



Avoiding the Pitfalls in Acquiring Real Estate in Thailand

Thailand has become an attractive option for many people interested in acquiring a second home, as well as those in search of a permanent residence or a retirement home. Blessed with warm weather year round, modern health care, a developed infrastructure, safe streets and a fascinating culture, Thailand competes favourably with other destinations around the globe. In addition, Thailand's growing spa and hotel industries provide opportunities for savvy investors seeking real estate opportunities.

However, foreigners considering acquiring real estate in Thailand need to be aware of the potential pitfalls to ownership. As in any country, there are those ready to take advantage of a foreigner's lack of knowledge concerning local property law and customs.

Here are the most common risks a property buyer ought to be aware of before signing a real estate transaction in Thailand:

There is no government-mandated licensing process for estate agents. Buyers should never place undue trust in anyone representing themselves as a real estate agent in Thailand before thoroughly checking them out.

Secondly, language and culture barriers exist. Most foreign buyers enter the Thai real estate market without speaking Thai. Moreover, the Thai legal system, as it involves real estate, title deeds and related issues, is likely to be very different to the system a foreign purchaser may be accustomed to.

Finally, many real estate purchasers in Thailand become interested in buying a second home here after having experienced the beauty of Thai nature and culture during a holiday. In many cases, people become infatuated with Thailand and make emotional decisions without hiring qualified legal counsel or conducting due diligence and negotiation.

For the careful investor, however, Thailand provides excellent opportunities for acquiring that dream holiday home, investment property, permanent residence or retirement home.

The risks on the horizon

The types of problems foreign purchasers may walk into are numerous but are, in most cases, preventable.

Perhaps one of the most publicised instances of Thai real estate fraud took place in 2006 on the island of Koh Samui. Government investigations into land companies on the island revealed that

thousands of plots of land had been illegally issued title deeds. Deeds for measurements of land exceeded the amount of land on the entire island, and encroachment and development of state-protected reserves was revealed.

Similar cases have occurred elsewhere in Thailand, usually involving land that borders national parks and mountainous areas. Most cases of land fraud are on a smaller scale, however, and usually involve a purchaser or investor not performing proper due diligence, or not demanding basic contractual safeguards.

Less dramatic cases of real estate misrepresentation and fraud can involve foreign clients discovering that their purchased property lacked promised (and paid for) amenities, including water pipes and sanitation systems. There are also cases where buyers have discovered that the title deeds for the property they believed they had purchased were simultaneously sold to another party, leading to lengthy lawsuits. In other cases, overseas buyers have found agents or business partners had suddenly become unresponsive, or disappeared altogether after receiving large deposits.

Know the laws, understand your rights

The basic premise of Thailand Land Law as it concerns foreigners is, unfortunately, often downplayed in real estate brochures and advertisements. The most important point is that Thai law prohibits, with very limited exceptions, foreigners from purchasing freehold land in Thailand.

The Thai law does, however, allow long-term leases and the freehold purchase of condominium units in designated areas. Thai law also allows foreigners to own buildings (but not land) and allows foreigners real estate rights that do not amount to full ownership. In general, it is advisable to be wary of agents who promise outright ownership of freehold land or the use of complicated company “nominee” structures as a way to avoid the prohibition on freehold ownership by foreigners. Most importantly, prospective investors should obtain qualified, independent legal counsel and execute a thorough due diligence.

The safest, and recommended, option for foreigners acquiring legal rights to real estate in Thailand is to use the widely recognised options for land acquisition that do exist. Such options include acquiring land leases, condominiums and land rights such as usufructs and habitation rights.

- **Land leases:** While Thai law prohibits non-Thai nationals from owning land in the country, foreigners may hold a 100% interest in a Thai land lease for a maximum of 30 years, with the possibility of renewal for additional 30-year periods. Depending on the type of land lease, title deeds may be transferred and inherited, and leases may be negotiated so that the holder has the right to build on, or develop the land in question.
- **Usufruct or right to habitation:** Under Thai law, a usufruct is essentially a right to use real estate owned by a Thai national for a time period that can be extended until the demise of the usufructuary. Traditionally, a usufruct is used for agricultural purposes. A “right to habitation” under Thai law provides similar rights as the usufruct, but applies to habitation purposes. While usufructs and habitation rights are appealing due to the option to extend them for lifetime periods, they are inferior to leases in a number of ways. Unlike leases,

usufruct rights may not be inherited and do not allow holders an absolute right to develop land.

- **Company Ownership:** Purchasing shares in a Thai-registered company has previously been a common means by which foreigners may obtain property rights in Thailand. In the past, and under certain circumstances, a foreigner may own up to 49% of shares in a Thai limited company that owns land. This method has come under increasing scrutiny. In many cases, this structure is not allowed due to concerns that it may be an attempt to circumvent the prohibition on foreign land ownership by use of Thai nominee shareholders.
- **Investments and BOI (board of investment) approval:** Another means by which foreign nationals may own land in Thailand is through an investment approved by the Thailand Board of Investment (BOI). Through an investment of 40 million TBHT for 5 consecutive years, foreigners may buy a limited amount of land, provided that the land is used for residential purposes. Foreign companies, alternatively, may request the approval of the BOI to purchase land for a limited time period.
- **Condominium Purchase:** Foreigners may purchase condominium units in designated projects in Thailand. This is an attractive option for many, as a foreigner may possess outright ownership of condominium units under Thai real estate law. Legally, non-Thai nationals may purchase condominiums in approved locations and projects throughout Thailand, provided that foreign ownership in the building does not exceed 49% of the total floor area.

Foreigners who wish to purchase condominiums in Thailand may do so without a Thai residence permit, provided that they can show proof that funds for the purchase came from outside of Thailand. Foreigners possessing legal Thai residence permits are not required to show evidence of funds from abroad at the time of a condominium purchase. Like many title deeds under land leases, condominiums may be inherited by either Thai or non-Thai nationals.

- A final, but ill-considered, method of acquiring land, that has gained notoriety, is using a Thai national to purchase real estate in their own name on behalf of a foreigner. The Thai national may then execute an agreement saying that the land is held for the benefit of a foreign client. This method of land purchase is illegal under Thai law, as it is unlawful for a

Thai citizen to act as a nominee for a foreigner in the purchase of real estate. There are a number of problems and risks in following this method.

Due diligence

A thorough due diligence by a qualified attorney offers potential purchasers a good measure of protection from real estate fraud and misrepresentation.

Due diligence is a customary legal investigation based on documents provided by the seller, the legal review of these documents, and then inquiries and investigations based on said documents, all with the aim of providing the purchaser with the maximum amount of information and transparency on the property he or she wishes to acquire. The procedure can also reveal important issues regarding the value of the property.

Due diligence can be extensive or minimal, depending on the property under review. A wide variety of documents may be requested for review, including, but not limited to:

- Copies of the title deed;
- Copies of the ID cards and signatures of the owners;
- Copies of insurance policies covering the land in question;
- Descriptions of lawsuits a land owner might have been involved in;
- Copies of land leases;
- Should the property in question include a business or enterprise, copies of assets owned by the company, and employee names and their salaries;
- Copies of mortgages registered against the land.

Due diligence normally also involves enquiries to the Government Land Department as well as inspection of the land involved. Most law firms will provide a detailed report that outlines potential risks and considerations.

Investment in Thai real estate can still be secure

Acquiring a second home in Thailand is an attractive option for many people. Thousands of foreigners successfully and securely acquire properties in Thailand each year. However, due care must be taken. Prospective investors should retain a qualified law firm and complete the necessary due diligence and not sign anything, or deposit funds, until potential risks have been either eliminated or minimized. The extra time, effort and expense involved in hiring a qualified attorney to oversee the purchasing process is well worth the payoff of the carefree enjoyment of a residence in one of the most beautiful countries on earth.

Laws Governing Land Ownership Of Foreigners In Thailand

There was a conflict between two laws with regards to the rights of foreigners to own a land in Thailand.

Foreigners are given equal property rights as Thai nationals have under its Thailand Civil and Commercial Code. According to the Thailand Civil and Commercial Code, any person or foreigner can own the land and any structure built on the land. However, the Land Code Act B.E 2497 (1954) prohibits foreigners from owning land in Thailand. The Condominium Act extends the restriction to condominiums.

This conflict was settled in 1970 when the treaty allowing foreigners to own a land in Thailand under the Thailand Land Code Act was dissolved.

Home Ownership of Foreigners Before 1970

Foreigners who purchase a home in Thailand can rent the land and own the house as a personal property. In whatever land structure which is open for lease, it is advised and recommended to obtain ownership over the house. The right of a person to acquire the house on another man's land always accords the term of the land lease or comprehensive agreement entered into by that person and cannot go beyond 30 years.

Furthermore, Section 84 of Thailand Land Code, foreigners may acquire land for purposes of residency, commerce, industry, agriculture, burial, public charity or religion. However, these purposes must be in conformation with the conditions and conditions prescribed in Ministerial Regulations and with the permission of the Minister. But these lands are further subjected to limitations such that the foreigners are only allowed to acquire land for residence with not more than 1 rai per family. This is also true with other lands acquired for purposes mentioned above in which each purpose has also limitations on the acquisition.

However, the last treaty which grants these property rights to foreigners was terminated in 1970. Since then, there has been no treaty with any country that allows foreigners to acquire and own land in Thailand. Moreover, anyone who breaches with Section 86 shall be punished in accordance to Section 111 of the Land Code Act.

Land Code Amendment Act of 1999

In theory, under section 96 of Land Code Amendment Act (1999), foreigners can own land up to 1 rai (1600 square meters) for residential purposes through the Board of Investment which will require a 40 million baht investment in Thailand. This will be under strict conditions and in specified areas and requires approval of the Minister of Interior. However, this is not a viable option in practice and is not transferable by inheritance. Thus, the ownership is extinguished once the person granted with the ownership dies.

Foreigners as a Statutory Heir

Also in theory, under section 93 of the Land Code Act, a foreigner married to a Thai national can inherit land as a statutory heir subject to the approval of the Minister of Interior. However, Section 86 of Land Code Act states that foreigners who inherited a land must dispose of this within one year of acquisition.

Land Ownership of Foreign Companies

Moreover, land ownership is also not open to foreign companies including Amity (US) companies, BVI companies or any other foreign juristic entity. However, foreign corporations with substantial investments benefiting the Thai economy may have special privileges and exemptions for land ownership which are to be governed by provisions of Section 27 of the Investment Promotion Act, Section 44 of the Industrial Estate Authority of Thailand Act, and Section 65 of the Petroleum Act. Land ownership by a legitimate Thai company, which is partly foreign owned, is allowable under Thai laws provided the foreign shareholding does not exceed 49% in numbers of shareholders and percentage of shares in that company. This is referred as “foreign” or “alien” company.

For it to be considered a legitimate Thai company, it must comply with the policy requirements provided under the Land Code Act. A company is said to be foreign if half or more of the juristic person’s shares are owned by the foreigners.

A company may be considered a Thai company if the company has only 1 Thai shareholder given that he holds and owns the majority of the shares in the company. A Thai company structure, therefore, is not a viable or secure vehicle for a long term foreign controlling interest in real estate in Thailand.

It has been a common practice for foreigners to form a Thai company and to hold land under a Thai company structure until May of 2006. This practice became less common when there were proposed amendments to Foreign Business Act and new land office guidelines were followed by the business registration rules.

The Thai government has conducted series of discussions to compensate the loopholes and conflicts on these laws governing land ownership in the country. Thus, under the new regulations provided in the Land Code Act as amended, guidelines followed by the authorities order officials to take into the effect the Section 74 of the Land Code Act which states that “In recording rights and legal acts by the competent authority under Section 71, the competent authority shall have the power to interrogate the parties and summon persons concerned to give oral testimony or send relevant written evidence as may be necessary and then proceed as may be appropriate under the circumstances. If there is reason to believe the recording of such rights and legal acts is in evasion of the law or there is reason to believe the purchaser is purchasing on behalf of an alien, instructions shall be asked of the Minister whose word shall be final.”

Land Ownership Through A Nominee

In addition, employing nominee shareholders to evade the Thailand Land Code Act or Foreign Business Act violates what was mandated by those laws. Any alien or foreigner setting up a

company with this kind of systems violates foreign ownership restrictions. Not only that, it creates an unlawful foreign ownership, not putting into fact the number of shares he possesses in the company.

Foreign Ownership Of Condominiums in Thailand

As provided in Section 19 of Thailand Condominium Act, non-Thai nationals, whether they are natural or juristic persons, may have absolute ownership of a condominium apartment unit in Thailand but this ownership is subject to terms and conditions stipulated in and provided for by this code. Moreover, as provided for in Section 19 of Condominium Act, aliens or foreigners are permitted to have residence in the country and are allowed also to enter into Thailand governed by Immigration Law and Investment Promotion Law, respectively.

Purchasing a condo must meet the requirements for foreign ownership as required under the law of Thailand. Pursuant to this provision, aliens (foreigners) are allowed to own not more than 49% of the total floor area of all condo units. Thus, the remaining 51% must be owned by Thai nationals.

Absolute Ownership Of A Condominium Unit

Absolute ownership over a condominium unit in Thailand must be registered and licensed as per the Condominium Act of 2008. The Act also states that a higher proportion of foreign ownership in a condo building is not allowable. This means a Thai national must own bigger proportion of the condominium unit.

On the other hand, tourist resort condos in Thailand are often sold leasehold and freehold to foreigners. This is tourist resort condos in the country do not have high demand. The lack of demand leads to many resort condos unable to sell enough units to Thai Nationals for them to have majority ownership. Even the Thai owned condominiums are traded to foreigners under leasehold agreement. This trend prompted many foreign-owned companies to buy condominium units as an option to leasehold. However, this practice became less common when a series of new regulations were issued by the Land Department making land ownership of a partly foreign owned Thai company illegal.

Condominiums in a Leasehold Setup

Condominium Act does not govern condominiums that are sold in leasehold set up. These condominiums are not registered and have several drawbacks which include lack of ownership rights, lack of tenant and consumer protection laws. Also, the principle right of control over the building and common areas belong to the building owner and not by the unit owners.

Condominiums registered under the Condominium Act gives the control over the building and common areas to unit owners.

In addition, leasehold of condos in Thailand is governed by the chapter Hire of Property stipulated in Sections 537-574 of Civil and Commercial Code. Under the Thai property law, lease is known as not a real property right but only as a hire of property contract.

In essence, leasehold ownership of a condominium under Thai law is a usual lease contract with a definite and fixed period of term which must not exceed thirty (30) years. Also, under Thai law,

rights coupled with leasehold are limited and may be terminated even before the contracted term. Termination of lease agreement may be due to failure of the lessee to comply with the terms stipulated in the lease agreement or when the lessee dies. The person renting the condominium cannot freely sell his leasehold during the period of the lease for it is not an asset. Thus, the lessee can only assign his contract right with the permission and cooperation of the registered owner of the condominium unit. With this, a lease is not automatically transferable by inheritance. Acquiring leasehold apartments is not illegal under the law and generally these apartments are less expensive. However, being a buyer of a leasehold apartment, one should check the written agreement and the intention of the developer. This kind of arrangements does not propose the same protection under the law, unlike what is offered in a licensed condominium development project. The difference is that, real condominium offers government control, actual ownership and protection under the Thailand Condominium Act while the condominium acquired through lease agreement offers just possession under the Civil and Commercial Code and must further offer individual protection through private agreements.

Considerations When Buying A Condo Under A Lease Agreement

There are main considerations when a person buys a condominium under a lease agreement. These include voting rights, selling and assigning a leasehold condo, inheritance of leasehold condo, term of the lease in the contract, condominium lease contract content, the lessee's additional property tax burden among others. As to the case of voting rights, unless specifically arranged, connected with ownership of the condominium stays with the owner of the unit and are not automatically transferred to the leasehold purchaser. Usually, only a few owners attend the condominium joint owners meetings and give the developer a portion of voting rights on leasehold units control and some matters relating to organization and maintenance fees. Consequently, selling leasehold condos could disturb the democratic voting system in a condominium. Moreover, the basic right of a leasehold buyer of a condominium is just a personal right of possession of the unit for a specified term. However, the leasehold purchaser does not possess any rights to sell or assigned the leased condo apartment during the lease term. Assignment of a lease is a three party agreement between the owner, the current tenant and new lessee/tenant. When formally registered with the Thailand Land Department, only a registered owner has the right to transfer ownership or to accept assignment of the lease to another person.

Inheritance of a Leasehold Condo

A foreign freehold owner of a condominium can pass on a condominium in Thailand to another foreigner. As earlier stated, lease in Thailand is a contract right and, under the hire of property provisions, is terminated upon death of the lessee. As a result, right of possession of the condo will not be automatically transferred to the heirs when the lessee dies. Succession clause must be included in the lease agreement. However this succession clause does not propose full guarantee on the transfer of the ownership.

The term of the lease of the contract cannot exceed 30 years and pursuant to Section 540 of Thailand Civil and Commercial Code, any longer term will be reduced to 30 years. This limit makes legal action under Thai contract law for pre-agreed renewals, pre-signed consecutive contracts or even registered contracts suggesting longer term not enforceable due to conflict with the provision of Section 540 of Thailand Civil and Commercial Code.

Further, the content of the condo sale contracts must meet the minimum standards and consumer protection laws. Condominiums acquired through lease agreement are subject to a rental tax at a rate of 12.5% over the actual yearly lease price or annual assessed lease price, whichever in these two is higher.

This is a yearly additional financial burden for the leasehold purchaser of a condominium for this is always passed on to the lessee in the lease agreement. More so that the transfer of ownership of a condominium is dependent on conveyancing tax and fees, and lastly, a lease registration fee of 1.1% of the total lease price is carried on buying a condominium under a lease agreement.

Foreign Ownership of Unregistered Apartments in Thailand

Residential apartment structures in Thailand have two (2) types:

- Registered and Licensed which offers absolute ownership over the individual units comprising the condominium, and
- Unregistered and unlicensed under the Land Department of Thailand which does not offer individual ownership over the units.

Registered Condominiums

Registered condominiums are licensed with the Land Department of Thailand and must conform to the legal structure as provided in the Thailand Condominium Act. These condominiums can propose outright ownership over the individual units. The legal structure laid down in Thailand Condominium Act is constructed around individual unit ownership, joint ownership over the common areas and joint management of the building by all the unit owners.

Unregistered Condominiums

On the other hand, apartment structures which are not registered and licensed are also not regulated by specific condominium laws. Moreover, the developer of an apartment structure can sell possession under his own terms and conditions. More so, that these apartment buildings are sold under various contract structures which vary from time-sharing schemes, mere apartment leases wherein the developer retains full ownership over the units to leases combined with shares in a holding company. Being a buyer, one must be aware that the contract structures must be double checked. Contract clauses on the lease structure, management system of the building, and ongoing financial costs through maintenance and management contracts must be scrutinized.

Apartment buildings which are not registered and licensed, like that of a condominium, can offer individual lease agreements over the units as part of the building. Also, foreigners do not have to qualify for lease registration under a special law and there is no foreign lease quota.

Selling of the apartment necessitates the cooperation of the owner of the land or property. In addition, the occupants of the building are merely tenants and must conform to the rules set by the owner of the property. Consequently, control and management over the land and building set by law to the owner of the land and the building.

The contract sale structure used for selling the leasehold apartments could go either way, pro lessee or pro lessor/developer depending on terms or conditions stipulated in the contract. Lastly, these units are subject to housing and land tax in accordance with the housing and tax regulations mandated by law in Thailand. In connection to this, apartment buildings require registration of a lease agreement over part of the building at the provincial or local Land Department branch office.

Difference Between Condominiums and Apartments

Legally speaking, there is a big difference between condominiums and apartments in Thailand in relation to foreign ownership. Condominiums registered and licensed under Condominium Act offer ownership title deeds. These ownership deeds are issued and administered by the government and are legally recognized under the law.

The lease agreement must clearly mention that the purchase of a condominium is an apartment project under the Thailand Condominium Act B.E. 2522 and that the transfer of ownership will take place at the land department. This lease agreement will further show if the purchase concerns a leasehold or freehold purchase.

A true titled condominium will have a government issued title deed for each condo. Leasehold apartment sale structures will usually involve a lease agreement and/or maybe a share transfer and management agreement. Furthermore, a leasehold apartment could have separate house books stating the address of the unit. However, this house book is different with the ownership document or ownership title deed.

Foreign Apartment Ownership

It is mandated under Section 19 of Condominium Act B.E. 2522 (1979) that Aliens or foreigners and juristic persons regarded by law as aliens may hold ownership of an apartment if they are allowed to have residence in the Kingdom of Thailand as approved by the Immigration Law of Thailand. Moreover, these foreigners are allowed to possess ownership if they are allowed to enter into the Kingdom of Thailand as governed by Investment Promotion Law of Thailand.

As provided in Section 97 and 98 of the Land Code, juristic persons under Thai law may possess ownership of an apartment in Thailand. More importantly, if these juristic persons (aliens) brought in foreign currency into the Kingdom of Thailand or withdraw money from Thai baht account of the person who have residence outside the Kingdom or who withdraws money from a foreign currency account.

Moreover, Section 19 of the Thailand Condominium Act provides that “In transferring of ownership of an apartment to an alien or juristic person as specified in Section 19 shall the applicant for transfer of ownership of apartment shall notify the Competent Official of the name of the alien or juristic person as specified in Section 19 together with the proportion of space of apartments already owned by such aliens or juristic persons.”

Additionally, fractional ownership seems to be on the rise in the real estate market of Thailand. In some instances, companies enter into a lease contract with a registered leaseholder and then entice potential clients to view and stay in the apartment. After which, these companies sell weeks of fractional ownership to the clients.

While according to the laws in Thailand, aliens (foreigners) cannot own real estate other than condos registered under the Thailand Condominium Act, still these foreigners vend fractional ownership of these apartments though basically, they don't own the apartment.

Fractional ownership apartments are commonly not registered and licensed as condominiums in accordance with the provisions stipulated in Thailand Condominium Act. These fractional ownership apartments are referred to as leasehold apartments. This type of ownership usually involves a rental element in some part of the lease agreement.

Likely, fractional ownership is sold as an interest or shares in a foreign (non-Thai) company that owns the lease or the building on the rented land. Legally, foreigners cannot have fractional ownership in the lands of Thailand but most likely, they will just become fractional tenant of the apartment for a maximum period of thirty (30) years.

Thailand Rules for Lease

Lease is defined as a contractual arrangement calling for the lessee (user) to pay the lessor (owner) for use of an asset. It is also referred to as rental.

Sections 537 to 571 of Thailand Civil and Commercial Code

Laws in Thailand do not have separate laws on leasehold. Lease is a real property right in Thailand. It is provided for in Sections 537 to 571 of Thailand Civil and Commercial Code that a property lease in Thailand is governed by this law particularly on the hire of property section which is placed under the rubric "Contracts" of Thailand Civil and Commercial Code.

Section 537 of Thailand Civil and Commercial Code provides that "A hire of property is a contract whereby a person, called the letter, agrees to let another person, called the hirer, have the use or benefit of a property for a limited period of time and the hirer agrees to pay rent therefore."

As clearly stated, a lease in Thailand is a normal contract with a fixed term. This lease cannot be transferred and even sold as an asset. This is, however, can be assigned only as a hire of property contract thus requires permission and support from the owner of the property being leased.

There are several drawbacks which are associated with hire of property in Thailand. One this drawback is the termination of the lease agreement, as a personal contract right of the lessee, upon death of the lessee. Furthermore, law of Thailand does not give the heirs, heiresses or successors of the lessee a right to inherent the leased property.

Lease Contract as an Inheritable Right

According to Thai laws, a lease or a hire of property is not an inheritable right, however, it can only be assigned as a contract with formal acceptance of the other party in the lease agreement which is the owner and registration on the title deed. Under the Thai law, the heirs or successors are not automatically entitled to rights of success over the lease when the lessee or tenant dies.

In the first place, lease or rental is not a real asset but rather a contract and personal right of the lessee. This means, that the lease agreement as confirmed by the Supreme Court of Thailand is terminated upon death of the lessee because the lessee (tenant) is the core of a lease agreement.

Moreover, as stipulated under the provision of Section 569 of Thailand Civil and Commercial Code, if the owner of the property dies the contract of hire is not terminated. This will remain in force

against the heirs or successors of the owner, however, only in so far as it concerns true hire of property or lease rights.

Additional contract rights in the lease are not considered true lease rights under Thai contract law. It will not transfer to the new owner and are terminated upon transfer of ownership in accordance with Section 569 of Thailand Civil and Commercial Code. Thus, the new owner must accept these clauses in the lease agreement or he will not be bound by a promise given by the previous owner to renew the lease or to assign, further, the lease to the lessee's heirs.

Lastly, death of the owner or transfer of ownership of the property hired could lead to the lessee to end up with a lease contract that only partly enforceable by legal action against the transferee owner.

Contract Terms

Under hire of property laws in Thailand, any property lease or rental with a fixed term exceeding three (3) years, as provided for in Section 538 Thailand Civil and Commercial Code, must be in writing and recorded on the ownership title deed – land or condominium title deed, as kept in the registers of the provincial or local land office.

Any lease agreement between the parties (lessee and owner) which is not registered with the Land Department of Thailand is enforceable by legal action for only a term of three (3) years. It is provided in Section 540 that the term of a registered lease agreement cannot exceed thirty (30) years and is automatically extinguished at the end of the registered term (Section 564).

On the other hand, a short term contract does not have to be registered but must be in writing for it to be enforceable by legal action. A lease, in practice, can only be registered over land with a confirmed right of possession or freehold ownership title deed or land with a title. In the case of a licensed condominium, a long term condominium apartment lease is registered with the local land office where the condominium is located and will be noted on the backside of condominium unit ownership title deed.

Lease Price

Payment of rent is one the essential element of a lease agreement under Thai Law as provided for by Section 537. In line with this, possession of a real property under a lease agreement in Thailand without payment of rent would not be enforceable as hire of property under the Thailand Civil and Commercial Code.

Also, a lease without a lease price would not be governed by the chapter hire of property but for example by right of habitation or usufruct laws and a different set of rules would apply. A rent will be required to be included in the lease for the registration of a lease agreement. The registration of the lease agreement will be refused should the lease price or rental price is found to be unreasonable and not viable for the lease.

Contracts More Than 30 Years

The term of registration of a lease in Thailand must not exceed thirty (30) years. Consequently, when the fixed registered term runs out, the lease comes to an end automatically. Some real estate leasehold sale contracts aimed at foreigners (aliens) to create or suggest more rights than a 30-year lease.

However, this kind of contract between the seller and the leasehold buyer can be complex and must at least separate ownership over the house from the land and often include additional 30-year prepaid hire periods and the option in the contract (or addendum to the contract) to transfer the land to a freehold title. Legally, this is considered as a contract structure between two (2) or more parties only and binding only between the parties. This kind of contract structure is not protected by Thailand laws and could be considered void and illegal.

In 2008, under new land office regulations imposed by Thailand authorities, the land offices must not accept registration of a lease agreement with obvious or illegal provisions such as a foreigner's right to transfer land to freehold title and pre-paid 30-year renewal terms. For this reason, these provisions are now often made in a separate addendum to the lease which is a part of the lease arrangement not registered with the Land Office, notwithstanding the fact that the Land Department of Thailand considers these sale methods void or illegal.

House Ownership Rules For Foreigners in Thailand

Laws in Thailand stipulated that foreigners don't have the right to own a land within the country. However, they can own a building or a structure with certain condition.

Essentially, there are two (2) ways of acquiring tenure over the dwelling constructed upon land but is separate from it. First method is for one to construct a building with or without a right of superficies upon a leased land. Second method would be for one to procure a structure already built and further acquire a lease on the land where it was built.

The preferred method for foreigners buying a house in Thailand is by registered land lease combined with legal ownership over the structures upon the leased land.

Requirements for Foreigners Buying a Property

Certain laws govern the purchase of a home or a house and even the property laws in Thailand. Moreover, this does not differ from that of other countries specifically on matters of real estate purchase. However, foreigners in the country cannot own land. Thailand Land Code Act governs land ownership in Thailand whereas house ownership in the country is governed by Thailand Condominium Act.

In Thailand, any building or any structure which is constructed above its lands may be possessed and transmitted separately from the land it is constructed. When ownership of a house is transferred separate from the land, the transfer procedure must conform to the Thailand Civil and Commercial Code stipulated in Property in Book IV. It also must be in writing and must be registered with the Land Department branch or provincial office.

Furthermore, the right to use the land such as the land lease and/or the right of superficies term is relative to the ownership of a house on a land owned by someone else. Thus, when the right to use the land expires, the right to own the house on the land perishes with it.

Moreover, title deed document is not provided to the building or any structure in Thailand. The process of transferring the legal possession of an already built structure commences at the land office in the locality. It is also necessary to make an announcement in the public for a span of thirty (30) days at particular places. After the given period, Land Department branch in the locality will complete the process of transferring the ownership of the building.

Evidence of tenure can, by and large, be documented by any of the following: a) an authorized permit of the building in which the name of the owner appeared; or b) the document which contains the sale of the building and is distributed, marked, imprinted and facilitated through the Land Department office in the locality.

Requirements in Transferring an Ownership of an Existing House

The process of transferring the legal rights of a building which is already constructed follows several methods which must be accomplished by the trader and the purchaser.

First, both parties must be in attendance during the announcement of the transaction at the local land office in Thailand. In cases where one of them is not around, a representative of the absentee party may be chosen using the authority given to the land office.

Secondly, legal documents necessary in making the transfer such as permits of the structure, identity cards of both seller and purchaser must also be shown during the process. The legal document which contains the permit of the building proves that the rightful owner of the structure is the seller and thus acquired permission to construct upon the land. For instances that the party fails to furnish a building approval, the structure may have been unlawfully built. After which, the land department office will furnish four (4) copies of notice letters of the transaction and to be published to four (4) specified places by the authorities. The purpose of which is to know if there's anyone from the community who would like to question the transfer.

Lastly, after the given period, both parties must be in attendance again at the land department, and, if in such case that there's no one who contested the transfer, both parties will sign the legal document of the deal for it to become implementable.

The Ta.Bian.Baan

The government of Thailand furnishes booklet which is the authorized registration book and is known as Ta.Bian.Baan.

Furthermore, this booklet contains the Thai nationals who dwell in the building. However, this is not a lawful document of tenure but a mere evidence of residency. Ta.Bian.Baan for Thai nationals and foreigners are separate from each other thus making it two (2) types of Ta.Bian.Baan – the blue book and the yellow book. In addition, the value of the yellow book is limited.

Rules On Real Estate Ownership For Spouses in Thailand

It is stipulated under the Thai laws that a foreign national is not allowed to co-tenure with his or her other half who is a Thai national. Also, they are not allowed to have any significant tenure of the land as mutually possessed conjugal or wedded assets between spouses. That means that even if a foreigner marries a Thai and the foreigner use his or her own money to buy a land in Thailand, the Thai national will be the one who will legally own the property regardless of who paid for the property.

The above process also applies to other real estate assets in the country. With this, the property purchased as a private asset will not become a conjugal asset between spouses.

Risks of Foreigners Buying a Property Under The Thai Spouse's Name

The land can be purchased using the identity of Thai national, who in a particular instance, is wedded to an alien (foreign). Conversely, this bares with it some risks and a lot of legal requirements. If a Thai citizen with an alien spouse desires to purchase an asset, evidence will be needed that the resources which will be utilized to purchase the asset is lawfully obtained from the spouse who is a Thai national only.

This rule also applies to cases of purchase of a condominium unit which is a part of a condominium building that will exceed permitted share of alien (foreign) possession. In instances of acquisition of real estate assets, the Thai spouse has to prove that the resources utilized is privately owned or a *Sin Suan Tua* by him or her in accordance to two (2) provisions of the Thailand Civil and Commercial Code.

Sin Suan Tua includes:

- assets privately owned by either of the husband and wife prior the marriage
- assets that are used by either party separately such as properties used for work
- assets obtained by either party throughout the matrimony through donations or presents;
- property which they call *Khongman*.

Moreover, the Thai party must show proofs in an official statement of authentication that all resources paid for the real asset is privately owned by either party in the marriage and not a joint asset.

In this situation, the Land Department of Thailand's policy is to inspect the authentic basis of resources to be utilized in the purchase. In cases the alien spouse is not a domicile of Thailand, it can be recorded by any authorized party in that particular country where the foreign spouse lives.

The abovementioned conditions will also pertain to listing of tenure over the land at the Thailand's Land Department Office. The guideline and method are aimed at averting the possibility of the Thai spouse and foreign spouse co-own the assets. This is based on Thai Family laws chapter on "assets between husband and wife".

It is also aimed at avoiding the Thai spouse acting as the owner of land on behalf of the alien spouse. In addition, the certified authentication letter is based on the principle of a certain provision in the Thailand Civil and Commercial Code which is Section 1472. It also states that if a privately owned asset has been traded for other property such as land, that property shall be in effect privately owned.

Foreigner as a Statutory Heir

In theory, as a legal heir, an alien who is wedded to a Thai citizen can have possessions of the land by means of inheritance. The alien (foreign) spouse can also record such tenure following the attainment of acquiescence from the Minister of Interior.

As stipulated in one of the provisions of the Thailand Land Code Act, an alien (foreign) spouse who obtains property through legacy as the legal heir can have tenure in such property with the given authority from the Minister of Interior but is subject to limitation such that it should not exceed the plots provided and clearly stated in Section 87 of the code.

However, it must be taken to consideration that the above provision concerns only the alien tenure of property acquired through a treaty and not to foreigners being recipient of land as a legal heir from the Thai partner.

Alien (foreign) spouses who get hold of land through legal succession has to reassign the property within one (1) year to a Thai national. It must be further noted that this can be useful only to foreign persons inheriting land as a legal successor and not to foreign inheritors who obtain land under a last will.

Any foreigner who gets hold of a condominium unit through legacy, either as a legal heir or inheritor under will, shall obtain rights of such unit and must meet the criteria set under Section 19 of the Thailand Condominium Act to essentially record rights with the Land Department of Thailand.

If that person has not met the requirements under section 19 or if he qualifies but the ownership would exceed the allowed forty-nine percent (49%) foreign ownership in the condominium building, it is required by law that the unit shall be disposed of within one (1) year from the date of acquisition of such condo unit. If the foreigner be unsuccessful on this, the Director-General of Land Department shall have power to sell the condominium on the foreigner's behalf.

Property Ownership Through Nominee Owner In Thailand

Thai Companies in Thailand with foreign participation and control are frequently set up just like majority of Thai owned companies for it to be recognized as Thai companies and furthermore not to be reprimanded by foreign ownership or foreign business restrictions.

Through using Thai nominee shareholders or proxies in the company, foreigners outwit foreign ownership and business restrictions and manage for prohibited and restricted foreign businesses in Thailand.

Thai Nominee Shareholders in a Foreign-Owned Company in Thailand

The employment of Thai nominee shareholders by foreigners to avoid Foreign Business Act (FBA) is under the law, illegal and could lead to criminal charges if proven. A minority foreign owned Thai company using Thai nominee shareholders is a foreign company.

However, there is still a vague definition of what exactly a Thai nominee shareholder is. For as long as the Thai government does not put into practice a stricter enforcement of existing anti-nominee laws or on other grounds examines a company structure, these foreign controlled Thai companies will continue operating for foreigners prohibited or restricted businesses in Thailand.

Nominee owner refers to a circumstance where in a Thai national buys a land on behalf of a foreigner or performs as the agent for the foreigner in the land purchase. It has been a common practice in Thailand that foreigners acquire land and register ownership in a Thai national's name and in return is given a lease, superficies or usufruct.

Foreigners do the registration of ownership either through a loan agreement and sometimes a mortgage registration. Under the Thai law, this structure is legal and duly recognized by law as long as the Thai national is not restricted in employing his or her outright ownership rights in the land which in fundamental nature relates to manage the land such as the freedom to encumber, trade and transfer the land. If such rights are restricted and lies with the foreigner it could be assumed that the Thai national obtained the land under Section 96 of the Thailand Land Code Act "as the owner in place of a foreigner" or acquired land on behalf of a foreigner as his representative. Under this law, both the foreigner and the Thai national are liable for fines and may even be punished with imprisonment.

Section 96 states that "When it appears that any person (including a juristic person) has acquired land as the owner in place of an alien or juristic person under the provisions of Section 97 and 98, the Director-General shall have the authority to dispose of such land and the provisions of Section 94 shall apply mutatis mutandis."

Section 113 of the same Code states that "Any person who acquires land as an agent of an alien or juristic person under the provisions of Section 97 or 98 shall be punished with a fine not exceeding twenty thousand baht or an imprisonment not exceeding two years, or both."

Under present law and regulations, the suggestion for a nominee shareholder lies principally in the source of the capital investment and the financial credibility of the Thai national shareholders when forming the Thai company. This also applies when transferring the land to a company often at the prudence of the officials involved.

The government makes it more complicated to form a company for foreigners nowadays.

Property Holding Companies Legal Issues

On the other hand, property holding companies have a whole set of different legal problems under Thai law. An arrangement which is sometimes being practiced is that a foreigner advances money to Thai national to purchase land, and in consideration for the financial loan the Thai national leases the land back to the foreigner under thirty (30) year land lease agreement whereby rent is set-off against payment of interest on the loan.

If, by instance, there is reason to believe that a Thai national is buying land on behalf of an alien the Land Department Office must interrogate the parties (the foreigner and the Thai national) and could refuse transfer of land to the Thai national.

In connection to this, if a nominee structure is being set up, transferring land to the Thai national and registering rights for the benefit of a foreigner (a real estate lease or usufruct) is commonly not done on the same day.

Section 74 states that “.....if there is reason to believe the recording of such rights and legal acts is in evasion of the law or there is reason to believe the purchaser is purchasing on behalf of an alien, instructions shall be asked of the Minister whose word shall be final.”

Usufruct Rights on Real Estate Properties in Thailand

By definition, usufruct contract pertains to the conformity and the right to use or occupy another man's real property for a term up to thirty (30) years. However, if the person dies before the 30th year, the contract is dissolved.

Frequently, a usufruct is granted to a family member such as a foreign spouse to secure the foreign spouse's right over the property in the event of death of the Thai spouse or the owner.

The right of usufruct transmits possession, use and enjoyment of an immovable property from the owner to the usufructuary. It can only be registered over appropriately titled immovable property and is instituted by agreement with the owner and registration at the local land office. The contract or memorandum for usufruct is the authorized document that states and confirms the formal concurrence between the owner and the usufructuary.

Usufructuary

Usufructuary refers to the holder of the usufruct right. So long as he/she is alive, the right of usufruct in the real property will also subsist. With that, after his or her death the real estate property regresses back to the owner.

Obligations of Usufructuary

A usufructuary is not allowed to put up for sale the real estate property because usufruct right remains with the registered owner of the property. He or she has the obligation to preserve the

property and take standard care of the property. If the usufructuary fails to perform this requirement and the property depreciates, the owner has the right to terminate the right of usufruct. Moreover, the usufructuary is accountable for loss of value or destruction of the property unless he or she can prove that damages are not caused by his/her fault. In certain circumstances, the formation of a usufruct could be an effective opportunity to protect a foreign spouse during his/her marriage in Thailand and upon death of his or her Thai spouse. However, in some cases, a usufruct could be not the best alternative.

Provisions in Thailand Civil and Commercial Code – Usufruct (Title VII)

Usufruct rights in Thailand are governed by Sections 1417 to 1428 of Thailand Civil and Commercial Code under Usufruct chapter of Title VII. The following are some of the provisions which oversee the usufruct rights.

- Section 1423 of this Code states that “The owner may object to any unlawful or unreasonable use of the property. If the owner proves that his rights are in peril, he may demand security from the usufructuary, except in the case of donor who has reserved to himself the usufruct of the property given. If the usufructuary fails to give security within a reasonable time fixed for the purpose, or if, in spite of the owner’s objection he continues to make use of the property unlawfully or unreasonably, the Court may appoint a Receiver to manage the property in his stead. Upon security being given the Court may release the Receiver so appointed.”
- Section 1427 provides: “If required by the owner, the usufructuary is bound to ensure the property against loss for the benefit of the owner; and if the property is already insured he is bound to renew such insurance when due. He must pay the premiums of the insurance for the duration of his usufruct.
- Section 1428 of Civil and Commercial Code further states that “No action by the owner against the usufructuary or his transferee in connection with the usufruct or vice versa may be entered later than one year after the usufruct comes to an end. But in an action by the owner who could not have known of the end of the usufruct, the prescription of one year shall run from the time when he knew or ought to have known of it.”

Usufruct in Thailand: Limitations/Restrictions and Period Terms

A. Limitations on Right of Usufruct in Thailand

- The usufructuary or the person granted with right of usufruct is not permitted to transfer this right; however, he or she is permitted to transfer the exercise of his or her right under the usufruct to another person. Moreover, the person granted with right of habitation cannot transfer the exercise of his or her rights.
- The usufruct is not transferrable by inheritance.
- The usufructuary does not obtain the title to the property, nor can he sell or consume the property.

B. Term of the Usufruct

The right of usufruct in Thailand can be done for a period of time up to thirty (30) years or for the life of person or persons. As mentioned earlier, a usufruct is dependent on the life of the person or persons granted with this right.

In any case that A (the owner of the property) gives to B the right of usufruct for that said period of thirty (30) years and B dies after twenty (20) years, then the usufruct will be terminated after twenty (20) years and the property will automatically be returned to the owner.

Leasing the Property under Usufruct

Except for a clear restrictions stipulated in the contract of usufruct, the usufructuary is permitted to lease out the property without the consent of the real owner and keep the lease. The power to register the contract for hire exceeding three (3) years with the land department can be included in the usufruct.

If a valid rental or lease has been established, the hire of property is not automatically terminated together with the end of the usufruct.

Foreign Nationals as Usufructuary

In situation that a foreign national is the usufructuary, land offices in Thailand will not permit registration of the contract for hire for under the Thailand Land Code Act. Foreigners are not allowed to manage land and can also not obtain this right under a usufruct. In practice, foreign usufructuary can only rent out the property under usufruct for periods not exceeding three (3) years at the time.

Usufruct Registration

By nature, usufruct can be granted with or without consideration. It must be registered at the local land office. With the total consideration, 1% and 0 are to be paid as registration fees and 1% stamp duty. If the usufruct is granted without the exchange of value or money, the registration will cost less than 100 THB per plot.

Superficies Rights in Thailand

A superficies is defined as a conveyable and alienable right of interest in land to possess or get hold of buildings or constructions completed on or above the land of another person for a specific period of time. It is a real right over an immovable property granted by Thai law to both nationals and foreigners alike. The right is usually resorted to when the owner of the improvement is not the landowner.

The right of superficies granted to a person in Thailand lawfully separates ownership over the building and the land.

Right of Superficies in Other Countries

The right of superficies law in Thailand is based on the mainland real estate laws of European Civil Law. It is called “Droit de Superficie” in France, “Erbbaurecht” in Germany and “Recht van Opstal” in the Netherlands. All of these countries have the same principle as to granting the right of superficies.

Just like how other countries practice this right, superficies in Thailand creates the registered right to use and to own buildings, structures or plantations upon land belonging to another person.

Definition of Superficiarius

Superficiarius is defined as the person granted with the right of superficies. He or she is permitted to utilize the land and to possess the structures built upon the land even without obtaining ownership rights over the land itself.

If the superfiary or superficiarius dies, the right of superficies is terminated.

Creation of Right of Superficies

Under the Thailand Civil and Commercial Code, the right of superficies is used when one person builds any structure on a land he or she does not own. It is required that the agreement creating such a right emerge in writing that indicates the terms and conditions of the right. This must be registered with the Land Department Office. Registration brings about the presentation of the Superficies contract along with other significant documents including the land title deed, house registration book, ID cards and passports. The right of Superficies is deemed created upon recompense of the required transfer tax.

A right of superficies is a real property right in Thailand. This must be attached to the land or part of the land area covered by title deed.

Establishment of Rights of Superficies

The following are the three (3) ways that may be used to establish a right of superficies:

- A period of time up to thirty (30) years
- Period of life of the owner of the land
- Period of life of the superfiary or superficiarius

A right of superficies registered for a specified term is a conveyable and inheritable interest in land.

Laws Governing Superficies in Thailand

Sections 1410 to 1416 of Thailand Civil and Commercial Code govern superficies in Thailand. The following are some of the relevant provisions in the Code pertaining to superficies in certain situations.

- **Acquisition of Superficies through Inheritance**

Section 1411 of the code provides “Unless otherwise provided in the act creating it, the right of superficies is transferable and transmissible by way of inheritance.”

- **No period of time has been fixed**

Section 1413 of Thailand Civil and Commercial Code states that “If no period of time has been fixed, the right of superficies may be terminated at any time by any partner giving reasonable notice to the other. But when rent is to be paid, either one year’s previous notice must be given or rent for one year paid.”

- **Failure of the Superficiary**

Section 1414 of the Code provides “If the superficiary fails to comply with essential conditions specified in the act creating superficies or, when rent is to be paid, he fails to pay it for two consecutive years, his right of superficies may be terminated.”

- **Extinguishment of Right of Superficies**

Section 1415 provides that “The right of superficies is not extinguished by destruction of the buildings, structures or plantations even if caused by force majeure.

” Section 1416 of the Code provides that “When the right of superficies is extinguished, the superficiary may take away his buildings, structures or plantations, provided he restores the land to its former condition. If instead of permitting the removal of the buildings, structures or plantations, the owner of the land notifies his intention to buy the land at a market value, the superficiary may not refuse the offer except on reasonable ground.”

Superficies: Land Lease and Existing Building Set-ups

The right of superficies can be registered as a separate right or in combination with a land lease. Generally, superficies is used by someone such as a foreigner who gets hold of a lease interest in titled land and uses the land for the construction of a building. Superficies is a well-built supporting right to a lease agreement thus a person could lose his or her lease upon termination upon death but the superficies remains in full force and can be transferred to that person’s heirs.

If a building or a property is already existing, registration of a right of superficies will not be approved by the Land Department. However, this could be allowed after would-be superfiary have shown transfer of ownership of the structure separate from the land and after transfer fees and taxes have been paid. Moreover, the person could be dispensed from showing transfer of ownership if he or she can prove that he or she is owner of the house already.

Registration of Superficies

There are several steps to be followed in registering superficies in Thailand. These steps are enumerated as follows:

- It must be entered in the Land Department's land registers.
- It will be noted by the competent authority (the local or provincial Land Department's branch office) on the backside of the owner's land title deed copy.
- As a registered property right, it follows the title (it is attached to the land, not the owner of the land) and is enforceable against any third parties. The right of superficies is not extinguished by transfer of ownership of the land.

Moreover, registration fees are 1.1% which includes a 0.1% stamp duty over the total consideration paid for the right of superficies. The registration will cost less than 100 baht per land plot if the superficies is granted without the exchange of value such as in the set-up of a land lease. Lastly, registration of a right of superficies will be allowed before construction or during the construction of a building, but an existing building must require first a transfer of ownership and payment of transfer tax.

Real Estate Purchase in Foreign Controlled Thai Company

Under the Thai law, using a foreign controlled Thai company to own land in the country is not allowed and punishable by the law. However, Thai law allows land ownership by a legitimate partly foreign owned Thai company if the foreign shareholding does not exceed 49% in number of shareholders and percentage of share.

Moreover, in view of purchasing real estate in a foreign controlled Thai company, it is not allowed for foreigners to use nominee Thai shareholders to create a majority Thai owned company for the purpose of land ownership. Thus, the use of this set-up to evade the Thailand Land Code Act or Foreign Business Act (FBA) is illegal and any foreigner setting up a company using nominee shareholders is in violation of foreign ownership regulations and creates an unlawful ownership.

Basics of Thailand Real Estates Laws

Thailand laws restrict foreigners from owning land in Thailand and in most cases these laws limit foreign property possession in the country. Moreover, purchasing a real estate property in Thailand follows a different legal process than buying realty in a country offering absolute property ownership for foreigners. Property laws in Thailand are straightforward in entailing that foreigners cannot own land but sales structures aimed at foreigners are often multifaceted and confusing. Real estate in Thailand can legally be divided into the following objects:

- Apartments registered under the Condominium Act of Thailand
- Apartments not registered under Condominium Act
- Land
- House
- Land and House

Laws Affecting the Determination of a Thai and Foreign Controlled Companies

According to the Thailand Land Code Act, a company is defined as “foreign” or “alien” if more than forty-nine percent (49%) of its capital is owned by foreigners or more than half of the company shares. As of July 2008, the private limited company must have a minimum of three (3) shareholders at all times, and for it to be considered Thai controlled company under the Land Code Act, it must have at least two (2) Thai shareholders and one (1) foreign shareholder. The latter may possess up to forty-nine percent (49%) of the total shares.

Furthermore, under the Foreign Business Act (FBA), a company is recognized as foreign if half or more of the shares of the juristic person is held by foreigners. On the other hand, a company is still considered Thai controlled company under this Act even if only one (1) Thai shareholder as long as he or she owns the majority or more than fifty percent (50%) of the shares in the company.

New Property Laws Set Up by Ministry of Interior and Local Land Bureau

It has been reported in the Ministry of Interior of Thailand that there have been foreigners working with Thais or had commissioned the Thais to put up corporation to do property dealing by primarily purchasing land and house for the principle of making this property a home or office and afterwards apply to modify the usage to for sale or subdivide and sale to foreigners which constitutes a violation of law.

In connection to this, the Land Bureau and the Ministry of Interior jointly set up new guidelines which come into effect on May 25, 2006, for legal entity which has foreign ownership. These affect Thailand’s property sector by requiring all partly foreign owned companies to demonstrate the source their capital before being allowed to buy land or house.

Furthermore, these new guidelines provide that if a company appears to have foreigners as shareholder or Director or of there is a reason to believe that it is nominating the Thais to hold shares for the foreigners, the land department office of Thailand must investigate the income of every Thai shareholder in the legal entity by looking into their work history of what kind of work they have done and what monthly salary they earned, all of these must be proved by evidence. Consequently, it was a common practice for foreigners to form a Thai company for the purchase of land, house, or condominium beyond the foreign ownership quota in Thailand. As long as the company had majority Thai shareholdings, there were no restrictions when purchasing a property and the partly foreign owned company was treated like any other Thai company.

Nowadays, the government is restricting the illegal use of Thai companies and nominee shareholding structures by foreigners. Under new regulations, the officials must follow procedures when dealing with partly foreign owned or controlled Thai companies to determine if the Thai

shareholders are not illegally acting as nominee shareholders on behalf of foreigners and if the company is not set up to circumvent the law.

Formation of a Thai Company for Foreign Property Ownership

Nowadays, the exercise of holding companies for property purchases by foreigners is much less common. A Thai company created merely as a facade for foreign property ownership is against the laws of Thailand and leads to illegal foreign ownership. Moreover, when a foreigner decides to be the owner of a property in a Thai company in Thailand, the foreigner will generally not become visible on the company formation documents such as Memorandum of Association or Shareholder list. After the property has been transferred to the one hundred percent (100%) Thai company, up to forty-nine percent (49%) of the preferred shares will be transferred to the foreigner. A company that owns a real property must appear to be a normal active company running a business and file yearly balance sheets and correct accounting. It may not be a dormant property holding company.

Land Title Deeds in Thailand

According to its basic definition in Law, land title deed is a deed or document evidencing a person's legal right or title to a property, particularly real property. It is a legal document signed and sealed and furthermore delivered to effectuate a transfer of property.

Land Rights and Land Documents in Thailand

Title deeds are issued by land department and other government departments of Thailand. There are six (6) main title documents which are issued by the Land Department office for the use of individuals which relate to temporary occupation, use and occupation, confirmed right of possession or notification of possession of land. These six (6) main title documents are enumerated as follows:

1. Sor Kor Nung (1)

The Sor Kor Nung (1) land document is a notice outline of possession of land and has little real rights coupled with it. It gives the holder the right to dwell in and use the land (normally for farming). The person who actually occupies the land may have a better right than the person who has just a notice form. This land may be traded and transmitted by inheritance. Lawfully, the transfer process is not more than handing over the notification form and possession or use of the land from one person to another. It is likely to register rights (sale, lease, usufruct, mortgage, etc.) over this type of land.

2. Nor Sor Song (2)

The Nor Sor Song 2 is an approval memo issued by the land department office to the possessor. This document gives the holder the right to occupy and use the land for a temporary period of time. The possessor has to initiate occupation and using the N.S.2 land with six (6) months and has to complete the utilization of the land with three (3) years from the receipt of N.S.2. This land may not be sold or transferred except by inheritance.

3. Nor Sor Saam (3)

The Nor Sor Saam (3) is a title deed which demonstrates a person's right to acquire a definite plot of land, but the land borders must be confirmed with neighbouring plots. There are no so called parcel points or numbered concrete posts which are hammered into the ground to mark the boundaries of the land. The name showing on the title is the person who has the right to the land and has the legal right to possess the land and use the benefit of the land as an owner (it is not actual full ownership). This right will be recognized by the law and can be used as evidence in any dispute with an ordinary person or the government. It is possible to register a sale or lease and apply and obtain approval to build on this land if building complies with relevant building regulations, zoning and or other laws (e.g. environmental protection). The owner may burden the land (mortgage, lease, etc.) and register this with the Land Department. The land may be sold subject to a 30-day public notice period.

Nor Sor Saam (3) Gor

The Nor Sor Saam (3) Gor has the same legal basis as the Nor Sor Saam however the borders of the land are defined and the land is truthfully reviewed in relation to neighbouring land areas (the land area parcel points are set by using an aerial survey), the right of use has been established and legal acts concerning the land, such as sale, do not need to be published and it is probable to register rights against the land and subdivide the land in smaller plots.

Nor Sor Saam (3) Khor

The Nor Sor Saam (3) Khor on the other hand, is similar to the N.S.3 Gor however is surveyed and issued in an area which has no parcel points set by using an aerial survey. This document is issued by a land officer. Moreover, there are no restrictions for the use of the land and there is no need to publicize any legal acts, and it is possible to subdivide the land into smaller plots.

4. Nor Sor Si (4) Jor (Chanote)

The Nor Sor Si (4) Jor or Chanote is an official document of true ownership for land and the only true ownership land title deed. The lands which are being hold under Chanotes are truthfully surveyed and GPS plotted in relation to a national survey grid and marked by unique numbered marker ports positioned in the ground. Chanote titles are found in the more developed areas of Thailand. Legal acts such as sale do not have to be published. Futhermore, there are no general restrictions on the use and the land can be sub-divided.

5. Nor Sor Ha (5)

The Nor Sor Ha (5) is a manuscript that substantiates the right of the holder in the N.S. 5 land. If the holder has a N.S. 5 land document along with a utilization certificate it designates that the district officer has confirmed the utilization on the land, so this N.S. 5 land title with the utilization certificate can be sold or transferred by registration at the land office. In addition, without the supporting evidence in the form of a utilization certificate it indicates that the district officer has not yet confirmed the utilization of such and in this case may not be sold or transferred except by inheritance.

Importance of Land Title Deeds in Real Estate Investments

6. The most important part of any real estate investment is the land title deed. In investing to real estate in Thailand, the land must have a suitable and legally issued title deed. The land title deed is the official document administered by the Land Department which states and proves a person's legal right to own or possess a piece of land, its survey status, as well as rights, obligations, or mortgages on the property. The only feasible land titles for investment, whether freehold through a company, by a Thai national or through leasehold is in the first place the Chanote (N.S.4.J) freehold land title followed by the Nor Sor Sam Gor (N.S.4.G). Less attractive is the Nor Sor Sam (N.S.3) as this land title is not (yet) accurately surveyed and the area must be confirmed with neighbouring land. This land may only be sold subject to a 30-days notice period in which it is not uncommon that boundary or ownership disputes are started. This type of land can be upgraded to a Nor.Sor.3.Gor or Chanote.

Contents of Land Title Deed

Title deed forms shall contain the following information, namely: Name, Surname, Residence of the owner, Location of Land, Area, and map of the plot of land showing boundaries on all four sides and shall have an index of registration. These title deed forms shall be signed by the land official and Province Governor and affixed with their seals of office. The aforesaid title deeds shall be made in duplicate one copy being given to the owner and the other being kept at the Province Land Office or its branch, as the case may be.

Rules Governing Building and Construction in Thailand

Generally, construction in Thailand is regulated by the Building Contract Act (BCA) and the Town and City Planning Act of Thailand. These two acts have been comprehensively amended in 1992. The Building Contract Act (BCA) affords for governmental control of practically all categories of construction by means of various applications and retribution in case of violation. The Town and City Planning Act (TCPA), on the other hand deals with the permissible uses of land in different

zones.

Moreover, these two acts are both under Ministerial Regulations indicating regulations and zone restrictions. Both building and construction in Thailand can also be restricted by environmental and other laws such as Nature Reserve Act and Forest Act. Lastly, the relationship between a customer/employer and a builder in Thailand is basically governed by a construction contract and the Civil and Commercial Code of Thailand particularly on the chapter of “Hire of Work”.

Building a Home in Thailand

There are several considerations that must be taken into place by the person who wants to build a house in Thailand. These factors are enumerated as follows:

- The nature of the land title (this should at least be a Nor. Sor.3.Gor/Khor or better a Chanote land title deed);
- Is the land title deed correctly issued and the title cannot be revoked on the grounds of any illegal issuance process;
- Existence of a solid legal structure for a long term interest in the land (proper land lease and/or superficies registered with the Land Department);
- Presence of the zoning and building regulations and restrictions for the specific area;
- Presence of a private servitude, public or municipality road connecting the land with the public road;
- Existence of any mortgages, encumbrances, claims or security of any kind registered against the land title deed;
- The land is not subject to any promise or agreement, court order or other judgment or decree;
- The owner is not involved in any action brought before court or bankruptcy/insolvency proceedings;
- The land is not encroached or any encroachment on the land;

Contents of Thai House Construction Contract

A construction contract specifies what, when, where, how, how much and by whom in the building a home project. It also includes the required terms and condition. Moreover, headers and provisions in the construction building contract include the following:

- Whereas
- Planning permission and building regulations
- The price
- Payments
- Carry out the work
- Changes to the work
- Extension of time for completion
- Defects and liability

- Breach and termination
- Contractor's indemnities
- Miscellaneous
- Governing law

Building Zones under the Building Control Act (BCA) on a Building near a Beach Set-up

Under the Building Control Act (BCA) issued the zoning areas enumerated below which specify what a person can build.

- **Area 1:** No building is allowed up to ten (10) meters from the beach. The coastline or beach line is a moving line and often at the discretion of the Or Bor Tor who can choose more or less where it starts.
- **Area 2:** Building of a single storey house not exceeding a height of six (6) meters with a total building area of up to seventy-five (75) square meters is allowed up to fifty (50) meters from the beach or coastline.
- **Area 3:** Building of a house or building with a height of twelve (12) meters and a ground floor or total building area of not more than 2000 square meters.
- **Area 4:** Any building of up to twelve (12) meters can be built within an area of more than two hundred (200) meters from the beach.

Sections 4 & 21 of Land Allocation Act

- **Section 4 of Land Allocation Act** provides that "Land Allocation refers to the sale of plot of land that has been divided into 10 plots upwards with property or other remuneration in return regardless whether it is divided from one or many adjacent plots. It also refers to the execution that the land has been divided less than 10 plots and thereafter, within 3 years, it has been divided in total into 10 plots onwards."
- **Section 21 of Land Allocation Act** provides that "Land allocation shall be prohibited unless the approval by the committee. The procedure for application and issuance of license shall be in accordance with regulation, method and conditions specified in Ministerial Regulation."