



# 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.

DLA Piper's global team of 600 lawyers devoted to the real estate sector assists its clients throughout the entire lifecycle of their investments. By leveraging our practical experience with our comprehensive knowledge of the Thai real estate investment market, we hope to provide you with the right insights to successfully invest in Thai real estate. This document is intended to serve as a guide for investors to better understand the various aspects of the real estate market in Thailand. If you have any further questions, our Thai real estate team is always ready and happy to assist you.



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# 1. Ownership of real estate

## 1.1 Property right

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

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

- Lease – Lease allows the use of land or real estate for a maximum term of 30 years. Except lease for commercial or industrial purposes, which may have a lease term of up to 50 years and is subject to certain requirements. 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. This binds the owner of the property to allow certain acts affecting its land or real estate or to refrain from exercising certain rights inherent in its ownership of a piece of land for the benefit of another parcel of land. This includes things such as a right of way. These are sometimes called easements.
- 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 him 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).

## 1.2 Restrictions on ownership by foreigners

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 where more than 50% of the number of shareholders are foreigners.

Foreigners may, however, acquire land for: residence, 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 Thai Baht 40 million may own up to one rai (1,600 square meters) of land for residential use, subject to the permission of the Minister of the Interior and the requirement under certain Ministerial Regulations. Foreign land ownership exceptions exist with respect to areas of land needed to carry on the relevant business under the Petroleum Act, the Investment Promotion Act and for businesses located in certain industrial estates.

## 2. Acquisition of ownership

### 2.1 Formal requirements

The sale and purchase of land or real estate in Thailand is usually a two-stage process. Firstly, the parties will enter into a sale and purchase contract and then secondly, perform the registration of transfer of land or real estate. It is possible that the first stage is dispensed with and the parties proceed straight to a transfer; however, this is unusual.

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.

### 2.2 Registration

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

### 2.3 Asset deals

In an asset purchase transaction, the buyer is able to choose which assets it acquires. The legal formalities, as detailed above must be observed for each one of those assets individually. The due diligence should be carried out by the buyer's lawyer. The process for such transactions will involve:

#### DUE DILIGENCE

It is highly advisable for the buyer to carry out due diligence on all aspects of the property prior to signing contracts. This is because, once the contracts have been

signed, the parties are obligated to complete. Such due diligence will cover:

- all legal aspects including title to the property and rights and easements affecting it. As part of this, the buyer will undertake various searches with the relevant local land office to gather information about the property;
- the title investigation will also include a review of the map showing the shape of the land attached to the land title deed and the official survey map of the property to ensure that all necessary permissions are in place; and
- depending on the nature of the property, it may be necessary or advisable to carry out a physical inspection to ascertain the state and condition of the property, investigate the environmental condition and whether the land is contaminated with hazardous substances or the land is encroached which need to be remedied.

#### SALE AND PURCHASE CONTRACT

As set out above, it is normal for parties to enter into the sale and purchase agreement. The sale and purchase agreement will normally contain a number of provisions that are relevant to the property and transaction. It is important to make sure that such provisions are properly dealt with. This may include:

- if the property is let and is being purchased as an investment, the apportionment of rent and other outgoings as well as provisions detailing how the property is to be managed between exchange and completion;

- the party's right to assign the agreement to a third party;
- tax liability provisions; and
- if the transaction is subject to any conditions precedents, the sales contract will contain the full details of those conditions.

### 2.4 Share deals

Another method to acquire real estate is to purchase the legal entity which owns the property. This is often the case as part of a business acquisition but is also common when buying significant investment properties that are held by a special purpose vehicle (SPV).

The purchaser acquires the shares in the target company that owns the property as well as all of its other assets, obligations and liabilities. In a share deal, all of the properties owned by the target remain with the target, but the ownership of the target changes. There is therefore no transfer of the land or real estate.

However, please note that foreigner is not allowed to own land in Thailand unless specifically permitted by law. Foreigner, as defined by the Land Code, include Thai-registered company where more than 49% of the capital is owned by foreigner or where more than 50% of the number of shareholders are foreigners.

To reduce the risk of acquiring liabilities, before conducting share deals it is crucial to conduct thorough due diligence on the target company, ensuring that there are no present or potential legal or financial liabilities "red flags" regarding the company. A sale and purchase agreement must be drafted.



Under Thai law, a transfer of shares must be made in writing, signed by the transferor and the transferee, and there must be at least one named witness for a share transfer instrument. In common practice, the purchaser and the seller will enter into a share sale and purchase agreement with respect to their agreement for a share purchase.

## 2.5 Public auctions

In case that the land or other real estate is registered as security for a debt repayment and 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 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 his 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 submit an action in court for a judgment ordering the 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 if the mortgagor is not the debtor, the creditor shall notify the mortgagee in writing within 15 days starting from the date of the notice to the debtor. Otherwise, the mortgagee shall be relieved of the obligation to pay interest, indemnity or any ancillary obligation arising from such debt from the subsequent 15 days.



## 3. Other rights to property

### 3.1 Mortgages

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. Security can be granted over real estate which includes the land, buildings erected on it and fixtures which form part of those buildings. 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.

### 3.2 Easements

An easement (i.e. servitude) is a right benefiting a piece of land (dominant land) that is enjoyed over another piece of land owned by someone else (servient land). Usually, an easement allows the

owner of the dominant land to do something or exercise specified rights over the servient land, such as rights to access to a public road. Easements must be made in writing and registered with the competent land office.

### 3.3 Leases

This topic will be explored in depth in Section 6 below.





## 4. Permits under zoning and planning law

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).

For new construction and refurbishment, there are two relevant laws i.e. the Building Control Act B.E. 2522 and the City Planning Act B.E. 2518 and their relevant notifications. Those laws govern, in both cases, whether a developer or land owner may construct a new building or refurbish an existing building on the land.

The Building Control Act B.E. 2522 controls the specifications and safety of the building which shall include the size, type and height of building. There are some local regulations issued pursuant to the Building Control Act B.E. 2522 that apply only to certain areas. One such example under this act is Samui Island. It mandates that the design of the roof of a building must be in accordance with its natural surroundings.

The City Planning Act B.E. 2518 controls the purpose for land utilization and the prohibition or restriction for construction of a building which shall include 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).

Any kind of building construction, repair, demolition, alteration or addition must have written approval and consent from the relevant authority under the Building Control Act B.E. 2522 e.g. the District Office, the Municipality or other relevant administrative organization.

There are many regulations and permits to consider. Different permits and regulations apply depending on the type of business operations 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.





## 5. Environmental liability

An owner or possessor of a pollution source shall be liable to pay compensation or damages due to soil contamination. The compensation or damages includes all expenses actually incurred by a government service for the clean-up of pollution arising from such incident of contamination.

However, the owner or possessor of a pollution source shall not be liable if it can be proved that such contamination is a result of:

- (1) Force majeure or war;
- (2) An act done in compliance with an order of the Government of Thailand or State authorities; or
- (3) An act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly responsible for the contamination.

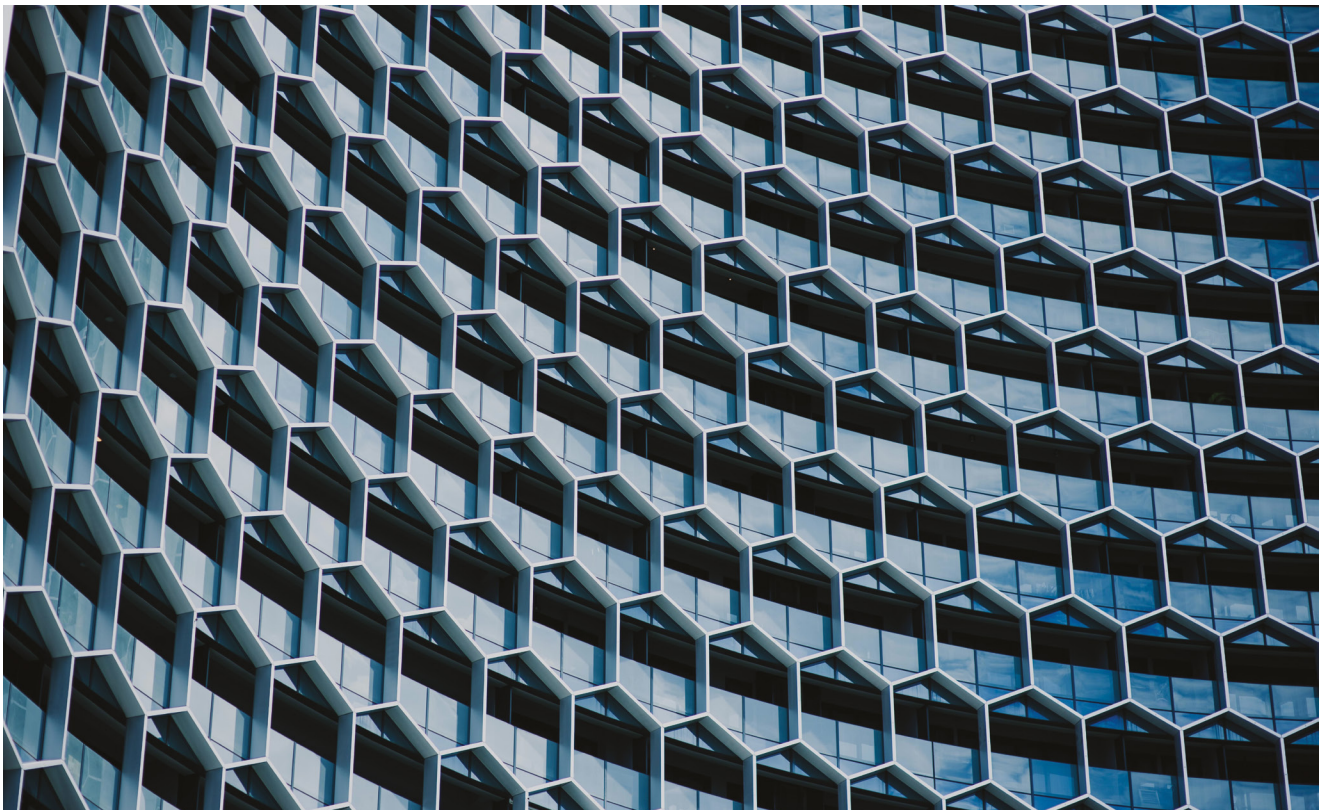
In addition, if such pollution source causes any loss or damage to natural resources owned by the State or belonging to the public domain, such person shall be liable to make compensation to the State representing the total value of natural resources so destroyed, lost or damaged.

It is therefore highly advisable for purchasers or lessees to take careful note of any environmental issues and seek to apportion liability for these or adjust the price of the property accordingly.

A holder of security over land (for example, a mortgagee) is not liable for environmental damage provided it does not take possession of the land and does not itself cause, or knowingly permit, damage to the environment. However, great care must be taken if the security

is enforced. As the mortgagee would then become the owner of land and thus become liable for the environmental damage on that land or coming from it, even if the mortgagee did not cause such damage.

Therefore, a mortgagee should not take possession of land without careful consideration of the implications of potential environmental liability.



## 6. Leases

### 6.1 Types of lease

In Thailand, there are two types of laws which allow occupation and use of real estate for a limited period of time.

#### (i) The Civil and Commercial Code

In general, a lease of immovable property is not enforceable by a cause of action unless some written evidence, as signed by the party which is 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.

#### (ii) The Lease of Immovable Property for Commercial and Industrial Activities Act B.E. 2542

This law 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:

##### (a) 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.

##### (b) 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.
- An area in an industrial estate zone governed by the Industrial Estate Authority of Thailand.

##### (c) Type of businesses:

- Commercial activities having an investment cost of not less than Thai Baht 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.

##### (d) The lease of land for commercial and industrial activities with an area more than 100 rai (one rai is 1,600 square meters) 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 the development of high technology.
- 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.

### 6.2 Duration

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.

Under The Lease of Immovable Property for Commercial and Industrial Activities Act B.E. 2542, the lease term for a lease of land for commercial and industrial activities can exceed 30 years but must not exceed 50 years.



### 6.3 Rent and rent review

The amount of rent is solely subject to a contractual arrangement between the parties. In general practice, fixed and variable rent arrangements are commonly used in Thailand.

The parties are free to determine the amount of rent to be changed or increased. Economic situations often dictate changes and variations in rent amounts.

There is no value added tax charged on rent.

### 6.4 Operating expenses

In a commercial lease, the lessee is usually expected to pay all expenses including utilities, rates and outgoings relating to the property.

Where part of a building is let, a lessee is also expected to pay its share (often a fair proportion based upon a square footage calculation) of the service charge incurred by the landlord in maintaining the common parts and providing any services to the lessee(s). There are other services such as electricity, water, air-conditioning systems, gas and telecommunications services which are normally provided by the suppliers directly to the lessee and the costs of such services are usually paid by the lessee on the basis of their specific usage. The lessor will also pass on the cost of insuring the building to the lessees. Each

lessee normally pays a proportion of the cost, based on the size of the premises they occupy in relation to the total rentable space in the entire building or estate.

### 6.5 Maintenance, repair and renovation at end of lease

The costs for the maintenance and repair of communal areas are covered in the management charges that are payable by the lessee. Management charges are usually calculated based on the size of the premises a lessee occupies in relation to the rentable space of the entire building or estate. In addition, lessees are usually responsible for the maintenance and repair of the interior of the premises they occupy.

The lease often sets out the handover conditions that the premises should be in when the lessee delivers the premises back to the lessor at the end of the lease.

### 6.6 Assignments and subleases

Under Thai law, the lessee is not entitled to assign or sublease the lease unless a consent from the lessor is obtained.

In general practice, lease agreements generally prohibit assignments, subleases, creation of any kind of alienation of the lease by the lessee. Sometimes, without the lessor's consent, a corporate lessee will be allowed to share the

premises with its parent company or any subsidiary companies which operate the same business as the lessee.

### 6.7 Termination

Under Thai law, the lease will end on the expiry date stated in the lease agreement.

Lease agreements generally provide termination clauses setting out the conditions which, if breached by the lessee, would allow the landlord to terminate the lease.

If the lessee does not hand over the premises once the lease agreement expires or it is terminated, the lessor must obtain a court order to recover possession.

In addition, it is uncommon to see a lease, with break clause allowing one or both of the parties to terminate the lease, before its expiry, on or after a specific date. To have break clauses, the lease agreement will usually specify that an advance written notice must be provided, and the lease will terminate upon the expiry of the notice.

### 6.8 Sale of leased property

A sale of the property subject to a lease does not affect the lease in any way. The benefits and liabilities of the lease are taken up by the new owner as the legal successor of the former owner.

## 7. Tax

### 7.1 Taxation on acquisition

The following taxes and fees arise upon the transfer of real estate 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 he or she has owned the immovable property for at least five years or his/her 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.

Please note that 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 Recurring taxation

The Land and Building Tax under the Land and Building Act B.E. 2562 (2018) ("Act") is a form of recurring taxation related to the ownership of immovable property. Under the Act, the properties which are subject to Land and Building Tax are (a) land, (b) buildings, and (c) condominium units. Tax payers are (a) the owner of those properties (if land, building, or condominium unit belongs to an individual/organization/company), or (b) the possessor or the user of

those properties (if land, building, or condominium unit belongs to the State), as the case may be.

The calculation of Land and Building tax is based on the appraisal price of each property which is in accordance with the appraisal price of the property for collection of the government registration fee under the Land Code. With respect to the tax rate, the Act specifies a different tax rate ceiling which depends on the purpose of the utilization of land as follows:

- (i) The tax rate for Agricultural purposes will be no more than 0.15%
- (ii) The tax rate for residential purposes will be no more than 0.3%
- (iii) The tax rate for other purposes (e.g. commercial or industrial purposes) will be no more than 1.2%
- (iv) The tax rate for land or buildings which are vacant or unutilised will be no more than 1.2%

Other than the Land and Building 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 Fees amounts and timing for payment depend on the specific condominium's or residence's regulations.

### 7.3 Tax on income from real estate

Rental/lease income and capital gains can be expected from the ownership of real estate in Thailand and 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 Thai Baht 5 million and total revenue of not more than Thai Baht 30 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 Tax on disposals

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

(1) **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).

(2) **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 he or she has 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.

(3) **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.

## 8. Real estate finance

Real estate finance involves the financing or refinancing of income-generating property by a borrower. The amount borrowed from the lender will be secured against the property as security for repayment of the debt.

### 8.1 Interest rate risks

Commercial property financing is possible with long and short-term loans. Interest rates are frequently agreed by reference to a floating rate of each bank or financial institution. There is a risk of increase to the interest rates. It is possible to counteract the risk by agreeing fixed interest periods with the lender, but these are often time limited.

### 8.2 Assets held as security

A lender will typically require a mortgage over the property as its main piece of security to protect the money advanced under its loan.

A mortgage is the creation of security over real estate which includes the land, buildings erected on it and fixtures which form part of those buildings, without the need to transfer the property.

Under Thai law, a mortgage agreement must be made in writing showing the mortgage amount in Thai Baht and registered at the relevant land office. As a result, there are usually no physical assets held as security, but the lender relies on registration in the public records.

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 he believes 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.

### 8.3 Taxation on the creation of security

There is a mortgage registration fee payable at the relevant land office on the registration date at the rate of 1% of the total mortgage amount, provided that the total fee may not exceed Thai Baht 200,000. Stamp duty may also apply in certain cases, i.e. if the parties wish a mortgage agreement to be evidence of a 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 Thai Baht 10,000.



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