

**BANKING AND FINANCE
PRACTICE GROUP**

**NEW ESCROW ACT – COULD IT BRING
CHANGE TO COMMERCIAL
TRANSACTIONS? (1)**

In the past, commercial transactions involving land ownership transfer often ran into a dilemma. On the one hand the land owner would not release the ownership over land until the land owner has received payment of land price. On the other hand, those wanting the land ownerships prefer to withhold payment until land ownership has been officially transferred. This “Chicken and Egg” dilemma has been going on for a very long time. Many times, when a party let go of their bargaining chip (i.e. payment made to the land owner before the eventual legal transfer of ownerships), a breach of contract ensues. Another classic example of these unfortunate incidences relates to scam housing projects whereby home building contractors abscond with the already paid down payments. Those living on frugal life with futile hope of eventually getting dream homes out of their lifetime savings were left with no alternative but having to chase down the fugitive contractor. The would-be homeowners were often left stranded in the court proceedings and with vast amounts spent on legal fees. These precedent cases have caused uncertainty and imposed commercial risks on commercial transactions in Thailand which often lead to economic loss of a large scale.

**Escrow system in
other jurisdictions**



In many jurisdictions, there is a system called “Escrow”. A reliable third party (the “Escrow Agent”) is appointed to represent contractual parties whose interests are conflicting. Often the case the transaction relates to payment by one party in exchange for ownerships of goods (eg. premises) and banks act as the escrow agent in this regard. The Escrow Agent will secure the property and examine documents to make sure that the terms of the obligations are met on each end, serving both parties as a “Middle Person” in the transaction. To give one example, in a real estate transaction, the Escrow Agent will hold the deed in escrow until all of the terms of both the buyer and seller are met. The buyer may deposit the money for the purchase with the Escrow Agent, which serves to “validate” the transaction prior to last-minute closing terms. This system has long been used in other jurisdictions as it is an important tool to protect parties in commercial transactions.

**Previous practice of
escrow concept in
Thailand**

Previously, even though there is no such escrow regulation in existence in Thailand, the concept of escrow has been used in various transactions. For example, when it comes to selling a land; the buyer and seller will appoint a bank to be their median. On the closing day, the seller will go to the land department and be ready to register the transfer of land. At the same time the buyer confirms to the bank that the money has been transferred, the seller will register and transfer the land with the department.

Risks in commercial transactions due to the lack of escrow regulation in Thailand



Nonetheless, since there is no concrete and specific law and regulation for the escrow system, risk could still be imposed on the parties. In some cases, the buyer and/or the seller will have obligations to be performed prior to the land transfer. In this case, the Escrow Agent is responsible for holding the land title deed or other types of document of title (i.e. certificate of ownership of a condominium unit) until such obligations are met. What happened in the past was that, the seller could still fraudulently go to the land department informing an official that his land title deed or the document of title was missing and request for a new one. Once the seller obtains a newly issued land title deed or the relevant document of title, he then sells such land (usually at a better price) to a third person, despite the contract made with another party.

The New Escrow Act B.E. 2551 (2008)

In order to provide parties under any commercial transaction or any such reciprocal contract more protection, the Escrow Act B.E. 2551 (2008) (“**Escrow Act**”) came into effect on May 21, 2008, establishing specific laws governing the escrow business in Thailand. The new Escrow Act provides a framework for an official escrow agent to be appointed and for parties to voluntarily use the escrow framework and the legally sanctioned escrow agent services.

How can the New Escrow Act mitigate risks in commercial transactions?



From now on, the Escrow Agent could only be commercial banks or finance companies or other person or entity which may subsequently be designated by the Act and must be licensed by the Ministry of Finance. In the case of immovable property or relating rights, with evidence presenting thereof, the Escrow Agent must notify the relevant land office in writing that such immovable property is under an escrow arrangement and such land office will be obligated to 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 or the Escrow Agent instructs the relevant land office to register the transfer of the immovable property under the escrow arrangement in compliance with the terms and conditions of the escrow agreement.

The Escrow Act, in effect, puts tighter controls on escrow transactions as well as the real estate transaction and creates more confident for any commercial transactions’ parties (the seller and the buyer alike) who can rest assured that their sale and purchase agreement on a plot of land or condominium will be consummated at the appropriate time and the risk of contract breaching is quite remote.

We will delve more into the details of the Escrow Act in our next circulation.

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- Dispute Resolution and Employment & Labor.

The content of this Newsletter is prepared as of 9 March 2009.

This Newsletter is informational in nature and is not to be considered as legal advice. It does not exhaustively cover the subjects which it treats, and is only intended to address some of the key issues. When specific questions arise in practice, it is necessary to obtain appropriate legal advice.



THERE IS ALWAYS A SOLUTION.

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