



Real Estate Investment in Thailand

THE LEGAL PERSPECTIVE

Introduction

Thailand offers one of the safest destinations in Southeast Asia for foreign and domestic investors to realize value in their investment. The effects of the economic crisis of the late 1990s have slowly dissipated, and, with its stable currency, urbanization, and prime geographical location, Thailand has developed mature and sophisticated residential and commercial property markets. Nevertheless, investors should be aware that restrictions are in place which limit their property rights within these markets.



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1. Commercial leases

1.1 Legal characteristics of a lease

1.1.1 TYPES OF LEASE

What types of arrangement does the law recognize which allow occupation and use of real property for a limited period of time?

The Civil and Commercial Code recognizes all kinds of leases. It is more of an issue of whether the lease is enforceable, rather than the form of the lease. In general, a lease of immovable property is not enforceable by a cause of action unless some written evidence signed by the party liable exists. If the lease is for a term of more than three years, it is enforceable only for three years unless it is made in writing and registered at the relevant governmental authority.

1.1.2 LENGTH OF LEASES

What is the usual length of each type of commercial lease?

The duration of the term depends on commercial considerations. The Civil and Commercial Code only requires registrations of a lease if the lease term is more than three years. It should be noted that the maximum term for a lease is 30 years, with an option to renew for another term of 30 years.

1.1.3 SPECIFIC REGULATIONS FOR ASSET CLASSES

Are there any specific regulations and/or laws which apply to leases of particular categories of real estate, such as residential, industrial, offices, retail or hotels and what is their impact?

Yes. The Lease of Immovable Property for Commercial and Industrial Activities Act B.E. 2542

applies to leases of commercial and industrial immovable property.

Under this Act, the lease term for a lease of land for commercial and industrial activities can exceed 30 years but must not exceed 50 years, subject to certain requirements.

The key requirements are as follows:

(i) Lease term and lease renewal:

The lease term may exceed 30 years but not exceed 50 years. Upon the expiration of the lease term, the parties may make an agreement to renew the lease, but the new term is not to exceed 50 years from the date that the parties agreed on the renewal.

(ii) Location of the land:

The land must be located in one of the following areas:

- an area zoned for commercial or industrial purposes under the applicable town planning laws; or
- an area in an industrial estate zone governed by the Industrial Estate Authority of Thailand.

(iii) Type of businesses:

- commercial activities having an investment cost of not less than THB 20 million;
- industrial activities that are eligible to receive a certificate of promotion under the Investment Promotion Act; and
- commercial or industrial activities that benefit the economic and social status of the country as declared by the Minister of Interior and endorsed by the Cabinet.

Note that the type of commercial or industrial activities for which a foreigner can apply for registration must be one which a foreigner can undertake under the Foreign Business Act.

(iv) The lease of land for commercial and industrial activities with an area more than 100 rai (one rai is 160,000m²) must comply with one of the following additional requirements:

- the operation of the business must add value to exports or support employment in the country;
- the operation must not have previously existed in the country or be otherwise insignificant;
- the operation must incorporate a unique process or development of high technology; or
- the operation must be of benefit to the economic and social status of the country as declared by the Minister of Interior and endorsed by the Cabinet.

1.2 Lessees' rights to possession

1.2.1 SECURITY OF TENURE

Does a lessee have a right to continue to occupy the relevant real estate after the expiry of a commercial lease?

In general, under the relevant laws, after expiration of a commercial lease, the lessee will not have the right to continue to occupy the relevant real estate. This matter is a contractual issue and subject to the agreement between the contracting parties.

1.2.2 RECOVERING REAL ESTATE FROM A LESSEE

What does a lessor need to do to ensure that a lessee leaves on the date originally agreed?

Contractual protections are generally used. The agreement should include a provision that provides that after expiration of a lease term or if the lessee is in breach of material terms of the lease contract, the lessor can enter into or occupy the relevant real estate. In the absence of such a provision, the lessor will bear the risk of being challenged and accused by the lessee of trespassing.

1.2.3 EARLY TERMINATION

Can a lessee be forced to leave prior to the date originally agreed and, if so, how long will this process take?

This issue is a contractual matter. It depends on negotiation between the parties to the contract.

1.2.4 TERMINATION BY A THIRD PARTY

Can a lease be terminated by any third party, eg the government or a municipal authority? If so, how long does this process take? Is compensation payable and, if so, who pays it?

Yes, in certain cases, such as eminent domain, where the leased property may be expropriated by the relevant government authority. If the property is taken, the lease may be terminated as the landlord no longer has any property to be leased. If a property is expropriated, the compensation will be paid to the owner of the leased property (eg if the leased property is land, compensation will be paid to the landowner; if the leased property is a building, compensation will be paid to the owner of the building).

1.2.5 FINANCIAL SECURITY

What additional form(s) of security can be provided to a lessor to protect against a failure by the lessee to meet its obligations?

In general practice, a lessor often asks a lessee to provide a security deposit or a letter of guarantee. The security deposit or guarantee will normally be returned to the lessee when the lease term expires.

1.3 Managing leased real estate

1.3.1 USE BY THE LESSEE

Can restrictions be imposed by the lessor on how a lessee uses the real estate and are there any regulations and/or laws which impose further restrictions?

Restrictions can be imposed by relevant provisions in the lease, as well as by relevant laws (i.e. the Condominium Act and the Civil and Commercial Code). For example, under the Civil and Commercial Code, any use of the leased property that is unlawful or contrary to public order or the good morals of the people of Thailand is prohibited.

1.3.2 ALTERATIONS

Is the lessee permitted to alter or improve the real estate and, if so, what conditions can be imposed on such works?

This matter is solely a contractual arrangement between the parties.

1.3.3 Transferring the lease

In what ways, if at all, can a lessee transfer its rights to a third party and what restrictions can be imposed on such transfers?

This matter is solely a contractual arrangement between the parties.

1.4 Rent

1.4.1 FIXED OR VARIABLE RENTS

Will the rent payable remain the same as long as the lease lasts?

This matter is solely a contractual arrangement between the parties. Both fixed and variable rent are commonly used in Thailand.

1.4.2 CHANGES IN RENT

If the rent is to be changed or increased, how will the new rent be determined?

This matter is solely dictated by the contractual arrangement between the parties and commercial considerations. Economic situations often dictate changes and variations in rent amounts.

1.4.3 VAT ON RENT

Is VAT charged on rent?

No. VAT is charged on goods and services only.

1.5 Costs other than rent

1.5.1 INITIAL COSTS

What costs if any, other than rent, are payable by a lessee at the start of a lease?

In general commercial practice in Thailand, a rent premium fee is often payable by the lessee.

1.5.2 COMMUNAL COSTS

Who pays for the maintenance and repair of areas used by several lessees, for example car parks and gardens?

This arrangement depends on the type of lease and negotiated terms. For example, for a condominium unit, an owner is required to pay a common fee for the use of common property. However, this burden can be shifted to the lessee by way of contract.

1.5.3 REPAIRING THE LEASED SPACE

Who pays for the maintenance and repair of the real estate actually occupied by the lessee?

Under the Civil and Commercial Code, it is the lessee's duty to undertake ordinary maintenance and minor repairs. This matter is, however, agreeable upon by contractual arrangement between the parties.

1.5.4 COSTS OF UTILITIES

How are utilities and telecommunications which serve a property occupied by several lessees paid for?

This is a contractual arrangement between the parties. Parties often allocate this responsibility so that:

- the lessee pays any such amounts directly to the relevant government authority; or
- the lessee pays any such amounts directly to the lessor at an agreed rate.

1.5.5 INSURANCE

Who pays the cost of insuring the real estate which is the subject of a lease and what events causing damage will usually be covered by the policy?

This is a contractual arrangement between the parties to the contract. The normal events causing damage which are insured against are fire, flooding and other force majeure events. An all-risks insurance policy is generally used to mitigate against these risks.



2. Construction

2.1 Legal framework

2.1.1 GENERAL CONSTRUCTION LAW

What are the main sources of law that govern and regulate contracts for the design or carrying out of building works?

The Civil and Commercial Code is generally regarded as the main source of law governing and regulating the specific contracts, including construction contracts for building works. Its provisions stipulate the duties and liabilities of the contracting parties who enter into construction contracts.

In addition, the Building Control Act B.E. 2522(1979) and its accompanying ministerial regulations (collectively, the BCA) are the specific sources of law governing the process of application for building construction permits, restrictions on the construction of the building, safety, fire protection and various other aspects. Therefore, the BCA must be carefully considered by the developers or the contractors before commencing construction of a building.

The Town Planning Plan B.E. 2518(1975) and its accompanying ministerial regulations are the specific sources of laws governing town planning and the utilization of the land. The National Environmental Quality Act B.E. 2535(1992) and its accompanying ministerial regulations are the specific sources of laws governing environmental quality and environmental impact assessments. Consequently, it is also necessary for those laws to be considered by developers and contractors before planning the development of a project.

Announcement of the National Council for Peace and Order No. 3/2559 suspends certain restrictions under the general town and country plans to exclude the enforcement of the law on town planning and building controls in a special economic development zone by allowing the construction of industrial plants in areas declared as Special Economic Zones (SEZs). The provinces that have been designated as SEZs are Chiang Rai, Kanchanaburi, Mukdahan, Nakhon Phanom, Narathiwat, Nong Khai, Sa Kaeo, Songkhla, Tak and Trat. This announcement is, however, subject to change at the authority's discretion.

2.1.2 LICENSES AND PERMITS

What official permissions, licenses or consents are required by a building or engineering contractor before it can start work?

Pursuant to the Building Control Act, it is a mandatory requirement to obtain a Building Permit or Letter of Notification for the Construction of a Building (LNC) prior to the construction of a building.

2.1.3 HEALTH AND SAFETY

In this country, what are the main rules relating to health and safety on construction sites? Do these rules in any way relate to the use of the development after construction is completed?

In particular, the Building Control Act (BCA) stipulates the application process for a building construction permit, restrictions on the construction of the building, safety, fire protection and various other matters. The BCA therefore must be carefully considered by developers or contractors before commencing the construction of a building.

2.1.4 ENVIRONMENTAL ASSESSMENT AND SUSTAINABILITY

What type of legislation exists dealing with environmental issues affecting building works and with promoting sustainable developments?

Certain projects or developments require that an environmental impact assessment report (EIA report) is approved before construction of a building can commence. This is in accordance with the notification issued by the Ministry of Natural Resources and the applicable Environment regarding "Types and Sizes of Projects or Operations which are required to prepare Environmental Impact Assessment Reports" which is enacted under the National Environmental Quality Act B.E. 2535(1992).

2.1.5 INFRASTRUCTURE AND UTILITIES

What arrangements are usually made with the local authorities and utility suppliers in relation to infrastructure (new roads, sewers etc.) to support a new development?

Utility arrangements are normally made prior to the construction of a building with utility suppliers. In Thailand, most utility suppliers are operated by public entities. Therefore, applications for connection to utilities will be dealt with in accordance with the rules and regulations of the relevant authority.

2.1.6 OBLIGATORY REQUIREMENTS

Are any terms and conditions imposed or implied by law or mandatory in contracts for the design or carrying out of building works?

In principle, the terms and conditions of the construction contract govern the design or carrying out of building works to the extent that such terms and conditions are not expressly prohibited by law and are not impossible or contrary to public order or good morals.

Unless the construction contract states otherwise, the following provisions of the Civil and Commercial Code apply in relation to the construction of a building:

- **Section 593:** If the contractor does not commence work in accordance with the contract terms, or if, without fault on the part of the employer, there is a delay in the commencement of the work in such a manner that it can be foreseen that the work will not be finished within the agreed period, the employer is entitled to rescind the contract without waiting for the time agreed upon for delivery.
- **Section 594:** When it is possible to foresee with certainty, while the work is proceeding, that, due to default by the contractor, the work will be executed in a defective manner or contrary to the terms of the contract, the employer may require the contractor by notice to make good the defect or to comply with the terms of the contract within a reasonable time (to be fixed in the notice) failing which the employer is entitled to have the work repaired or continued by a third person at the risk and expense of the contractor.

2.2 Forms of contract/ procurement methods

2.2.1 INDUSTRY FORMS OF AGREEMENT

Do any industry bodies, organizations or associations produce standard form contracts for use within the construction and engineering sectors? Are any international forms of contract ever used? How is the form of construction contract to be used selected?

For public procurement, the standard agreement pursuant to the Rule of the Office of Prime Minister on Procurement B.E. 2535(1992) generally applies to any construction contract made with governmental bodies. In the scheme of public procurement, the contractor would usually not be allowed to change or adjust the significant terms and conditions of the standard agreement. In cases where the changes in material terms and conditions under the standard agreement are necessary, an approval from the Office of the Attorney General is required.

With respect to a private scheme, although standard agreements have been produced by various organizations, parties may enter into construction contracts pursuant to standard agreements or otherwise. The parties' intentions govern the duties and liabilities between the contracting parties, which are subsequently reflected in the terms and conditions of the construction contract.

2.2.2 PARTIES TO A CONSTRUCTION OR ENGINEERING CONTRACT

Typically, who are the parties to an engineering or construction contract or package of contracts and who is responsible to whom?

The following parties are generally involved in construction contract:

(i) Employer

This is a party procuring or instructing the construction of the building by a contractor (commonly referred to the project owner or project developer).

(ii) Main contractor and sub-contractor

A main contractor is hired to carry out all construction works involved in the building in accordance with the construction contract and is directly liable to the employer in the event of any dispute which occurs in relation to the construction of the building. Most main contractors usually engage a sub-contractor to carry out certain parts of the construction works. The sub-contractor will be directly liable to the main contractor in the event of any dispute which occurs in relation to the construction of the building.

2.2.3 ALLOCATION OF RISK

What risks in a construction or engineering contract are normally borne by the contractor? To what extent is force majeure relevant in such contracts?

The contractor generally bears the potential risks or any losses incurred during the construction process. Upon delivery of the work, under Section 600 of the Civil and Commercial Code, unless otherwise provided in the contract, the contractor is only liable for a defect which appears within five years after delivery of the work. This limitation does not apply if the contractor has concealed the defect.

In addition, the construction contract usually contains a force majeure clause. A force majeure event occurs when an event happens that is outside of the control of the parties, for instance, a natural disaster or uprising. The event cannot have been reasonably foreseen and cannot have been prevented. In the event of a force majeure event, the contractor may avoid liability.

2.2.4 PUBLIC PROCUREMENT

Are public private partnerships (PPPs) common? Are they promoted or encouraged by the government?

Public-private partnerships (PPPs) are a common form of collaboration between the public sector and the private sector in Thailand. The public and private entities will jointly operate a project, for instance, infrastructure, energy or telecommunication projects, in a mutually beneficial collaboration. Public sector entities are sometimes subject to various limitations, such as lack of funds for investment,

technical knowledge or the capacity to carry out operations efficiently. A private sector entity may be able to offer greater resources to overcome these limitations, while lacking the capacity to oversee and operate the services that the project offers. The main forms of PPP include, but are not limited to, concessions and joint-ventures. The process of collaboration in PPPs is subject to the Public Private Partnership Act B.E. 2562 (2019) and its accompanying ministerial regulations.

2.2.5 FIXED PRICE CONTRACTS

Is it possible for parties to enter into a construction contract where the price to be paid to the contractor is fixed?

Yes. The parties are able to fix the price for the entire work whereby the price is stipulated in the construction contract. Consequently, the contractor will take the risk of increasing costs, including materials and labor. This usually occurs in regard to public procurement.

Alternatively, payment in a construction contract may be split into separate stages. This usually occurs in regard to private procurement.

2.2.6 INSURANCE

What insurance needs to be put in place by law or under a typical construction contract?

There is no legal requirement to insert an insurance clause into a construction contract. However, in practice, the contractor will normally enter into an insurance policy with an insurer in order to protect itself against loss. The premium will be calculated on the basis of the potential risks and the amount insured.

2.2.7 SECURITY DOCUMENTS

Apart from the contract, are any other documents commonly entered into by way of security – such as a guarantee from a building contractor's parent or ultimate holding company or a bond from a third-party surety?

The parties commonly agree on the following types of security in a construction contract, especially in public procurement situations:

(i) Bid bonds

The contractor provides a bid bond to the employer during the bidding process in order to provide security in the event that the bidder defaults in the process of entering into the construction contract.

(ii) Performance bonds

The contractor provides a performance bond for the employer during the construction contract in order to provide security in the event that the contractor defaults in performing its duties under the construction contract.

2.3 Implementing the contract

2.3.1 PAYMENT

How are payments to contractors, design consultants and subcontractors normally structured?

There are various methods of payment, each of which is stipulated in the construction contract.

The payment will generally be made on an installments basis in connection with the progress of each stage of the works. Once the works have been inspected, the payment to the contractor will be made in accordance with the payment dates agreed upon and outlined in the construction contract. In addition, unless otherwise provided in the contract, a retention is usually required in order to guarantee the remedy of any defects that occur after the date of delivery of the works.

2.3.2 DELAY

Is it possible for the parties to a construction contract to agree that the time/date for completion of the works is to be fixed? How would delay be dealt with?

Yes. The construction contract will usually set out the specific date for completion of the works. If the contractor fails to meet the deadline, a default or breach of

contract will occur. The employer is subsequently entitled to claim for any damages for late completion.

In addition, the contract will generally fix the penalty for late completion at a specific amount on a daily basis, and if the limitations on such penalties are reached, the employer is entitled to terminate the construction contract and claim any damages incurred due to the termination of the construction contract.

2.3.3 VARIATIONS

How are variations to the specification for engineering or construction works normally dealt with?

Variations to the scope of the works can be made pursuant to the parties agreement in the construction contract.

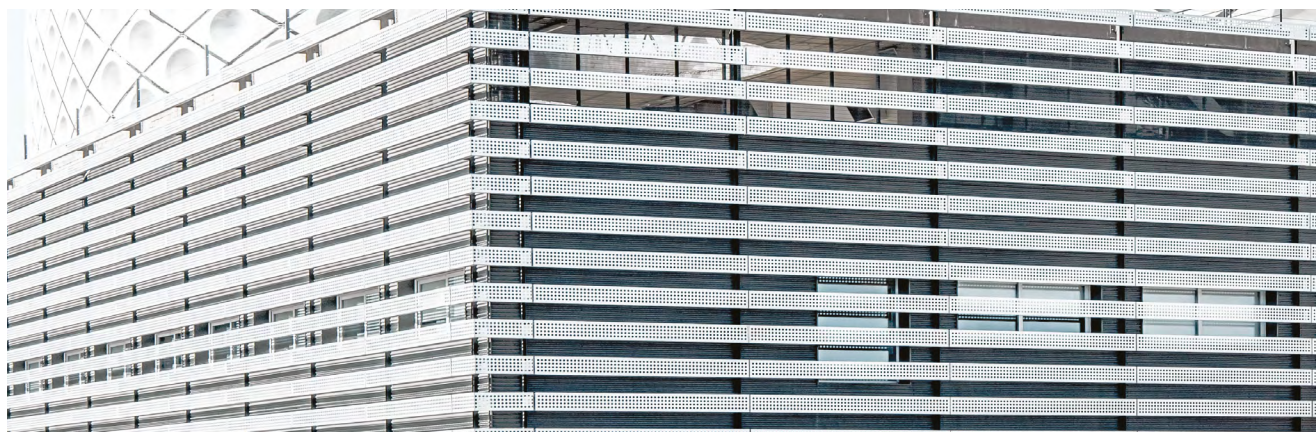
2.3.4 COMPLETION

Does the law state what has to be achieved before completion of the building works can be certified and, if so, can this be overridden by specific terms in the contract? Who would certify completion of building works carried out in accordance with a construction contract?

In Thailand, the law does not stipulate what has to be achieved before completion of the construction works; this depends on the terms and conditions

under the construction contract mutually agreed upon by the parties. In practice, the acceptance by the employer will be an official indication of completion of the construction works pursuant to the construction contract. In this regard, the employer must exercise with caution on the acceptance of the delivery of the work because the contractor is not liable for any defect after acceptance by the employer, whether expressly or implied, unless the defect could not have been discovered before acceptance or the defect was concealed by the contractor pursuant to Section 598 of the Civil and Commercial Code.

In addition, unless otherwise provided in the contract, the contractor is liable for any defect which appears within five years from the date of delivery if the work is for the construction of a building pursuant to Section 600 of the Civil and Commercial Code.



2.4 Liability

2.4.1 LIMITATION PERIOD

During what period of time following execution of a construction contract may a party to that agreement bring a claim in the courts for breach of contract?

Under the Civil and Commercial Code, either party may take legal action against the defaulting party for breach of contract at the date of the breach of contract. The Civil and Commercial Code, however, imposes prescription periods upon the cause of action as follows:

(i) Two years:

- claims by merchants, industrialists, manufacturers, artisans and those who practice industrial arts, for the delivery of goods, performance of work and care of others' affairs, including disbursements, unless the service is rendered for the business of the debtor;
- claims by employees, whether they be permanent, temporary or day workers, and apprentices, for wages or other remuneration which are not fixed, including disbursements, or claims by employers for advances made upon such claims; and
- claims by engineers, architects, auditors or those engaged in other independent professions, for services including disbursements or claims by the employer for advances made upon such claims,

(ii) Five years:

- arrears of interest;
- sums payable for the purpose of paying off the principal in installments; and
- arrears of fixed salaries paid periodically, annuities, pensions, allowances for maintenance and all other periodical payments.

Furthermore, a claim for damages arising from a wrongful act is barred by prescription after one year from the day when the wrongful act and the person bound to make compensation became known to the injured person, or ten years from the day when the wrongful act was committed, whichever is earlier. In addition, no action against the contractor can be brought later than one year after the defect appeared.

If no other period of prescription applies, the law provides a prescription period by default.

2.4.2 DEVELOPER'S LIABILITY TO END USER

To what extent would a person who procures or carries out building works have liability for any physical damage or economic loss suffered by the end user(s) of the completed development? Can such liability be excluded in any way?

In principle, the developer is liable for damages or losses suffered by the end user according to the relevant contractual relationship. Notwithstanding this, the developer, unless the contract provides otherwise, is only liable for defects appearing within five years from the date of delivery, if the work involves the construction of a building and is based upon the hire of work or service contract, pursuant to section 600 of the Civil and Commercial Code. The prescription period will be reduced to one year in cases where the agreed contract is a sale and purchase agreement.

In addition, the end user may claim for compensation against the developer for damages incurred if the developer, willfully or negligently, unlawfully injures the end user's life, body, health or property under the law of tort/a wrongful act pursuant to section 420 of the Civil and Commercial Code. In

particular, under section 434 of the Civil and Commercial Code, if the damage is caused by reason of the defective construction or insufficient maintenance of a building, the possessor of the building is bound to pay compensation; but if the possessor has used proper care to prevent the damage from occurring, the owner is bound to pay compensation. In addition, if a third party caused the damage, the possessor or owner may seek indemnity from such third party.

By law these liabilities may not be excluded.

2.4.3 OTHER LIABILITY TO END USER

To what extent would an architect, another designer, the building contractor or any sub-contractor have liability for any physical damage or economic loss suffered by the end-user(s) of a completed development? Can such liability be excluded in any way?

In principle, end users who are not parties to the construction contract are not entitled to directly claim damages from the architect, designers, contractors or sub-contractors.

2.4.4 RIGHTS OF PURCHASERS, TENANTS AND BANKS

How are third parties who are not parties to the construction contract – such as purchasers, tenants and lending banks providing finance towards the development – afforded protection and given rights against the original designers and contractors involved in the design and construction of the project?

In principle, third parties who are not the parties under the construction contract are not entitled to directly claim against the original designers and contractors involved in the design

and construction of the project. Nevertheless, the third parties are able to claim against the developers if the contract allows or under the law of tort/wrongful act for any damages incurred pursuant to section 420 and 434 of the Civil and Commercial Code. The developer may then have recourse against those who are directly liable to the developer.

2.5 Dispute resolution

2.5.1 DISPUTE RESOLUTION IN THE COURTS

Which courts specialize or deal with construction disputes? Can decisions be appealed?

A specialist court for construction disputes does not exist in Thailand. Claims relating to construction disputes are submitted to the court with territorial jurisdiction covering the defendant, or to the court within territorial jurisdiction over the place in which the cause of action arose, in which case it is unnecessary for the defendant to have a domicile in Thailand.

Court decisions may be appealed. Thailand's court system has three levels: the Court of First Instance, the Court of Appeal and the Supreme Court. If the parties disagree on the judgment rendered by the Court of First Instance, either party may appeal the decision to the Court of Appeal. Similarly, either party may appeal the judgment of the Court of Appeal to the Supreme Court.

2.5.2 ARBITRATION

Is it common for construction disputes to be referred to arbitration? If so, how does arbitration compare with litigation through the national/federal courts?

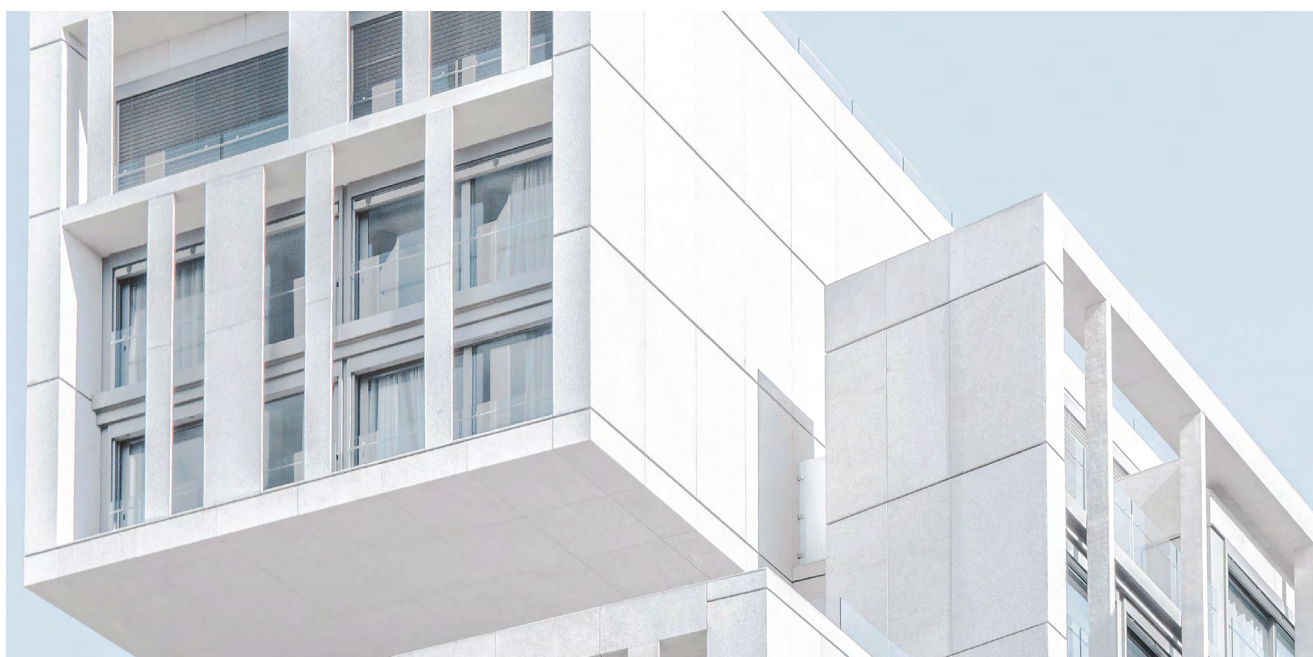
Construction contracts commonly contain an arbitration clause for the settlement of disputes arising from the construction contract. The arbitration system allows the parties to appoint specialist arbitrators. Arbitration proceedings are normally faster than litigation proceedings through the judicial system, and arbitration offers confidentiality to the parties. The Arbitration Act B.E. 2545(2002) stipulates arbitration procedures under Thai law.

2.5.3 ALTERNATIVE DISPUTE RESOLUTION PROCEDURE (ADR)

Is it common for construction disputes to be referred to ADR – such as adjudication, determination by an expert, mediation or conciliation? Is a form of ADR required by law, perhaps as a mandatory first step in the dispute resolution procedure?

ADR is an optional, though not yet common, proceeding for the settlement of disputes arising from construction contracts and may include various types of resolution such as mediation, conciliation and compromise.

Thailand is continuing to recognize the significance of ADR proceedings. To this end, the Alternative Dispute Resolution Office was established to promote, support and advise on ADR proceedings, though Thai law does not require submission to ADR.



3. Corporate vehicles

3.1 Real estate investment by foreigners

3.1.1 RESTRICTIONS ON FOREIGN INVESTMENT

Are foreigners allowed to invest by directly purchasing a commercial real estate asset?

Foreign ownership of land in Thailand is generally prohibited. Buildings and other structures located on the land could be owned by a foreigner with separate title registration. Moreover, a foreigner is allowed to directly own condominium units with an aggregate unit space of up to 49% of the total floor area of all units in a condominium building.

In addition, foreign-owned companies may be allowed to own land for their business if operated in an industrial estate zone and/or granted investment promotion by the Board of Investment.

3.1.2 PERMANENT ESTABLISHMENT

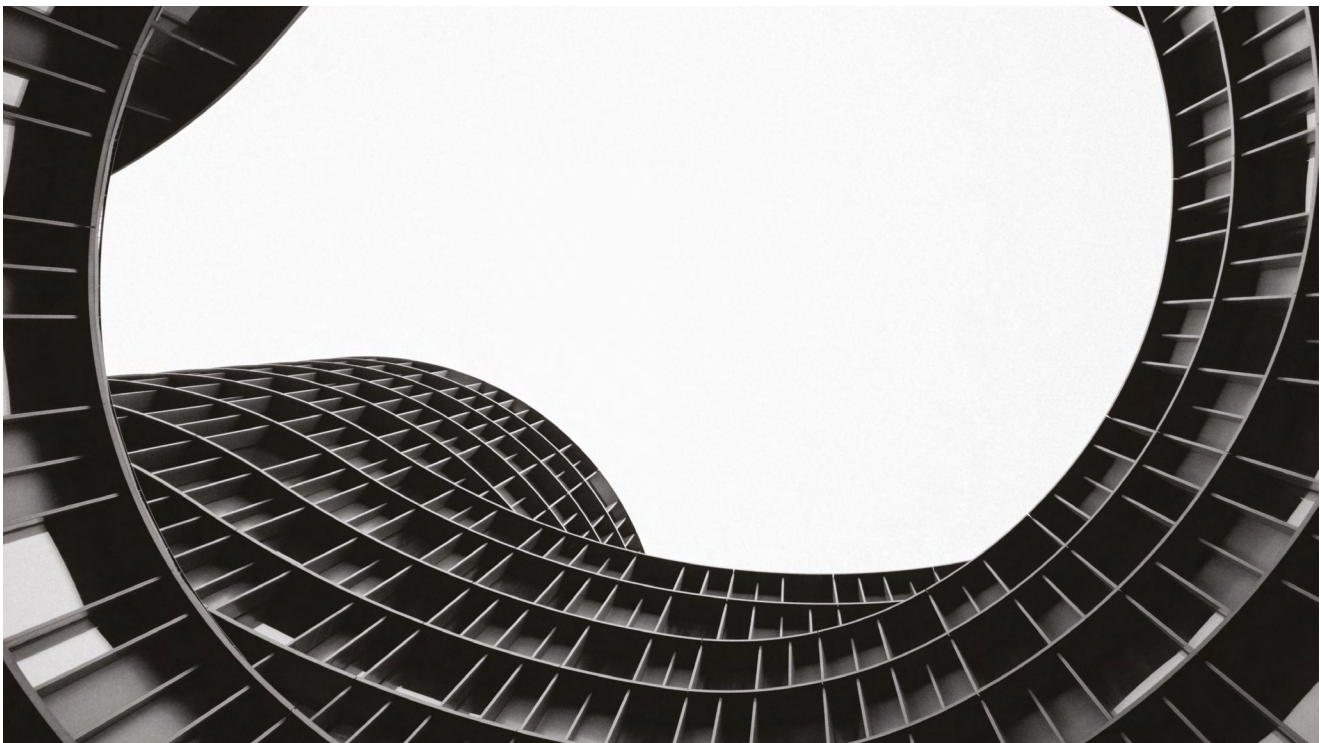
Does the concept of a permanent establishment apply when a foreign person invests in real estate and, if so, how much does it cost to set up such a permanent establishment, how long does it take and what corporate governance requirements apply?

Investment in real estate in Thailand by a foreign person does not constitute a permanent establishment PE unless the real estate is used as a fixed place of business through which the foreign person operates its business wholly or partly in Thailand. However, income derived from the real estate (e.g. rent or capital gain) is subject to tax in Thailand regardless of whether the foreign person has a PE in Thailand or not.

There are various types of PE recognized by the Thai tax authority and, from a tax perspective, the PE may or may not have to be registered with the Ministry of Commerce.

A type of PE that would need to be registered with the Ministry of Commerce is a branch office of foreign company. The cost and time involved in setting up a branch depends on the size and complexity of the business which the branch will be carrying in Thailand.

Other types of PE, including branch offices, may be required to apply for a foreign business permit depending on business activities to be carried on in Thailand.



3.2 Types of corporate vehicle for investment

3.2.1 TYPES OF VEHICLE

What types of corporate vehicle to hold real estate assets are available to investors in this country?

The most common form of corporate vehicle for investors to hold real estate assets in Thailand is a private limited company. Real Estate Investment Trusts (REITs) and property funds registered with the Stock Exchange of Thailand (SET) offer another vehicle for foreigners to invest in property in Thailand.

3.2.2 CONSTITUTION OF VEHICLES

What are the main features of the constitution of each type of corporate vehicle used to invest in real estate?

Limited Company

Under Thai law, a limited company is an artificial person with rights and obligations, distinct from those of its shareholders. A limited company must have at least three shareholders at all times, individuals or legal persons. A shareholder's liability is limited to any paid and unpaid amounts of the share capital of the company. All shares must be paid up to at least 25% of the share par value, whether by way of cash or property.

The Civil and Commercial Code of Thailand stipulates that only shares with a par value of THB5 or above may be issued. The registered share capital may be increased at any time by special resolution of the shareholders. Companies are incorporated by the adoption of a Memorandum and Articles of Association, which must be registered with the Ministry of Commerce

Property Fund

A property fund is publicly listed and traded on the Stock Exchange of Thailand (SET) and the units are similar to shares in a company. There is no nationality restriction for investing in property funds. They are established with the objective of mobilizing public funds by issuing investment units and then investing the funds in real estate, residential projects or other property-linked securities allowed by law. A property fund focuses purely on investment in property that returns a regular income stream rather than purchasing and developing property for future sale by way of trade.

Property funds are classified into two types:

- Specific property funds, which have clearly specified the property or properties to be purchased or leased in the prospectus; and
- Non-specific property funds, which describe the type of property to be acquired in the future.

Nevertheless, both fund types are required to invest at least 75% of their net asset value (NAV) in real estate, or leasehold rights over real estate, which must be located in Thailand and, if under construction, must be at least 80% completed. Furthermore, after acquiring a property, the property fund must hold it for at least one year. The regulations concerning property funds do not, however, allow investment in dormant land.

Property funds are required by regulation to pay dividends at a minimum of 90% of the annual net profit to the unit holders.

Unfortunately, the establishment of a new property fund is no longer allowed under the law.

REIT

REIT is an investment vehicle which is regulated under the Securities Exchange Commission (SEC) and Stock Exchange of Thailand (SET). REITs are not legal persons under Thai law and are distinguishable from Property Funds in that REITs can invest in any type of property that generates rental revenue (except for real property involving immoral or illegal businesses), including overseas property. The prospectus of the REIT will detail the types of property that the REIT may invest in; similarly, the name of the REIT will reflect these property types as well. Up to 35% of the total assets of the REIT may be leveraged, and, if the REIT has obtained an investment-grade credit rating, this is increased to 60%. Other characteristics of a REIT include the option to place its assets as collateral and for up to 10% of the total assets in the REIT to be comprised of projects still in development.

During the establishment of a REIT, there must be a trust settlor who will eventually become the REIT Manager. The REIT Manager is responsible for filing a public offering of trust units with the SEC. In addition, there will be an underwriter, appointed by the REIT, to distribute trust certificates to the general public and trust unit holders will become the REIT's beneficiaries. The public offering process is regulated by the SEC, and once this process is complete, the underwriter will transfer the capital raised from this process to a trustee approved by the SEC. The trustee's responsibilities include monitoring and supervising the performance of the REIT manager and paying out dividends to trust unit holders.

3.3 Setting up a corporate vehicle

3.3.1 MINIMUM CAPITAL

What is the minimum capital required to set up each type of corporate vehicle used to invest in real estate?

Limited Company

The limited company can be formed with a minimal registered capital starting from THB15.

REIT

A REIT in Thailand must have a minimum capital of THB500 million.

3.3.2 SET-UP COSTS

How much does it cost to set up each type of corporate vehicle used to invest in real estate?

Limited Company

The government fees payable for registration of the Memorandum of Association is THB500.

The government fees payable for incorporation of limited company is THB5,000. The government fees payable for the issuance of the certificate of incorporation is THB100.

REIT

The application fee set by the Securities Exchange Commission (SEC) and Stock Exchange of Thailand (SET) is THB200,000 (and will be increased to THB300,000 for an application which will be submitted from January 1, 2020 onwards) and THB100,000. The filing fee for the SEC is 0.01% of all REIT units offered for sale. The initial listing fee for SET listing varies depending on the paid-up capital with a minimum fee of THB100,000 rising to a maximum fee of THB3 million. The annual fee is between THB50,000 and THB3 million.

3.3.3 TIMESCALE

How long does it take for each type of corporate vehicle used to invest in real estate to become operative?

Limited Company

The time frame for incorporation of a Thai limited company is approximately three days from the date of making a reservation of the company's name with the Ministry of Commerce.

REIT

Similar to property funds, the establishment of REITs must be permitted by the SEC. The timescale for authorization depends on the application documents; however, the SEC must complete approval of establishment of REIT within 45 days after the date that the application has been lodged. The trust units must be offered to the potential purchasers within six months after the date of the approval. The capital raised must be transferred by an underwriter to the trustee within 15 days after the closing date of the IPO. All trust units must be listed in the Stock Exchange of Thailand within 45 days after the closing date of IPO.

3.4 Governance and taxation of corporate vehicles

3.4.1 CORPORATE GOVERNANCE

What corporate governance requirements apply to each type of corporate vehicle used to invest in real estate?

Limited Company

The Civil and Commercial Code of Thailand provides comprehensive regulations on the rights and obligations of the company, its directors and its shareholders.

REIT

Similar to property funds, the fiduciary duty and duty of care under the Securities and Exchange Act and the Securities and Exchange Commission regulations are applicable to the REIT manager and the trustee.

3.4.2 COMPLIANCE COSTS

How much does corporate and accounting compliance cost for each type of corporate vehicle used to invest in real estate?

Corporate and accounting compliance costs for a limited company and REIT will vary depending on the extent and number of the real estate assets held and the complexity of the company and fund structures.

3.4.3 TAXATION

How is each type of corporate vehicle used to invest in real estate taxed?

Limited Company

Corporate Income

A gain derived from a sale of real estate assets is required to be included with other taxable income and subject to corporate income tax at the rate of 20% in a given year. Conversely, a loss resulting from the sale can be used to offset any other taxable income in the given tax period.

Specific Business Tax (SBT)

SBT at the rate of 3.3% (including municipal tax) applies on the greater of the sales price or the most current appraised value on record by the Department of Land (DOL). The SBT must be paid at relevant land office upon the registration of the real estate assets.

Withholding Tax

A seller of real estate assets who is a legal person will be subject to withholding tax at the rate of 1% of the sales price or the most current appraised value on record at the DOL, whichever is greater.

Transfer Fee

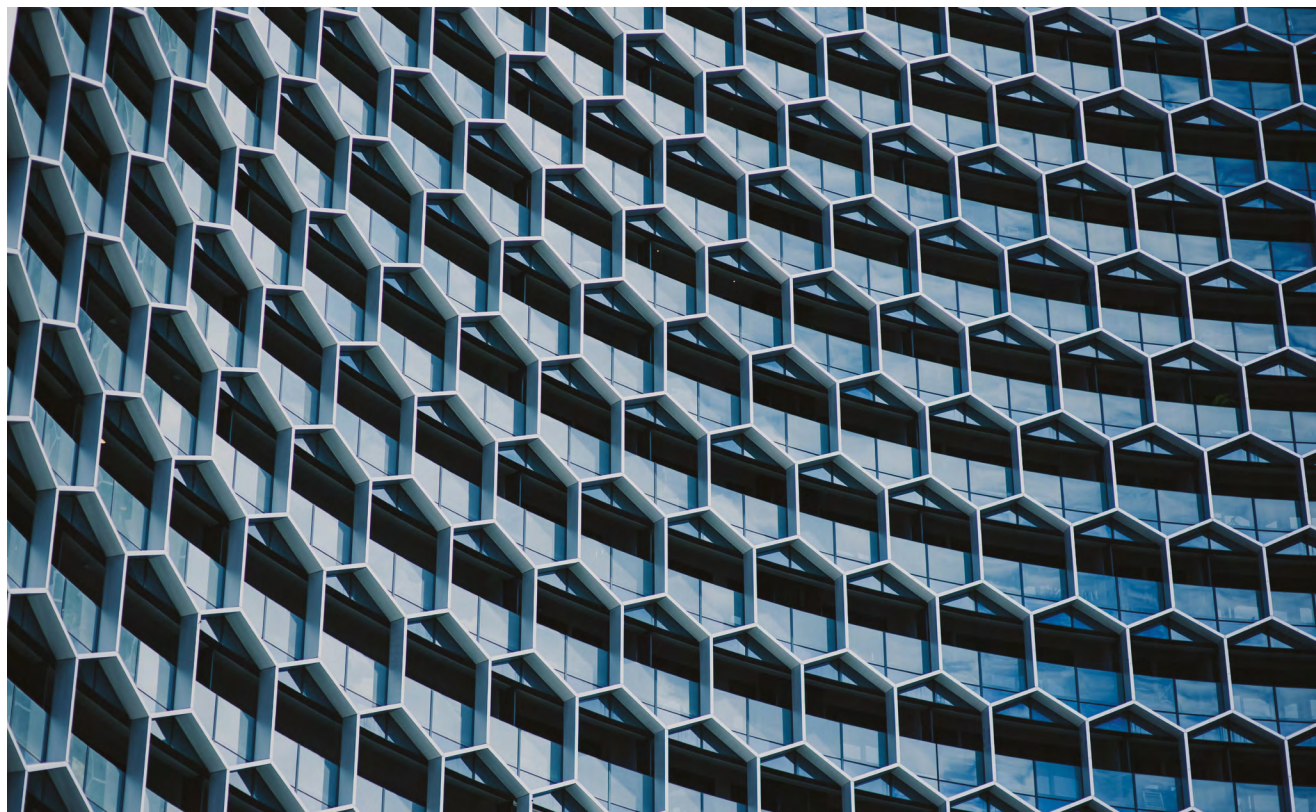
The sale/ transfer of real estate assets is subject to a transfer fee at a rate of 2% of the official appraisal value of the DOL. The transfer fee will be collected by the DOL

Stamp Duty

The sale of real estate assets is subject to 0.5% stamp duty on the sales price of the land or the most current appraised value on record with the DOL, whichever is greater. The stamp duty will be exempt if the SBT has been paid on the sale of the real estate assets.

REIT

REITs are not regarded as taxable entities, and are not subject to corporate income tax. Nonetheless, REIT is subject to VAT, SBT and Stamp Duty. Profit sharing distributed by the trustee to the unit holders will be subject to withholding tax at the rate of 10% when paid out to the unit holders of the trust. Capital gain from selling the trust units is subject to corporate income tax for companies that operate business in Thailand. However, foreign companies that do not operate business in Thailand but receive capita gain from selling REIT units are subject to 15% withholding tax. Natural persons are exempted from personal income tax for capital gain from selling REIT units.



4. Planning/Zoning

4.1 Legislation and planning/zoning controls

4.1.1 APPLICABLE LEGISLATION AND GOVERNANCE

In outline, what legislative and governmental controls apply to strategic planning/zoning across regions and in localities?

The governmental body that controls strategic planning/zoning in Thailand is the Department of Public Works and Town and City Planning, Ministry of Interior for both regions and localities. This body may delegate its authority to relevant local administrations pursuant to the Plan Development and Process for Decentralization to Local Administration Act B.E. 2542 (1999).

4.1.2 CONTROLS ON SPECIFIC NEW CONSTRUCTION AND REFURBISHMENT

Does public law control whether a landowner may construct a new building or refurbish an existing building on its land?

Yes, the Building Control Act B.E. 2522 and City Planning Act B.E. 2518 and the relevant notifications control in both cases whether a developer or land owner may construct a new building or refurbish an existing building on the land.

4.1.3 CONTROLS ON DETAILED DESIGN

Does public law control the detailed design, appearance and method of construction of any new building?

Yes, the Building Control Act B.E. 2522 controls the layout of the building such as the setback requirements and there are some local regulations issued pursuant to the Building Control Act B.E. 2522 that apply to certain areas, such as Samui Island, that mandate that the design of the roof of the building must be in accordance with its natural surroundings.

4.1.4 DESIGNATED USE

Are there any legal restrictions on the designated use to which any new building may be put or on any change in the designated use of an existing building?

Yes, the Building Control Act B.E. 2522 and City Planning Act B.E. 2518 and its notifications are applicable. The Building Control Act B.E. 2522 controls the setback requirements of the building, and the City Planning Act B.E. 2518 controls the floor area ratio (FAR) (the ratio of a building's total floor area to the size of the piece of land upon which it is built) and the open-space ratio (OSR) (the proportion of a development required to be left as open space) and the designated use of the land.

4.1.5 RESPONSIBLE AUTHORITIES

Which authorities are responsible for regulating the development and designated use of individual parcels of real estate in this country and which legislation applies?

The Department of Public Works and Town and City Planning, Ministry of Interior. City Planning Act B.E. 2518 and the associated notifications.

4.1.6 OTHER RELEVANT STATUTORY PERMITS

Which other statutory permit regimes must be considered in relation to planning/zoning and development?

There are many regulations and permits to consider. Which are applicable depends on the type of business operation involved, for example, the Enhancement and Conservation of the National Environmental Quality Act, Public Health Act, Factory Act, Hotel Act and other legislation relate to the type of building that will be constructed on the designated land and the type of business to be operated in that building.

4.2 Obtaining permission for development

4.2.1 PERMISSION FOR NEW CONSTRUCTION OR DESIGNATED USE

What is the process for obtaining permission for development or carrying on a new designated use?

The developer must apply for a building permit from, or submit a notification of building construction to, the relevant local authorities. The applicant must file an application or submit a notification together with the blue prints and layout of the building. The authorities will consider the application or the notification and the plan based on the relevant zoning and building control regulations. After examination, construction permit approval or receipt of notification (as applicable) will be issued.

4.2.2 THIRD-PARTY OBJECTIONS

In relation to official permissions for the development or carrying on a designated use of real estate, do third parties have the right to object?

Yes, the third parties who may be damaged or affected by the new development have the right to object to the permission.

4.2.3 REVIEW BY OTHER BODIES

Are there any circumstances in which an application for permission for development or the carrying on of a designated use or the permission itself is reviewed by another body, e.g. a court?

No, local authorities have the sole discretion as to whether or not to approve the permission for development. However, if the permission is refused, the applicant can appeal to the Appeal Committee within 30 days from the refusal and if the applicant does not agree with the decision of the committee, the applicant shall file action to a Thai court within 30 days from such decision.

4.2.4 TIMING

How long does it take for an initial decision to be made after receipt of an application for permission for development or the carrying on of a designated use?

Approximately six to seven months depending on environmental requirements, and the size and type of the development.

4.2.5 RIGHTS OF APPEAL

Is there a right of appeal against a relevant authority's decision in respect of an application for permission for development or the carrying on of a designated use?

Yes, the applicant can appeal to the Appeal Committee within 30 days from the refusal and if the applicant does not agree with the decision of the committee, the applicant shall file action to a Thai court within 30 days from such decision.

4.2.6 STATUTORY AGREEMENTS

As well as obtaining a permission, is it possible or necessary to enter into agreements with local or governmental authorities or agencies or with utility suppliers in order to facilitate the carrying out of development?

Yes, but entering into an agreement with local or governmental authorities is required only for some developer activities. For instance, a development on which there is a power or electricity business might be required to enter into an agreement with the government.

4.3 Validity of permissions and enforcement

4.3.1 VALIDITY PERIOD

For how long is a permission for development or the carrying on of a designated use valid?

One to three years, depending on the size of the project. This time period can also be extended.

4.3.2 ENFORCEMENT

How are restrictions on development and designated use enforced?

The local authorities have the power to enforce restrictions on the developer if the permitted building has not been constructed according to the approved blueprints and layout.

5. Real estate finance

5.1 Forms of security

5.1.1 TYPES OF SECURITY

What sort of security is typically created or entered into by an investor who is borrowing to acquire or develop real estate?

The most typical security created or entered into by an investor borrowing to acquire or develop real estate in Thailand is the real estate mortgage. A mortgage agreement is defined as a contract whereby a person, called the mortgagor, mortgages an immovable property to another person, called the mortgagee, as security for the performance of an obligation, without delivering the property to the mortgagee. It is a kind of encumbrance over land or other real property registered as a security of a debt repayment on the condition that if the mortgagor does not repay the debt, the mortgagee shall be entitled to enforce the mortgage and collect the debt from consideration of a public auction of the land or the real property; provided that the mortgage will be redeemed should the terms of the mortgage have been satisfied or performed. Apart from the real estate mortgage, under the Business Security Act B.E. 2558, a person, as a security provider, who directly operates the real estate business can also assign an immovable property as security for securing their or others' transactions. A personal guarantee is, in addition, a less popular type of security. A number of schemes such as a pledge of shares and either a conditional or unconditional assignment of rights and liabilities belonging to an investor are also available.

5.1.2 REAL ESTATE AS SECURITY

Which assets and rights are considered to be real estate or real rights over which security can be granted to a lender?

Land which has title documents and buildings which are located on such land are considered real estate over which security can be granted to a lender.

5.1.3 TRUSTS

Is the concept of a trust or a split between legal ownership and beneficial ownership recognized?

Yes, this concept is recognized in Thailand in the form of a Real Estate Investment Trust (REIT). While an authorized trustee can own the assets which are to be invested in by an authorized REIT manager, only a trust unit holder can receive the profit gained from such investment. The REIT's investment and business must be focused on real estate only. The REIT, trustee and REIT manager must be authorized by the Office of the Securities and Exchange Commission (SEC) before the REIT can be set up.

5.1.4 TRADING OF DEBT

Is secured debt traded between lenders? If so, how is a transfer of the debt to another lender effected?

Yes, the trading of secured debt can be made by either novation or assignment between lenders or other parties. The transferee will acquire only the right to claim if the transaction has been effected in the form of an assignment. In contrast, the transferee will acquire both liabilities and rights if the transaction has been made in the form of novation.

5.2 Creating security

5.2.1 RESTRICTIONS ON FOREIGN LENDERS

Are there restrictions on granting security over real estate to foreign lenders, and if so, what are they?

There is no restriction on granting a mortgage over real estate to foreign lenders, but the registration approval is at the sole discretion of the registrar. The registrar can refuse the registration of a mortgage over real estate on the grounds that they believe that the borrower is a nominee of the foreign lenders. Evidence such as loan agreements and a money transfer certificate must be presented to the registrar in order to clarify the nominee issue.

5.2.2 TAXES AND FEES

Are taxes or fees paid on the granting and enforcement of security over real estate, such as documentary taxes, registration fees and notaries' fees?

There is a mortgage registration fee payable at the Land Office on the registration date at the rate of 1% of the total mortgage amount, provided that the total fee does not exceed THB200,000. Stamp duty may also apply in certain cases, i.e. if the parties wish the mortgage agreement to be an evidence of the loan or overdraft facility, such mortgage agreement shall affix stamp duty at the rate of 0.5% of the mortgage amount but shall not exceed THB10,000.

5.2.3 CORPORATE GOVERNANCE

Does the law lay down any rules which must be complied with before a corporate entity can give valid security over its real estate assets, for example financial assistance rules and corporate benefit rules?

No. There is no such restriction in Thailand but the board of the directors of the company must give approval before a corporate entity can give valid security over its real estate assets.

5.2.4 RESTRICTIONS ON PAYMENTS TO FOREIGN LENDERS

Are there any restrictions on re-payments being made to a foreign lender under a security document or loan agreement?

No.

5.2.5 PRIORITY OF SECURITY

Is it possible for existing secured debt to become postponed to newly created debt in any circumstances in this country, whether by agreement or otherwise? If so, how does this happen?

Yes, as specified by law. The Thai Civil and Commercial Code provides for preferential rights which can be generally divided into the following three categories:

- (i) general preferential rights;
- (ii) preferential rights in movable assets; and
- (iii) preferential rights in immovable assets.

For each category, existing secured debt may be postponed to newly created debt according to a certain hierarchy. The law in this area is complex and specific advice should be sought.

5.3 Consequences of taking security

5.3.1 JURISDICTION

Will a clause in a security document making a foreign law apply be recognized and applied by the local courts? Does local law always apply in certain circumstances?

Yes, generally the foreign law will be respected.

5.3.2 IMPERFECT SECURITY

If a security interest has not been validly perfected, what is the position of the holder of that security if the borrower becomes insolvent?

The holder of the unperfected security will not have a preference right over the secured property and they will be deemed normal creditors in relation to unsecured assets of the debtor.

5.3.3 ENVIRONMENTAL LIABILITY

Can a lender holding or enforcing security over real estate in their country be liable under environmental laws, even if it did not cause any pollution of the real estate?

No.

5.4 Borrower Insolvency/enforcement

5.4.1 ENFORCEMENT OF SECURITY

When a borrower is in default, are there any formalities required or obstacles to be overcome before the lender is able to enforce its security over real estate?

In order to enforce the provisions of the mortgage contract, the mortgagee must notify the mortgagor in writing of the mortgagor's duty to perform their obligation within a reasonable time (such reasonable time shall not be less than 60 days from the date of the receipt of the notice) to be fixed in the notice. If the mortgagor fails to comply with the notice, the mortgagee may enter an action in court for a judgment ordering seizure of the mortgaged property and sale by public auction. In addition to this remedy, the mortgagee is entitled to foreclose on the mortgage subject to certain conditions; provided that the mortgagor is not the debtor, the creditor shall notify the mortgagee in writing within 15 days commencing from the date of the notice to the debtor or else the mortgagee shall be relieved from the obligation to pay interest, indemnity or any ancillary arising from such debt from the subsequence of 15 days. The provisions of the Civil and Commercial Code also provide for the various rights and duties of the parties to such an agreement.

5.4.2 NON-INSOLVENCY PROCEDURES

Are there any schemes or arrangements which can be implemented in relation to a debtor company or business which is in financial difficulties (other than insolvency proceedings)? How do they affect the rights of a lender with security?

Arrangements can be negotiated between the parties, unless otherwise prohibited by law.

5.4.3 EFFECT OF BORROWER'S INSOLVENCY

Are any security interests created by a borrower in favor of a lender made void if the borrower becomes insolvent? Are there any other effects?

No.

5.4.4 ORDER OF PAYMENT

In what order are creditors paid on a debtor's insolvency, and if more than one creditor holds the same security interest over the same real estate asset, how is that situation resolved?

Creditors are paid in the order in which security has been perfected, including cases in which a creditor holds the same security interest over the same real estate asset. The enforcement shall be in respective order of the date and time at which the creditor's right thereof was legally registered.



6. Sale and purchase

6.1 Ownership of real estate

6.1.1 FORMS OF REAL ESTATE OWNERSHIP

What are the categories of property right that can be acquired? Are there any interests in real estate other than exclusive ownership?

There are two categories of property right that can be acquired: ownership and the right of possession.

In addition to exclusive ownership, the Thai Civil and Commercial Code recognizes the following rights:

- **Lease:** leases allow the use of land or real estate for a maximum term of 30 years, apart from the lease for commercial or industrial purposes, which may have a lease term of up to 50 years. In order to be enforceable, any lease for a period of longer than three years or for the life of the lessor or lessee (in the case of an individual) must be registered.
- **Servitude:** land or real estate may be subject to a servitude by virtue of which the owner of the property is bound for the benefit of another parcel of land or real estate, to allow certain acts affecting its land or real estate or to refrain from exercising certain rights inherent in its ownership, such as granting a right of way.
- **Habitation:** a person who has been granted a right of habitation in a building is entitled to occupy the building as a dwelling place without paying rent. The maximum term for a habitation right is 30 years or for the life of the grantee (in the case of an individual).

- **Superficies:** the landowner may create a right of superficies for the benefit of another person by giving them the right to own buildings, structures or planting which are either on or under the land. The maximum term of a superficies right is 30 years or for the life of the landowner or the superfiary (in the case of an individual).

- **Usufruct:** land or real estate may be subject to a usufruct by virtue of which the usufructuary is entitled to the possession, use and enjoyment of the property. The maximum term of a usufruct right is 30 years or for the life of the usufructuary (in the case of an individual).

6.1.2 OWNERSHIP RESTRICTIONS

Are there any legal restrictions on foreign investors acquiring real estate?

Yes. Unless specifically permitted by law, foreigners are not allowed to own land in Thailand. Foreigners, as defined by the Land Code, include Thai-registered companies where more than 49% of the capital is owned by foreigners or more than 50% of the number of shareholders are foreigners.

Foreigners may, however, acquire land to live on, for commerce, industry, agriculture, burial, public charity or religion subject to the conditions and procedures prescribed in ministerial regulations and with the permission of the Minister of the Interior. Also, foreigners who have made qualifying investments in Thailand of not less than THB40 million may own up to one rai (1,600 m²) of land for residential use, subject

to the permission of the Minister of the Interior and the requirement under the Ministerial Regulations. Foreign land ownership exceptions exist under the Petroleum Act, the Investment Promotion Act and for businesses located in certain industrial estates, with respect to areas of land needed to carry on the relevant business.

6.1.3 MANDATORY PRE-EMPTION RIGHTS

Do mandatory pre-emption rights apply to the sale of real estate assets in this country?

No pre-emption rights apply to the sale of real estate assets.

6.2 Legislation affecting real estate sales

6.2.1 REAL ESTATE LEGISLATION

Which legislation applies to property transactions?

The main legislation governing the transfer of real estate is as follows:

- The Civil and Commercial Code;
- The Land Code;
- The Condominium Act;
- The Foreign Business Operation Act;
- The Investment Promotion Act; and
- The Industrial Estate Authority of Thailand Act.

6.2.2 SPECIFIC LEGISLATION

Does a special set of laws apply to the transfer of title to any of the following types of real estate: residential, industrial, offices, retail and hotels?

No.

6.3 Transactional process

6.3.1 EFFECTIVE TRANSFER OF OWNERSHIP

How is a lawful and proper transfer of title to real estate to a purchaser effected?

Under the Civil and Commercial Code, a sale of land or real estate must be made in writing on the official form of the Land Department and be registered with the competent official at the relevant land office which the land or real estate is situated.

6.3.2 REGISTRATION OF TITLE

Is real estate registered/does a reliable register of land ownership exist? Are transfers of title recorded? Is title insurance common?

Yes, real estate is registered. Ownership of land or real estate, as well as other forms of rights in land, such as leases of over three years, mortgages, rights of servitude, habitation, superficies and usufruct must be registered by a competent official at the relevant land office for the area in which the land is situated.

Transfers of land are recorded. Every transfer of title must be registered at the relevant land office in which the land is situated. After the completion of registration, the information recording the transfer of ownership of the land or real estate will be recorded at the relevant land office.

Title insurance does not exist in Thailand.

6.3.3 STEPS IN THE TRANSACTION

What are the normal steps involved in a real estate transaction?

Following the investigation of the land title deed and ownership of the land or real estate, the parties will enter into a sale and purchase agreement and register the land or real estate transfer of ownership at the relevant land office in which the land is situated.

6.3.4 DUE DILIGENCE

Do buyers usually carry out due diligence?

The buyer will use their discretion as to whether they wish to carry out due diligence. Buyers (with the assistance of their lawyer) will normally conduct due diligence on significant transactions involving commercial property, hotels, resorts, department stores, etc. before entering into the sale and purchase agreement.

6.3.5 CONSENTS

Are special consents required for certain transactions (for example, consent by a spouse)?

Yes. In addition to specific consents required due to the legal capacity of the seller and the buyer (for example, in the case of minors or the mentally disabled), if the seller has a spouse, the seller must have a written consent from their spouse before the transferring any type of land or real estate.

6.4 Contents of a contract

6.4.1 FORM OF CONTRACT

Are there formal requirements regarding the content and structure of a sale and purchase contract relating to real estate (SPA)?

Yes. There are standard forms of sale and purchase agreement in the case of:

(i) buying land and/or a house from a developer under the Land Development Act; and

(ii) buying a condominium unit under the Condominium Act.

Under the Land Development Act, a sale and purchase agreement between the developer and its buyers must be made on the standard form provided by the Central Land Development Committee. If any part of the sale and purchase agreement does not accord with the standard form of the Central Land Development Committee and is not beneficial to the buyer, that part of the agreement will not be enforced.

Under the Condominium Act, a condominium unit sale and purchase agreement between the owner of the land and building and the buyer must be made on the standard form provided by the minister. If the sale and purchase agreement does not follow the standard form and such information cannot be interpreted in such a way as to benefit the buyer, that part of agreement will not be enforced.

For all other sales and purchases, the parties are free to negotiate the terms as they see fit. However, the essentials of a sale and purchase agreement should include the parties' identities, details of the property to be sold, the purchase price and the date of registration for the transfer of ownership. On the registration date, the parties will enter into an official form of sale agreement and the agreement for the transfer of ownership will be registered with the competent official at the relevant land office for the area in which the land or real estate is situated.

6.4.2 SELLER'S WARRANTIES

What seller's warranties are provided under statute in the sale of real estate in this country (for example, as to the state of the building, asbestos etc.)?

Under the Civil and Commercial Code, the seller's warranties are as follows:

In the event that there is a defect in the property sold which impairs either its value or its fitness for ordinary purposes, or the purposes of the contract, the seller is liable whether the seller knew of the existence of the defect or not. However, the seller is not liable in the following cases:

- (a) if the buyer knew of the defect at the time of sale, or would have known of it if it had exercised such care as might be expected from a person of ordinary prudence;
- (b) if the defect was apparent at the time of delivery, and the buyer accepted the property without reservation; or
- (c) if the property was sold by public auction.

- The seller's liabilities for any interference with the buyer's peaceful possession of the land or real estate are as follows:

- (a) The seller is liable for the consequences of any disturbance caused to the buyer's peaceful possession by any person having a right over the property sold existing at the time of sale or due to a default by the seller. However, the seller is not liable for a disturbance caused by a person whose rights were known to the buyer at the time of sale.
- (b) In any case of disturbance where an action arises between the buyer and a third person, the buyer is entitled to summon the seller to appear in the action to be a joint defendant or a joint plaintiff with the buyer, in order to enable the court to settle disputes between all the parties in one action.
- (c) The seller is also entitled, if it thinks proper, to intervene in the action in order to deny the claim of the third person.
- (d) The seller is liable if the buyer is evicted and therefore deprived of the whole or part of the property sold or if the property is subject to a right, the existence of which impairs its value, fitness, use or benefit and of which the buyer had no knowledge at the time of sale.

6.4.3 MISREPRESENTATION

What are the buyer's remedies against misrepresentation by the seller of real estate?

The buyer will have the right to terminate a sale and purchase agreement and seek recovery from the seller for all actual damages incurred, and have the right to seek specific performance of the seller's obligations under the sale and purchase agreement.

6.5 Real estate sales and public law

6.5.1 REAL ESTATE AND PUBLIC LAW

What are the most important areas of public law for an investor to consider when purchasing real estate?

The important areas of public laws for an investor to consider when purchasing the land or real estate are the relevant Town Planning, Building Control Act and relevant environmental legislation. Additionally, an investor should verify that the land or real estate is not state property.

An investor should also satisfy itself:

- that the intended use of land or real estate is permissible under the relevant Town Plan;
- that the construction of the building complies with the general requirements prescribed by the Building Control Act in connection with stability, safety, fire protection, public health and maintenance of the quality of the environment;
- that the design and installation of electricity, water, gas, fire protection and water treatment systems, as well as parking areas and entrances, comply with the Building Control Act;
- whether an Environmental Impact Assessment Report was required to be submitted for the construction of the building; and
- in the case of the purchase of a building, that the construction permit and the certificate of use for the building are obtained for inspection. The inspection of the plans and the building should be conducted by an expert.

6.5.2 ENVIRONMENTAL LIABILITY

Is the buyer of a real estate asset in this country responsible for soil pollution or contamination of the building even if it did not cause the pollution or contamination?

Yes. The National Environment Quality Act provides that an owner, occupant or possessor of a pollution source will be liable for any damage due to such pollution. As a result, the buyer will be responsible for any existing soil pollution or contamination of the land or building after the date of registration of the ownership transfer.

6.5.3 PLANNING/ZONING ISSUES

How can a buyer ascertain the permitted uses of a parcel of real estate under the applicable zoning or planning law in this country?

The buyer should confirm with the relevant official of the Department of Public Work and town and Country Planning and review the relevant town plan to which the land or real estate is subject as to whether the buyer's intended use of a parcel of land or real estate is a permissible use in accordance with the relevant town plan. Please note that a landowner may only use its land to the extent that the use is not prohibited in the zone to which the land belongs. Additionally, the local authority will consider whether the landowner's intended use of the land is permissible under the relevant town plan before issuing a construction permit.

6.5.4 AGREEMENTS WITH PUBLIC BODIES

Is it possible to enter into specific development agreements with relevant public authorities in this country in order to facilitate a project?

No. It is not possible to enter into specific development agreements with relevant public authorities to facilitate a project

6.5.5 EXPROPRIATION/COMPULSORY PURCHASE

Is expropriation (compulsory purchase) possible in this country?

Yes. Expropriation is possible in Thailand. Under the Expropriation of Immovable Property Act, subject to certain requirements, governmental entities can expropriate immovable property for the purpose of public utilities, military purposes, agricultural development, or town and country planning. The Act provides governmental entities with the absolute and unilateral right to exercise this power and the expropriated property owners must comply with any expropriation order. However, the owners will be entitled to receive compensation as provided by the Act.

6.6 Taxation of real estate sales and purchases

6.6.1 TAXATION OF ASSET DEALS

Which taxes are relevant/which transaction costs will be incurred when buying real estate as an asset (asset deal) and how are the transaction costs shared between the buyer and seller?

The following are tax considerations regarding the purchase of assets:

Corporate income tax

A seller's income derived from the sale of land or real estate will be subject to Thai corporate income tax at a rate of 20% (although the normal rate is 30%) and subsequent years. The tax is applied to the net profits derived from the sale of the land or real estate. The net profit or gain is calculated by taking the gross proceeds from the sale and deducting the direct cost and relevant administrative expenses for the sale of the land or real estate.

Withholding tax

The payment attributable to the price charged on transfer of land or real estate or official appraisal value as recorded by the Land Department, whichever is greater will be subject to withholding tax at the rate of 1% in the event that the seller is a legal person. This withholding tax can be used to offset the corporate income tax payable at the year-end and if it exceeds the corporate income tax payable, the seller can claim a cash refund.

In the event that the seller of land is an individual person, the withholding tax rate will be calculated on the basis of the official appraisal value with a deduction based on possession years, which varies depending on the number of years that the seller has been in possession (the higher years of possession, the more the deduction), and based on the seller's progressive income tax rate (ranging from 5% to 35%).

Specific business tax

The seller will be subject to specific business tax at a rate of 3.3% (including municipal tax) on the sales price of the land or real estate or the official appraisal value as recorded by the Land Department, whichever is greater.

Stamp duty

The seller is subject to 0.5% stamp duty on the sales price of the land or real estate or the official appraisal value as recorded by the Land Department, whichever is greater. The stamp duty is inapplicable if the Specific Business Tax has been paid on the sale of the land or real estate.

Transfer fee

A transfer fee applies at a rate of 2% of the official appraisal value of the land or real estate and is borne equally by the parties unless otherwise provided in the agreement.

6.6.2 Taxation of share deals

Which taxes are relevant/which transaction costs will be incurred when buying real estate via the shares in the owning company (share deal) and how are the transaction costs shared between the buyer and seller?

Stamp duty should be paid at the rate of 0.1% on the greater value of the paid up registered value of shares or the sales proceeds value resulting from the sale of the shares; and the buyer of the shares will have to deduct withholding tax at a rate of 15% unless otherwise exempted by a double-taxation agreement.



7. Taxes

7.1 Investment structures

7.1.1 ROUTES FOR INVESTMENT

How can investment in real estate by an individual/organization/company be set up?

An individual/organization/company may invest in Thai real estate either directly in their own name or indirectly through any one of many different legal entities, including corporations, limited partnerships, registered ordinary partnerships, and REITs.

Under the Land Code, generally, foreigners are not allowed to own land freehold. However, under the Condominium Act, generally, foreigners may own condominium units. Also, a foreign individual or entity, is allowed to hold up to 49% of the investment units in a property fund having ownership or a leasehold interest in land or immovable property. The aforementioned also applies to REIT that invests in real estate in Thailand.

Please note that the establishment of a new property fund is no longer allowed under Thai law. However, the existing property funds are able to operate their businesses until the expiration of the fund.

7.2 Tax on acquisitions

7.2.1 TAXATION OF ACQUISITIONS

What taxes are payable in relation to the purchase of real estate via the various types of corporate vehicle available and who is responsible for the payment of these taxes?

The following taxes and fees arise upon the transfer of real property regardless of whether the transaction involves corporations or individuals.

1. Transfer Fee: 2% of the Land Department's appraisal value for the property. According to the Civil and Commercial Code, the seller and the buyer are equally responsible for paying the transfer fee unless agreed otherwise by the parties.

2. Withholding Tax: If the seller is a corporation, there is a requirement for the buyer (payer) to withhold and pay to the authorities withholding tax at the rate of 1% of the actual sales price or the Land Department's appraisal value, whichever is higher.

If the seller is an individual, the Land Department's appraisal value of the property will be used and the personal income tax rates will apply after a complex calculation.

3. Specific Business Tax: Specific Business Tax (including municipal tax) applies at a rate of 3.3% of the appraisal value, or the actual transaction value, whichever is higher. Specific Business Tax applies if immovable property is sold in a commercial manner or for profit. Generally, a seller who is a corporate entity is liable to pay this tax. While an exemption may apply to a seller who is a natural person in situations where they have owned the immovable property for at least five years or their name has been entered on the house registration for the property for at least one year

4. Stamp Duty: If the sale is not subject to Specific Business Tax, it shall then be subject to Stamp Duty of 0.5% of the Land Department's appraisal value or actual transaction value, whichever is higher. Liability generally falls on the seller. In other words, the Stamp Duty is exempt if the seller is subject to the Specific Business Tax.

7.2.2 VAT ON AN ACQUISITION

Is VAT payable on the purchase of real estate and if so, can it be recovered?

The sale or purchase of immovable property is not subject to VAT. However, VAT may be applicable in certain circumstances where the sale or purchase of immovable property is inclusive of moveable property, e.g. furniture.

7.2.3 OTHER COSTS OF ACQUISITION

What costs/charges (other than tax and VAT) are payable on completion of the purchase of real estate and who is responsible for paying these costs and to whom are they payable?

There are none.

7.3 Recurring taxation

7.3.1 ONGOING TAXATION

What taxes (if any) are payable by the owner of real estate on a recurring basis and can these be reduced or offset in any way?

Recurring taxation related to the mere ownership of immovable property is in the form of:

- House and Land Tax;
- Local Development Tax; or
- no tax.

House and Land Tax is imposed at a flat rate of 12.5% of the annual rental value on land, houses, apartments, condominiums etc. if the property is used for commercial purposes (including renting for residential purposes) or industrial purposes. This tax does not apply if a house is owner-occupied and not used for commercial purposes. In situations where the owner is a legal entity, the tax payable can be treated as deductible expenditure in computing liability for corporate income tax.

Local Development Tax is imposed on persons who either own land or possesses land, and who are not subject to House and Land Tax (i.e. Local Development Tax normally applies to unused land). The taxable value is the median value of the land, excluding buildings, improvements, and material goods produced on the land, if any. The tax is calculated in accordance with a progressive schedule whereby the tax amount increases as the median value increases. This schedule varies from region to region and the extent of allowances permissible depends on the location of the land. As with House and Land Tax, the tax payable can be treated as deductible expenditure in computing liability for corporate income tax.

Recently, new legislation imposing property tax has been drafted and is expected to come into force in the near future. As such, the House and Land Tax and/or the Local Development Tax are likely to be abolished.

7.3.2 ONGOING COSTS OF OWNERSHIP

What costs/charges (other than tax) are payable by the owner of real estate and who are these payable to?

Other than House and Land Tax and Local Development Tax, there are generally no taxes, charges, fees, duties, or assessments for ongoing ownership of immovable property, whether on a national or local level.

However, an owner of a condominium unit under the Condominium Act or of a residence unit under the Land Allocation Act is required to pay common expenses (known as Common Area Maintenance Fees or CAM Fees). Common expenses means expenditure required on common services and tools or facilities provided for joint use or joint benefit and expenditure required on maintenance and operation of common property as well as tax and duty costs (if any), based on the ownership ratio of common property of each co-owner. The CAM fee amount and timing for payment depend on the specific condominium's or residence's regulations.

7.4 Tax on income from real estate

7.4.1 INCOME FROM A REAL ESTATE INVESTMENT

What types of income can be expected from ownership of real estate?

Rental/lease income and capital gains can be expected from the ownership of real estate in Thailand.

7.4.2 TAXATION OF INCOME

How is income arising from an investment in real estate taxed and can these taxes be reduced or offset in any way?

Rental/lease income and capital gains would be treated as income subject to personal income tax (if the recipient of the income is an individual) or to corporate income tax (if the recipient of the income is a corporation).

As far as personal income tax is concerned, the owner is subject to progressive tax rates ranging from 5% to 35%. An allowance of 30% of total rental/lease income may be deducted from the taxable income. However, if the owner can substantiate that the cost is actually higher than the 30% threshold, the actual expenses evidenced by supporting documents may be deducted from the taxable income in computing the personal income tax.

For owners that are corporate entities, the normal corporate income tax rate is currently 20% of net profit. Some companies may be subject to progressive tax rates at 15% and then 20% provided that such companies have registered capital of not more than THB5 million and total revenue of not more than THB30 million per year.

If investment is made through a qualifying property fund, real estate investment trusts (REITs) or other relevant tax rules, the net profit is not subject to tax.

7.4.3 TAXATION OF DISTRIBUTIONS

Are additional taxes incurred if any income generated from a real estate investment is transferred to the shareholders or partners in the relevant vehicle and can these be reduced or offset in any way?

The investment vehicle itself would not be subject to additional taxes on the transfer of income generated from real estate to its shareholders or partners. However, it will be required to withhold tax when applicable and appropriate. Generally, the withholding tax rate applicable to the dividend or profit remittances is 10% unless otherwise reduced by a relevant double tax agreement. Nonetheless, the withholding tax rate applicable to profit sharing to a foreign company that does not operate business in Thailand is 15%. However, the withholding tax may be exempt subject to certain conditions.

7.4.4 OTHER COSTS OF RECEIVING INCOME

Are any costs/charges (other than tax) payable in respect of income generated from an investment in real estate and who are these charges payable to?

No.

7.4.5 OTHER COSTS OF DISTRIBUTIONS

Are there any additional costs/charges (other than tax) payable if income generated from an investment in real estate is transferred to the shareholders or partners in the relevant vehicle and who are these charges payable to?

No, but if the shareholders or partners reside outside Thailand, a bank fee may apply

7.5 Tax on disposals

7.5.1 TAXATION OF DISPOSALS

What taxes are payable on the sale of real estate and can these be reduced or offset in any way?

Upon the transfer of real estate, the following taxes and duty would generally be payable.

Withholding Tax

If the seller is a corporation, there is a requirement for the buyer (payer) to withhold and pay withholding tax at the rate of 1% of the actual sales price or the Land Department's appraisal value, whichever is higher. This withheld tax can be used as a tax credit for the corporate seller, when calculating its corporate income tax liability.

However, in situations where the owner is a foreigner, the capital gain from the sale of immovable property is generally subject to withholding tax at the rate of 15%.

If the seller is an individual, the Land Department's appraisal value for the property is used and personal income tax rates apply after a complex calculation. Individuals may choose to exclude income from the sale of immovable property from their annual personal income tax return in certain cases (e.g. when there is a sale of immovable property acquired by bequest or gift).

Specific Business Tax

Specific Business Tax (including municipal tax) applies at a rate of 3.3% of the appraisal value, or the actual transaction value, whichever is higher. Specific Business Tax

applies if immovable property is sold in a commercial manner or for profit. Generally, a seller who is a corporate entity is liable to pay this tax. An exemption may apply to a seller who is a natural person in situations where they have owned the immovable property for five years or his/her name has been entered on the house registration for the property for at least one year.

Stamp Duty

If the sale is not subject to the Specific Business Tax, it is subject to Stamp Duty of 0.5% of the Land Department's appraisal value or the actual transaction value, whichever is higher. Liability generally falls on the seller. In other words, the Stamp Duty is exempt if the seller is subject to the Specific Business Tax.

7.5.2 OTHER COSTS OF DISPOSALS

What costs/charges (other than tax) are payable on the sale of real estate and who are these charges payable to?

Transfer Fee: 2% of the Land Department's appraisal value for the property. According to the Civil and Commercial Code, the seller and the buyer are equally responsible for paying the transfer fee unless agreed otherwise by the parties.



8. Transfer fee

A transfer fee applies at the rate of 2% of the Land Department's appraisal value for the property. According to the Civil and Commercial Code, the seller and the buyer are equally responsible for paying the transfer fee unless agreed otherwise by the parties.



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