

## Using Escrow Act as a property developer's tool

In certain jurisdictions, an escrow account system is required in order to protect the interests of the purchasers of properties. This is a system whereby 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 the duty to ensure that the parties fulfil their obligations under both the contract and the escrow agreement. The escrow agent will also be responsible for the safekeeping of any money, assets or documents deposited by the parties and for handing over the money or arranging the transfer of ownership or rights to the assets when required.

No such requirement yet exists in Thailand although in a move to offer more protection to property buyers, Thailand finally enacted the Escrow 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 institution businesses, and banks established under a specific law may operate as escrow agents. In addition, to operate as escrow agents, they must be licensed by the Finance Minister, based on the recommendation of the Escrow Business Operation Supervision 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 if they are detected 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. In case of funds deposited by the buyer, the escrow agent is required to deposit the funds with a financial institution.

2. In relation to a real-estate transaction, the escrow agent is required to inform the land office in writing of the escrow arrangement whereupon the land officer shall record the existence of

an escrow arrangement and disallow the registration of transfer of title of the relevant property until it receives notice in writing from the escrow agent.

3. With respect to other types of properties placed in escrow, the escrow agent is obligated to properly maintain such properties or any relevant documents 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.

Unlike the new Condominium Act which significantly protects buyers' interests, 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 without much protection granted to the buyer. As is commonly practised, buyers' deposits are used to partly finance the project. In a market that is increasingly becoming a buyer's market, however, this practice may have to change as buyers more and more become averse to risk.

Developers and sellers nonetheless can find many opportunities in a tightening property market by making use of the escrow arrangement to their benefit. Developers who are new to the market can use it to attract buyers. In a buyer's market, it makes good business sense to give buyers assurances of the soundness of their investment by minimising their risks. Buyers do 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 developer's default.

In transactions involving foreign buyers, the involvement of an independent third party lends more credibility to the seller and the subject property. As a result, buyers would not be overly concerned about putting up larger deposits or even the total purchase price. This then assures the developer or the seller of the buyer's payment and commitment to close the deal.

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