

**BANKING AND FINANCE
PRACTICE GROUP**

**NEW ESCROW ACT – SOLUTIONS TO
EXISTING CONCERNS (2)**

Following our first episode in the series entitling “New Escrow Act – Could it bring change to commercial transaction (1)” in which we discussed background of escrow transactions in Thailand, in this second episode we will explore certain issues prevailing during the pre-escrow act era and solutions provided therefor under the Escrow Act B.E. 2551 (2008) (“Escrow Act”).

PRE-ESCROW ACT: CONCERNS

During the pre-Escrow Act era, parties who wished to engage in an escrow transaction did so with the following risks, among other things, in existence.

***COMMINGLING OF ASSETS OF
THE INSOLVENT ESCROW
AGENT:***

The risk exists as delivery of assets by parties to the escrow transaction to the escrow agent is one of the requirements for the performances under the escrow arrangements. Problems emanate in the worst case scenario when the escrow agent itself becomes insolvent. The official receiver then intervene operation of the escrow agent itself with a view to swelling the pooled assets for further distribution to the escrow agent’s creditors. Most likely the case the official receiver would treat assets in possession of the escrow agent as belonging to the pooled assets. Parties to the escrow transaction, whose assets then rest with the escrow agent, must prove to the satisfaction of the official receiver the existence of the escrow arrangement, before the official receiver then order the release of the escrowed assets. With proper documentation in place, the proof should not be too difficult. Nevertheless, the burden of proof itself adds unnecessary onus on parties to the escrow transaction.

FRAUDULENT ACTS

When subject of escrow relates to land, normally land title documents (eg. title deeds, Nor. Sor. 3 Kor.) are deposited with the escrow agent. Despite the safekeeping of the land title document by the escrow agent, the risk of fraudulent act is not at all eliminated. In theory, a fraudulent report of loss of the land title document to the relevant land department (following the required procedure) so that a replacement document can be re-issued is possible. The fraudulent practice exacerbates

impending commercial risks to parties to the escrow transaction.

PROBLEMS ELIMINATED

The Escrow Act has eliminated those impending commercial risks effectively.

Under the Escrow Act the escrow agent must keep escrowed assets (which are not belonging to the escrow agent) separate from the assets of the escrow agent. As a result thereof, when the escrow agent becomes subject to a receivership order or required to suspend business, whether all or any part thereof, funds and assets under escrow will not be subject to sequestration order in civil lawsuit, nor will they be disposed of by the relevant authority.

In this regard the relevant authority must keep the escrowed assets segregated from the assets of the insolvent or encumbered escrow agent and as a result of which the relevant authority is empowered to do any of the followings:

- (a) returning funds and assets under escrow to parties in compliance with the terms of the escrow agreement when parties to the escrow transaction operated under the Escrow Act wish to terminate the escrow agreement; or
- (b) transferring the escrow transaction to other escrow agents as parties may wish to proceed; or
- (c) compromising, taking actions so as to conclude the management of the escrowed assets.

On the risk emanating from fraudulent acts, the Escrow Act requires that when the escrow assets are immovable properties with documents of title, the escrow agent must notify the relevant land department of the existence of the escrow arrangement. The relevant land department will then record that such escrowed immovable property is subject to the escrow arrangement. Any further transfer of the escrowed immovable property will not be permitted until approved of by the escrow agent.

Now that the major commercial risks have been eliminated, we should expect more of the escrow arrangements under the Escrow Act.

In our next episode we will elaborate as to how parties including those qualified to act as an escrow agent should get themselves ready for the escrow transaction, as now the floodgates have been wide open.

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THERE IS ALWAYS A SOLUTION.

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Important Note and Disclaimer

The content of this Newsletter is prepared as of 13 May 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.