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Thailand

Thailand: The Escrow Act - Investment Safeguard

Summary

As of 20 May 2008, parties to commercial transactions in Thailand will benefit from a more stringent escrow arrangement under the newly passed Escrow Act B.E. 2551 (2008) (the "**Escrow Act**"). The Escrow Act provides restrictions on the persons who can qualify as escrow agents and dictates the legal obligations of escrow agents.

Full Update

Eligible Transactions

Under the Escrow Act, parties to any kind of commercial transactions involving payment and transfer of property may voluntarily engage an escrow agent. The escrow arrangement can be applied not only in real estate purchases, but also in share acquisitions and other contractual transactions such as engineering, procurement and construction contracts or vendor financing transactions. However, there are no commercial transactions which require the compulsory involvement of an escrow agent under the Escrow Act.

Escrow Agents

In the past, escrow agents apart from commercial banks and finance companies were not regulated and were not required to obtain any approvals for their operations.

Under the Escrow Act, only commercial banks, finance companies, banks incorporated under a specific law (the "**Financial Institutions**") or any juristic persons prescribed in the relevant ministerial regulations are eligible to apply to be escrow agents. To ensure the credibility of escrow agents, non-Financial Institution escrow agents may also be required to provide security, and to comply with financial status requirements or any additional requirements as prescribed in the relevant ministerial regulations. In addition, the escrow agents should not have either direct or indirect interest in the commercial transactions they are involved in.

Escrow Agents' obligations

Escrow agents have three fundamental obligations as follows:

- (i) to ensure that the parties perform their debt obligations within the specified period and under the prescribed terms and conditions in the escrow agreement;
- (ii) to maintain funds, assets and any other documentary evidence of debts (the "**Escrow Property**") that the parties deposit; and
- (iii) to deliver and transfer ownership or rights of the Escrow Property to the relevant parties.

In addition, escrow agents must comply with other obligations according to the Escrow Act, such as maintaining an escrow registry book and copies of escrow agreements, and separating the Escrow Property

from their own and other assets. Escrow agents may provide any other services related to an escrow agreement as agreed to by the parties, which should be in accordance with the rules prescribed by the Escrow Supervisor Committee.

If escrow agents including their management, perform their duties improperly, they may be subject to a fine under an administrative order or be considered as committing a criminal offence. Additionally, such act may result in the revocation of the license of the escrow agents.

The fee which escrow agents charge must be at the rate prescribed by the Escrow Supervision Committee. Escrow agents cannot deduct any escrow fee from the Escrow Property.

Management of the Escrow Property

The Escrow Act requires escrow agents to deal with the Escrow Property as follows:

(i) in case of funds, deposit the funds paid by the payee parties to the escrow account, opened with a financial institution, within one business day following their receipt of the funds, and issue evidence of such deposit to both parties;

(ii) in case of immovable property (such as land), or any right to the same, with evidence presented thereof, inform the land officer in writing who shall in turn record that such immovable property is under an escrow arrangement and disallow the registration of a transfer of the ownership or rights to such immovable property unless further notice in writing is obtained from the escrow agent; and

(iii) in case of other types of properties or rights to the same, maintain such properties or any relevant documentary evidence of the properties, such as share certificates, upon receipt of the same from relevant parties.

Once the parties have complied with the terms and conditions under the escrow agreement, the escrow agent shall transfer or arrange for the transfer or delivery of the Escrow Property including the interests on the money in the escrow account to the entitled parties. If there is any dispute between the parties, the escrow agent must not transfer the Escrow Property in its custody unless an agreement is reached by the parties or a final court judgment has been granted.

The Escrow Property in the custody of escrow agents is protected from seizure or attachment by the escrow agent's creditors, whether in a civil case or a bankruptcy case. Thus, the parties can ensure that they will not be exposed to any risks if the escrow agent becomes bankrupt or is sued by creditors.

Conclusion

The Escrow Act provides a much needed regulation to the escrow arrangement in Thailand. Escrow agents will now be required to obtain an escrow business license and strictly comply with the requirements under the Escrow Act. Financial Institutions have until 17 August 2008 to apply for an escrow business licence under the Escrow Act.

Parties to commercial transactions will find an escrow arrangement beneficial, especially high-priced transactions and real estate purchases, for example, in purchasing real estate, the buyer is assured that the seller cannot transfer the property to a third party. Alternatively, the seller is assured of payment, which is already safely deposited in an escrow account.

However, since the escrow arrangement is optional for parties to commercial transactions, real estate developers in Thailand will not be required under the Escrow Act to deposit any payments made by the buyers

to escrow accounts.

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