

Everything you wanted to know about usufructs in Thailand.

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Isaan Lawyers has recently registered usufruct agreements in more than 15 provinces in Thailand. The following text is aimed to give you objective and accurate information about this right included in the Civil and Commercial Code of Thailand (hereafter CCCT). Don't hesitate to communicate with us should you have any further questions or inquiries.

As you probably know, foreigners are forbidden to own land in Thailand by the land Code. There are few rare exceptions to this rule (investment of 40 million baht, BOI approval, etc.). This is why many foreigners are looking into ways to secure a real estate investment or at least, give them the right to enjoy a property even if they are not the "full" owner. A usufruct agreement can give you this right: to possess and enjoy a property without being the full owner. And it is perfectly legal.

HISTORY

A usufruct is a real right ('real' means in civil law "attached to a thing") that originates from Roman Law. In Roman law, the wife wasn't entering legally in the family of her husband. At the death of her husband, the wife had no rights of inheritance in the estate. To bypass this injustice, Roman law created the right of 'usufruct'. This usufruct was giving the widow the possibility to enjoy the asset of her husband after his death even if she wasn't an heir and the owner. The asset was normally devolved to the children at that time. This right of usufruct is also known in civil law and Thailand adopted it.

By essence, the right of usufruct is temporary and has roots in family relationships.

WHAT IS A USUFRUCT AGREEMENT

Usufruct contracts are governed by sections 1417 to 1428 of the CCCT. A usufruct is a right granted by the owner(s) of the land/house in favor of a usufructuary whereby this person has the right to possess, use and enjoy the benefits of an immovable property (section 1417 CCCT). The usufructuary has the right to manage the property (sect 1414 CCCT). It can be on a piece of land, on a house or on both of them.

A usufruct is a real right (real means in civil law = attached to a thing) that originates from Roman and Civil law. The holder of a usufruct, known as "usufructuary", has the right to use, possess and enjoy the property, as well as the right to receive profits from the fruits of the property. The usufructuary could be a person or an entity (ex: a company).

In civil law, property is divided in three parts. They are called in latin "usus" (use), "fructus" (fruits) and "abusus" (abuse). The word usufruct is normally unknown in Commonwealth countries. It combines the two first parts of the property in civil law, the usus (use, or possession) and fructus (fruits, or as we will see, more or less the "profits"). In French, it is called "usufruit" and in Thai "See-tee-kep-kin". It is interesting and useful to know that Thai Civil Law was largely inspired by French Civil law. (see "the work of codification in Siam" by Rene Guyon, 1919.)

In Civil law, the owner who gives the usufruct is called in French "nu-propiétaire" or by literal translation in English "naked-owner". It means that the owner has nothing else than the ownership: He can't use his possession, even if he is the owner. Beside possession and enjoyment of the

property, the usufructuary has also the legal right to use and derive benefits from the property that belongs to another person, as long as the property is not damaged. "Fruits" should be understood as its natural (fruits, livestock, etc) and/or its legal definition (rent, etc.).

If you would like to use this right for industrial purposes, be aware that some taxes might be required.

Let's see some examples of usufruct agreements.

EXAMPLES

Imagine that you have a usufruct on a piece of land, an orchard. The apples (natural fruits) will be your asset and do not belong to the 'real' owner of the land. But in our days, fruits are more or less the legal fruits, like a rent from a lease. Section 148 of CCCT defines what can be the legal fruits in Thailand: "legal fruits denote a thing or interest obtained periodically by the owner from another person for the use of the thing; It is calculated and may be acquired day by day or according to a period of time fixed."

Now imagine that you have a Thai girlfriend. She buys the land and gives you a usufruct on this land for free. It means that you can enjoy this property, even ask her to leave the property, can sublease and get the money from the rents, and this, until the end of your life. It is NOT restricted to 30 years maximum. On top of that, if you decide to build on this land, it is possible for you be the full owner of the buildings and constructions. It is really a strong right.

THE END OF A USUFRUCT CONTRACT

In Thailand, a usufruct can be created for a limited time (5 years, 10 years, etc.) or the LIFE of the usufructuary. (sect. 1418 CCCT). If no time has been fixed, it is presumed that the usufruct is for the life of the usufructuary. In any case, the usufruct ends at the death of the usufructuary.

THE USUFRUCTUARY CAN LEASE THE LAND/HOUSE

A usufructuary has the right to enjoy, use and possess the land. He is acting like the real owner but can not sell or destroy the property as he is NOT the full owner. However, he can transfer his rights on the land/house to a third party. Even if the usufruct will end at the death of the usufructuary (or a fixed period of time) the usufructuary can lease out the land to a third party and this second agreement will NOT end when the usufructuary will die as per the Supreme Court ruling 2297/1998: "the lessor does not have to be the owner of the property".

By this way, the usufructuary can grant a thirty years lease to a third party. By this way, you could pass on your rights to your children or other relatives even after death if the lease was done before the demise. Do not forget that all leases over 3 years must be registered at the land department and taxes have to be paid.

REGISTRATION

By a decision of the Supreme Court of Thailand, all usufruct agreements must be registered to be valid (Supreme Court decisions 6872/2539). Once you register a usufruct at the land department where the title deed is located, your name will be registered (written in Thai) on the title deed. After this registration, the land/house can only be sold provided the buyer respects this usufruct. This is why it will be difficult for the owner to sell the land/house after a usufruct is register: nobody wants to buy a property where they can't live. Be aware land departments in Thailand have different rules and requirements. Some will ask to see your visa, some will ask for the father and mother's name of the usufructuary, etc.

You can also get a yellow book which is a House Registration Certificate (Thor. Ror 13) with a usufruct but many other documents will be required.

MYTHS AND FACTS ABOUT USUFRUCT AGREEMENTS

1) Usufruct can be done for maximum 1 rai

False. We registered usufruct agreements for more than 100 rai with one contract and multiple title deeds. However, the usufruct must be registered on EACH title deed separately.

2) Usufructs have never been tested by the Court

False, there are Court decisions about usufructs (for examples: Supreme Court of Thailand 2783/2516, 6872/2539, 2297/2541, 2380/2542, etc.). The land department has also published a small guideline about usufruct agreements. Usufructs originate from Roman Law and they are known in Civil Law countries for centuries. It has nothing to do with some old agricultural laws or customs. Remember that leases were mostly used in the 18th and 19th centuries by farmers as they were not rich enough to fully buy land.

3) Usufructs are not as safe as lease agreements:

False. There is no legal, historical or factual grounds for this affirmation. If a lease is safe in Thailand (section 537 and following), a usufruct is safe. Both of them are in the CCCT, just as a gift agreement (section 453 and following) or a loan contract (section 640 and following). Unless the Thai law changes, foreigners are fully allowed to make usufruct agreements, just as they are allowed to purchase condominiums or to make a lease agreement. Some law firms prefer to register lease agreements as leases agreements are normally more expensive. There is even some legal grounds in civil law to say that a usufruct is stronger than a lease agreement.

4) You must pay taxes to register a usufruct agreement

True. If the usufruct agreement is done for an amount of money, taxes of about 1.5 % on the value of the contract will have to be paid. Some land departments don't like to register usufruct agreements for free as they see that their government is not making as much money as a lease agreement. On a lease agreement, you will also have to pay taxes on the value of the rents for the total agreement. Rents must be based on the assessed value of the property. Most of the time, it is cheaper to register a usufruct agreement than a lease agreement. If you register a usufruct agreement involving a company, the land department might ask for some value on the contract. They won't like to see it done for free. It is the discretion of the land officers to accept an agreement even if by law, it is clear and usufruct agreements for free can be done.

5) The owner can't borrow money or sell its property if a usufruct is registered

False. Even if you register a usufruct agreement on a title deed, the owner can sell his property to anyone. But in reality, nobody is interested to buy a property where they will have to maintain your right and won't be able to use this property until you die. This is why a usufruct is a good protection for you as it allows you to live there for the rest of your life, whatever happens. If you want this right to be passed to your heirs, it can also be done by a lease agreement might be a better option depending on your case.

6) It is possible to cancel or void a usufruct agreement

If you are NOT married to the owner granting you the usufruct, we believe it is not possible to cancel a usufruct and you are legally protected.

If you are legally married to the owner, Thai lawyers disagree on the application of article 1469 CCCT. This article mentions that all agreements made between spouses can be cancelled by the Court at the request of one party, unless agreements affect third parties. According to one interpretation, "publicity" or registration affect third parties and a usufruct can't be cancelled. According to the other interpretation, we have to search for the spirit of the law and it looks like Thai law wanted to end all relations between spouses in case of

divorce, even usufruct agreements. A way to avoid the application of 1469 CCCT would be to have a second agreement (like a lease) affecting a third party before the Court could cancel your usufruct agreement.

7) I will be fully protected with a usufruct

False. Imagine that you bought a big house in a small village near the family of your girlfriend. Now, imagine that things go wrong with her and you decide to expulse her from this house. You have the legal right to do it. But do you really think your life will be nice and quiet near her family, in a big house, in the middle of nowhere? Usufruct will legally protect you but there are situations where even a legal protection won't have any authority in face of the reality.

8) Usufruct agreements can be done anywhere in Thailand

False. Usufruct agreements must be registered and you can register a lease or a usufruct only on title deeds equals or superior to Nor Sor Sam. It means that usufruct can be registered for Chanotte or Nor Sor Sam, but can NOT be registered in some rural areas without proper title deeds.

9) A usufruct agreement is a simple form.

False. It is a contract, like a loan or a lease. All contracts can be adapted or constructed around the situations of the parties. For example, some clients prefer limitations to their usufruct right for their own and personal use. However others want to be able to transfer their rights without any prior notice or notifications. Some usufructs are done for free, some for an amount of money. Any clause can be written if it is not against public order.

Usufruct agreements are a strong protection as they to let you possess, use and manage a property in Thailand. We believe they will give you some piece of mind while you enjoy all the other aspects of Thailand. They can be a very good alternative to lease agreements, as they can be for your lifetime, with lesser taxes. Don't hesitate to consult a lawyer if you want to know your best options according to your needs and your personal situation.

(Mr Alan McAdam (British solicitor) and Mr Nattawut Intarakhamhang (Thai Attorney-at-Law) helped the author for the redaction of this text).

DISPOSITIONS OF THE CIVIL AND COMMERCIAL

CODE OF THAILAND

TITLE VII: USUFRUCT

Section 1417

An immovable property may be subjected to a usufruct by virtue of which the usufructuary is entitled to the possession, use and enjoyment of the property.

He has the right of management of the property.

The usufruct of a forest, mine or quarry entitles the usufructuary to the exploitation of the forest, mine or quarry.

Section 1418

A usufruct may be created either for a period of time or for the life of the usufructuary.

If no time has been fixed, it is presumed that the usufruct is for the life of the usufructuary.

If it is created for a period of time, the provisions of Section 1403 paragraph 3 shall apply mutatis mutandis.

In any case the usufruct comes to an end on the death of the usufructuary.

Section 1419

If property is destroyed without compensation being paid, the owner is not bound to restore it; but, if he does so to any extent, the usufruct revives to that extent.

If any compensation is paid, the owner or the usufructuary must restore the property so far as it is possible to do so, having regard to the amount of the compensation received, and the usufruct revives to that extent; but, if restoration is impossible, the usufruct comes to an end and the compensation must be divided between the owner and the usufructuary in proportion to the damages suffered by the respectively.

The same rules apply mutatis mutandis in the case of expropriation as well as in the case of partial destruction of the property or of partial impossibility to restore the property.

Section 1420

When the usufruct comes to an end, the usufructuary must return the property to the owner.

The usufructuary is liable for the destruction or depreciation in value of the property, unless he proves that the damage was not the cause of his own fault.

He must replace anything which he has wrongfully consumed.

He is not bound to give compensation for depreciation in value caused by reasonable use.

Section 1421

The usufructuary must, in the exercise of his rights, take as much care of the property as a person of ordinary prudence would take of his own property.

Section 1422

Unless otherwise provided in the act creating the usufruct, the usufructuary may transfer the exercise of his right to a third person. In such case, the owner of the property may sue the transferee directly.

Section 1423

The owner may object to any unlawful or unreasonable use of the property.

If the owner proves that his rights are in peril, he may demand security from the usufructuary; except in the case of a donor who has reserved to himself the usufruct of the property given.

If the usufructuary fails to give security within a reasonable time fixed for the purpose, or if, in spite of the owner's objection, he continues to make use of the property unlawfully or unreasonably, the Court may appoint a Receiver to manage the property in his stead. Upon security being given, the Court may release the Receiver so appointed.

Section 1424

The usufructuary is bound to keep the substance of the property unaltered, and is responsible for ordinary maintenance and petty repairs.

If important repairs or measures are necessary for the preservation of the property, the usufructuary must forthwith inform the owner thereof and permit them to be carried out. In case of default by the owner, the usufructuary may have the work carried out at the owner's expense.

Section 1425

All extraordinary expenses must be borne by the owner, but in order to meet these or expenses coming under the foregoing section he may realize part of the property unless the usufructuary is willing to advance the necessary funds without charging interest.

Section 1426

The usufructuary shall, for the duration of the usufruct, bear expenses for the management of the property, pay taxes and duties, and be responsible for interest payable on debts charged upon it.

Section 1427

If required by the owner, the usufructuary is bound to insure the property against loss for the benefit of the owner; and if the property is already insured, he is bound to renew such insurance when due.

He must pay the premiums of the insurance for the duration of his usufruct.

Section 1428

No action by the owner against the usufructuary or his transferee in connection with the usufruct or vice versa may be entered later than 1 year after the usufruct comes to an end; but in any action by the owner who could not have known of the end of the usufruct, the prescription of 1 year shall run from the time when he knew or ought to have know of it.