



Property Lease Agreement Registration Laws

Enforceability of a rental with a fixed term and consecutive leases

Thai Lease Registration

REGISTRATION OF LEASES LEASEHOLD RENTALS EXCEEDING A 3-YEAR TERM

Under hire of property laws in Thailand any property lease (rental with a fixed term) exceeding 3 years must be **in writing** and **recorded on the ownership title deed** (land or condominium title deed) as kept in the registers of the provincial or local land office section 538 Civil and Commercial Code. If the lease agreement between the parties is not registered with the Land Department the lease is enforceable by action for a 3 year term only. The term of a registered lease agreement **cannot exceed 30 years** (section 540) and is automatically extinguished at the end of the registered term (section 564). A short term contract does not have to be registered but must be in writing to be enforceable by legal action.



The land offices in Thailand only use Thai language and Thai script documents, even the foreigner's name in the contract is usually written in Thai script. The lease must be drawn up in the Thai language but may contain a translation in another language.

In practice a lease can only be registered over land with a confirmed right of possession or freehold ownership title deed (land with a title). A long term condominium apartment lease in a licensed

condominium is registered with the local land office where the condominium is located and will be noted on the backside of condominium unit ownership title deed (*image right*). A lease agreement of a unit in an apartment building not registered under the Condominium Act will be registered as a lease over part of the building on the land title deed and specified in the plan of the building .

Lease registration fee

A lease **registration fee** shall be collected by the provincial or local land office at the rate of 1% of the **total rental** throughout the lease term. Rental shall include the remuneration for the lease, the remuneration during the construction, the key money, the fee for the land's survey, the construction cost contribution or other amount of money paid by the lessee to the lessor for the lease benefits. Stamp duty shall be collected on the registration of the lease at the rate of 0.1% of the total rental throughout the lease term.

Content of the registered lease

The written content of a registered lease can be divided into rights given under hire and property laws and rights based on general contract law and the freedom of contract between the parties. The practical importance of the two relates to the future enforceability of contract promises and obligations in a contract, especially in case ownership of the property is transferred during the term of the lease .

Practical questions about lease term and lease registration

Is an office rent with a term of 5 years (split in a 3 year term with another 2) enforceable for the term of 5 years?

- A 3 year lease with an option for another two years is under **hire of property laws** enforceable by action as a rental with a fixed term of 3 years (section 538 Civil and Commercial Code). The option for another 2 years is considered an enforceable option under **general contract law**, meaning against the owner of the property who you signed the lease with. Should for any reason ownership of the property hired have been transferred prior to the expiration of the first 3 year term the new owner is not automatically bound by a renewal option given by the previous owner and the option may not be enforceable by legal action (e.g. Supreme Court Judgment 6763/ 1998).

I have signed 3 consecutive back-to-back 3 year lease agreements, is this enforceable for the total of 9 years?

- Entering into multiple back-to-back short-term 3 year leases without registration with the Land Department is generally not enforceable as this is seen as an avoidance of section 538 Civil and Commercial Code (e.g. Scj. 6451/ 1995), unless the lessee finds protection in supreme court judgements (e.g. Scj. 5770/ 1996).

The Phuket land office has registered 2 consecutive back-to-back 30 year leases over a property. How legal is this?

- Under hire of property laws and in line with supreme court judgments if both leases are made with the same person it will be deemed **one lease** and the total term reduced to 30

years (section 540), irrespective of registration of the second lease. If the second lease is made with a different party the registration of the second lease term is considered **void** pursuant section 152 or voidable under section 151 Civil and Commercial Code. It has happened that land officers in the tourist areas of Thailand have registered additional leases on a property title following the first registered 30 year lease term, especially to assist sellers of expensive leasehold properties, even though the registration of the second term does not create a valid lease there is legally no liability for the land officers involved (Section 73 Land Code Act).

Can a lease protect me when I register ownership of land in my Thai girlfriends name and can a lease give me the right to transfer to ownership?

- It is under the Thailand Land Code Act not allowed to use a Thai national to buy land on your behalf (section 113 Land Code Act). The Thai national could be deemed holding the land as the agent or nominee on behalf of a foreigner. In this structure both the Thai and foreigner are liable for criminal charges .

Can a lease agreement protect me (foreign) when a property is registered in my wife's (Thai) name?

- Leasing real estate from your Thai wife has several practical problems (payment of rent, income tax). The main reason this structure does not offer protection is that any agreements between you and your wife entered into during marriage can be voided (section 1469 Civil and Commercial Code) and the Land Offices in Thailand generally refuse for this same reason registration of a lease between husband and wife. A right of superficies or right of usufruct may offer a better protection.

Lease Agreement and Payment of Rent :

Possession of real estate in Thailand under a lease agreement Payment of rent.

Payment of rent is under Thai law an **essential element** of a lease agreement (section 537). Possession of a real property under a lease agreement in Thailand **without payment of rent** would not be enforceable as hire of property under the Civil and Commercial Code. A lease without a lease price would not be governed by the chapter hire of property but for example by right of habitation or usufruct laws and a different set of rules would apply. For the registration of a lease agreement the land office will require that the lease includes a rent. The lease price or rental price must be considered a reasonable rent or the land office will refuse registration of the lease agreement or will assess the rent based on the government appraised value of the property (registration fees, property tax, income tax for the owner will be based on this amount). Lease as opposed to superficies, usufruct or habitation cannot be registered for a nominal (1 baht) amount or without consideration to be paid.

The appraised valuations are set by the **Treasury Department** and the **Land Department** and adjusted every 4 years. The appraised value should be as closely as possible to the actual **market value** of the property. The assessed value is used as a baseline for market transactions and for tax purposes. Market value is the probable open market price agreed on by a willing and knowledgeable

buyer and seller with no prior relationship with each other where the transaction is not a forced sale. The market value is the probable price on the date of the valuation or appraisal under normal market conditions.

A residential property lease in Thailand can be made for a term not exceeding 30 years at the time. Rental payment can be made in advance for the whole term, but not for additional lease terms or a term exceeding the registered 30 years lease term. It has previously been common practice in the Thailand real estate market to include additional pre-paid terms in a 30 year lease agreement aimed at foreigners (e.g. suggesting a fully paid 90 year term), however, under new 2008 land office regulations the land officers must reject registration of lease agreements containing such (void) clauses.

A clause in the lease agreement; 'it is hereby agreed that there shall be no further payments due for any renewals as the price shall cover the entire lease term however long it may be' is **not enforceable under hire of property laws** in Thailand. The maximum enforceable term allowed under Thai law is 30 years and any property lease agreement made for a longer period than 30 years will by law be reduced to 30 years (section 540). A lease can be renewed upon expiration of the first 30 year term but the new lease must be registered by the parties with the land office and must include what is considered a reasonable rent at that time. Also the common clause in a lease agreement for foreigners, 'the renewal of the lease term under clauses x.a and x.b shall be granted without any additional rental or consideration to be paid by the Lessee', is not enforceable as a contract .

Renewal of a 30 year lease

A lease renewal after 30-years is not a right given under hire of property laws but a mere contract promise between the parties to the contract, and even when dealing with the original lessor at the end of the registered 30 year term such clause should under Thai law be considered unenforceable by legal action. A renewal option in a 30-year lease could best be described as a moral obligation to the original lessor that will be extinguished upon transfer of ownership. Any possible court decision granting the lessee the right to continue to lease the property based on the circumstances at that time will include that the lease price must be for the market value (at that time), irrespective what is agreed in a lease agreement made 30-years ago.

Payment of tax (income, rental tax)

Income received in the form of rent is taxed as income under the Revenue Code (Personal Income Tax or Corporate Income Tax). If the rent is paid in advance (not exceeding 30 years) this could be taxed as income for the whole sum in the year received, or if applied for with the Revenue Department, spread out as yearly income over the term of the lease. Housing and Land tax shall be paid if the owner leases out **land and building** or if the leased property concerns a apartment registered or unregistered under the Condominium Act .

Sub-rent, sub-let, assignment of a residential lease

Leasehold and re-sale of a lease agreement

Lease in the Civil and Commercial Code is placed under the rubric **contracts** and as a hire of property primarily a **personal contract right** of the lessee (termination upon death of the lessee) with aspects of a real property right. This is the reason why under Thai law the right to sub-rent or assignment of a residential lease agreement is only allowed if the lease agreement contains the right of the lessee to transfer his lease rights or transfer possession of the leased property to a third person (section 544). The right of the lessee to sublet or assignment of his lease **must** be included in the lease agreement or the lessee is under Thai laws not allowed to sublet or assign the lease to another person.

Sub-lease or sublet:

1. the lease remains binding upon the original lessee
2. the lessee has to execute a new lease with the sub-lessee
3. does not have to be in writing or have written evidence

Transfer of lease rights:

1. the transferee lessee takes the place of the original lessee
2. the lease rights will transfer subject to the lease
3. must be in writing (*section 306 Civil and Commercial Code*)

Transfer (sell) a lease agreement

Assignment or transfer of a lease agreement in Thailand is a three party agreement. The owner must agree to assignment of the lease agreement and assist with registration of the new lessee at the local land office. Sub-lease in Thailand, as opposed to assignment, is generally not subject to permission of the owner/ lessor. If a leasehold agreement in Thailand is made by a foreigner with the purpose selling the lease and making a profit this must be included in the lease agreement and is subject to cooperation of the owner of the property. The lessee does not own the property nor has he the title to the property and leasehold in Thailand (*with a term not exceeding 30 years and no real registered right of renewal*) is a diminishing asset.

Sub-rent example

Should the lessee lease raw undeveloped land and would not have agreed with the owner the right to sub-lease the land he is not allowed to sub-rent the land (section 544 Civil and Commercial Code), but if the lessee then builds a house on the leased land and rents out the house, this will not be seen a sub-lease or breach of the lease contract (*Scj. 2237/1981*). Should however the lease

contract state that the lessee is not allowed to let someone else use the land, then in the same situation, it will be seen as breach of the lease contract (*Scj. 6843/ 1998*).

Assignment of a lease upon death of the lessee

As a property lease (tenancy) is under Thai hire of property laws by nature a personal right of the lessee, lease is as such not an inheritable contract right. Under hire of property and Thai contract laws a lease agreement is terminated upon death of the lessee because the lessee is the essence of the lease agreement (*supreme court of Thailand*). Death of the lessee terminates rent. Assignment of the lease to the heirs upon death of the lessee must be included as a specific clause in the lease agreement.

Lease vs Special Reciprocal Agreements

Special Reciprocal Contract (Special type of Lease Contract created by the Supreme Court)

Contrary to a lease agreement governed by normal hire of property laws this type of special lease contract is not specified in the Civil and Commercial Code but created by the Thailand Supreme Court. In some specific situations where the lessee has made an agreed **substantial investment** in the improvement of the leased property that upon expiration of the contract will **benefit the owner** the lease could be deemed a special reciprocal contract. When there is **mutual agreement** between the parties of making the investment by the lessee and the benefit for the owner upon expiration of the contract term the hire of property contract could be consider a special reciprocal contract and (based on Supreme Court Judgments) a different set of rules would apply on the contract (beyond hire of property laws). This type of special contract is not specified in the Civil and Commercial Code but is created by the Supreme Court but has limited application.

Agreed investment in the improvement

If the lessee and the lessor have agreed in the contract that the lessee shall have more burden by an additional investment in the property that will benefit the owner upon expiration of the term in the contract the agreement between the parties could be considered a special reciprocity contract (more than a normal lease contract). In this type of contract the parties must have some common objective (possession of the property for a fixed term of the lessee vs benefit of the improvement for the owner upon expiration). In all such contracts the **consent** of the parties must be expressed. If a contract between the parties is deemed a special type of lease contract (special reciprocal contract) the contract is for example enforceable by action for a term exceeding 3 years even **without registration** of the agreement with the Land Department (for example Supreme Court judgment 1135/1963). In a normal lease for a period over 3 years the agreement **MUST** be registered with the land office and written in Thai to be enforceable. If the agreement is considered a special reciprocity contract the rental or lease agreement is enforceable even if the lease is not registered with the competent authority. It may technically not even have to be in writing!

It will not be considered a special reciprocal contract if the lessee has put more burden upon himself, meaning, if the extra burden is not as such agreed between the lessor and lessee, but the lessee, say, chooses himself to improve the land or real estate. This will not be considered a special reciprocity contract as there is no consent from the lessor expressed.

Samples of differences of a normal lease and special reciprocity contract

- In a normal hire of property the lessee is the essence of the lease contract, therefore the lease rights will not automatically transfer to the lessee's heirs
- If the contract is considered a special reciprocity contract the lessee is not the essence of the agreement, therefore the rights under the contract will transfer to the lessee's heirs.
- In a normal hire of property any lease agreement over three years must be registered with the Land Department. If the lessor has agreed in the contract to register the lease the lessee can sue the lessor within the first 3 years to register the lease agreement. If registration is not agreed in the contract the lessee cannot sue the lessor;
- The lessee can sue the lessor even if the lease contract did not specify that the lessor shall register the lease

The benefit of a special reciprocity contract lies in the fact that certain legal requirements (drawbacks) that apply in a normal hire of property do not govern a special reciprocity contract. The legal theory behind this special type of lease contract could be used in **land lease agreements** for foreigners but cannot extend the period beyond the maximum term of 30 years. In this type of contract the lessee finds protection in supreme court rulings that he would normally not have in normal hire of property. The main elements of such special contract is the agreed investment and extra burden for the lessee and the benefit for the owner upon expiration of the term. Not a special reciprocal agreement is considered where the lessee invests a large amount in the improvement of a property without agreement with the lessor (e.g. supreme court judgment 7858/1999)

Some creative lawyers in Thailand have included supreme court judgments and theory behind this type of special lease in a 90 year lease agreement to extend the maximum term in section 540 Civil and Commercial Code or to suggest enforceable renewal options in a lease (e.g. the investment by the lessee in the construction of the house and the lessor becoming the owner of the house upon expiration of the third term after 90 years). This is unlikely as this type of contract cannot repair or include under Thai hire of property laws voidable or void clauses. Recommended is a land lease combined with a right of superficies.

Hire of property laws in Thailand :

leasehold, lease and rentals of real estate and condos are governed by the section hire of property of the civil code.

The legal agreement whereby rent is paid in order to use another man's real estate property (residential or commercial property) in Thailand is governed by the lease agreement between the parties and the Civil and Commercial Code. The laws governing hire of property in Thailand is applied in the same manner if the hirer is a Thai or foreign national. The primary source of laws governing hire of property is the Civil and Commercial Code. The general principles of lease (as a contract) is governed by Title VI Juristic Acts and Book II Obligations and more specifically the Chapter Hire of Property, but the Supreme Court of Thailand gives rules for the exact interpretation of words and sections of the Civil and Commercial Code and therefore lease in Thailand cannot be fully understood without also taking into account specific Supreme Court judgements. You can read the Civil Code but won't be able to fully understand it.

What is lease or leasehold in Thailand

The main drawback of Thai property law is that leasehold in Thailand is not a real property right (governed by book IV Property) but a personal contract right of the lessee (governed by book III *specific contracts*). The lessee cannot buy or sell his lease unless the owner is willing to cooperate, the lessee cannot mortgage his lease nor use it as collateral. Lease in Thailand is in essence a normal **hire of property contract** (a tenancy) governed by the section hire of property in the Civil and Commercial Code. A lease in Thailand (as it is in essence a normal tenancy) is a personal right of the lessee and attached to the lessee therefore according to the Thailand Supreme Court terminated upon the lessee's death.

The Chapter Hire of Property (lease in the Civil and Commercial Code)

- General provisions
- Duties and liabilities of the letter (*lessor*)
- Duties and liabilities of the hirer (*lessee*)
- Extinction of a contract for hire (*lease*)

Only in case of **specific commercial leases** the Thai government created a specific act requiring large investments into Thailand; the Hire of Immovable Property for Commerce and Industry by Foreigners.

The structure that comes close to lease as a real right is a 30 year land lease combined with a right of superficies specifying the rights to own a house on leased land. Note that it is only possible to register a lease over titled property, i.e. condominiums and titled land and buildings on titled land having a land title deed issued by the Land Department confirming right of possession or full freehold ownership .

Lease contract and lease term :

The term of a real estate lease in Thailand may be fixed or periodic. The maximum lease term in Thailand is 30 years (section 540). Any lease of immovable property for a longer period than 30 years in Thailand may only be made by renewal of the lease contract upon its expiration. Based on supreme court judgment it is possible to say that a valid and enforceable renewal can only be made within a period of 3 years prior to the expiration of the first lease term (not 30 years prior to expiration). If for example the lessor and lessee have executed 2 or more consecutive 30-year lease agreements it shall by law be deemed as 1 lease and reduced to 30 years.

For specific leases by foreign corporations the Thai government created a longer term in a specific act; the Hire of Immovable Property for Commerce and Industry by Foreigners Act B.E. 2542.

Thai law puts a limit of 30 years on any property lease in Thailand. Parties cannot extent this term in the contract. For the same reason parties cannot make an enforceable provision for renewal of a 30 year lease term. A renewal promise in a 30 year lease agreement is under Thai hire of property laws not enforceable by legal action and legally best described as a **moral obligation** to the person or developer who gave the option. A renewal promise in a 30 year lease agreement merely hold the illusion of a longer lease contract.

Lease extensions (renewal)

A RENEWAL OPTION IN A 30 YEAR LEASE IS A SALES PITCH FOR FOREIGNERS

Also the commonly used controversial 90 year lease (created to sell real estate in Thailand to foreigners) is subject to section 540 of the Civil and Commercial Code and if made as a 90 year lease it will by law be reduced to 30 years. A lease renewal option or **any number of renewal options** in a 30 year lease agreement is allowed based on a general freedom of contract principle in Thai law, even if it cannot be enforced as a contract. The parties to the lease can consent to terms in the lease agreement that are in practice not enforceable by legal action (the Thailand Land Department in general does **not** intervene in private contracts between the parties upon registration of the lease agreement (*)).

The Thai government did limited the freedom of contract terms in a lease agreement on certain elements in **2008 land office regulations** that need to be enforced when a lease with foreigners is registered with the Land Department. Under these regulations **pre-paid** renewal terms in a 30-year lease registration must be rejected (as in conflict with the law) and an option given to a foreigner to transfer the leased land to a freehold title must also be refused. As a result such arrangements are now often made in an addendum to the lease agreement **not registered** with the Land Department.

(*) Sale and purchase agreements in a **licensed condo or housing project** is a government contract controlled business (*not the small private developments*), meaning developers are not free to form the content of a sale contract. The freehold sale contracts are part of the government licensing procedure and the sale contracts must comply with specific ministerial regulations and consumer protection laws protecting the buyer. These rules however **do not apply** to the **leasehold sale contracts** in the same project (*specifically aimed at foreign purchasers*) and these contracts are not controlled by the government and can include provisions that may not be legally binding and could contain void or voidable clauses.

Other than hire of property

There are a few other theories behind a 90 year lease however these are not based on hire of property laws. These alternative contract structures have as the main agreement a 30-year lease agreement but aim to give additional rights in the wording of the agreement and in supplemental agreements not registered with the Land Department. These structures are not recognized under Thai law and legally questionable (*or void*) because foreigners cannot own land and lease cannot exceed 30 years .

House ownership on leased land

Essential in any long term leasehold interest in a real estate property in Thailand is ownership over the house separate from ownership over the land (lease land own the house upon the land). The lessee obtains ownership over the house and a leasehold interest in the land without obtaining ownership over the land. This structure is ideally combined with a right of superficies .

Contract options in a lease agreement

Transfer of ownership does not break rent but breaks contract rights in the lease agreement.

Contract rights vs real lease rights

The content of a registered lease agreement in Thailand can be divided into rights given under hire and property laws and rights based on general contract law and the freedom of contract between the parties. The practical importance of the two relates to the future enforceability of contract promises and obligations in a contract, especially in case ownership of the property is transferred during the term of the lease. Real lease rights in a lease agreement are enforceable against third parties and once given the promisor can't change his mind or take it back should the circumstances change. A simple promise by the lessor to do something in future (renew a lease in 30 years time) can be revoked or may turn out unenforceable under Thai contract law.









Transfer of ownership and the lease agreement

If the leased real estate property is transferred during the term the lease is not terminated and the new owner takes the property subject to the registered lease (section 569). Section 569 hire of property laws refers to and protects only rights and obligations in the lease agreement which are in **essence hire of property rights**. Only real hire of property rights will by law transfer with the property to the new owner and are automatically enforceable against the new owner. **Contract** obligations (non lease rights), even though included in the lease agreement, remain with the original owner. True hire of property rights and non lease rights under Thai law are for example:

True hire of property rights

1. payment of rent and lease term
2. purpose of the lease
3. responsibilities for defects
4. right to sublet and assign

Non lease rights (*contract rights*)

- | | | |
|---|-------------------------------------|---|
|  | 1. renewal option in the lease |  |
|  | 2. option to transfer to freehold |  |
|  | 3. penalty payment upon termination |  |
|  | 4. succession clause |  |

The new owner is by law (section 569) bound by true hire of property rights and obligations, but not by non-lease rights in the lease agreement. Non lease rights are under Thai contract law personal to the original parties to the lease agreement. The new owner of the leased property would have to accepted the additional contract options in the lease agreement or he will not automatically be bound by these terms. This could be effected in a sale and purchase agreement (in a specific optional clause) between the original lessor and transferee owner of the property.

Lease Term Options and Renewal :

Real lease rights and contractual obligations in lease agreements in Thailand

Thailand lease Agreement:

Foreigners are not allowed to own land but they may lease land real estate for a term not more than thirty years.

A lease agreement in Thailand can contain clauses based on general freedom of contract between the parties and clauses based on specific hire of property laws. The importance of the distinction between the two lies in the future enforceability of contract obligations and true hire of property right (real lease rights). Real lease options and obligations are enforceable against all other persons and by law binding upon successors of the leased property (real lease rights follow the property along with the ownership), and once given the owner (lessor) can't take the option in the lease back and he cannot change his mind, in contrast to contract promises in the lease agreement and possible difficulties in future enforceability. Under Thai law and Supreme Court rulings the agreed term in the lease is considered a real right of the lessee, but an option to renew the lease is considered a contract option or contract obligation (not a real lease right) that needs to be enforced in the future.

Lease rights and contractual promises in the lease agreement

Transfer of ownership does not terminate the lease agreement in Thailand (section 569). Transfer of ownership does not break the lease, but section 569 of the Civil Code must be read ONLY in relation to the content of a lease agreement that is in essence hire of property. When reading a real estate lease agreement it is important to understand that not everything written in a lease contract remains enforceable in case the property is transferred. Only rights and obligations that are under Thai law considered true hire of property rights transfer under section 569, not sections in the lease that are considered mere contract promises. Lease contracts to sell real estate to foreigners are drafted to generate sales and can include promises that are not always guaranteed or enforceable as a contract .

Non-lease rights are for example the option in the lease to renew a rental or lease agreement upon its expiration (Supreme Court Judgment (6763/ 1998)) but also considered a contract promise and not a lease right under hire of property laws is the option to assign and transfer the lease agreement to the lessee's heirs upon the lessee's premature death .

If the lessor dies during the lease term, or in case a juristic person is dissolved or the land is transferred to another company or person, the transferee owner is not by law bound by contractual promises made by the previous owner, unless this is clearly accepted as a contractual obligation by the new owner. The protection the lessee finds in the law (section 569 Civil and Commercial Code) concern the rights and obligations which are under Thai hire of property laws considered hire of property rights (e.g. lease term, payment of rent, right to sublease, responsibilities for defects, purpose of the lease, termination, etc.).

Renewal options in a lease agreement

The rule with renewal options in a lease agreement in Thailand is that there is nothing against including them, but as a renewal guarantee giving more than a registered 30 year lease term they don't and cannot work. Any personal promise to enter into an agreement in 30 years time (that is what is required) that is not backed by written law, formal registration or Supreme Court judgments holds very little value. If the lease is near termination the lease can be renewed (the owner willing to renew it), but legally renewal is not enforceable in a court based on a promise made in a lease signed 30 years ago .

Superficies and lease agreements

It is not common in Thailand (yet), but in a proper structured land lease agreement a supporting real property right of superficies should be registered in addition to the land lease agreement. As opposed to European Civil Law countries, the real estate sector and land offices in Thailand are not familiar with right of superficies. This while in fact a right of superficies is a higher and stronger right attached to the property, compared to a hire of property (lease agreement) attached to the lessee. A superficies is a real property right as opposed to contract rights such as a lease agreement. As a real property right it is attached to the land rather than a person and is as opposed to a lease by law transferable by inheritance and not terminated upon death of the lessee.

Beyond lease agreements: in some specific cases the Supreme Court of Thailand has given additional rights to the lessee and his heirs in certain specific situations (beyond the section hire of property in the Civil and Commercial Code), and a lease agreement could include some of these principles but this must include an investment by the lessee (the house upon the land) becoming ownership of the lessor upon expiration of the lease agreement .

An alternative leasehold purchase structure concerns the **true intention of the parties**, i.e. transfer of ownership, even though land ownership is prohibited for foreigners. The land offices in Thailand will refuse such contract structures therefore it is created by a separate addendum to the lease agreement. Legally it is and will be up to a court in Thailand to determine the additional rights of the foreigner under a contract leasehold purchase structure (if any and the contract structure not deemed void for illegality). The foreigner's true registered rights always remains a 30 year hire of property with uncertain additional rights based on contract law.

Inheritance, succession and a property lease :

Inheritance of Real Estate Lease rights A hire of property (lease) is not an inheritable right.

The heirs of the lessee are under Thai law not automatically entitled to succession of lease rights when the lessee/ tenant dies. Lease in Thailand is governed by the chapter 'hire of property' which is placed in the rubric **contracts** of the Civil and Commercial Code. Lease is in the first place a contract and **personal right** of the lessee and **not a real asset**. This means, as confirmed by the Supreme Court of Thailand, that the agreement is terminated upon death of the lessee because the lessee (tenant) is the **essence** of a lease agreement. If he dies the lease is terminated (e.g. Scj. 1108/1994).

The chapter Hire of Property can be found in Book III 'Specific **Contracts**' and not under 'Property' (Book IV of the Civil and Commercial Code) or real property rights. This for example means that a lease agreement as a contract (not an asset) is not automatically transferable by inheritance and can only be assigned as a contract with formal acceptance of the other party in the lease agreement (the owner) and registration on the title deed.

If the **owner of the property dies** the contract of hire is not terminated and remains in force against the heirs of the owner (section 569), however, **ONLY** in so far it concerns true hire of property or lease rights. Additional contract rights in the lease that are under Thai contract law not considered true lease rights (under current supreme court rulings the renewal option but also a lease inheritance clause) will not by law (*section 569*) transfer to the new owner and are as contract rights terminated upon transfer of ownership. The new owner must accept these clauses in the agreement or he will not be bound by a promise given by the previous owner to renew the lease or to assign the lease to the lessee's heirs.

Succession clause and inheritance of a lease agreement

To allow succession of the lease agreement and assignment to the heirs of the lessee the lease agreement should have specific clauses granting the right of succession. The transfer or assignment of the lease to the heirs of the lessee requires registration and assignment of the lease agreement at the land department and for that reason cooperation of the owner. In the event of premature death of the lessee his heirs have the right to claim such performance directly from the original lessor, if a valid **succession clause** has been included in the lease agreement. Otherwise the heirs could end up having no rights to succession and the lease or rental agreement will be permanently terminated upon the lessee's death and the owner can take possession of the property.

Succession clause is a contract right

It should be noted that a succession clause in the lease agreement is considered a **personal** contractual promise between the parties to the contract and not a registered lease right (i.e. not protected by section 569 Civil and Commercial Code). As a separate contract right this obligation will not automatically follow the property when ownership is transferred during the lease term. A transferee owner (e.g. the heirs of the owner), as an in fact a third party to this clause, is not

automatically bound by the succession promise given by the previous owner. If not accepted there is in principle no legal obligation for a transferee to assign the remaining term of the lease to the heirs of the lessee. The tenancy or lease ends at death of the lessee as the lessee is considered an essential element of the agreement - when he dies the contract ends. A succession clause is not considered true hire of property right (protected by section 569) therefore the heirs of the lessee may not be able to successfully enforce this clause by action against a successor of the property.

Special protection in specific cases

The Supreme Court of Thailand has in some specific cases gone **beyond the normal principles of the law** to protect the rights of the lessee and the lessee's heirs in case the lessee has made a substantial investment in the improvement or development of the property that at the end of the lease period will benefit the owner. In this case the lease will not be terminated upon the death of the lessee and the FULL contract of hire will transfer for the remaining term to the heirs of the lessee. It is however ESSENTIAL that the contract is drafted according the principles of Supreme Court rulings and the leasehold purchase is structured with **ownership over the building** by the lessee. Leases are often not drafted this way as this in fact includes that the lessor becomes the owner of the house upon expiration of the 30 year lease term which is what most foreigners want to prevent .

With regards to succession by inheritance or assignment of the lease to the heirs of the lessee there are 3 options:

1. Nothing is arranged regarding succession and the lease is terminated upon the death of the lessee (e.g. only a standard land office lease agreement has been signed by the parties or the lease agreement between the parties is not registered on the title deed);
2. A valid succession clause is included in the contract which is enforceable against the original owner party (lessor) of the agreement;
3. Following the Supreme Court judgments in certain situations the contract for hire or lease goes beyond normal hire of property laws and the contract and its rights will in this case transfer to the heirs.
- 4.

Legal practical

In a normal lease or **hire of property laws** the normal principles under the above 1 and 2 above apply and in this case it is recommended to have more than **more than one person as the lessee** in the contract to prevent early termination upon the death of 1 of the lessees. In case of No. 3 above the **lease agreement** must be drafted according to the Supreme Court judgments by a legal professional familiar with hire of property laws and who is up to date with the Supreme Court judgment governing lease and hire of property in Thailand. Foreigners must realize that under Thai law and Supreme Court judgments a lease can last only for a period up to 30 years.

Tip: combine a land lease with a right of superficies, as a right of superficies is under Thai law a fixed real property asset and inheritable right.

Sample clause in the lease agreement:

The parties hereto agree that in the event of the death of the Lessee prior to the expiration of the Lease Term the Lessor irrevocably agrees to let the person designated by the Lessee or any person appointed by order of the administrator of the Lessee's estate to lease and use the Land and the Lessor agrees to enter into a new Lease Agreement with that person for the same term and conditions specified in this agreement without any further payment.

Short term commercial lease and rentals :

Rental laws and leasing a commercial shop or office and Commercial rentals

Commercial rentals and residential rentals are governed by the **Chapter** Hire of Property in the Thailand **Civil and Commercial Code**. Rental of commercial properties exceeding 3 years must be registered with the Land Department and cannot exceed a period of 30 years. Only in specific commercial leases (for commerce and industry by foreigners) the Thai government issued a specific act for foreigners, but apply only if the foreigner meets the requirements (substantial investments) and complies with the restrictions (land size and location).

In case of commercial property for small businesses (shops, restaurants) often a lease term of **5 years** is offered. To avoid registration and taxes this often means a **3 year** rental with an **option** for another two years. However, any lease over 3 years must be registered at the Land Office to be enforceable over 3 years (section 538 Civil and Commercial Code). A renewal in a short term rental is basically an enforceable option but may not be enforceable against a transferee owner as the renewal option is considered a personal contract promise (and illusory promise in a 30 year lease agreement), and not part of the rental agreement that will automatically transfer with ownership of the property hired under section 569 Civil and Commercial Code.

Supreme Court Judgment 6451/ 1995; 'Should both parties have made 10 lease agreements at the same time, each contract has a three year term and pre-specified dates of execution consecutively for 30 years, it will only be enforceable for the first three years'. This will be seen as an avoidance of section 538 CCC and therefore not enforceable.

Key-money and rental price

Commercial leases often include key-money, but key money in Thailand does not have a fixed definition .

Registration of commercial rentals exceeding 3 years

If the rental exceeding 3 years is not registered with the competent official (the Land Department) only the first 3 years is enforceable by legal action. Should the lessor sell the property within the first 3 years or just does not want to give you the option to renew for the extra 2 years you would have to go to court with an uncertain outcome .

Special reciprocal contract vs rental agreement

Note, in specific situations where a lessee has made a **substantial investment in the improvement of the property** that will upon expiration of the contract **benefit the owner of the property** according to the agreement between the owner and the lessee (mutual agreement of making the investment by the lessee and the benefit for the owner upon expiration). The Supreme Court of Thailand has deemed some contracts with such elements a special type of contract (special reciprocal contract) that is enforceable for the whole term exceeding 3 years, **even without registration** of the rental agreement with the Land Department. This type of contract is not specified in the Civil and Commercial Code but is created by the Supreme Court but has limited application.