

SPI Newsletter

RIGHTS OVER LEASEHOLD ASSET: A NEW TYPE OF PROPERTY RIGHT IN THAILAND

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On 30 April 2019, the Rights over Leasehold Asset Act B.E. 2562 (2019) (the “Act”) was enacted. The Act provides for a new class of property rights in Thailand which are intended to overcome certain limitations of the conventional lease under the Thai Civil and Commercial Code (“CCC”) and the lease of immovable property for commercial and industrial purposes under the Lease of Immovable Property for Commercial and Industrial Purposes Act B.E. 2542 (1999) (“Commercial and Industrial Leasehold Act”). The Act will become effective on 27 October 2019 (180 days following its publication in the Royal Thai Government Gazette).



What are “rights over leasehold asset”?

The “rights over leasehold asset” prescribed in the Act enable the owner of immovable property including a plot of land with a title deed, a building on land with a title deed or a condominium (“asset”) to create and register a transferrable right over the owner’s asset for a maximum period of 30 years. The owner may register the right to another person who will become the receiver/holder of rights. The rights created are capable of being assigned, pledged as security and transferred through descent without the limitations that are placed on personal property under the CCC. Following registration, the receiver/holder of rights will enjoy similar rights over the asset to the owner for the term for which such rights are created.

Rationale behind the Act

The purpose of the Act is to facilitate investment in real estate and property development in Thailand by providing a new class of property rights as an alternative to other property rights under existing laws which are considered as having the following limitations:

1. Conventional leasehold as prescribed under the CCC is a right *in personam* or personal property enforceable only between the parties that can terminate upon either party being deceased. Moreover, conventional leasehold prohibits the transfer of rights, sub-letting, modification to the leased asset without prior consent from the lessor, and rights under the conventional leasehold or the term of such leasehold cannot be used to secure a mortgage.

2. Lease of Immovable Property for Commercial and Industrial Purposes Act affords rights to use leasehold to secure a mortgage, to modify the leased asset without consent of the owner and transfer leasehold through descent. However, rules and regulations subsequently issued under the Commercial and Industrial Leasehold Act impose a multitude of criteria for qualification coupled with its exclusive use for commercial and industrial purposes. This makes it impractical for general application resulting in only as few as six business operators having registered a commercial and industrial lease under the Commercial and Industrial Leasehold Act.

Characteristics of the rights over the leasehold asset

The key characteristics of the rights prescribed under the Act are as follows:

- The maximum term for which the rights over leasehold asset can be created is 30 years.
- Rights over leasehold asset are established through registration at the Land Office and assigned to another holder of rights through written agreements.
- Rights over leasehold asset may be established only for: (i) bare or unutilized plots of land; (ii) utilized land containing structures or fixtures; or (iii) condominium buildings registered under condominium laws and sub-division of such rights to multiple parties may not be registered over the same asset/title deed.
- Once rights over leasehold asset have been established, the owner may not create other real estate right over the same asset without prior written consent from the holder of the rights over leasehold assets.
- The owner retains ownership rights to dispose of or mortgage the assets or use the asset as collateral.
- The holder of rights over leasehold asset enjoys a similar bundle of rights as the asset owner except the right to dispose of the asset or to commence any action for recovery of possession over the asset from unlawful possession by others whereby the holder of rights must promptly notify the owner for their action.
- The holder of rights may transfer, assign or sub-let such rights over leasehold asset without prior consent from the owner.
- The rights over leasehold asset can be offered as collateral to financial institutions to secure a mortgage or be offered as collateral under Business Security laws.
- The holder of rights may alter, modify and construct upon the real estate/asset and retain ownership over such alterations, modification and construction for the duration for which the rights over leasehold asset are valid.
- Upon the holder of rights becoming deceased, rights over leasehold asset can pass to their descendants for the remainder of the term of the rights.





Creation and registration of the rights over leasehold asset

Unlike conventional leasehold, the rights over leasehold asset is not created or established through contract but rather through voluntary application and registration by the owner of the asset. To establish rights over leasehold asset, the owner must present the respective Land Title Deed (Chanote or Nor Sor 4) or a Condominium Unit Title Deed at the relevant Land Office and pay of a fee of 20,000 Baht for each registration. The owner may register rights over leasehold asset over their asset for a term of up to 30 years.

The Land Office will issue two copies of the certificate of rights over leasehold asset with payment of an additional certification fee of 10,000 Baht where one copy is retained at the Land Office and the other issued to the first holder of rights i.e. the owner of asset at the time of registration of rights. Once the certificate is issued, the owner may then enter into a contractual agreement with another to pass this certificate to another holder of rights to utilize the asset for any agreed purpose for an agreed period (which must be within the registered period).

Where the asset is already under mortgage or used as collateral under other laws, the owner must obtain consent from the mortgagor before they can create and register rights over leasehold asset over their asset.

Any subsequent dealings with the rights over leasehold asset including the transfer of rights to another person or to a descendent or pledging rights for mortgage or collateral or must be made in writing and registered with the Land Office together with payment of registration fees as follows:

- Transfer of rights over assets with capital value and transfer of rights under inheritance shall pay a transfer fee of 2% of the capital value of the asset as declared by the applicant.
- Transfer of rights over assets without capital value shall pay a transfer fee of 1,000 Baht/registration.
- Registration of mortgage of rights shall pay a registration fee of 1% of the capital value of rights over asset to be pledged.
- Cancellation of rights over leasehold asset registration shall pay a de-registration fee of 20,000 Baht/each application.

Termination of the rights over leasehold asset

Rights over leasehold asset will terminate at the end of the term which it was originally registered (i.e. not exceeding 30 years); after lapse of the term fixed under agreement between the owner and holder of rights; or through default of the agreement for rights over leasehold asset. The owner may terminate prior to the term of the rights over leasehold asset to the extent that this does not affect the rights of a bona fide third party who has already paid consideration and registered their rights.

Once the rights over leasehold asset is terminated, possession of the asset must be returned to the owner and ownership over any structures, alterations or modification made by the holder of rights during their occupation of the asset will pass to the owner of the asset or as otherwise agreed to between the parties.

Potential issues in practical application

At this stage in time prior to the Act becoming effective, a few potential issues in the practical application of the Act can be identified as follows:

1. Registration to create rights over leasehold asset may not be suitable for owners of large plots of land contained on one title deed who wish to divide use to multiple parties within the same plot.
2. Owners with multiple adjacent plots of land wishing to permit use of multiple plots to a single party may be faced with registration fees for multiple plots and the holder of rights will encounter the same issue with fees payable to the Land Office for any transfers or registrations they may wish to effect on their certificate of rights over leasehold property.
3. Registration fees for transfer of rights over leasehold property (at 2% of the capital value of the asset as declared) is higher than fees applicable for registration of conventional long-term leasehold of 1% of the value of the total rental fees throughout the duration of rent without considering the value of the asset that is the subject of lease. This will be a factor which the asset owner should assess and consider before the registration of such rights.

Conclusion

Registration of rights over leasehold asset is intended to provide a further alternative for the owner to utilize their asset while still retaining ownership rights with respect to the asset and to in turn promote investment in real estate in Thailand. Subsequent to the issuance of supplementary rules, regulations and ministerial guidelines under the Act, there will need to be adjustments to existing systems of relevant government agencies such as the Land Office, Department of Public Works and Town & Country Planning for issuance of any building permits to the holder of rights under the Act, and the Ministry of Commerce for registration of business collateral as well as financial institutions in order to streamline systems.

We will keep you updated on any significant developments with respect to the Act.



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