

CHAPTER 7 LAND, BUILDINGS AND CONDOMINIUMS

In this chapter, the principles of Thai land law are discussed, and the rules regarding foreign ownership of land, buildings and condominiums in Thailand.

Land ownership Ownership of land or possessory rights may be evidenced in one of the following ways:

Title deeds Thailand has a system of land titling similar to the Torrens system in Australia. An ownership deed, known in Thai as a *chanot*, is issued in several copies, one copy for the owner, the mortgagee, etc., and one for the official records of the Land Department. The title deed contains the tile number, a description of the land, including the area, boundaries and marking posts, details of the registered owner of the land and any mortgages or other encumbrances registered against the title, together with a history of all registered transactions concerning the land. A title deed, or at least the Land Department copy, is the best evidence of ownership. The registered owner may transfer ownership or grant other rights by presenting his original title deed at the Land Department together with the appropriate contract (sale, lease, mortgage, etc.) The transaction can be registered immediately, and there is no waiting time required in order to effect registration. Title deeds are issued mainly for land in urban and other built-up areas.

Confirmed certificate of use A Confirmed Certificate of Use or *Ngor Sor Saam Gor* is generally similar to a title deed. It certifies that the person named in it has the right to use the land and that his right has been confirmed, that all requirements for the issue of a title deed have been met and the issue of the title deed is pending the issue of title deeds in the area concerned. A transfer of this certificate is made at the *Amphur* (District Office) office rather than at the Land Department. Transfers may be made without the need to post a notice or for a waiting period to elapse.

Certificate of use A Certificate of Use or *Ngor Sor Saam* is similar to the Confirmed Certificate of Use, except that not all the formalities to certify the right to use have been performed. The Certificate of Use may be transferred at the *Amphur*, but before a transfer can be made, it is necessary to post a notice of intent and then to wait for a period of 30 days to elapse to see if any person objects to the transfer.

Certificate of possession A Certificate of Possession or *Sor Kor Neung* is a recognition that a person is in possession of land, but the certificate does not imply that there are any rights associated with the possession. A Certificate of Possession cannot be transferred, but a person in possession may transfer physical possession and the new possessor may apply for a new Certificate of

Possession. Certificates of Possession are common, mainly in rural areas. Their issue must precede the issue of a Certificate of Use.

Tax receipts A person may pay local development land tax and use the tax receipt as evidence of possession. The tax receipt does not confer any rights but it is useful in applying for a Certificate of Possession.

Possession only A person may be in possession of land without any documentation at all. Depending on the nature of the land involved and other possible claimants, including the government, mere possession could possibly, step by step, evolve into documented possession and ultimately, to the issue of a title deed. Mere possession can be transferred from one person to another by an agreement in writing. (Such an agreement cannot be registered.) The transferee does not obtain any right greater than the transferor had.

Ownership by adverse possession Ownership of immovable property can be obtained by adverse possession for a period of ten years. Ownership so obtained is superior to the ownership shown on a title deed or other similar document. The court may order that a new title deed be issued to the adverse possessor, subject to adequate proof. However, ownership cannot be obtained to state property within the public domain, by adverse possession.

Executory contracts of sale Contracts to transfer immovable property at some future date are specifically enforceable; however, these contracts generally cannot be registered, and so it is possible for the seller in the interim period to transfer good title to a third party. There is therefore little protection for would be buyers who enter into contracts to purchase immovable property in the event that the seller becomes insolvent or sells to someone else.

Transferring ownership Ownership is normally transferred by a contract in writing made before the appropriate official at the Land Department or *Amphur*. The transaction is recorded on the title deed or other document, and copies of the supporting documents such as the contract for sale, lease or mortgage are retained in official records.

With respect to land, the purchaser, if a natural person, must prove that he has the right to acquire it by proving his Thai nationality. For example, if the purchaser's father was not Thai, the purchaser may have to show documents to prove that he has completed his Thai military service. Thai women with foreign fathers may have to prove that they are not buying the land for use by their fathers.

Foreign ownership The law generally restricts the right of foreigners to buy or own land unless there is a treaty allowing such ownership, or the foreigner has received special permission. All treaties allowing foreigners to buy or own land

have been abrogated. Foreign ownership of land is currently possible in the following cases:

1. The Board of Investment has power to permit majority foreign owned promoted companies to own land in connection with a promoted business.
2. Majority foreign owned Thai companies may own land in industrial estates owned by the state-owned Industrial Estates Authority of Thailand.
3. Permission for land ownership may be granted to petroleum concessionaires under the Petroleum Act, for use in approved projects.
4. Banks and financial institutions that have become foreign owned with Bank of Thailand consent, may own land, or acquire land through debt restructuring proceedings, on the same basis as Thai-owned financial institutions.
5. A foreigner who invests at least 40 million Baht in authorized securities in Thailand, may be granted permission to purchase up to one *rai* (roughly 400 square metres) of land for residential purposes, subject to other requirements.
6. Property funds licensed by the Securities Exchange Commission may have all their units owned by foreigners. Such property funds are subject to minimum investment and other requirements.

Anti-nominee provisions Under the present law, a Thai company that is at least 51% Thai owned may purchase land. In the past, foreigners sometimes purchased land using companies that were 49% foreign owned and 51% of the shares were held by Thai nominees.

In May 2006, the Ministry of the Interior issued a letter to all Land Departments. It applies to all companies or partnerships where there are any foreign shareholders, directors or partners. In such cases, where it is reasonable to believe that a Thai is holding shares on behalf of a foreigner, then the Land Department is entitled to investigate their income background, current employment and salary, and call for evidence regarding such matters. If a loan was used in connection with the purchase, evidence of the loan can be called for. If after investigation it appears that the transfer of land was intended to avoid the law, or a person is buying the land for the benefit of a foreigner, then Land Department officers are obligated to refer the case to the Land Department in Bangkok for further consideration. There is no reference in the regulation to penalties. A directive could however be issued by the Land Department that the application to register the transfer should be refused.

In July 2008, the Ministry of the Interior issued a further instruction to all Land Departments. This widens the scope of any investigation, to include land acquired for other purposes. In a case where the company has any foreign promoters, shareholders or directors, or where foreigners control the voting rights, or the Thai shareholder does not have an occupation related to investment, the Land Department is required to investigate the Thai shareholders, and ascertain the sources of funds raised or used by the company to acquire land. In addition, if a foreign company or Thai company with majority foreign ownership leases land or acquires a lease for a long period, the reasons for the lease may also be investigated.

Other rights in land

Leases Although foreigners usually may not buy land, they may lease land on a short or long term basis. Leases for up to three years may be entered into by simple contract and need not be registered.

Leases for more than three years are valid for only three years unless the lease is registered on the Title Deed or the Certificate of Use. Leases for three years with an option to renew may in certain cases be treated as a lease for more than three years and the renewal option may not be valid, unless the lease with the renewal option is registered.

Leases may be registered for up to 30 years (or the life of either party) and where the lease is for a period of years it may provide for a renewal clause allowing the lease to be renewed for an additional period of up to 30 years. However, the renewal provision is not automatic, the parties must appear at the Land Department to register the renewal. There are court decisions which indicate that the renewal clause is personal to the landlord, and thus may not be binding on his heirs or successors.

In 1999, a change in the law was made to permit a lease for industrial or commercial purposes to be granted for a term of up to 50 years, and this may also include an option to renew for a further 50 years. The granting of such longer leases has not become popular in practice.

Superficies This is a right granted by an owner of land in favour of another whereby the superficiary is granted the right to own upon the land, buildings, other structures or plantations. It is similar to a lease, and the rules concerning leases apply to superficies. Often, what many people believe is a lease is in fact a superficies.

Usufruct This is a right granted by an owner of land in favour of a usufructuary whereby the usufructuary has the right to possess, use and enjoy the benefits of the property. Specifically, a usufructuary normally has the right to exploit forests,

mines and quarries. The rules concerning usufructs are similar to those concerning leases.

Habitation This is a right to inhabit a building as a dwelling without paying rent. It may be granted for the life of the grantee or for a period of time not exceeding thirty years subject to the right to renew for an additional period of 30 years. The rules concerning habitations are generally similar to those concerning leases.

Servitudes A piece of immovable property may be subject to various types of servitudes for the benefit of another piece of immovable property. A servitude may, for example, be granted, consisting of an easement giving access to a parcel of land or of the right not to have a tall building built on the subservient estate. Servitudes may be acquired by prescription but normally must be registered on the applicable title deeds. Servitudes by necessity also exist in favour of parcels of land to which there would otherwise be no access or unduly difficult access.

Charges A piece of immovable property may be subject to a charge entitling the beneficiary to a periodic performance out of such property or to a specified use and enjoyment thereof. A charge may be created for the life of the beneficiary or for a period of 30 years, subject to a right to renew for an additional period of 30 years

Mortgages A mortgage may be granted by an owner in favour of a person, bank or financial institution, to secure the performance of any obligation. Whilst there is no law restricting the right of foreigners to be granted mortgages over land, it is sometimes difficult in practice for foreigners to register mortgages at the Land Department, taking the view that such mortgages may be a subterfuge for the foreigner to secure beneficial ownership of the land. Foreign banks, however, may take mortgages over land.

For residents of Thailand, only individuals and licensed banks and finance companies can be granted mortgages, where the mortgage finances the construction or purchase of the immovable property. But any company can be granted a mortgage to secure trading debts or other obligations.

Divided ownership of land and buildings It is common in Thailand for buildings to be owned separately from the land. Since there are no nationality restrictions on owning buildings, it is common for foreigners to own buildings and to lease the land on which their factories or other buildings are constructed.

Ownership of buildings may be transferred at the Land Department or *Amphur* at the same time that the ownership of the land covered by a Title Deed or Confirmed Certificate of Use is transferred. Otherwise, ownership may be transferred at the *Amphur* only after notice of the proposed transfer has been posted and 30 days have elapsed without any objection.

Apartments may be leased in the same manner as buildings, but cannot be owned separately from the whole building.

Making leases tax effective Leasing arrangements are often structured by the preparation of several documents, rather than a single document. Since landlords are liable to pay land and house tax of 12.5% of the gross rental derived from renting out land and buildings, but only 7% VAT is charged on services provided, landlords in order to minimize their taxes often prepare two or three separate agreements.

The first agreement will be a lease of the apartment or building. The rent will be subject to 12.5% land and house tax. Other agreements, for example providing for the use of furniture or for other services, are exempt from land and house tax, but are subject to Value Added Tax, currently at 7%.

Condominiums The law regarding condominiums is to be found in the Condominium Acts (1979-2008). The rules concerning ownership of condominiums are similar to those concerning land. Condominium units have a form of title deed and ownership is transferred at the Land Department.

Since each condominium unit carries with it a proportionate ownership of the land, foreign ownership of condominiums is strictly controlled.

Foreigners, meaning foreign natural persons, foreign companies or foreign majority owned Thai companies, may currently own up to 49% of the units in a condominium project. For foreign natural persons without a residence permit, there must be proof that foreign currency was brought into Thailand to purchase the unit. Different rules apply to persons in BOI promoted companies and foreigners with residence permits.

Notwithstanding the above, condominium units may be leased by foreigners, in the same manner that they may lease land.

Increased protection for condominium owners The Condominium Act (2008) contains detailed provisions designed to ensure good management of condominiums, and grants enhanced rights to unit owners to take action in cases of non-compliance with duties imposed under the Act.

Fees, stamp duty and tax The fees, stamp duty and taxes that arise on the sale, lease, or mortgage of land, buildings and condominiums are described below:

Transfers of land, buildings or condominiums The land transfer fee for transferring ownership to land, buildings or condominiums is 2% of the assessed value, no matter what amount is declared. In addition, there is stamp duty of

0.5% based on the amount declared or the assessed amount, whichever is higher. For those who sell land or buildings held for less than five years (less than one year, if the owner has his registered domicile at the place being sold) there is a specific business tax due of 3.3% (inclusive of municipal tax) of the declared amount. But if this tax is paid, then the 0.5% stamp duty referred to above is not payable.

Temporary fee reduction The land transfer fee for some types of property was reduced from 2% to 0.01% and the SBT reduced from 3.3% to 0.11%, until 29 March 2010. This was limited to: land up to one rai, land up to one rai with buildings, buildings alone (but only houses), condominium units and office buildings with/without land. It is possible that this concession may be partly or wholly renewed by the Government in the future if it is deemed that the property market is in need of stimulation.

Sale by juristic person For juristic persons that sell land, buildings and condominiums, there is a 1% income tax withholding payable at the registration office. Full corporate income tax must be paid on the profit at the time the selling company files its annual or semi-annual income tax return. A credit is allowed for the 1% withheld.

Sale by natural person Natural persons who sell land, buildings or condominiums (but not in the course of a business) must pay income tax on the capital gain at a rate from 0% to 20%, at the time the transfer is made. The tax is assessed on the assessed price, less a standard deduction based on the length of time that the seller has owned the property.

The usual progressive natural person tax rates are applied to the deemed profit (see further Chapter 12 *Personal Taxes*), but in any event the tax may not exceed 20% of the gross sale price. When a natural person files his annual income tax return, he can choose to declare the actual profit or loss, or he can ignore the matter, and the tax paid at the registration office will be deemed to be the actual tax.

Fees on leases Natural or juristic persons who register a lease of land, buildings or condominiums (or other similar right, such as a superficies, usufruct or habitation) pay a 1% fee of the assessed rental value. In other words, the total monthly or assessed rental value for the term is calculated and the tax is paid on the total amount.

In addition, there is stamp duty payable of 0.1% of the above figure, and additional stamp duty of 0.5% based on the receipt of rent or any prepaid rental recited in the lease. If there is no prepaid rent, this stamp duty is not due until the rent is actually paid and a receipt given.

Fees on mortgages The fee for registering a mortgage on land, buildings or condominiums is 1% of the amount declared in the mortgage agreement, subject to a maximum fee of Baht 200,000. In addition, proof must be presented that the 0.05% stamp duty due on a loan agreements (subject to a maximum duty of Baht 10,000) has been paid. If the stamp duty has not already been paid, it must be paid at the time that the mortgage is registered.

Temporary fee reduction The fee for mortgage registration was reduced from 2% to 0.01% until 29 March 2010. This is limited to mortgages on: land up to one rai (roughly 400 square metres), land up to one rai with buildings, buildings alone (but only houses), condominium units, and office buildings with/without land. It is possible that this concession may be partly or wholly renewed by the Government in the future if it is deemed that the property market is in need of stimulation.

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