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Legal Guide

to Thailand Real Estate

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Dear Readers,

Welcome to Siam Legal's Guide to Real Estate in Thailand!

In this, our first guide to property law, we hope to shed some light into the often intricate maze that makes up Thai property laws. In particular, we have chosen and included in this guide our most popular property articles which touch on all the current real estate issues in Thailand.

This guide covers a wide number of issues regarding real estate. We look at how to buy a condominium, how to obtain financing for your property, what to look for in leasehold titles, pitfalls in off-plan properties and even a guideline on running a successful property development business.

At Siam Legal, we offer a wide range of legal services as well. With offices located internationally in London and Los Angeles and branches throughout Thailand, we offer an extensive range of professional legal, corporate and real estate services that are accessible to clients domestically and internationally.

We employ more than 40 multi-lingual staff with a track record of providing highly effective legal solutions to both local and international clients. Keeping abreast of the latest legal developments in Thailand, we are able to provide tailor-made solutions to all your real estate, business and investment endeavors. We are also an active member of both American and British Chambers of Commerce.

Whether you are a real estate developer, a buyer or a broker, we hope that this guide will provide you with valuable information and instill greater confidence whenever you are venturing into the real estate world in Thailand. Enjoy reading!

Dennis P. Ramm & Kert Stavorn
Partners
Siam Legal International

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Siam Legal is proud to provide you with our first legal publication intended especially for those who wish to know more about the legal processes behind purchasing real estate in Thailand. Buying property in Thailand doesn't need to be a complicated matter. Our staff of attorneys and solicitors can assist you in every step of the way.

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- Over 50 Articles on Thai Real Estate
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Buying a Property in Thailand

Thailand has many different types of properties on offer and whatever your dream home is, you can realize it here if you have all the right paperwork. Prices are a lot cheaper than in Europe or the US but there are a few extra checks you will need to make here as laws and culture differ to your home country.

The first thing you need to do is obtain the services of a reputable real estate agent or lawyer on your behalf. Check over the title deed and make sure the property is what it says. Some buyers have bought the house only to find the land is on a different title & visa versa. The same goes with the boundaries of the property which need to be the same as the title deed. If buying from a private individual you have to get your lawyers to draw up a reservation or purchase option and lease contract. This contract binds you and the seller to the sale of the house at a specific price in accordance to schedules you have both agreed. Such an agreement will include any penalties for default of either party.

Now that you have the title all checked out you can go ahead and translate it into English just to make sure. If you are buying a new home from a developer, the developer will almost likely have a standard contract format. The format may vary but always go over the deed and title and anything else in the contract regardless of what the developer shows you.



Payment of your Property

A deposit of 10% is usually required to secure a property and total payments should be made within 30 to 60 days. You can obtain longer periods but you will probably be required to pay a higher deposit. Deposits are normally non refundable, except by default of the vendor, so bear in mind that once the deposit is placed you are committed.

This is also the same for the seller. They have to refund your deposit and pay a penalty of an equal amount if they default on the contract. Deposit in escrow is still rare in Thailand, but it is becoming an increasingly recognized way of proceeding. It is a lot safer compared to having to make a claim for damages in case the seller defaults.

Beyond the price, payment and schedules, it's important that a contract includes clauses to cover who will pay the legal fees, transfer fees and taxes as well as an understanding of the value at which the sale will be declared. This is normally, for tax reasons, at or close to the government minimum assessed value.

Buildings apart from condominiums do not have any form of title document, but their sale or long lease can be registered at the Amphor land office. Proof of ownership, must be established either from proof of construction or document showing previous sale-purchase. This is not to be confused with the House Registration document, which is only a register of the house's occupants.

PROPERTY DEVELOPMENT & CONSTRUCTION

Guide to Planning a Property Development Project in Thailand

Property development is a complex business process and like all businesses, proper planning is essential. Unlike other businesses, property development involves many intricate steps and solid financial management. Property development often brings to mind stories about rags to riches. Sometimes, it is even seen as the ticket to our early retirement. However, property development is certainly not for the faint hearted and requires just as much effort, if not more, as any other businesses to yield a healthy turnover. The good news is though, with good planning and a healthy dose of hard work, a property development can indeed produce a very profitable income for the developer.

There are so many different types of property development so it is important to set out from the outset what the end goal is. This is important because the implementation of works in a project can be a lengthy operation requiring a myriad of resources and a host of variables. In this article, we will concentrate on property or real estate development as opposed to land development or 'fixer-uppers'. Property or real estate development can be defined as the construction of physical buildings on raw land. This can take the form of residential, commercial, institutional, recreational or industrial projects. Further classification can be made on the complexity of the intended buildings or whether the project is a high or low-rise structure.

Stages of Property Development

In general, the steps in a development project can be broken down into five stages. They are, in respective order, inception and feasibility, design, tendering, construction and handover and maintenance. This article will focus on the first stage of a project development. This first step is important as it will let you know early on whether the project will be worth your time and effort and provides a strategic structure with which to establish the rest of the development stages. In practice, this is often considered by practitioners to be the most difficult and challenging stage since if it is not handled with care, it could potentially be a recipe for disaster later on.

Getting Started

The first thing to do is to arrange your finances and outline a budget for your project. Armed with this, you would then go out in search of suitable block of land with potential for development. It is a good idea at this stage to have your team of consultants ready at hand. You can either have a development manager who can coordinate the whole process or you can liaise individually with a number of advisers which may include a lawyer, an architect, a quantity surveyor, urban planner and an estate agent to provide you with initial advice on the property and the marketability of any possible development. Together with your advisers, this is also the stage where you identify your project objectives.

Land Resolutions

The next stage is to ascertain if there are any issues with the land. Find out if there are any zoning laws or ministerial regulations which may affect what or how much you can build on the land. In

most coastal properties, restrictions regarding the height of buildings may also be in place. To find this out, you will need to check with the local district or land office where the land is located. You should also conduct a standard due diligence on the land which includes finding out issues relating to title, discovering if there are any easements or any other covenants on title which may impede your project. This is also a good time to find out what licensing will be required for your proposed project and whether your project will need a property allocation license for the subdivision of separate plots.

Environmental Regulations

Environmental concerns are also becoming more prominent for property developers today. In late 2007, the Office of National Resources and Environmental Policy and Planning (ONEP) issued a new regulation requiring every new property project to plant a tree at least five meters in height and width for every air conditioning unit that ranges between 12,000 to 24,000 BTU. Also, a condominium project in Thailand which has more than 79 units or housing projects with a land area of more than 100 rai or about 40 acres will need to apply for an Environmental Impact Assessment (EIA). Smaller projects may also need to have an Initial Environmental Evaluation (IEE) done.

Starting a Project Brief

After all this evaluation and checks on the land, we will then need to set up a 'User's Requirement' in the form of a preliminary project brief. This is where you assess what the market wants in that area and build something that you believe would sell or lease well. Take a look around the neighborhood and consider issues relating to town planning and urban design. It should be noted that the User's Requirements are progressively refined and honed into a detailed project brief throughout the design and tendering stages so do not be too concerned if you haven't figured out exactly what it is you want to build.

The Feasibility Study

Now is time to do that all important number crunching session in a feasibility study. We will normally begin by identifying the criteria and the parameters we need when we consider the technical and financial aspects of the project. This includes, among others, time scales, costs for consultants, cost of construction as well as the likely end sale values and the profit margin you want to make. There are many softwares out there today that can help make this part faster, cheaper and easier. It can generate reports and offer recommendations on the likely success of the project. Nonetheless, a project's success depends a lot on this feasibility study as this is what allows you to make an informed decision. Sufficient time, resources, and expenses should be allocated to ensure that the objectives can and will be achieved in the later stages.

Organizing the Team and Project

Finally, the only thing left to do in this first stage of the process is to set up a project organization and management structure. This is important in the process as it outlines the players and their roles in the project. It also sets out accountabilities and provides a framework with which everyone can work with to achieve the final goal.

Conclusion

The planning stage of any property developments requires a lot of hard work and perseverance. Property development is an inherently risky business as capital expenditure is often high and liquidity is, by nature of having property as its main asset, extremely low. Financial management is crucial to the success of a project development and in order to have good financial management, it is essential to have good planning of all the technical aspects of the project. At least with good planning, you will know early on whether to continue on with the project and proceed to the next stage.

Thinking of Buying a Condominium?

Purchasing a condominium is by far the most popular and relatively straightforward method for a foreigner to acquire a property in Thailand. Indeed, a recent Bangkok research conducted in the first quarter of 2007 has shown that there are nearly 50,000 existing condominium units in Bangkok alone and this number is continually growing with new developments sprouting all over the country. There are also a large number of condominium units in popular tourist destinations such as Phuket, Hua Hin and Pattaya and the number of units in these regions is also steadily increasing. With such a great interest in condominium units among local and foreign nationals, it may be pertinent to shed some light on some of the post-implications of such an acquisition.

Many of us are already familiar with condominium titles in our home country. Some jurisdictions refer to it as a Strata title or a commonhold as it is known in the UK, which in essence, is almost identical. In Thailand, the features of this ownership right are quite similar. A condominium is a planned development that has been created pursuant to and registered under the Condominium Act B.E 1979. It is characterized by the individual ownership of living units and the joint ownership of the common areas within the building.

Although purchasing a condominium unit in Thailand is a fairly simple process, there are nevertheless certain steps which should also be considered as part of the due diligence. Standard due diligence will normally check for, among others, that the title is good, that the owner is who they claim to be and that there are no registered encumbrances on the property. While such checks are necessary, there are other steps which may be just as necessary in order to prevent any harrowing nightmares impeding on your dream purchase.

When purchasing a condominium in Thailand, much time, money and effort can be saved if these steps are taken into account. Also, knowing your rights afforded by the Condominium Act would put you in a better position if faced with unfair or unscrupulous treatment by your condominium management company.

Maintenance Fees and Sinking Funds

Ensure that you check in the contract how much the monthly maintenance fee and sinking fund is. This should be in all the contracts for new condominium units although some units in the secondary market may omit this in their documents. Do ask the seller to provide you with this or you may obtain it directly from the condominium's management company. The Condominium Act stipulates that the maintenance fees must be in accordance to the ratio of space that you own. As such, it should be expressed as an amount per square metre. This amount is also registered under the Rules and By-laws of the condominium at the relevant Land Office. Any increase must be agreed with a three-fourths majority vote amongst all joint-owners of the building and the amended Rules and Regulations registered at the Land Office in order to take effect.

Rules and Regulations or By-Laws of the Condominium

It is prudent to obtain a copy of the Rules and Regulations of the Condominium before you decide to buy the property. According to the Condominium Act, it should, in the least, include the following:

1. Name of the condominium's juristic person;
2. Objectives
3. Location of the office;
4. The amount of sinking fund an owner must pay;
5. Other common properties;
6. How the common and individual properties would be used;
7. The ratio of each unit in terms of space;
8. The procedures for the general meeting;
9. The ratio of the maintenance fees;
10. Procedure for managers and their appointments.

As a general rule, things to look out for may include the following:

1. Restrictions on pets;
2. Restrictions on age of children who can use the pool or other facilities;
3. Restrictions on parking any vehicles or boats;
4. Restrictions on types of floor-covering materials, drapes or window hangings, screenings or closing in of open balconies;
5. Limitations on use of recreational facilities in the common areas;
6. Sound or noise restrictions.

Know Your Condominium Juristic Person

It is in your interest as a co-owner of the common areas to ensure that everything is in good order. Be sure that a good and reputable management company is looking after things in an orderly and transparent manner. Beware of development companies appointing their own managers as they could be acting with ulterior motives in regards to repairs during the default liability period in which the developer should be responsible for and not the juristic person. The co-owners may wish to appoint a new manager if 50% of the co-owners in a general meeting agrees.

You may also wish to request for a copy of the juristic person's accounts to ensure that everything is in order and that no funds are being siphoned furtively or that any payments are unaccounted for. This is important as you want to see fees you contribute help maintain the premise and ensure its value in the long run.

Occasionally, there may be a need for the management to call forward an emergency fund to cover some unexpected repairs. In practice, the Condominium Act stipulates that the decision to attain this fund must have a three-fourths approval in a general meeting. Before you vote, do check that the fund is indeed genuine and by right, you may request for all the related information in regards to this emergency expense.

As an added precaution, the Condominium Act also allows the co-owners to set up a Committee to oversee the management of the juristic person. The number of members shall not be more than nine and may consist of any of the co-owners of the condominium who are elected in a general meeting of all co-owners. It may be useful to note that a co-owner's voting rights are determined by the proportion of the ratio of space owned in the building.

Having Your Say

Politics may not be everyone's cup of tea and it is certainly regarded by many as a waste of time and effort. Such views do often lead to apathy and many of us try to avoid the dreaded rigmarole of residential politics and hope by ignoring it long enough, it will go away. Living in such a close knit arrangement would, not surprisingly, lead to some conflicts in some way or form. Indeed if you have a complaint, it is best to deal with it rather than live with it especially if you have to live with it everyday. Common complaints may include, noisy pets, parking spaces being used by neighbours in an inconsiderate manner, loud music at unreasonable hours or the committee members acting in an autocratic or biased manner.

The Condominium Act requires that a general meeting be held at least once each year although in practice, this can be as often as required. You may wish to take the floor and air your grievances here or if having a right of audience is not your preferred mode of communication, be sure there are other formal methods set up to air your grievances within the juristic person.



Buying an Off-Plan Property

Thailand is seeing a current surge in housing and condominium developments despite the slight downturn in the economy. The demand for these projects by foreign investors is still strong, particularly in traditionally popular markets such as Bangkok, Phuket, Pattaya and Hua Hin. Pre-construction or off-plan properties have increased significantly whereas the secondary property markets have remained relatively stable. This is not exceptional in Thailand as the rest of the world have for many years embraced pre-construction investment for its highly attractive buy low and sell high scenario. Regardless of this trend, in order to protect your future investment and interest with such types of acquisitions, there are certain things to look out for when buying a pre-construction property here in Thailand.

What is Pre-Construction Acquisition?

Firstly, pre-construction real estate acquisition is the practice of buying properties very early on in the construction process. Developers are selling these future properties to customers in order to finance the development itself. The customers, on the other hand, are banking on the appreciation of the property once the land has been sub-divided and all infrastructures and amenities have been put in place. There are certainly advantages to buying a pre-construction

property such as the relatively discounted price, the choice of selecting a more appealing plot within the project or other added incentives offered by the developer to early buyers.

As you would with any property acquisition, carrying out proper due diligence on the pre-construction development is by no exception, very important. Apart from title deed checks, you may wish to also check on the history of the developer, their financial standing or any previous projects they have developed. You can check if the developer has applied for any necessary licenses required for development or if an environmental impact study has been conducted on the project as these licenses give you some automatic protection under Thai law. You can also conduct your own investigation into the values and costs of the property or you may want to have an independent surveyor appraise the property or project for you and compare this with the figures given to you by the developer.

Contracts in Thailand

It is interesting to note here that the Thai approach to contracts in general is linked to its cultural importance to relationships between parties. Back home, we place great faith on what is written on paper whereas in Thailand, far greater emphasis is given to relationships itself. However, throughout the many years of dealing with international clientele, Thailand has shifted its approach to accommodate a more comprehensive type of document. A "Boston lawyer" style of contract drafting may still not work too well here and it is still common for Thai parties to give you a 2 to 3 page type contract for all types of matters. This is based on the tradition that the contracts are just an outline of the principles and serves as the basis of the

relationship. However, we are much more used to seeing a contract as an exhaustive list of all the rights and obligations which allows for all possibilities and contingencies. So it may be good to keep this in mind when dealing with contracts in Thailand although you will generally find they can be quite accommodating to amendments if your relationship with them is good.

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What to Look Out for in a Pre-construction Contract?

There are some fundamental elements which should be included in every pre-construction contract. These are, among others:

1. Time frame

An agreement should have a time frame which stipulates clearly the starting date for construction as well as its completion date. Check for any extension clauses which normally give the developer a few extra months to complete without incurring any penalties.

2. Price

The agreement should state clearly the price, the payment terms and the payment method. Ideally, in a construction agreement this should be listed as a schedule. It should also be calculated by units such as per square meter or square wah as plot size may vary after completion. Be wary of additional charges that you have not discussed with the developer.

3. Payment Penalties

Check that the penalties for default of payment are not too burdensome on you. Terms such as immediate rescission of contract and retaining the money you have already paid are not uncommon but there should be a period given to you to remedy this default.

4. Developer's Default

Ensure that you have some recourse to a full refund in the event that the developer does not complete the construction due to insolvency or for any other reason.

5. Late Completion

Penalties should be given to you if the completion is late. This is normally deducted from the final payment due upon completion. Penalty rates vary greatly in Thailand although for condominiums there is a daily minimum penalty of 0.01% of the total unit price. For homes and villas, the penalties tend to be around the 3,000 THB to 5,000 THB per day figure.

6. Building Specifications

The contract should have a comprehensive list of all the materials being used in the construction including its quality, quantity and model. Usually, the more detailed the better. Be wary of substitution clauses which gives the developer the latitude to replace certain materials with "similar or better quality" items should the price of that material increase. Ensure that such a clause is drafted in a way so as to give you the final decision on the matter.

7. Building Floor Plan

Ensure that a floor plan is also attached to the main documents. Again be wary of clauses in the agreement which allows the developer to "modify" the floor plan but keeping it 'similar' to the plan agreed upon. You will want to be aware of such deviations whether minor or not and the agreement should be drafted to reflect this.

8. Recitals

Ensure that in the recital or in the beginning of the agreement, it states that the developer is the rightful owner of the land in question. If they don't, you should address the concern in the fine print or by adding an addendum by inserting language such as if the developer does not currently hold title, the agreement may be rescinded by the buyer along with full refund.

9. Assignment

Many things can happen in the future so it is useful to have an exit clause should your plans change. An assignment clause allows you to transfer the obligations of the agreement to a third party. Note the administration fee due to the developer for this action. An assignment clause may also allow you the option to 'flip' the property should the market be conducive.

10. Alternative Dispute Resolution

No matter how careful you are or how good your relationship is with the developer, a dispute may arise. The agreement should have an arbitration clause so settle any disputes. Arbitration is generally less costly and formal compared to court proceedings.

Escrows in Thailand



The concept of putting money down on escrow before you receive title to your property is such a familiar occurrence in common law jurisdictions we don't often give it a second thought. In fact, in some states in the US such as California, to transfer a property is to 'close escrow'. In real estate terminology, an escrow can be defined as an impartial holding of documents or funds related to the sale and transfer of a property. An escrow is designed particularly with consumer protection in mind safeguarding your rights should anything go wrong before the transfer of the property. Nevertheless, an escrow system does offer equal protection to all parties involved including the seller, developer and agent.

Thai Property Landscape Today

The property business landscape is very different today compared to what it was five or ten years ago. Land prices have increased exponentially country wide and international interest in the Thai property market has remained unabated bringing with it different practices and expectations. Property transactions have increased and the numbers of unscrupulous developers have also inevitably increased. With this rise, we are also seeing more and more civil suits from unfortunate consumers losing their hard earned money to projects that have gone to dust or were dust to begin with.

The government recognizes the need for greater regulation and protection to consumers in property and in other large business transactions. Technically speaking, the Civil and Commercial Code does allow for a pseudo-escrow system by applying section 805. This section permits the use of dual agents to hold funds such as installments to a property prior to the transfer if it is drafted into a sale and purchase agreement. This, however, does not regulate the role of the agent properly and questions often arose as to their impartiality. The other problem is that it is once again discretionary and lacked public awareness.

The Beginning of Escrow Law in Thailand

In December 2007, the National Legislative Assembly introduced a first draft of escrow law in Thailand. Again, the main thrust of this law is to protect homebuyers from losing money on down payments in the event property developers become unable to complete and transfer the property to them. The difference is that the draft is intended to apply to all developments across the board and all players are required to oblige. Many property developers are arguing that it will add more pressure on their financial management as they would not have access to the deposits they so heavily rely on until this day. Nonetheless, it will take some time before we know how the new administration will affect the draft bill.

Current Application of Escrows in Thailand

Despite a lack of regulation in Thai law, escrows have been widely used by larger property developers, law firms and other third parties in the country for some time already. Law firms and some estate agents apply section 805 of the Civil and Commercial Code, mentioned earlier, to enable this. More established companies and firms provide their clients with an offshore escrow account in a jurisdiction which already has a recognized escrow law in place. Whatever the case may be, it is prudent for you, as a client, to know what the terms and conditions of the escrow are. Some escrow arrangements are drafted into the sale and purchase agreement itself and some more complicated arrangements will require a separate escrow agreement to outline the conditions subsequent to transfer.

Financing is a big consideration for many property buyers. However, foreign nationals may find it difficult to obtain a loan for their property in Thailand. There are still some options available to the astute investor but domestic financing from some local commercial banks are also available.

No.	Name	Terms and Conditions for Qualification of Loan
1.	Bangkok Bank PCL.	Bangkok Bank in Thailand itself does not provide loans for foreigners under any circumstances. Only Bangkok Bank in Singapore provides this service to foreigners.
2.	Bank of Ayudhaya PCL.	Bank of Ayudhaya does not offer loans to foreigners at this present moment.
3.	HSBC	HSBC does provide loans to foreigners under the following conditions: <ul style="list-style-type: none"> • Residence Permit, 1 year work permit, letter of employment, company's documents or other pertinent documents upon request. • Bank will grant loans for foreigners based on the current market value: <ul style="list-style-type: none"> - Condominium 70% of the value and Land and House up to 80% of the value. - An amortization period of 7 years.
4.	Kasikorn Bank	Kasikorn Bank does not offer loans to foreigners at this present moment.
5.	Siam Commercial Bank PCL. (SCB)	Provides loans for foreigners under the following conditions: <ul style="list-style-type: none"> • 1 year work permit, consideration based on rate of salary, background check for the employment and credit rating. • The foreigner can receive a loan for a condominium or house. • A joint loan can only be obtained between blood relations. • Amortization period of between 5-7 years.
6.	Thai Military Bank PCL. (TMB)	For personal loans, SCB only grants credit cards, but not for personal business loans. Provides loans for foreigners (only condominiums) under the following conditions: <ul style="list-style-type: none"> • 2 year work permit or 2 years residence permit, passport, letter of the employment, payment slip and other supporting documents requested. • If the foreigner has some added security finance, this will be an added appendage for the banks to consider. • If the loan is for landed property, a foreigner will only be able to obtain a loan if they apply jointly with a Thai spouse.
7.	UOB Public Company Limited	UOB in Thailand provides loans for foreigners under the following conditions: <ul style="list-style-type: none"> • A loan for landed property can be obtained by a foreigner if it is applied jointly with a Thai spouse. <p>UOB has an International Home Loan Scheme for Thailand to allow foreigners access to financing when they wish to buy condominiums in Thailand. This is a joint financing program between UOB in Thailand and UOB in Singapore. Loans will be obtained in UOB in Singapore and secured by SBLC which will then be issued by UOB in Thailand which will in turn register the mortgage locally.</p> <p>UOB in Thailand suggests that the entire application procedure can be done within Thailand without the applicant going to Singapore.</p>

What are Superficies?

The legal system in Thailand is based largely on continental European laws. Like many civil systems, the Civil and Commercial Code (CCC) sets the legal foundation of all laws within the Kingdom. For those of us from common law jurisdictions, dealing with property laws in Thailand may sometimes feel like dealing with laws of another planet altogether. The right of superficies is a good example of this. Pronounced su-per-fi-shēz, it is a constant source of amusement in many English-speaking law offices throughout Thailand. However, because of this unusual appellation, many buyers are not aware of its existence and, even if they do, mistrust the role it plays in Thai property laws.

Superficies in Thailand Today

Superficies may be granted to a person under Section 1410 of the CCC. It is essentially a right which can be granted to an individual, irrespective of nationality, to own on the land the 'buildings, structures or plantations'. This right may be granted for a period of time (a maximum of 30 years) or for life of either the owner of the land or the person granted the right. The process of registering superficies is similar to any other proprietary transfers in Thailand. All involved parties will need to attend the Land Office to register the right along with the relevant documents including, among others, the land title deed, house registration book, ID cards and passports. There is also a transfer tax of 1.5% involved.

The Benefits of Superficies

A positive characteristic of a superficies is that it is binding on your heirs. It is fully transferable to your loved ones unless drafted otherwise in the agreement. Like all proprietary rights, it can also be transferred to other parties but will need the consent of the land owner and requires a re-registration of the right at the Land Office with the new party. Despite all this, one of the most salient features of a superficies is that it is a fully registered right giving you an inalienable right on the property for the duration of the superficies.

Over the past year or so, the Thai government have been clamping down on the use of local companies and nominee shareholders to buy and own land. More stringent measures have also been put in place by the Land Office to ensure the Thai shareholders in a company are indeed genuine. In other words, it is becoming more and more difficult to get good title to a property in Thailand, at least for the time being. Therefore, the key benefit of a superficies is that there are no limitations on foreign nationals holding such rights. This is, for many foreign nationals, a significant aspect to consider, which at a minimum is available as an alternative.

The Downside

There is one major problem with superficies. It suffers from a lack of acceptance. The granting of superficies, despite Thailand being a civil system, is not common practice. Due to this, you may find it difficult to find sellers or developers willing to grant a superficies on that perfect property you found by the sea. Sellers are often not comfortable with this concept because they just want to transfer all rights and liabilities of the land and wipe their hands free forever. Buyers also don't feel all too happy about buying what is essentially a 'personal' right over a 'real' right, at least in theory. It may take some extra time, work and, not to mention, frustration to find not just the right property but also a willing seller.

However, superficies may prove to be extremely useful if you have a Thai spouse. Your Thai spouse may purchase a property on a freehold basis and register a superficies in your favor to give you more added protection as a foreigner. Of all the proprietary rights afforded under Thai laws, superficies appears to be the most effective safeguard for this purpose.

What are Usufructs?

Usufruct is a legal property right which is rich in history. Pronounced yu-ze-frukt, it is another civil law concept which may be quite foreign to those more accustomed to common legal systems. The term comes from the Latin terms usus et fructus which is literally translated into 'use and enjoyment'. Like most civil law concepts, the term derives from ancient Roman law. In most of

THAI PROPERTY TERMS

today's civil law environment, it is defined as the legal right to use and derive profit or benefit from property belonging to another person. Thailand has adopted this same principle in its Civil and Commercial Code where it is codified in section 1417. Here it states that "an immovable property may be subjected to a usufruct by virtue of which the usufructuary is entitled to the possession, use and enjoyment of the property." It goes further to clarify that "the usufruct of a forest, mine or quarry entitles the usufructuary to the exploitation of the forest, mine or quarry."

What it Means for Foreign Property Buyers?

Legal ramblings aside, all this comes down to the simple notion that there are more options available to foreign property purchasers in Thailand. It is another tool in the arsenal of civil codes available for home buyers. Usufruct works in many ways like a lease. It is a legal property right and is registered at the local Land Office to offer the usufructuary the enjoyment to the property. A usufruct can be registered for the life of the usufructuary or for a maximum of thirty years. During the period of the usufruct, the owner cannot sell or transfer the property to other third parties. Another benefit is that it would allow you to apply for a House Registration Certificate providing you with greater security on the property. This also means that you can safely rent out the property and receive a rental income from it. As a usufructuary, you may also lease the property to other parties and obtain profits from this. However, when the usufruct is terminated, the property must be returned to the owner.

Can Usufructs be Transferred?

Under section 1422 of the Civil and Commercial Code, you as the usufructuary have the legal authority to transfer your right of the usufruct to third parties of your choice. However, it should be noted that the right to a usufruct terminates upon the usufructuary's demise so it cannot be passed on to your heirs. This makes it a slightly less favorable option when compared to other property rights in Thailand such as leases and superficies where a well drafted contract may permit such succession rights.

However, there may be a way around this hurdle. As

usufructuaries are allowed to lease the property to other parties, technically they may be able to provide their heirs with a further thirty year lease after the termination of the usufruct. Courts in Thailand have interpreted that a lease on a property granted by a usufructuary survives the usufruct itself. This is a rather complex method of succession planning but it can be effective if done correctly.

Usufruct vs. Common Law

shares similarity to a life estate, which is still in use in some jurisdictions in the US, however, it has been replaced by the law of trusts in the UK. A life estate is where the ownership of the land is given for the duration a person's life. The owner of a life estate cannot be left to heirs and nor can it be inherited.

How to Avoid any Problems

When you are thinking about procuring a usufruct on a property in Thailand, there are a few things to keep in mind. As a usufructuary, you have an obligation to maintain the property in proper maintenance including any petty repairs. This also includes payments for any taxes and duties as well as any interest owing upon it so be sure to check there is no outstanding mortgage on the property unless this is part of the deal. Also, you are not permitted to make any major alterations on the property. You are responsible for any destruction or significant depreciation in value of the property unless you can prove that it is not your fault or the depreciation is caused by reasonable use. Due to this, it is prudent to list the items included in the usufruct in an inventory to avoid any misunderstanding in the future. This should also be registered along with the usufruct at the Land Office.

Another important factor to consider when talking about usufruct is insurance. The owner has the right to compel you to obtain insurance on the property and if insurance already exist, you are duty bound to maintain the insurance. This is also for good reason. The destruction of the property caused by fire or any other accidents will mean that the usufruct terminates and reverts back to the owner unless 'compensation' is paid for its restoration. It is in the usufructuary's interest to have good and proper insurance on the property to fully cover the cost of restoring the property into its original condition.

VILLAS



Leasehold Villa Investments: A Viable Option in Thailand?

In recent years, leasehold interest is fast becoming the most common method of acquiring property in Thailand. This is due in part to the Thai government's stricter stance on foreign ownership through the use of a locally incorporated vehicle. However, despite its growing popularity, there are still some reservations expressed by many buyers on its longer term implications. This article hopes to highlight some of these implications.

Maximum Leasehold Period

Leasehold interest is governed by the Civil and Commercial Code of Thailand (CCC). The maximum lease period in Thailand for a residential property is 30 years. However, lease contracts typically include further renewable lease periods resulting in, technically, 60 or 90 year terms. What happens after the original 30 year lease period has lapsed has long been shrouded by myths and over zealous sales pitches. There is indeed no automatic renewal of leases after the 30 year lease period. In fact, there is an automatic extinguishment of the lease after this period. The renewal terms are merely a contractual obligation by the parties to do so. Therefore, only the 30 year period is registered at the Land Office itself. At the end of this period, the lease expires and all the parties will have to attend the Land Office and register another 30 years again.

Transfer of Leasehold Interest

Transferring or assigning an existing leasehold interest in a villa is quite a straightforward procedure. An assignment agreement is usually prepared and all interested parties will attend the Land Office again and effect the transfer. It is worth noting here, however, that only the remaining period of the lease is transferred during this period. Any subsequent renewal terms in the contract will have to be made again by the new lessee and the lessor. These renewable terms are once again limited by the problems highlighted earlier. Alternatively, it is also possible under certain circumstances to extinguish the original lease that you have with the lessor and have the new lessee enter into a new lease agreement for the full 30 year period. It may be advisable to consult with a legal professional in getting these types of contracts drafted.

A Good Investment?

So far we have highlighted some of the limitations of leasehold titles in Thailand but the question remains whether it is a viable investment option for foreigners. There is a certain stigma to leasehold titles and this is due mostly to the inadequate duration of the lease. Indeed, 30 years may not seem like such a long period and thus investments of this nature is not for everyone. Due to the restrictions imposed on the lease term, buyers should be wary of the return surplus after all expenses have been considered.

Due to the nature of leases, there is a likelihood that the villa will depreciate in value as the lease term draws to a close so it is important to make sure that the rental yield over the 30 years will far exceed the amount invested. Using the first 30 years is a good baseline when making your calculations. Should you be able to exercise your renewable terms then that would be considered a bonus. This conservative approach should save much headache and quite possibly, heart-ache in the future. As such, we will be looking at a minimum of 8% rental return on the villa to make it a viable acquisition.

Ways to Make your Lease a More Secure Investment

Thai property law is based generally on the continental European legal system and therefore some of the terms used may be unfamiliar to those who are more accustomed to the common law system of countries such as the UK, US and Australia. In broad terms, there are other codified rights which can further protect your leasehold interests on the villa. Rights such as a superficies used in conjunction with a leasehold title may be able to provide better security on the villa as this right affords greater interest on the physical structure itself.

Another option being offered by some respectable villa developers in order to protect their buyers' rights on the property is by the use of an off-shore company. It works in some ways as a quasi co-op commonly used in cities such as New York or Chicago. As an example, more often than not the off-shore company may be set up to own the site and in turn, their buyers will also receive shares of this company which then provides them further protection on top of their leases. This ensures that further extensions on the lease shall be met as the buyers themselves have relative control over the actual ownership of the property as a whole. This is naturally subject to the rules and regulations of the developer, or more commonly known in the US as the Covenants, Conditions and Restrictions (CC&R). It is advisable to go through this carefully or get a lawyer to go through it to make sure you know what you are getting yourself into.

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