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LEGAL & TAX ADVISERS

Thailand's Escrow Law in effect

By Kraisorn Rueangkul

Another legal measure to safeguard the interests of investors in Thai real estate has been implemented through the enactment of Escrow Act BE 2551 (the Act), which came into effect on May 20, 2008. While the escrow law has a broad definition of the kinds of transaction and parties thereto that the Act governs (namely, any reciprocal contract where a contractual party is obligated to transfer or deliver property or documents embodying the obligation, and where the other contractual party is obligated to make payment under the contract) the business sector which seems to be mostly affected is the real estate sector.

For example, a buyer in a real estate project, such as a condominium or villa, must pay a substantial amount of payment to the developer and hope that the developer of the project can develop the project on budget and on time without measures to ensure this. In the Thai real estate market, we have seen many cases where developers financed their projects by channeling from the deposits received from buyers. Often, these projects later stall due to lack of further funding, leaving buyers with the often difficult task of attempting to recoup their losses given the costly and time-consuming nature of court procedures in Thailand. Buyers are also disadvantaged in such situations due to the unpredictability of how awards will be calculated. Hence, the necessity for an escrow agentto eliminate or, at least, ease these problems.

An escrow agent has a duty required by law to ensure that the contractual parties perform their obligations according to the period of time and the conditions prescribed in the escrow contract. This agent also has a duty to maintain funds, property or documents embodying the obligation that the contractual parties have placed under his custody, and to deliver funds and arrange for the transfer of ownership or right in the property to the contractual parties.

An agent who wishes to engage in the escrow business is required to obtain a license from the competent authority, namely, the Ministry of Finance with a recommendation from the Escrow Business Operation Supervision Committee (the Committee), the governing body which has been established to govern this business. Further, an agent must be a financial institution or other types of juristic person (legal entity) as prescribed in the ministerial regulations.

Certain procedures in obtaining the escrow license have not yet been issued. Therefore, there is now a certain gap between the practice and written-law arena in which many financial institutions now offer escrow services notwithstanding the fact that no license has yet been obtained.

The escrow contract must be made in writing and signed by the contractual parties and the escrow agent (trilateral contract). It must specify certain particulars as prescribed in the Act, e.g.: the name of the reciprocal contract prescribed between the contractual parties the period of time or conditions on the delivery of property or documents embodying the obligation and the delivery of money of the contractual parties, rights, duties and liabilities of the contractual parties and the escrow agent. An escrow agent must separate the property of the contractual properties from his own, whereby he must prepare a list of property of each contractual party separate from his own list of properties, and shall also maintain the same according to the bases prescribed by the Committee.

Another interesting issue is that in the case where the property that the contractual party must deliver or transfer the right thereof is an immovable property with a certificate showing rights in land, the escrow agent shall notify the officer under the land law in writing of such, and the officer shall record this as evidence. By doing so it is then prohibited to register any transfer of rights in such property until such officer is so notified by the escrow agent.

DFDL Mekong (Thailand) Ltd
9th Floor, The Dusit Thani Building,
946 Rama IV Road,
Bangkok 10500, Thailand.
Tel: (66) 2636 3828
Fax: (66) 2636 3290
Email: kraisorn@dfdlmekong.com
www.dfdlmekong.com