

## Legal Update

### ESCROW ACT

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

#### **Escrow Business**

Escrow business under the Escrow Act means a business of acting as an agent to oversee payment of debts of the contractual parties to be in accordance with the agreement upon the escrow contract. Thus, 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. There are no commercial transactions which require the compulsory involvement of an escrow agent under the Escrow Act.

#### **Escrow Agent**

Under the Escrow Act, only commercial banks, finance companies, banks incorporated under a specific law (**Financial Institution**) or any juristic persons prescribed in the relevant ministerial regulations are eligible to apply for license to be escrow agents (**Non-Financial Institution**). Any Financial Institution who is already providing escrow services prior to the enactment of the Escrow Act and wishes to continue to carry on escrow business must apply for a license within 90 days upon enactment of the Escrow Act. Any person operates or acts as an escrow agent without obtaining a license thereof shall be subject to a fine of not exceeding Baht 1,000,000.

No one other than the licensed escrow agent shall use or display the name in its business as "escrow agent" or any other words of the same meaning. Failure to comply with such shall be subject to a fine of not exceeding Baht 500,000.

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. An escrow agent shall be prohibited from providing escrow services to parties in which it has a direct or indirect interest. The definition of interest will be prescribed by the Escrow Commission.

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### Escrow Agents' Duties, Liabilities and Remuneration

The Escrow Act prescribes general duties of an escrow agent to ensure that each party will fulfill its obligations under the escrow contract and provide a safe keeping for property, documents and/or money (**Escrow Property**) that the parties have deposited with the escrow agent and effect the transfer of ownership or rights of the Escrow Property once the obligations of the parties under the escrow contract are fulfilled. In addition, escrow agents must comply with other duties or obligations according to the Escrow Act, such as maintaining an escrow registry book and copies of escrow contracts, and separating the Escrow Property from their own and other assets.

Escrow agents may provide any other services related to an escrow contract as agreed to by the parties and in accordance with the rules prescribed by the Escrow Commission.

The improper management and/or duty performance of escrow agents may cause the escrow agents to be subject to a fine and/or imprisonment as prescribed in the Escrow Act. And the license of the escrow agents may be revoked due to such act as well. All offences under the Escrow Act that shall be subject to only a fine punishment may be settled by the Settlement Committee.

The rate of remuneration or service fee to be paid to escrow agents shall be fixed by the Escrow Commission. Such remuneration or fee shall not be collected or deducted from the Escrow Property. A termination of escrow contract by whatever reasons shall not prejudice the rights of the escrow agent to receive remunerations and service fee for the works done by such escrow agent, except where the termination of contract arises from fault of the escrow agent.

### Management of the Escrow Property

According to the Escrow Act, an escrow agent shall manage the Escrow Property as follows:

- (i) In case of funds, to deposit the funds paid by the payee parties to the escrow account, opened with a financial institution, within one business day following their receiving of the funds, and issue evidence of such deposit to both parties;
- (ii) In case of immovable property or relating rights, with evidence presented thereof, to notify the relevant land office in writing 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 relating rights, to maintain such properties or any relevant documentary evidence of the properties, such as share certificates, upon receiving same from relevant parties.

Once the parties have complied with the terms and conditions under the escrow contract, 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 shall be protected from seizure or attachment by the escrow agent's creditors, whether in a civil case or a bankruptcy case in order to secure interest of relevant parties.

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