

# Escrow in Thailand

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Kert Stavorn is a senior legal adviser for Siam Legal International. Kerts practice primarily focuses on real estate, construction and corporate matters.

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## Escrow 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'.

Many property owners are turning to rent in these areas in order. 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.

### Problems with Introducing Escrow to Thailand

Thailand has been toying

with the idea of regulating and formalizing laws on escrow accounts since early 2001. Even prior to this, the government had implemented a discretionary measure on the practice but the idea did not really take off due to a lack of publicity and understanding. There were other problems as well. The notion of escrow derives from a common law concept of trust law. The main challenge has been that the concept of trust is said to be the major hypothesis that clearly differentiates civil from common law.

Further to this, Section 1686 of the Civil and Commercial Code of Thailand voids any

relationship created by trusts. It is with this background that many legal scholars believed Thailand will have difficulty introducing escrows to a wider audience. Property developers are also strongly against an introduction of an escrow system because they depend extensively on the 10% to 20% deposit of the selling price to finance the construction. However, because Thailand has experienced immense growth in the last few years, many new laws are required to keep up with these changes. Property developers just have to adapt to the changing environment if they want to survive.

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## 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

As mentioned earlier, in 2001, by virtue of section 9 of the Commercial Banking Act 1962, the government introduced a 'Letter' allowing commercial banks to provide an escrow account services to customers who have entered into a sale and purchase agreement with a developer. This allows for an escrow agreement outlining the terms and conditions of each party, in particular, the payment to the seller or developer. Although these controls have been introduced since 2001, their applications have also been haphazard, particularly by the banks. The attempt falls short of mandatory practice which when left to discretion often leads to it being, once again, overlooked. It is, however, most certainly a step in the right direction and sets out the agenda for the development of escrow law in its entirety.

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. agreement to outline the conditions subsequent to transfer.

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.

#### **Final Word**

It is perhaps only a matter of time before escrow laws are fully enshrined into the Thai legal system out of necessity. Indeed, with the draft bill being approved late last year, it would appear almost imminent. This is good news for property buyers as you will be better protected from those few dishonest, underfinanced or inexperienced developers. It is certainly a much better alternative to a diluted claim for civil damages in the event of default on the part of the developer. Developers will also benefit by the growing consumer confidence by homebuyers in the property sector.

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