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Issue 83 August 2011
S\$10, RM20, IDR70,000, THB 200, HK\$60

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KDN PPS 1662/10/2011 (028320)
MICA (P) 140/02/2011
ISSN 17934737
9 771793 473005

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Property Buyers' Legal Clinic

Experts from Limcharoen, Hughes and Glanville, one of the region's leading law firms, answer your questions on property law.

My wife and I own a land plot in Phuket that is fairly elevated above sea level. I have heard many times previously that in all parts of Phuket no building may be constructed above 80 metres. How is this measured? Is it the foundation that must be below the 80 metre mark or the roofline? - (B. Curtis, Sydney)

The 80 metre mark that you have heard of many times relates specifically to the gradient of land and the rule is that no building may be built on land 80 metres or more above sea level in any part of Phuket. The relevant measurement is height above sea level. Accordingly, buildings may only be built in Phuket on land that is less than 80 metres above sea level in order to comply with the laws.

However, height restrictions may also be imposed on the building itself depending on the specific environment and zoning laws applicable to the land on which the building will be constructed. All land in Phuket is subject to zoning laws, and height restrictions are ministerial regulations issued from Bangkok. However, such restrictions are enforced by the local authorities in Phuket. As a general guide (but not always the case), the closer the land is to the sea the lower the permitted height of constructed buildings. For example, Zone 1 is typically land close to the sea and the restriction in zone 1 is that a building may not exceed 6 metres in Height. Where zoning laws do restrict building heights, in order to determine the height of the building, the building is measured from above ground level up. This means the building would be measured from the ground to the top of the structure.

Pongsak Daengkaew (Phuket Office)

I plan to lease a villa in Bali and consider entering into the lease contract in the name of a Hong Kong company that I own. I would also like to rent out the villa when I am not there. Can a Hong Kong company enter into a leasehold contract, and are there any special requirements under law to rent out the villa? (Melanie Reese Chou, Hong Kong)

Under Indonesian law, a foreign individual can enter into a leasehold contract with an Indonesian landowner to acquire a timely limited usage

right over a property known as Hak Sewa. Generally, any foreigner is eligible to hold a Hak Sewa right over a property which is usually made and documented under a notarial lease deed. With regards to your Hong Kong company, strictly under law, a foreign company (i.e. a company established outside the jurisdiction of Indonesia) is only eligible to acquire leasehold rights if such company has established a Representative Office in Indonesia (Agrarian Law, Art. 45 lit. d). The set up of any Representative Office would have to be effected through the Investment Coordinating Board (BKPM) in Jakarta. Once a

LEASE REGISTRATION FORMALITIES ARE FORMALLY A PART OF ANY LEASE AGREEMENT

Representative Office is established the foreign parent company would be eligible to enter into leasehold contracts directly. Under Indonesian law, any private building which is used not only as a residence but also commercially for a rental business would require a special permit known as Pondok Wisata. Therefore as a first step you should check the building permit of the villa, the Ijin Mendirikan Bangunan (IMB) whether the purpose of the building is marked as 'residential' (Rumah Tinggal) or allows rental use (Pondok Wisata). As the IMB is usually issued in the name of the Indonesian landowner and lessor you should liaise with your prospective lessor to request assistance with amending the purpose of the villa to allow rental use in order to have proper licenses in place.

Ingo Mueller (Bali Office)

I have located a land plot in Phang Nga, Thailand in which I will be purchasing a leasehold interest from the freehold owner for a period of 30 years. I have been informed by the seller of the lease that all leases must be registered in Thailand. Is this true and could you explain the lease registration process to me? (Randy Boehr, Seattle)

Not all leases in Thailand must be registered with the local Land Department to be enforceable. However, any lease under a lease agreement that is over 3 years in length must be registered at the Land Department as soon as

practicably possible to fully protect the leaseholder's interest. If a lease for a term of over 3 years is not registered properly then it is only enforceable for 3 years against the freehold owner. Accordingly, the land department and relevant courts would not likely recognise the remaining years as being an enforceable. Therefore, it is critical that any long terms lessee of land in Phuket (or anywhere in Thailand) ensure that lease registration formalities are formally a part of any lease agreement.

With respect to the process of lease registration, in order to register a lease at the Land Department in Thailand the land must be Nor Sor 3 or Nor Sor 3 Kor or Title Deed (Chanote). It is not possible to register a lease against any other land type. It should also be noted that if the land is mortgaged by a bank, the lease may not be registrable without the bank's consent (which is unlikely).

The lessor and lessee will need to provide certain documents to the Land Department including the original copy of the title document, identification documents (such as a copy of passport if the lessor/lessee is an individual or copy corporate documents if a company) and proof of payment of the rent. In terms of proof of payment the Land Department needs to see what should have been paid up until the registration date under the terms of the lease agreement. If the lease agreement requires payment of the total 'rent' for the entire lease term, then the Land Department will require evidence that this payment has been made in full. If you are purchasing an existing lease from the current lessee (on a re-sale) the Land Department will also require that you provide a consent letter from the lessor to this assignment. Finally, on the date of lease registration, the Land Department assesses a fee of 1.1 per cent of the full value of the lease, which will be calculated on the total rental that is due from the lessee to the lessor throughout the term. Most lease agreements require the lessee to pay this fee as per the terms of the contract.

Robert Krupica (Phuket Office)