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# The Legal 500 Country Comparative Guides

## Thailand

# REAL ESTATE

### Contributor

Kudun & Partners



#### Peerasanti Somritutai

Partner and Co-Head of Real Estate Practice | [peerasanti.s@kap.co.th](mailto:peerasanti.s@kap.co.th)

#### Chavisa Jinanarong

Associate | [chavisa.j@kap.co.th](mailto:chavisa.j@kap.co.th)

#### Kamonrat Kongtheing

Associate | [kamonrat.k@kap.co.th](mailto:kamonrat.k@kap.co.th)

#### Chayakorn Boonsri

Associate | [chayakorn.b@kap.co.th](mailto:chayakorn.b@kap.co.th)

This country-specific Q&A provides an overview of real estate laws and regulations applicable in Thailand.

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# THAILAND REAL ESTATE



## 1. Overview

In general, ownership of real estate properties in Thailand is limited to Thai nationals, with a few exceptions against foreign ownership. While there is a provision in the Land Code allowing foreigners to acquire properties, without proper planning and careful consideration of the local law, foreign companies and individuals can face unexpected complications and liabilities that may be detrimental to their investment in Thailand.

Kudun and Partners is a leading Thai law firm made up of multilingual partners and lawyers — well versed in English, Chinese, German and Dutch — who are prepared to help foreign and domestic investors navigate through all aspects of real estate transactions and the development of land. Receive unparalleled guidance from some of the country's most sought-after real estate law Thailand specialists.

## 2. What is the main legislation relating to real estate ownership?

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

- Civil and Commercial Code – provides general regulations on the proprietary rights of real estate;
- Land Code – provides specific regulations on the proprietary right of land, including the issuance of the title document and restriction on foreign ownership of land;
- Condominium Act B.E. 2522 (1979) – provides specific regulations on condominiums, including the ownership of the condominium unit and common area, and juristic persons of condominiums;
- Foreign Business Act B.E. 2542 (1999) – provides regulations on businesses and activities that a foreigner can undertake and the requirements of a foreign business license;
- Investment Promotion Act B.E. 2520 (1977) – provides investment incentives which allow a foreigner to own land if such foreigner operates a promoted business;
- Industrial Estate Authority of Thailand Act B.E. 2522 (1979) – provides regulations on the land ownership in industrial estate area; and
- Eastern Special Development Zone Act B.E. 2561 (2018) – provides regulations on the land ownership in the Eastern Special Development Zone.

## 3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

Since December 2022, there has been no new law with material impacts on real estate investors or lenders. Similarly, from publicly available sources, there is no new law of the similar effects expected to be enacted in the near future.

In 2022, a draft ministerial regulation with material effects on a foreign ownership restriction over real estate was made publicly available, but such ministerial regulation has not yet come into effect.

To elaborate, on October 25, 2022, the Cabinet approved the draft ministerial regulation proposed by the Ministry of Interior allowing 4 groups of foreigners to own plot(s) of land under certain criteria (the “**Draft Regulation**”). Such 4 groups of foreigners are (i) wealthy global citizens, (ii) wealthy pensioners, (iii) work-from-Thailand professionals, and (iv) highly-skilled professionals (each, a “**Qualified Foreigner**”). Under the Draft Regulation, a Qualified Foreigner can apply for ownership over plot(s) of land having an area of not exceeding one rai (i.e. 1,600 square meters) which is located in Bangkok, Pattaya or any other area stipulated as residential area according to the Town and Country Planning Act. To

apply for land ownership, a Qualified Foreigner must invest at least THB 40,000,000 in any specific type of investment, maintain such investment for at least 3 years and comply with all other requirements as stipulated under the Draft Regulation. The Draft Regulation was intended to serve as a relaxation of the relevant ministerial regulations referenced to in Item 5(1) below by, for example, reducing the investment period from 5 years to 3 years. However, the Ministry of Interior subsequently requested for the withdrawal of the Draft Regulation as the Ministry of Interior wanted to review and re-evaluate negative and positive effects of the Draft Regulation on the Thai economy and society in greater detail. Accordingly, on November 8, 2022, the Cabinet approved the withdrawal of the Draft Regulation. There is no specific timeframe as to when the revised Draft Regulation would be submitted for the Cabinet's approval.

#### 4. How is ownership of real estate proved?

Every transaction relating to and name of the title owner of any land must be registered at the competent land office and recorded at the back of the relevant title document. Every title document of the land (e.g. land title deed) consists of 2 identical originals, (i) one of which is held for safekeeping at the land office having jurisdiction over such land (depending on the area in which the land is situated), and (ii) the other original is issued to the landowner. Therefore, every transfer of the land title must be registered at the relevant land office such that both originals of the title document of the land be updated accordingly. The transfer of ownership, and the new owner, of the land will not be legally recognized until the registration process has been completed.

Unless proven otherwise, a person or entity whose name appears in the title document of the land as a landowner is presumed as an owner of the land and whatever construction, building or immovable property situated thereon.

In addition to the transfer of ownership of the land, the foregoing registration is also required for creation of other land-related rights such as mortgage, servitude, etc. or for enforceability of a contractual right (i.e. a lease of land with the term longer than 3 years).

#### 5. Are there any restrictions on who can own real estate?

Yes. Unless specifically permitted by law, foreigners are restricted to own land in Thailand. **"Foreigner"** means (i) a non-Thai national individual, (ii) a foreign entity, (iii) a Thai-registered entity in which foreigners hold more

than 49% of the total ownership interests (e.g. shares), and (iv) a Thai-registered entity with more than half of the number of the holders of its ownership interests (e.g. shareholders) are foreigners.

However, foreigners may be permitted to own land subject to certain requirements and criteria. For example, the following legislation sets out exceptions and criteria permitting foreigners to own land:

##### (1) Land Code

A foreigner may own up to one rai (i.e. 1,600 square meters) of land for residential use, provided that such foreigner brings in not less than THB 40 million from abroad to invest in specified businesses in Thailand and obtains permission from the Ministry of Interior. This permission is subject to the criteria, procedures, and conditions prescribed in the relevant ministerial regulations.

##### (2) Investment Promotion Act B.E. 2520 (1977)

A foreigner who receives investment promotion from the Board of Investment ("**BOI**") may be permitted to own land for the purpose of the operation of a promoted business as the BOI deems appropriate. Therefore, if a foreigner ceases to operate such promoted business, such plots of land owned by a foreigner must be disposed within 1 year;

##### (3) Industrial Estate Authority of Thailand Act B.E. 2522 (1979)

A foreign business operator who operates its business in an industrial estate may be permitted to own land located in such industrial estate as the Board of Directors of the Industrial Estate Authority of Thailand ("**IEAT**") deems appropriate. Therefore, if such foreign business operator ceases to operate its business, such plots of land must be disposed to the IEAT or any transferee within 3 years; and

##### (4) Condominium Act B.E. 2522 (1979)

Under the Condominium Act, a foreigner is allowed to own any "foreign-quota" condominium unit. In each condominium building, all of the foreign-quota condominium units must have the aggregate area of not exceeding 49% of the total area of all units in such condominium building. A foreigner must also comply with other requirements to own a foreign-quota condominium unit; for example, the money used for the purchase of a condominium unit must be transferred from outside of Thailand or withdrawn in THB or (any foreign currency) from a foreigner's non-resident account in the amount not less than the condominium

unit price.

Please note that, in Thailand, the ownership of a building (including any construction) can be separated from the ownership of the land on which such building is situated. Even though a foreigner is generally not permitted to own land, a foreigner is allowed to own a building. Therefore, it is somewhat common in Thailand for a foreigner to lease the land to construct or operate the building that is owned by a foreigner.

## 6. What types of proprietary interests in real estate can be created?

There are 3 types of proprietary interests in real estate: ownership (also known as, freehold interest), entitlement over immovable property and right of possession.

**(1) Ownership/Freehold Interest** – the owner has absolute ownership over land or real estate. The ownership over land includes ownership over the surface of, space above (to the reasonable extent) and beneath such land. The ownership over a condominium unit consists of the ownership over such condominium unit and the joint ownership over the common area in the condominium building.

**(2) Entitlement over Immovable Property** (also known in Thai as, “Sub-Ing-Sith”) – the Entitlement over Immovable Property Act B.E. 2562 (2019) (the “**Act**”) provides a new type of proprietary interest in real estate. The owner of (i) a plot of land with a land title deed (a “**Land Plot with Title Deed**”), (ii) a building constructed on a Land Plot with Title Deed (a “**Qualified Building**”), or (iii) a condominium unit (together with a Land Plot with Title Deed and a Qualified Building, collectively, the “**Properties**”), may grant another person (*including a foreigner*) a right to use a Property (i.e. a Land Plot with Title Deed, a Qualified Building or a condominium unit) for the maximum period of 30 years – for clarity, a person to whom such right to use a Property is granted will be referred to as an “**Entitlement Holder**”.

Any right granted to an Entitlement Holder must be registered at the competent land office to be perfected. Upon the registration completion, the responsible land official will issue 2 identical originals of a certificate evidencing the entitlement over a Property, (i) one of which is held for safekeeping at the competent land office, and (ii) the other original is issued to the owner of a Property.

Upon the registration of the entitlement over each Property, an Entitlement Holder can enjoy rights, obligations and liabilities with respect to the relevant

Property in capacity as an owner of the relevant Property, but without the following rights which are exercisable only by the owner of the relevant Property:

- (i) right to dispose of the relevant Property;
- (ii) right to retrieve the possession of the relevant Property from others; and
- (iii) right to prevent any unlawful interference with the relevant Property.

Unless a prior written consent from an Entitlement Holder is obtained, the owner of each Property (over which the entitlement under the Act has been created and registered) cannot create any proprietary right over such Property or do anything that prejudices the rights of an Entitlement Holder over such Property. However, without an Entitlement Holder’s consent, the owner may carry out: (1) an ownership transfer of; and (2) a creation of mortgage or business security (under the Business Security Act B.E. 2558 (2015)) over, such Property.

Any entitlement created under the Act may be assigned, transferred, mortgaged or registered as a business security, and can be inherited, in each case, through the registration at the competent land office.

**(3) Right of Possession** – the right of possession can be classified under the Civil and Commercial Code as follows:

- **Lease** – in exchange for rents, the owner or Entitlement Holder of real estate (i.e. the lessor) grants another person (i.e. the lessee) a right to use such real estate for the maximum period of 30 years or the life of the lessor or the lessee (applicable for an individual only). However, a lease for qualified commercial or industrial purpose may have a lease term of up to 50 years. In any case, any lease for a period longer than 3 years must be registered at the competent land office to be enforceable. Unless agreed otherwise by the parties, under a normal lease arrangement, the lessee’s right cannot be inherited, sub-let or transferred to any third party. However, the lessee’s right under a lease for qualified commercial or industrial purpose can be inherited, sub-let or transferred to any third party;

- **Servitude** – with or without consideration, the owner or Entitlement Holder of real estate which is subject to servitude is bound to (i) allow certain acts on its land or real estate, or (ii) refrain from exercising its rights, in each case for the benefit of another real estate. An example of the servitude is a right of way. There is no statutory limitation imposed on the term of servitude. Any right of servitude must be registered at the competent land office to be perfected. Servitude can be

created by juristic act or prescription;

- **Habitation** – the owner or Entitlement Holder grants another person a right to live in a building without paying rent. The maximum term for the right of habitation is 30 years or for the life of the grantee (if the grantee is an individual). Any right of habitation must be registered at the competent land office to be perfected;

- **Superficies** – with or without consideration, the owner or Entitlement Holder grants another person (i.e. the superficiary) a right to own buildings, structure or plantations either situated on or under the land (as opposed to the land itself). The maximum term for a right of superficies is 30 years or for the life of the landowner or the superficiary (if either the landowner or the superficiary is an individual). Any right of superficies must be registered at the competent land office to be perfected. Unless agreed otherwise by the parties, any right of superficies can be transferred and inherited. Upon the expiry of a right of superficies, the superficiary must demolish any building, structure or plantations owned by the superficiary and must return the land to the owner or Entitlement Holder in the original condition. However, if the owner or Entitlement Holder offers to purchase any building, structure or plantations owned by the superficiary at the market value, the superficiary must not reject such offer without a reasonable cause; and

- **Usufruct** – with or without consideration, the owner or Entitlement Holder grants another person (i.e. the usufructuary) a right to possess, use and enjoy benefit of and product arising from real estate (as opposed to such real estate itself), such as crops from a field. The maximum term for a right of usufruct is 30 years or for the life of the usufructuary (if the usufructuary is an individual). However, if the real estate that is subject to a right of usufruct is destroyed, a right of usufruct will also be extinguished; but if the owner or Entitlement Holder restores the conditions of the real estate destroyed, a right of usufruct will also be restored to the extent usufruct-able as a result of such restoration. In any case, any right of usufruct must be registered at the competent land office to be perfected. Unless agreed otherwise by the owner (or Entitlement Holder) and the usufructuary, any right of usufruct can be transferred but cannot be inherited.

## 7. Is ownership of real estate and the buildings on it separate?

Yes, the ownership of a building (including any construction) can be separated from the ownership of the land on which such building is situated. However,

unless proven otherwise, a person or entity whose name appears in the title document of the land as a landowner is presumed as an owner of the land and of whatever construction situated thereon. Therefore, if the ownership of the land is transferred to a transferee, the ownership of the building would also automatically be transferred to the same transferee.

However, the building can also be transferred separately from the land on which such building is situated. The first transfer of any individual building (i.e. without the transfer of land) must be registered at the competent land office and recorded in the newly created building registration (as opposed to and separate from the title document of the land).

## 8. What are common ownership structures for ownership of commercial real estate?

The most common form to hold ownership in commercial real estate is a private limited company. A private limited company can directly own commercial real estate in its name or indirectly through any one or more legal entities, including other private limited companies, public limited company or Real Estate Investment Trust (“REIT”).

REIT (the only type of real estate-related trust recognized under Thai law) is an investment vehicle regulated by the Securities Exchange Commission (“SEC”) and the Stock Exchange of Thailand (“SET”). REIT will invest in real estate for the benefit of the unit holders – the unit holders will receive the profit gained from the investment. REIT may invest domestically or internationally in any freehold or leasehold real estate for the main purpose of rental collection, which in turn majorly becomes the profit available to the unit holders. As REIT’s property is managed by the REIT manager, the profit received by REIT (through rental collection) will be partially used to pay the REIT manager in exchange for the management of REIT’s property before having distributed to the unit holders. REIT is subject to the test of foreigner-ship under the Land Code, and as such, REIT must comply with the unit-holding restrictions (between Thais and foreigners) required by the Land Code if REIT is to own any freehold interest over land.

## 9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

It is customary for a buyer to conduct legal due diligence before acquiring real estate. The buyer (through its legal advisor) should conduct a due diligence investigation on:

(i) the legality and validity of the relevant title document(s) of the land and the access and egress of the real estate; (ii) encumbrances registered at the relevant land office; (iii) material transactions relating to real estate; (iv) the relevant regulations on zoning, construction and environmental control; (v) the relevant permits and licenses for construction and operation of real estate; (vi) corporate search on the seller (corporate entity); and (vii) litigation and bankruptcy search on the seller and the real estate.

### 10. What legal issues (if any) cannot be covered by usual legal due diligence?

A usual legal due diligence would not cover an unregistered encumbrance, i.e. an encumbrance which is valid and enforceable under Thai law without any registration required. Thus, the usual due diligence investigation and searches of public records would normally not cover an unregistered encumbrance. Examples of unregistered encumbrances are (i) a lease having a lease term of not more than 3 years, and (ii) any encroachment (which, if subsisting for 10 years or longer, may result in an adverse possession).

An investigation of any unregistered encumbrance should be analysed and prepared on a case-by-case basis.

### 11. What is the usual process for transfer of commercial real estate?

There are 2 phases for a transfer of real estate: commercial and registration phases.

**Commercial Phase** – During the commercial phase, the buyer may, at its discretion, conduct legal due diligence to verify the legal conditions and evaluate the value of real estate. Concurrently, the seller and the buyer will (i) negotiate terms for the sale and purchase of real estate, including price, conditions precedent and payments of governmental fees, and (ii) prepare and execute a sale and purchase agreement including any other ancillary agreements. Even though the activities in this commercial phase are technically not required and the parties to the transfer of real estate can jump directly at the registration phase, it is advisable in a commercial transaction for the parties to properly and carefully allocate risks and rewards entailed in such transaction. Such allocation of risks and rewards would not be documented in an official form of the sale and purchase agreement (to be discussed immediately below), and thus, this commercial phase is customary and recommended.

**Registration Phase** – To legally effect the transfer of real estate, the parties must register such transfer at the relevant land office. During such registration, the parties must execute an “official form” of the sale and purchase agreement before the responsible land official (the contents of which are controlled by the land official). Upon the registration completion, the land official will record the transfer (i) at the back of the title documents of the land (both originals safe-kept at the relevant land office and issued to the landowner), or (ii) in the building registration, in either case to reflect the name of each new owner of such real estate.

### 12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Comparing to an “asset deal” which entails the transfer registration and payments of fees and taxes, a transfer of real estate through share transfers (i.e. a “share deal”) can be somewhat more attractive. This is because there will be no change to the owner of the real estate and no fees or taxes will be incurred. However, the share deal would be viable for a buyer who wants to buy all of the assets owned by the target entity (which will belong to (or be controlled by) the buyer after the share transfers). This explains why it is customary in Thailand for an owner to own real estate through a “single-asset special purpose vehicle (“SPV”)” – for greater flexibility. The most popular form of SPV in Thailand is a private limited company because of (i) simple rules of corporate governance, and (ii) a corporate veil which provides each shareholder with a liability limit of up to the aggregate par value of shares owned by each shareholder.

Each share transfer is subject to a stamp duty at the rate of 0.1% of the greater of (i) the selling price, and (ii) the aggregate par value, in each case of the shares transferred.

The share deal may not be as attractive as the asset deal when buying real estate mingled in a multiple-asset SPV or multiple-asset entity. Among other reasons, identification and mitigation of risks stemming from any unwanted liability can be difficult and risky in practice.

### 13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Yes. Under the Civil and Commercial Code, a transfer of real estate would not affect a valid, enforceable lease made over such real estate. That is, upon the

registration of a transfer, the transferee will receive ownership of such real estate together with rights and obligations (as a new lessor) under any existing lease agreement. However, please note that only “material” rights and obligations of the former lessor under the lease agreement would be transferred to the transferee. This means the transferee would not be liable for any “extra” arrangement between the transferor and the lessee if such arrangement imposes any greater burden to the transferee other than as contemplated for a normal lease transaction under the Civil and Commercial Code.

#### 14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

The most typical security interest (also known as, collateral) created over real estate is mortgage whereby a mortgagor (i.e. an owner of real estate) mortgages real estate (without delivering the property) in favour of a mortgagee to secure indebtedness owed by any person to a mortgagee. The mortgage will be legally perfected upon the registration at the competent land office. Once perfected, as a protection provided to a mortgagee, the mortgage will subsist despite any subsequent transfer of the real estate mortgaged. Ranked equally with the mortgage in the eye of laws on insolvency and bankruptcy, the Business Security Act B.E. 2558 (2015) allows a business operator who operates real estate business to create security interest over real estate in the form of a “business security” in favour of a “security receiver” prescribed by the same Act (e.g. commercial banks in Thailand). Each business security will be legally perfected upon the registration with the Department of Business Development of the Ministry of Commerce, Thailand.

Other common property rights registered over real estate are:

- **Lease** – with rent, lease allows the use of land or real estate for the maximum term of 30 years or the life of the lessor or the lessee (applicable for an individual only). The lease with a term of more than 3 years must be registered at the competent land office, otherwise such lease would be enforceable only for the first 3 years;
- **Servitude** – with or without consideration, the owner of real estate is bound to allow actions affecting its real estate for the benefit of another real estate (e.g. granting a right of way);
- **Habitation** – the owner of a building is bound to allow

any person with a right of habitation to occupy such building for residential purpose without paying rent;

- **Superficies** – with or without consideration, the owner of the land is bound to allow another person to own buildings, structures or planting over the owner’s land; and
- **Usufruct** – with or without consideration, the owner of the land is bound to allow another person to possess, use and enjoy the owner’s real estate.

#### 15. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

No, this concept is neither recognized nor regulated under Thai law, except REIT as explained in Item 7 above.

#### 16. Is public disclosure of the ultimate beneficial owners of real estate required?

No, the title document of each real estate only shows the name of the owner of such real estate (as opposed to the ultimate beneficial owners).

However, during any transaction at the competent land office, a land official may inquire or investigate as to ultimate beneficial owners as such official deems appropriate.

#### 17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

**Ownership** – tax relating to the ownership of real estate is the land and building tax.

##### (1) Land and Building Tax

Under the Land and Building Tax Act B.E. 2562 (2019) – effective from January 1, 2020 (but subject to certain relaxation):

- (i) each owner of land, building, or condominium unit; or
- (ii) any person who possesses or uses land or building that belongs to the state,

in each case, is required to pay land and building taxes as assessed by the competent local administrative organisation depending on the purpose of use and the appraised value of the relevant land or building.

In addition to the land and building tax, an owner of a condominium unit under the Condominium Act or a residence under the Land Allocation Act must pay common expenses (i.e. common area maintenance fees). The amount, and timing for payment, of the common area maintenance fees will be set out in the relevant regulations of a condominium or residence.

**Transfer** - taxes relating to the transfer of real estate are: (i) transfer fee; (ii) withholding tax; (iii) specific business tax and municipal tax; and (iv) stamp duty.

(1) **Transfer Fee:** 2% of the governmental appraised value of the real estate transferred. Unless agreed otherwise by the parties, the seller and the buyer will be equally responsible for the transfer fee.

(2) **Withholding Tax:** The seller must pay to the competent land office (during but before completion of the transfer) the withholding tax at the rate applicable to such seller. The rate applicable to a corporate seller is 1% of the sale price or the governmental appraised value of the real estate transferred (whichever is higher). The rate applicable to an individual seller will be calculated based on the governmental appraised value of the real estate transferred and the tax rate applicable to such individual.

(3) **Specific Business Tax and Municipal Tax:** 3.3% of the sale price or the governmental appraised value of the real estate transferred (whichever is higher). Unless agreed otherwise by the parties, the seller will be responsible for the specific business tax and municipal tax. The specific business tax and municipal tax may be exempted if the seller is an individual and: (i) has possessed the real estate transferred for at least 5 years before the transfer; or (ii) the real estate transferred has been used as the principal residential place as evidenced by the seller's name having appeared in the relevant household registration for at least 1 year.

(4) **Stamp Duty:** If the transfer is not subject to the specific business tax and municipal tax, the stamp duty at the rate of 0.5% of the sale price or the governmental appraised value of the real estate transferred (whichever is higher) will apply. That is, the seller must pay the stamp duty if the specific business tax and municipal tax are exempted.

## 18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The Civil and Commercial Code regulates and controls formality and certain statutory arrangements of all kinds of lease (against which the parties may not contract).

For example:

(i) a lease of an immovable property (including real estate) for the term of more than 3 years will only be enforceable for only 3 years, unless it is made in writing and registered at the competent land office;

(ii) the maximum term of a lease is either (a) 30 years or the life of the lessor or the lessee (applicable for individual only), with an option to renew for another 30 years, or (b) 50 years (with an option to renew for another 50 years) if qualified under the law on lease for commercial and industrial purposes; and

(iii) any use of the leased property that is unlawful or contrary to public order or good morals of the people of Thailand is prohibited.

Other terms and conditions (e.g. rent, cause of termination, cost of utilities and dispute resolution) depend on commercial agreements between the parties. To the extent not agreed by the parties, general provisions of lease provided under the Civil and Commercial Code will apply; for example, the lessee must undertake ordinary maintenance and minor repairs and the lessor must undertake major repairs.

## 19. How are use, planning and zoning restrictions on real estate regulated?

The governmental agency that controls and regulates the planning and zoning control in Thailand is the Department of Public Works and Town & Country Planning of the Ministry of Interior. The main legislation relating to the planning and zoning control is the Town Planning Act B.E. 2562 (2019) (the "**Town Planning Act**"), its subsidiary regulations and associated notifications. The Town Planning Act divides the town planning into 3 levels: national, regional and provisional levels, such that each local administrative organisation can take part in town planning. The Town Planning Act provides guidelines and policies on national level town and city planning, including criteria for land use. The competent regional board will take charge of supervising and approving the town and city planning proposed by each province and the Department of Public Works and Town & Country Planning.

The Town Planning Act together with the Building Control Act B.E. 2522 (1979) and the relevant notifications regulate, among others (i) the restrictions on use of land in each area, (ii) the layout and design of the building (e.g. set-back requirement), (iii) floor area ratio (FAR) (i.e. the ratio of a building's total floor area to the size of the plot of land upon which it is built), and (iv) the open-space ratio (OSR) (i.e. the proportion of a development



required to be left as open space).

## 20. Who can be liable for environmental contamination on real estate?

The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992) recognizes the concept of “the polluter-pays” – a person who pollutes the environment must be responsible for the damage caused. Therefore, the owner or the processor of a pollution source will be liable for any damage due to such pollution, including fines and other penalties such as imprisonment.

## 21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

Yes, there is a requirement on energy performance for certain types of building. Under the Promotion of Energy Conservation Act B.E. 2535 (1992) (the “**Promotion Energy Conservation Act**”), subject to exceptions, a building or a factory with energy usage at certain amount (e.g. having electric meter or transformer of 1,000 kilowatts or 1,175 kilovolt-amperes) (a “**Controlled Building**”) must have (i) energy performance assessment, (ii) energy conservation policy/plan/goal, and (iii) energy management working team. The owner or possessor of a Controlled Building must also submit an annual report on energy inspection and verification of energy management to the Department of Alternative Energy Development and Efficiency, Ministry of Energy. However, the Promotion Energy Conservation Act does not currently impose on any type of building a requirement on the minimum energy performance levels.

## 22. Is expropriation of real estate possible?

Yes, expropriation is possible in Thailand. Under the Real Estate Expropriation Act 1987 (the “**Expropriation Act**”), governmental agencies can expropriate immovable property if the agencies view that such expropriation is necessary for public utilities, national defence, agriculture development, city planning or other economic-wise purposes (e.g. agro-industry or industry and trading). Such power of governmental entities is absolute and unilateral. If any expropriation will take place, a specific Royal Decree will be enacted – stipulating, at least, the purpose of the expropriation, the authorized expropriation official and the area to be expropriated. The owner of real estate expropriated will

be entitled to receive compensation as provided in the Expropriation Act.

## 23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Yes, a mortgage is the most typical security interest created over real estate in Thailand. Under Thai law, a “mortgage” is a contract whereby a mortgagor (i.e. an owner of real estate) mortgages real estate (without delivering the property) in favour of a mortgagee to secure indebtedness owed by any person to a mortgagee. The mortgage will be legally perfected upon the registration at the competent land office. Once perfected, as a protection provided to a mortgagee, the mortgage will subsist despite any subsequent transfer of the real estate mortgaged.

Upon a default of an underlying indebtedness secured by the mortgage, the mortgage will become enforceable. The enforcement of mortgage must be carried out through a court-ordered public auction sale, and, unlike in some other jurisdictions, a direct foreclosure of a mortgaged property is not permitted under Thai law (unless certain criteria have been met and the court has ordered in favour of such direct foreclosure). However, if (i) the mortgage becomes enforceable and (ii) the mortgaged property is not subject to any other mortgages (securing other indebtedness) or preferential rights, the mortgagor may notify the mortgagee in writing to sell the mortgaged property by public auction without a court order.

To enforce the mortgage, the mortgagee must notify the mortgagor to perform a defaulted indebtedness owed to the mortgagee within a reasonable period (but not shorter than 60 days from the date on which the mortgagor receives such notice). This is to provide the mortgagor with an opportunity to avoid a mortgage enforcement. If the mortgagor fails to perform such defaulted indebtedness, the mortgagee will be entitled to request the court for a judgment ordering seizure of the mortgaged property to undergo a public auction sale. If (i) the amount of proceeds received from the public auction sale, or (ii) the value of the mortgaged property foreclosed, is lower than the amount of indebtedness owed to the mortgagee, the law provides that the mortgagor (who may also be a debtor) will not be liable to the mortgagee for any shortfall. However, if the mortgagor is also a debtor, the parties may otherwise agree that the debtor shall be further liable to the mortgagee for any shortfall.

## 24. Are there material registration costs associated with the creation of mortgages over real estate?

There is a mortgage registration fee payable at the competent land office on the mortgage registration date. The fee will be charged at the rate of 1% of the total mortgage amount; provided that the total mortgage registration fee will be capped at THB 200,000 (except for the mortgage of condominium unit(s) which the

mortgage registration fee will not be capped).

## 25. Is it possible to create a trust structure for mortgage security over real estate?

Yes, REIT (i.e. the only type of real estate-related trust recognized under Thai law as explained in Item 7 above) can provide and receive a mortgage over real estate. However, provision or acceptance of a mortgage is not a common purpose of REIT.

## Contributors

### Peerasanti Somritutai

**Partner and Co-Head of Real Estate Practice**

[peerasanti.s@kap.co.th](mailto:peerasanti.s@kap.co.th)



### Chavisa Jinanarong

**Associate**

[chavisa.j@kap.co.th](mailto:chavisa.j@kap.co.th)



### Kamonrat Kongtheing

**Associate**

[kamonrat.k@kap.co.th](mailto:kamonrat.k@kap.co.th)



### Chayakorn Boonsri

**Associate**

[chayakorn.b@kap.co.th](mailto:chayakorn.b@kap.co.th)

