

# Using Thailand's Escrow Act in Property Development Transactions

■ Written by: Cynthia Pornavalai

In certain jurisdictions, an escrow account system is required in order to protect the interests of the purchasers of properties. In an escrow arrangement, the buyer and the seller mutually agree to appoint a third party escrow agent, who will hold the seller's documents and assets on the one hand, and, on the other, the buyer's deposit or the whole purchase price. This involves a tri-party written agreement known as an escrow agreement. The escrow agent has a duty to ensure that the parties fulfill their obligations under both the purchase contract and the escrow agreement. The escrow agent is also responsible for the safekeeping of any money, assets, or documents deposited by the parties, for handing over funds, and/or arranging the transfer of ownership of or rights to the assets when required.

## The Escrow Act

Although an escrow arrangement is not required in Thailand, the Thai government made a move to offer more protection to property buyers when it finally enacted the Escrow Act ("Act") on May 21, 2008.

Under the Act, the use of an escrow account is voluntarily entered into by the contracting parties. Only commercial banks and finance companies under the law governing financial institutional business and banks "established under a specific law" may operate as escrow agents. In addition, to operate as escrow agents, the financial institution must be licensed by the Minister of Finance, based on the recommendation of the Escrow Business Operation Supervision Committee ("Escrow Committee"). The Act lists the conditions and requirements for engaging in the escrow business, the rights and duties of the parties to an escrow agreement and those of an escrow agent, and the powers of the Escrow Committee. Escrow agents will be monitored by the Escrow Committee, which has the authority to order them to



correct or stop prohibited activities and to perform their duties in compliance with the Act. Criminal penalties are prescribed for escrow agents committing fraud.

The Act requires the escrow agent to deal with the property in escrow as follows:

1. The escrow agent is required to deposit the buyer's funds with a financial institution.
2. In a real estate transaction, the escrow agent is required to inform the appropriate land office in writing of the escrow arrangement. The land officer must record the existence of an escrow arrangement and disallow the registration of transfer of title of the relevant property until the land office receives written notice from the escrow agent.
3. With respect to other types of property placed in escrow, the escrow agent is obligated to properly maintain such properties and/or any relevant documents related thereto.

Once in escrow, the funds cannot be transferred unless the parties have reached an agreement or a court has

passed final judgment. The law also provides that, in the event the escrow agent becomes bankrupt, the funds in the escrow account and the property under enforcement will be protected against attachment or seizure.

## The Benefits of Escrow for Property Developers and Buyers

Unlike the Condominium Act, which significantly protects the interests of the buyers, the Escrow Act falls short of requiring the establishment of escrow arrangements with respect to property transactions. Developers and sellers are still free to require deposits from buyers without much protection granted to the purchaser. It is common practice for buyers' deposits to be used to partly finance the project. In a market that is increasingly becoming a buyers' market, however, this practice may change as investors become more and more averse to risk.

Developers and sellers can, nonetheless, find many opportunities in a tightening property market by using escrow arrangements to their benefit. Developers who are new to the market can use it to attract buyers. In a buyers' market, it makes good business sense to give buyers assurances of the soundness of their investment by minimizing their risks. Buyers not only want to be satisfied that the project is viable and that the developers are reliable; they also want to be assured that they have non-judicial recourse in the event of a developer's default. In transactions involving foreign purchasers, the involvement of an independent third party lends more credibility to the seller and the subject property. As a result, buyers will be less concerned about putting up larger deposits or even the total purchase price. The developer or seller is thereby assured of the buyer's payment and commitment to close the deal. ■

*Cynthia Pornavalai, Partner in the Corporate and Commercial Department at Tilleke & Gibbins International Ltd. in Bangkok, can be reached at [cynthia.p@tillekeandgibbins.com](mailto:cynthia.p@tillekeandgibbins.com)*