from the party who causes such damages.

Strict liability is imposed on the owner of a building where the damage is caused by defective construction or a lack of sufficient maintenance of the building. Compensation shall be made by the owner of the building. The possessor of the building, however, can prove that he or she has taken proper care to prevent damage to avoid potential liability.

There are no specific liabilities under Thai laws imposed on tenants, unless otherwise agreed by the parties in the lease agreement (eg, liability from the use of property contrary to ordinary course, damages caused to the leased property, alteration without the lessor's consent and failure to carry out maintenance and small repairs).

A real estate lender does not hold any specific legal liability unless the loan agreement provides otherwise.

Protection against liability

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

Generally, the owner cannot avoid tortious liability incurred from damage that is caused by his or her building and construction. Thus, liability insurance may be an alternative to insure against third-party claims. Environmental insurance can be found in Thailand, but it is rare due to the high cost of premiums and some limitations on coverage.

Choice of law

- 8 | 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?

The Conflict of Law Act of 1938 is applicable to transactions involving properties in two jurisdictions. The governing law on real estate is the law of the country in which the property is located. The provision to choose the law of another jurisdiction as the governing law is acceptable in general contracts. However, for contracts pertaining to real estate located in Thailand, Thai law is the sole choice of governing law and Thai courts will not accept any choice of law in matters concerning enforcement.

Jurisdiction

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

Real estate disputes are handled by the court of justice, which has the broadest and most common judicial authority. Civil cases, including real estate disputes (eg, claims against eviction, trespass, forced transfer of property, return of property, enforcement of mortgage and tort), can be commenced by plaintiff filing to the competent court of justice where the property is situated or to the court where the defendant is domiciled.

A real estate dispute involving a criminal case (eg, a claim against trespass, fraud, misappropriation and mischief) can be brought to the competent criminal court. An interested person can join the lawsuit as a joint plaintiff or a defendant during the court proceedings.

Delivery of pleading in Thailand may be made by the competent court to the defendant at the domicile or place of business or by the acceptance of the defendant. If the defendant is overseas, the plaintiff must proceed out-of-jurisdiction service by requesting the court to deliver a certified copy of the plaint and summons, in the official language of the destination country or English, to the defendant by international express mail, courier or through diplomatic channels, at the plaintiff's expense.

A party is not required to be qualified to do business in Thailand to enforce judicial remedies. However, foreign judgment is not enforceable under Thai jurisdiction, as Thailand is not a party to any treaties or conventions on enforcement of foreign judgments, but it can be used as an evidence in the court proceedings.

Commercial versus residential property

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

In principle, properties for commercial or residential purposes are not treated differently, except for some respects such as lease of properties for those purposes, etc.

Generally, lease of any property, whether for commercial or residential purposes, shall be subject to the Civil and Commercial Code, under which the lease term shall not exceed 30 years, etc.

Unlike a lease for residential purpose, a lease for commercial purpose can enjoy more benefits under the specific laws (eg, a lease term of up to 50 years subject to satisfaction of the requirements provided).

Planning and land use

- 11 | 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?

There are two main laws concerning town planning and land use.

The Building Control Act of 1979 regulates the requirements and conditions for any action in relation to buildings and constructions (ie, construction, modification and demolition). Those activities require prior approval from, or prior or post notification to the competent administrative officer. Non-compliance with the law may lead to severe fines and an imprisonment term or lead to rectification or demolition of the building. The penalty will double if the building is used for a commercial purpose.

The Town and City Planning Act of 1975 regulates the type of land usage in different areas. Each zoning regime is governed by separate regulations, which vary based on the particular province. Zoning areas will be periodically reviewed every five years.

Zoning decisions cannot be appealed upon its implementation. Thus, obtaining the written official confirmation from the competent authority to confirm compliance prior to the construction or acquisition of the land is common.

Government appropriation of real estate

- 12 | 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?

Expropriation of immovable property regularly occurs for the public benefit, (eg, for public utilities, national defence, acquisition of natural resources, town and city planning or other public purposes as prescribed under the government plan). The Immovable Property Expropriation Act of 2019 stipulates the requirements and the process of compulsory purchase of real estate and compensation.

Owners, tenants and sub-tenants of land and buildings are entitled to the compensation. Lenders, however, are generally not directly compensated.

Compensation for expropriation, on a case-by-case basis, shall be evaluated from various factors, including the value of the land, demolition costs, relocation costs and other damages resulting from the owner leaving the expropriated land.

Forfeiture

- 13 | 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?

As a general principle of criminal law, any property which is involved in the commission of a criminal offence (eg, money laundering or drug dealing) can be forfeited by court order and generally sold by way of public auction.

In addition to criminal cases, if a foreigner illegally owns the land or a landowner subsequently becomes a foreigner, it is required to dispose of the land within a period of one year from the date of becoming a foreigner under Thai laws.

Bankruptcy and insolvency

- 14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy cases are subject to the Bankruptcy Act of 1998 which applies a legal concept of involuntary bankruptcy (ie, only when commenced by a creditor filing a petition against a debtor). The case is within the jurisdiction of the Central Bankruptcy Court. In the case of court proceedings, an official receiver will be appointed. Although there is no automatic stay upon filing of an application for bankruptcy, upon such filing, the bankruptcy court will issue a court order staying execution against the assets of the bankrupted borrower case by case basis. Upon a seller's bankruptcy, the seller's fraudulent conveyance can be voided (even if it is implemented before bankruptcy) under certain statutory conditions.

Business reorganisation can be an alternative for corporate debtors. Debtors or creditors can commence business restructuring by filing a petition to the Central Bankruptcy Court. It allows a corporate debtor to continue business operations in accordance with the approved restructuring plan. There is an automatic stay upon the acceptance of filing of an application for business reorganisation.

INVESTMENT VEHICLES

Investment entities

- 15 | 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?

A private limited company is the most common form for foreign investors, although it is not a pass-through entity.

Alternatively, investment in real estate projects can be done through property funds and real estate investment trusts (REITs), of which the latter is more popular. While a REIT is a pass-through entity, a property fund is not. Property funds, however, are exempted from the applicable taxes on land transfer transactions (ie, value added taxes, specific business taxes and stamp duties), while REITs are still subject to those taxes.

Foreign investors

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

Private limited company investment structures are commonly used by foreign investors.

Organisational formalities

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

A private limited company can be established by way of registration at the Department of Business Development. Formal requirements of incorporated entities include having at least three individual promoters, remittance of registered capital (with at least 25 per cent paid-up) and preparation of constitutional documents (eg, Memorandum of Association, Articles of Association and list of objectives).

After the establishment, a private limited company must maintain at least three shareholders at all times. Any changes of matters of the company shall be subject to registration; otherwise, monetary penalties may be imposed against both the company and its authorised directors.

A foreigner within the definition of the Foreign Business Act of 1999, including a foreign-owned company, is subject to restrictions on operating businesses in Thailand and real property-related business is also generally subject to this restriction.

ACQUISITIONS AND LEASES

Ownership and occupancy

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

Legal ownership and occupancy interests in real estate that are recognised under Thai law include the following:

- ownership – an absolute right granted to the owner of property to use and dispose it or to acquire its fruits or to recover it from any person not entitled to take it, and prevent such person from unlawful interference;
- servitude – commonly known as a right of a way or easement, which is a property right granted to the dominant property on the servient property for access by foot or vehicle or use in any means; and
- right over leasehold asset – a right granted by the owner of real estate over a plot of land, a building on land or a condominium to create and register a transferrable right over the property of the owner for a maximum period of 30 years. The right is transferrable and can be inherited and pledged as a security. The right over the leasehold asset shall be registered with the competent land office.

Other than the above, there are leasehold, mortgage, joint ownership, possession, habitation, usufruct, superficies and charges.

Pre-contract

- 19 | What are the typical pre-contractual steps?

At the pre-contractual stage of sale of real property of substantial value, there are submission of reservation form, undertaking of comprehensive due diligence or execution of the letter of intent between the parties by a potential buyer. The legal effects of pre-contractual documents depend on the intentions of the parties. The parties can reserve certain provisions in the agreement to have either non-binding effect for common understanding between the parties or to have legal and binding effect on the parties, which the court may enforce.

During the course of negotiation, it is not customary for the owner to take the property off the market.

Having a real estate broker is not necessary for the transaction, but they are sometimes involved. Real estate brokers in Thailand are not specifically regulated. Thus, it does not require any educational requirements, certification, caps on commission, disclosure obligations or professional conduct regulations in Thailand.

Contract of sale

20 | What are typical provisions in a contract of sale?

A sale contract typically includes the following particulars:

- details of the property (eg, location and title owner);
- details of seller and buyer;
- purchase price and payment term;
- registration of transfer of property;
- taxes, fees and expense payment;
- representations and warranties of seller and buyer; and
- termination and breach of contract.

Typically, the down payment varies from 10 per cent to 20 per cent of the purchase price. In Thailand, it is not common to have an escrow arrangement. The buyer can verify the good title to property from the land title deed available at the competent land office at the buyer's expense.

Typical representations and warranties with respect to the title of property provided by the seller are legal ownership, transferability and confirmation on non-encumbrance over on the property, due or outstanding taxes or payment for the property, pending or potential litigations or claims, and compliance with the relevant laws and regulations.

Environmental clean-up

21 | 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?

The Enhancement and Conservation of National Environmental Quality Act of 1992 prescribes a duty of care for a business operator (ie, owner or operator) and imposes strict liability on them. A business operator who is a source of pollution or contamination that causes death, bodily harm or health injury to any person, or causes damage to the property of any individual or the state shall be liable for the compensation or damages, including expenses incurred by government services, for pollution clean-up.

When purchasing commercial real property, buyers sometimes conduct an environmental land survey, and generally the cost of the survey will be borne by them. If any contamination is found as a result of the survey, generally the seller will be responsible for the clean-up of such contamination unless the transaction is on an as-is basis.

Clauses regarding long-term environmental liability and indemnity that survive the term of a contract are not common in Thailand.

If any environmental defect is discovered on the target real estate before the execution of a real estate sales contract, the buyer usually requires the seller's covenant to cure that environmental defect before or after the closing. Completion thereof shall be stipulated as one of the closing conditions, or by setting such covenant as a post-closing obligation of the seller.

For breach of the provisions, remedies will be contractual damages or request for termination of the contract of sale.

Lease covenants and representation

22 | 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?

Representations and warranties from the seller usually include confirmation of any existing lease agreement, no current breach of lease agreement and completion of rent payment.

Typical covenants from the contract date to the closing include clauses on no material adverse change for the existing lease or no change of the lessor and the lessee.

Generally, representations and covenants do not cover brokerage agreements.

Lease representations and covenants generally do not survive after the completion of sale.

Estoppel certificates are not customarily required for the purchase of property that contains a large number of tenants as a condition to confirm the status of each lease agreement prior to the sale.

Leases and real estate security instruments

23 | 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?

Whether the lease will survive the enforcement of security interest (ie, mortgage) depends on the sequence of creation of lease.

If the lease is created after the security interest, it may not generally be subordinated, as registration of lease cannot be made without having consent of mortgagee and as long as consent of mortgagee is provided, the lease will survive after enforcement of mortgage. If the lease is created prior to the security interest, the lease will remain in effect for its full legal term upon the enforcement of the security interest.

The lender may ask tenants to enter into a subordination and non-disturbance agreement.

Unless otherwise stipulated in the lease agreement, the above analysis is applicable to either ground (head) leases or sub-commercial leases, as they are considered the same under Thai law.

Delivery of security deposits

24 | 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?

When ownership of real property is transferred to a buyer, all obligations under a perfected lease with respect to such real property (including the obligation to repay security deposits to existing tenants) are automatically transferred to the buyer. To ensure delivery of all security deposits, it is common for the buyer to offset the amount of such tenants' security deposits against the purchase price.

When entering into the lease agreement, a security deposit is commonly given to ensure the performance of obligations to the lessor. It can be made in any form of payment and it is customarily made in immediately available funds (eg, cash or cashier cheque), rather than letter of credit or bank guarantee.

It is common for residential and commercial leases to have a short term (usually not more than three years to avoid the burden of registration) and to have rent reviews at the end of this term.

Due diligence

25 What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Unless it is a large-scale investment project, it is not common to have an engineering company review the legality of the structure, use and occupancy of relevant real estate. However, it is common to have lawyers perform a legal due diligence investigation, regardless of the size of transaction. Due diligence is generally completed prior to execution of contract.

As the priority of interests in real estate is statutorily created as a result of registration with the land office, most information is usually obtained from the competent land office and other relevant government authorities.

As a preventive measure in real estate transactions, representations and warranties and indemnification clauses will provide contractual protection to buyer. There is no practice to use title insurance, legal title opinion or indemnity funds.

It is not usual, but if necessary, a written official confirmation letter from the competent authorities regarding legal use and occupancy can sometimes be obtained to confirm compliance and avoid potential disputes regarding the target property after closing.

Structural and environmental reviews

26 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?

This depends whether an engineering or environmental review is arranged on a case-by-case basis. Representations and indemnities on technical perspectives (eg, engineering and environment) are customarily provided.

Environmental insurance is available but not common in Thailand.

Review of leases

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

As long as it is an important agreement, a lease agreement is usually reviewed, not only by the business side but also by lawyers. One of the key legal issues to point out in particular under Thai law is how to keep a leasehold for more than 30 years for long-term projects.

Lenders generally do not allow a property management agreement to be prioritised to financing security instruments, but do not in practice require it to be subordinated to financing security instruments should it be deemed the ordinary course of business of the borrower.

Other agreements

28 What other agreements does a lawyer customarily review?

In commercial property transactions, in addition to the real property contract of sale itself, it is customary for lawyers to review a variety of other transaction-related documents, including:

- a certified copy of title deed;
- official purchase and sale agreement;
- construction permit and occupancy permit;
- property management agreements and other service contracts; and
- debt financing-related agreements, if applicable.

Closing preparations

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

Actions taken at the closing include preparation of the list of deliverables, based on the agreement contemplating the transaction. Usually, lawyers have the important role of organising the closing to run smoothly. This involves not only preparation of the documents and a dry run through the closing and checklist, but also coordination with the competent land office to cross-check the application to be registered on the closing date and to estimate the taxes, fees and expenses payable in advance.

The list of deliverables may include:

- confirmation of consideration payment;
- personal and organisational documents to verify authority and internal approval to enter into the transaction;
- original or copies of title documents;
- application to register the transaction at the competent land office; and
- confirmation letter from the relevant authorities.

The time from the contract date to the closing date may be subject to the nature of the transaction, but it may take three to six months.

Thai parties usually use the signature of an authorised director with the company seal (if necessary) to execute documents, with confirmation of due corporate authorisation of the authorised director duly registered at the Department of Business Development.

Debt finance advancement is usually necessary for sourcing part of the real estate purchase price, and a lender or other debt finance provider always requires immediate perfection of the security interest over the purchased real estate upon advancement of the loan. The timing of the closing and funding should normally be simultaneous or very closely executed.

Closing formalities

30 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?

A closing meeting for the transfer is usually held at a law firm, the competent land office or one party's office, depending on the case. The closing shall be conducted by having either the parties themselves or their representatives under the power of attorney present to submit the application at the competent land office, as the registration is required to complete any property-related activities, including conveyance or creation of mortgage. Once the registration is successfully completed, the official fees and taxes shall be paid, recording of transaction will be made on the title document and an official receipt thereto will be issued as an evidence of registration.

Contract breach

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

Regarding the execution of a real estate sale contract, the seller may request a down payment from the buyer as part of the payment obligation. However, in practice, the parties usually request for a deposit to secure obligations under the contract. In general, the receiving party may forfeit the deposit if the giving party breaches the contract. On the other hand, the receiving party is generally obliged to return the deposit if the receiving party breaches the contract. In addition, if a party breaches the contract, the other party can terminate the contract and each party shall be restored to the original states. A party can enforce the contract in case of non-performance and claim damages against the defaulting party through the court proceedings.

Breach of lease terms

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

Remedies are provided for tenants and landlords upon the breach of lease agreement (eg, termination by the non-defaulting party and claiming damages).

When the lessee defaults, eviction cannot be enforced against the lessee unless a court order is given. An execution officer will be appointed to process the eviction and restore the possession of the leased property to the lessor.

There is no material difference between the proof of remedies of commercial and residential leases.

FINANCING

Secured lending

33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

A mortgage is commonly used to secure the performance of obligation.

Property used in a real estate business can also be used as collateral under the Business Collateral Act of 2015. Security receivers under this law are limited to financial institutions and other entities specifically prescribed by law. Business collateral is similar to a mortgage.

There are two basic methods for enforcement of mortgage and collateral, whether by way of public auction or foreclosure of property. Considering the time-consuming process of foreclosure, a public auction is more common, but it still takes a long time to complete enforcement. As the parties cannot agree enforcement otherwise, only those two measures are available to enforce security.

Real estate financing in Thailand is usually given by financial institutions. Generally, commercial banks are qualified to act as finance providers.

Leasehold financing

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

A lease, particularly for a commercial or industrial purpose, can be mortgaged under the Lease of Immovable Property for Commercial and Industrial Purposes Act of 1999.

A lease can also be used as collateral under the Business Collateral Act of 2015, provided that the business collateral agreement is made in writing and registered at the Department of Business Development.

In addition, a right over leasehold assets under the Rights over the Leasehold Asset Act of 2019, which is similar to the leasehold right in some respects, can also be mortgaged, provided that such right can be established only for land and condominium, with a valid title deed. It must be registered with the competent land office.

Leasehold financing usually requires consent from the landowner so that the enforcement thereof may be executed more smoothly. There are no specific lease provisions required in a ground lease to make it financeable.

Form of security

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

One of the most typical methods to create security interest over real estate is a mortgage. A mortgage must be in writing and registered at the competent land office.

As for collateral, under the Business Collateral Act of 2015, the execution, amendment, cancellation and revocation of business collateral agreements must be made in writing and registered at the Department of Business Development. Information about registered collateral is publicly available.

Valuation

36 | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

An appraisal report may be requested by the lender. Currently, as regulations for real estate appraisals are still under consideration, such activity is not regulated under Thai law. However, in practice, an appraiser may obtain a certificate or licence from the Securities Exchange Commission, the Bank of Thailand, the Office of Insurance Commission or other private associations (eg, the Thai Valuers Association) on a voluntary basis.

Legal requirements

37 | 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?

In principle, a loan made by foreign lenders to borrowers in Thailand may be subject to foreign business restriction and if such a loan is secured by collateral located in Thailand, loan is highly likely to be subject to foreign business restrictions. Therefore, making a loan secured by collateral in Thailand from another jurisdiction would be prohibited in principle unless a licence from the competent authority is provided. However, it is difficult for offshore entities to obtain such a licence in practice.

Loan interest rates

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

In Thailand, the Tokyo inter-bank offered rate or minimum lending rate is commonly used to determine a floating rate loan's interest rate.

In principle, under Thai law, the chargeable interest rate shall not exceed 15 per cent per annum. An agreement on interest exceeding the prescribed rate will be invalid and the lender will be subject to criminal liability under the Excessive Interest Rate Prohibition Act of 2018.

Regarding interest rates chargeable by financial institutions, the interest rate for loans can be set by themselves under the supervision of the Bank of Thailand. For transactions other than loans, the chargeable rate shall not exceed the maximum rate prescribed by the Bank of Thailand.

Loan default and enforcement

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

Enforcement of a debtor's obligations under a loan agreement can be made through judicial proceedings. Mortgage or business collateral can also be enforced through judicial proceedings. As the court judgment is a prerequisite for public auction, this process could take some time.

Loan deficiency claims

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

Under Thai laws regarding mortgages, if the amount received from foreclosure of the mortgaged property or from sale by public auction of the same is less than the outstanding loan balance, the lender cannot recover deficiency from the borrower unless it explicitly agrees otherwise in the loan agreement. This principle is applicable in cases where the borrower or any third party assigns his or her property to secure the borrower's loan.

For enforcement of collateral under the Business Collateral Act of 2015, the lender can recover deficiency after the sale of collateral, provided that the claim for deficiency can be made only against the borrower. The lender, however, cannot recover deficiency after foreclosure.

Protection of collateral

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

A lender can request an injunction from the court to prevent the borrower from disposing the mortgaged property.

Recourse

- 42 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?

Where a security is provided to secure the debt, lenders can choose to bring a case against the borrower either to request repayment under the loan agreement or to enforce the security under the mortgage agreement. When choosing to claim for repayment, the lender will be able to recourse from all assets of the borrower, while, upon enforcement of a security, lenders can recourse only from such security. Recourse is not typically limited to the collateral.

Recourse from the borrower's asset is generally not prohibited in the bankruptcy proceedings unless it is deemed as fraudulent or the court has ordered otherwise. It is prohibited in a business reorganisation procedure unless the court's approval is granted.

Personal recourse against a guarantor is generally not limited only to an action of bankruptcy or sale or foreclosure of the mortgaged property.

Cash management and reserves

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

In Thailand, lenders, particularly commercial banks, usually require borrowers to open and use particular bank accounts for cash management control of borrowers. Commercial banks sometimes require certain amounts of reserves from borrowers to maintaining their working capital.

Credit enhancements

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

It is common for a lender to obtain credit enhancements, even if mortgages and other security arrangements are taken. Letters of credit and guarantees are commonly used as enhancements.

Loan covenants

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

In the case of a limited-recourse loan, it is common to incorporate a set of covenants to protect the lender, while a recourse loan arrangement (typically for corporate loans) is much more limited in scope and number. Covenants commonly required include affirmative covenants, such as compliance with relevant laws, and negative covenants, such as restrictions imposed on the borrower in relation to merger and acquisition, disposal of assets, making payment and creation of additional encumbrance. Covenants in loan documents are not generally different depending on asset classes, but covenants for freehold and leasehold may be different.

Financial covenants

46 | What are typical financial covenants required by lenders?

Financial covenants that are typically required by lenders mostly concern the financial status of borrowers, such as maintenance of debt-service-coverage ratio, debt-to-equity ratio, registered capital (in the case of a corporate borrower) and the amount of debt not exceeding the specified amount or ratio. Lenders will usually require borrowers to report their financial status upon request or within a specified period.

Secured movable (personal) property

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

Typical forms of security interests in movable property are:

- pledge;
- business collateral; and
- mortgage on specific types of movable property such as machineries registered with the Department of Industrial Works, vessels, equipment and trade fixtures.

A pledge is defined as a contract whereby the pledgor delivers to the pledgee a movable property as security for the performance of obligation. The pledged property must be movable property or the right represented by a written instrument, and must be delivered into and kept in the possession of the pledgee or kept by a third person throughout the period of pledge. A pledge becomes valid and perfect upon the delivery of the pledged property into possession of the pledgee.

A mortgage does not require the delivery of the property to the mortgagee. A mortgage becomes valid and perfect upon registration at the competent land office.

Movable property that borrowers use in business operations (eg, machineries, goods, inventories or raw materials), can also be collateral under the Business Collateral Act of 2015. The method of creating and perfecting a collateral agreement for movable property is similar to that for immovable property.

Single purpose entity (SPE)

48 | 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?

In the case of a non-recourse loan, the lender will sometimes require that a borrower be an SPE. As fully non-recourse loans are not common in Thailand, it is not common that the lender will require the appointment of an independent director as well as the submission of a non-petition letter (as Thai bankruptcy law chooses an involuntary system).

UPDATE AND TRENDS

International and national regulation

49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction? (eg, transition to a new alternative benchmark rate upon cessation of LIBOR as benchmark rate?)

Emerging trends and hot topics in Thailand are:

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- from 1 January 2020 onwards, the Land and Building Tax Act of 2019 has come into effect, which applies on both buildings and lands including vacant lands; and
- the Eastern Economic Corridor Act of 2018 declared areas of certain provinces in the eastern part of Thailand to be the Eastern Economic Corridors (EEC) to promote economic efficiency in the designated areas. This also promotes real estate operators to develop new real estate projects.

Coronavirus

50 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

To address the impact of the recent outbreak, the Thai government has introduced several relief measures, for example:

- 90 per cent reduction of land and building taxes;
- reduction of land registration fee for transfer and mortgage of lands and buildings from 2 per cent and 1 per cent of the appraisal price respectively to 0.01 per cent starting from June 2020 to June 2021; and
- lower interest rate of commercial banks for housing loans.

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