

LEGAL PROBLEMS INVOLVING LEASEHOLD CONDOMINIUM IN TERMS OF THE EFFECTIVENESS OF THE LAW ENFORCEMENT*

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ABSTRACT

Because of the implementation of AEC and Government's policy to urge and boost industrial and commercial long term investment, it results to the free flow of labour and capital come to Thailand. Owing to the restriction of law on the foreigners holding the ownership of land and the limitation of the foreign ratio to hold the ownership of freehold condominium, leasehold condominium becomes an excellent alternative for the foreigners who desire a long term living in Thailand.

Since the leasehold condominium is developed on the land which is subject to leasehold, it is not governed by Thai Condominium Act B.E. 2522 (1979). Instead, it is governed by the hire of immovable property law, section 537-574 of Thai Civil and Commercial Code. As the unique business concept of leasehold condominium, which the buyer (lessee) is required to make fully payment of the rental in advance on the date of lease registration, some provisions under Thai Civil and Commercial Code are not proper in compliance with lease of leasehold condominium. In practice, most parties negotiate some clauses differentiate from the law in order to correspond to such unique business concept; however, it does not guarantee or ensure the buyer of leasehold condominium

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to have properly protection by law as well as it leads to many unsolved problems.

In order to urge the economy of our country, particularly in real estate sector, and to guarantee or ensure the buyer of leasehold condominium to be properly protected by law, this thesis, therefore, studies on the foreign laws relevant to leasehold interest; the United States of America and Ontario, Canada are the countries where their legal systems have been influenced from common law system whereas the legal system of Germany and France are the root countries of civil law system. Furthermore, this thesis will suggest the legislative solutions by amending Thai Civil and Commercial Code to specify provisions regarding the lease of leasehold condominium.

Keywords: Leasehold Condominium, Leasehold Interest, Freehold Condominium

บทคัดย่อ

เนื่องด้วยมีการรวมกลุ่มประชามติระบุกิจจาชีบัน (AEC) รวมทั้งรัฐบาลได้ออกนโยบายเพื่อกระตุ้นและส่งเสริมการลงทุนระยะยาวในภาคอุตสาหกรรมและพาณิชยกรรม จึงมีผลทำให้มีการให้ผลวิบัติของแรงงานและเงินทุนผ่านเข้ามายังประเทศไทย แต่เนื่องจากกฎหมายไทยได้กำหนดห้ามชาติ่างชาติที่ถือครองกรรมสิทธิ์ในที่ดิน อีกทั้งยังจำกัดอัตราส่วนของชาติ่างชาติในการถือกรรมสิทธิ์ห้องชุดในอาคารชุดที่ถือครองกรรมสิทธิ์ (Freehold Condominium) ดังนั้นาอาคารชุดที่ถือครองสิทธิการเช่า (Leasehold Condominium) จึงกลายมาเป็นอีกทางเลือกหนึ่งให้กับชาติที่สนใจจะเข้ามาอยู่อาศัยระยะยาวในประเทศไทย

โดยเหตุที่อาคารชุดที่ถือครองสิทธิการเช่านั้นได้ถูกพัฒนาขึ้นบนที่ดินที่มีเพียงสิทธิการเช่า ดังนั้นาอาคารชุดที่ถือครองสิทธิการเช่าดังกล่าวจึงไม่ได้อยู่ภายใต้บังคับของพระราชบัญญัติอาคารชุด พ.ศ. 2522 แต่อยู่ภายใต้บังคับของประมวลกฎหมายแพ่งและพาณิชย์ ในเรื่องการเช่าอสังหาริมทรัพย์ ตามมาตรา 537 – มาตรา 574 และด้วยลักษณะเฉพาะของธุรกิจอาคารชุดที่ถือครองสิทธิการเช่า ที่ซึ่งผู้เชื่อ (ผู้เช่า) ต้องชำระค่าเช่าทั้งหมดคล่วงหน้าภายใต้วันที่จดทะเบียนการเช่านั้น ทำให้กฎหมายบางมาตราในประมวลกฎหมายแพ่งและพาณิชย์ ไม่เหมาะสมที่จะนำมายใช้บังคับการเช่าอาคารชุดที่ถือครองสิทธิการเช่า ในทางปฏิบัติ คู่สัญญาส่วนใหญ่จะเจรจาด้วยกันกำหนดข้อสัญญาให้แตกต่างไปจากที่กฎหมายบัญญัติไว้ เพื่อที่จะให้มีความเหมาะสมและสอดคล้องกับลักษณะเฉพาะของธุรกิจอาคารชุดที่ถือครองสิทธิ

การเข้าดังกล่าว แต่อย่างไรก็ตาม การตกลงกำหนดข้อสัญญาดังกล่าวนั้นก็ไม่รับรองหรือทำให้ผู้ซื้ออาคาร ชุดที่ถือครองสิทธิการเข้ามั่นใจว่าได้รับการคุ้มครองทางกฎหมายอย่างเหมาะสม อีกทั้งยังเป็นการ ก่อให้เกิดปัญหาตามมาอีกมาก

เพื่อที่จะกระตุ้นเศรษฐกิจของประเทศไทยเฉพาะในภาคอสังหาริมทรัพย์ และเพื่อที่จะ รับรองและทำให้ผู้ซื้ออาคารชุดที่ถือครองสิทธิการเข้ามั่นใจว่าได้รับการคุ้มครองทางกฎหมายอย่าง เหมาะสม วิทยานิพนธ์ฉบับนี้ จึงมุ่งเน้นศึกษาหลักกฎหมายของต่างประเทศที่เกี่ยวข้องกับสิทธิการเข้า อัน ได้แก่ ประเทศสหรัฐอเมริกา และเมืองอ่อนแทร์โอ ประเทศแคนาดา ซึ่งระบบกฎหมายของประเทศ ดังกล่าวได้รับอิทธิพลมาจากการระบบกฎหมายคอมมอนลอว์ ในขณะที่ระบบกฎหมายของประเทศไทยยังมี และประเทศฝรั่งเศสนั้น เป็นรากฐานของระบบกฎหมายชีวิลลอว์ นอกจากนี้ วิทยานิพนธ์ฉบับนี้ ยัง เสนอแนะมาตรการทางกฎหมายในการแก้ปัญหาดังกล่าว โดยการเสนอให้บัญญัติมาตรการที่เกี่ยวข้องกับการ เข้าอาคารชุดที่ถือครองสิทธิการเข้าในประมาณกฎหมายเพิ่งและพาณิชย์เป็นการเฉพาะ

คำสำคัญ อาคารชุดที่ถือครองสิทธิการเข้า, สิทธิการเข้า, อาคารชุดที่ถือครองกรรมสิทธิ์

1. Introduction

By the end of the year 2015, the ASEAN Economic Community (AEC) is implemented. The goal of the AEC is to become a single production base where goods can be manufactured anywhere and distributed efficiently to anywhere within the region. These effects in the ASEAN countries to be aware of the free flow of labor and capital which come to their country. Because of the geographical nature as well as the availability of infrastructure and foreigner friendly habit¹, these all make Thailand to be the attractive country for the foreign investors. In addition, the Hire of Immovable Property for Commerce and Industry Act B.E. 2542 (1999) was enacted, on 19th May B.E. 2542 (1999), with its objectives to ease any rules and conditions in respect of the hire of immovable property for commercial and industrial purposes and to increase the investor's confidence and attractiveness of long term investments particularly

¹ Thailand Board of Investment, "Why Thailand/Thailand's Advantages", available at http://www.boi.go.th/index.php?page=thailand_advantages (accessed June 1, 2016)

foreigners. Besides considering the factor on the law supporting the long term lease, dwelling becomes the one of the significant factors to consider which country they determine to make the long term investment since they have to migrate from their country to another country.

Unfortunately, Thai law restricts the foreigners having the ownership of land; however, they can register the lease of land for 30 years and have the ownership of the house or they can own the freehold condominium in case the ownership in the condominium units collectively not exceeding 49% of the spaces of the whole units in such particular condominium at the time of making the registration of such condominium². As there are many restrictions in having the ownership of a dwelling, leasehold condominium is an excellent alternative for the foreigners who desire to live long term in Thailand. Leasehold condominium is the unique business concept which the buyers (lessees) are required to make full payment of the purchase price of the unit (rental) in advance of the date of registration of the lease.³ Because of its unique business concept, it differentiates the lease of leasehold condominium from the other lease of residential space, for example, rented house, dormitory, etc. For the lease of residential space, the lessee usually makes the payment of rental in monthly or yearly basis during the lease term, whereas, in the lease of leasehold condominium, the lessee requires to make full payment of rental in advance upon the date of registration of the lease. Furthermore, in the lease of residential space, the lessor is more concerning to the characteristic of lessee than the lease of leasehold condominium.

Under Thai Condominium Act B.E. 2522 (1979), leasehold condominium is not regarded as to be condominium since it

² พระราชบัญญัติอาคารชุด พ.ศ. 2522 มาตรา 19 ทวิ (Condominium Act B.E. 2522 (1979), sec. 19 bis)

³ คุณชา จรุกิจอนันต์, ทำอาคารชุดบนสิทธิการเช่าได้ด้วยหรือ?, กรุงเทพธุรกิจ, 19 มิถุนายน 2556” ภายใต้ “กฎหมายเศรษฐกิจ”, (Koonlacha Charungkit-Anant, *Can the condominium be developed on the leased land?*, Krungthepturakij, June 19, 2013, under “Economic Law”) available at <http://www.bangkokbiznews.com/blog/detail/512009> (accessed June 1, 2016)

has been developed on leased land which the developer has no ownership of land.⁴ Therefore, leasehold condominium in Thailand is regulated under the hire of immovable property law, section 537-574 of the Thai Civil and Commercial Code. The provisions under this Code are suitable for the general lease which the rental payment shall be made in monthly or yearly basis. As a result, such provisions are not proper and suitable for the unique business concept of leasehold condominium. In practice, most parties enter into the agreement having some clauses differentiating from the law provided in order to correspond to the unique business concept of leasehold condominium; however, it does not guarantee or ensure the leasehold condominium buyer to be properly protected by law. In addition, the major drawback of principles of lease law in Thailand is that the characteristic of lessee is the essence of a lease agreement. From this, it leads to many unsolved problems relating to the lease of leasehold condominium. In addition, at present, there is no specific provision to apply properly with the lease of leasehold condominium and some possible provisions are silent on some issues and improper to solve the arising problems. It is, therefore, essential to lay down the laws relating to lease of leasehold condominium in the specific provisions.

2. Definitions and History of Leasehold Condominium

According to Brian Bucknall's view, a law professor at Osgoode Hall Law School located in Toronto, Ontario, it denotes the term leasehold condominium that "*the possibility of creating condominium projects on land that is held under a long term lease.*"⁵

Based on Hiroshi and Melvin A. Reskin's view, it defines that "*the purchaser of a unit in the freehold acquires an undivided fee simple interest in land, whereas the purchaser of a unit in the*

⁴ พระราชบัญญัติอาคารชุด พ.ศ. 2522 มาตรา 6 ทว (Condominium Act B.E. 2522 (1979), sec. 6)

⁵ Brian Bucknall, "Leasehold Condominiums: The Further Flight of the Fee" Osgoode Hall Law Journal, Volume 14, Number 1 (June 1976)

leasehold acquires an undivided interest in leasehold on a fee which has been submitted to a horizontal property regime.”⁶

In the eye of Leo J. Joliet, the term leasehold condominium refers to “*the principal use for the leasehold condominium is in those areas where transfers in fee have become so restricted that the public has become accustomed to paying a ground rent for residential property or in those instances where land cannot be conveyed in fee.*”⁷

From aforementioned scholars’ view, it can be implied that leasehold condominium is a condominium where is developed on the land is subject to the leasehold. The purchasers of the leasehold condominium unit do not obtain the ownership of the unit, on the other hand, they shall be granted the right of use the condominium unit for a specific period.

The number of demand of dwelling is increasing, whereas the number of supply of freehold land becomes decreasing. In addition, in some countries, the lands are held the ownership by the governmental agency which their laws restrict to transfer the ownership of lands, for example, Hong Kong, Singapore, etc. Thus, the concept of leasehold condominium was introduced, by the real estate developer, in order to maximize the use of land for solving such issue.

3. Distinction of Freehold Condominium and Leasehold Condominium

In the condominium business field, the interest of real estate can be categorized into two characters which are:

1. Freehold condominium, the buyer has the ownership’s right perpetually which the buyer can sell, distribute, transfer, or give the ownership’s right of the condominium to any other person without any restriction.

⁶ Hiroshi and Melvin A. Reskin, “*Leasehold Condominiums*”, Connecticut Law Review, Vol. 2, No. 1, June 1969

⁷ Committee on New Developments in Real Estate Practice, “*Real Property, Probate and Trust Journal*”, Vol. 2, No. 3 (Fall 1967), 347-361

2. Leasehold condominium, the lessee (the buyer of the leasehold condominium unit) has only the right of possession and occupancy. When the term of the lease ends, the right of possession and occupancy shall revert to the lessor, thus the lessor's interest during the lessee's possession and occupancy is known as a revisionary interest.⁸

The advantages of leasehold condominium are described as follows:⁹

First, the development costs of leasehold condominiums are lower than those of freehold condominium.

Second, the landowner continues to hold the ownership of land, whereas the particular parcel of land can be generated income by means of development.

Third, in case there is the restriction of transfer of the ownership of the land, leasehold condominium can be created without violating such rules.

Fourth, the purchaser of the leasehold condominium unit may be able to purchase the unit at a lower price since the cost of the land is not included.

4. Foreign Laws Relating to Leasehold Interest

4.1 The United States of America

The concept of leasehold condominium is recognized in the Uniform Condominium Act. This Act provides the definition leasehold condominium and the definition the unit owner as well as, the creation of the leasehold condominium. Apart from the Uniform Condominium Act, the Uniform Commercial Code and the Restatement (Second) of Property: Landlord and Tenant, Part V. Transfer by Landlord or Tenant of Interest in Leased Property are the

⁸George J. Siedel and Robert J. Aalberts, *Real Estate Law*, 6th ed., (Mason, Ohio, U.S.A: Thomson West, 2006), 389

⁹ *Supra* Note 8

laws governing the lease of leasehold condominium. Some significant matters relating the lease of leasehold condominium shall be described as follows:

- The lessee is entitled to sublease the leasehold interest to the third person unless otherwise specified in the lease agreement. The sublessee shall be responsible to the lessor directly to the extent of the lease agreement as well as obtaining protection by law.¹⁰

- The lessor or the lessee has the right to transfer the interest of the leased property to the third person unless the law prohibited.¹¹ Even though, the interest of leased property shall be transferred to the third person (transferee), the transferor shall remain binding to perform the obligations which specified explicitly in the lease agreement.¹²

4.2 Ontario, Canada

The concept of leasehold condominium has emerged as the one of type of condominium in Ontario, Canada. Leasehold condominium is created on lands where the declarant (the person who processes the registration of leasehold condominium) possessed only a leasehold interest and has the consent of the owner of land to develop the condominium on the lands.¹³ Condominium Act, 1998 and the Residential Tenancies Act, 2006 are the laws to govern the lease of leasehold condominium. Some significant matters relating to the lease of leasehold condominium shall be described as follows:

- The lessee has the right to transfer or lease of the leasehold interest of the unit to the third person without obtaining the prior consent of the lessor. Nonetheless, in case of the transfer of the

¹⁰ Uniform Commercial Code, § 2A-305

¹¹ Restatement (Second) of Property: Landlord and Tenant, Part V. Transfer by Landlord or Tenant of Interest in Leased Property, § 15.1

¹² Restatement (Second) of Property: Landlord and Tenant, Part V. Transfer by Landlord or Tenant of Interest in Leased Property, § 16.1

¹³ Mark Freedman, “*Condominium Development Update*”, Canadian Institute Condominium Conference, March 2007

leasehold interest of the unit, the lessee cannot transfer the leasehold interest of the unit and its appurtenant common interest in part.¹⁴

- The lessee has also the right of mortgage the leasehold interest of the unit without obtaining the prior consent of the lessor.¹⁵

- In case of the renewal of the lease of leasehold condominium, the lessor bears the responsibility to give the written notice to the leasehold condominium corporation, whether the lessor intends to renew or not at least five years before the end of lease term. Then, such copy of notice shall be sent to the lessee. In case of the renewal of the lease of leasehold condominium, the lease term shall be at least 10 years or the greater term as specified in the notice.¹⁶

- When a lessee dies and there is no other lessee in the leased property, the lease agreement shall be deemed to be terminated in thirty days after the death of the lessee.¹⁷

4.3 Germany

According to the German Civil Code (BGB), leasehold interest can be categorized into two types which are; 1) *Ordinary Lease*, the lessor has an obligation to grant the lessee the use of the leased property for the leased period and the lessee is obliged to pay the agreed rent to the lessor,¹⁸ and, 2) *Usufructuary Lease*, the lessor has an obligation to grant the lessee the right to possess, use and enjoy the property as well as the right to receive benefits from its fruits of the leased property during the leased period.¹⁹ There are some significant matters relating to the lease of leasehold condominium which shall be described as follows:

¹⁴ Condominium Act, 1998, sec. 165 (4) – (5)

¹⁵ Condominium Act, 1998, sec. 165 (4)

¹⁶ Condominium Act, 1998, sec. 174

¹⁷ Residential Tenancies Act, 2006, sec. 91 (1)

¹⁸ อชาวิศว์ สหบุณ, การเช่าช่วงและการโอนสิทธิการเช่า, (วิทยานิพนธ์นิพนธ์ศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554), 95 (Artchavid Sahiboon, Sublease and Assignment,

(Master's Thesis, Faculty of Law, Thammasat University, 2011)), 95

¹⁹ *Id.*

- For residential leases, the lessee may require the lessor to give permission to permit a third person to use or occupy the leased property if the lessee acquires the justified interest. However, the lessor may be entitled to refuse such permission when; 1) there is a compelling reason in the person of the third person; 2) the residential space would be overcrowded or; 3) the lessor cannot, for other reasons reasonably, be expected to permit third person use. Notwithstanding, if the lessor grants such permission, the lessee shall remain fully responsible for any liability and/or damages arising from the third person.²⁰

- Upon the death of the lessee, the lease agreement shall succeed to; 1) spouse holding a joint household with the lessee, including civil partner; 2) lessee's children living in the joint household of the lessee if the spouse does not succeed; 3) other family members holding a joint household with the lessee if spouse or civil partner does not succeed; or 4) persons maintaining a joint household of a permanent nature with the lessee.²¹

- The lessor has the right to transfer the ownership of the leased property to any other person. The transferee shall be bound by the rights and obligations of the transferor (lessor) towards the lease agreement. However, the lessor shall remain to be liable as the surety of the transferee to the lessee in case of the transferee's default of performance obligation under the lease agreement.²²

4.4 France

According to French Civil Code, the hire of thing can be divided into two types which are; 1) *Rente Fonciere*, the lessee shall pay the annuity in order to acquire the immovable property and the original owner shall receive perpetual income,²³ and, 2) *Lease*, the

²⁰ German Civil Code (BGB), sec. 540

²¹ German Civil Code (BGB), section 563-564

²² German Civil Code (BGB), section 566

²³ รศรีนทร์ ปลดอดจำ, การโอนกรรมสิทธิ์ในสังหาริมทรัพย์ให้เช่า, (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554), 71-73 (Rossarin Plordkhome, The Transfer of Ownership

lessor allows his property to be under the administration of the lessee for the limit of time, and the lessee shall pay the rent for the consideration.²⁴ There are some significant matters relating to the lease of leasehold condominium which shall be described as follows:

- The lessee can sublet or assign the leasehold interest to any other person unless there is forbidden as agreed by the parties. It is obviously that the leasehold interest under lease agreement is not regarded as the exclusive right of the lessee. However, it may be forbidden wholly or in part and such forbidden clause is always strict.²⁵

- The leasehold interest under the lease agreement shall be transferred to the heir of the lessor or of the lessee whether the death of the lessor or the lessee occurs. Then, the said heir shall be bound by the rights and obligations of the lease agreement.²⁶

- The purchaser of the leased property shall be bound by the rights and obligations of the lease agreement. Moreover, the said purchaser shall not evict the lessee who has the authentic lease, from the leased property, or the lease agreement has a certain expiry date unless such right reserved by the lease agreement.²⁷

5. Problems regarding Lease Agreement of Leasehold Condominium under Thai Civil and Commercial Code

The provisions of Thai Civil and Commercial Code are incompatible for the current real estate property market. Leasehold condominium, which is a consequence of the evolving real estate development business, becomes more attractive to many buyers who are looking for the living space for their long term stay. There are,

of Immovable Property Hired, (Master's Thesis, Faculty of Law, Thammasat University, 2011)), 141-143

²⁴ *Id.*

²⁵ French Civil Code, article 1717

²⁶ French Civil Code, article 1742

²⁷ French Civil Code, article 1743

however, obstacles or problems arising therefrom which are as follows:

1) Leasehold Interest being Ceased upon Death of Lessee

Since the leasehold interest is an exclusive right of the lessee, when the lessee dies, the leasehold interest shall not be transferred or devolved to the heir of the lessee unlike the ownership right. Therefore, the leasehold interest shall be ceased and the leased property shall be returned to the lessor.²⁸ This principle of lease law certainly leads to the unsolved problem since the lessee had already made full payment of rental in advance upon the date of registration of the lease in order to live until the expiration of the lease term (30 years). In order to solve such arising problem, the parties shall mutually agree on such matter by stipulating the clause in the lease agreement that, such leasehold interest shall be devolved to the heir upon the death of the lessee. This clause is generally called as “succession clause” nevertheless, if this succession clause is not defined in the lease agreement, the heir of the lessee cannot claim from the lessor to perform the obligations under the lease agreement. Therefore, it would be better to have the legislative measure to assure the lessee and the heir of the lessee the proper protection of their rights.

2) Purchaser of Leased Property Bound by only Rights and Obligations under Lease Agreement

In general, for attracting the lessee (purchaser of the leasehold condominium), the renewal clause shall be defined in the lease agreement. When the ownership of the leased property is transferred to the third person (transferee), the transferee shall bind by the rights and obligations under the lease agreement.²⁹ However, the Supreme Court’s Decision has defined that the rights and

²⁸ ศาสตราจารย์ ดร. ไผ่ชาิต เอกจิริยักษ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เช่าที่ดิน, พิมพ์ครั้งที่ 18. (กรุงเทพฯ: วินยูชอน, 2557), 209-210 (Professor Dr. Phathaichit Ekkachariyakon, “*Hire of Property, Hire-Purchase*”, Vol. 18 (Bangkok: Winyuchon, 2014)), 209

²⁹ Thai Civil and Commercial Code, sec. 569

obligations which are bound by the transferee of the ownership of leased property shall be only the rights and obligations under the lease agreement. In other words, any other rights and obligations which are not the essence of the lease agreement shall not be bound by the transferee. Even though, the renewal clause is specified in the lease agreement, the transferee shall not bind to perform such clause since it is not right and obligation which is the essence of the lease agreement.³⁰

3) No Specific Law on Devolution of Rights and Obligations upon the Death of Lessor

According to the principle of law provided, the death of the lessor shall not affect the survival of the leasehold interest, the rights and obligations under the lease agreement shall be transferred to the heir of the lessor. However, this issue is still controversial whether the rights and obligations of the lessor shall be transferred to his heir under section 569 of Thai Civil and Commercial Code or the principles of inheritance law. Such controversy has been referred to by the Supreme Court's Decisions which are divided into two opinions as follows:

- Under the principles of inheritance law, it is resulting that the heir of the lessor shall be bound by the rights and obligations as well as any liabilities under the lease agreement.³¹

- Under section 659, it means that the heir of the lessor shall be bound by only the rights and obligations under the lease agreement.³²

Even though, most scholars have the similar opinions on the principles of inheritance law,³³ there is no explicit law to govern

³⁰ ยำนักช์ คล้ายสังข์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย เช่าที่รัพย์ เช่าซื้อ พิมพ์ครั้งที่ 8 (กรุงเทพฯ: สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์, 2533), 31 (Amnak Klaisang, *The Explanation of Civil and Commercial Code, Hire of Property, Hire- Purchase*, Vol. 8 (Bangkok: Thammasat University Press, 1990)), 31

³¹ รองศาสตราจารย์ สำเรียง เมฆแก้วไกร, คำอธิบายกฎหมาย เช่าที่รัพย์ เช่าซื้อ ลีสซิ่ง, พิมพ์ครั้งที่ 1. (กรุงเทพฯ: นิติธรรม, 2555), 314 (Professor Samrieng Mekkriengkrai, *Hire of Property, Hire-Purchase and Leasing*, Vol. 1 (Bangkok: Nititham, 2012)), 61

³² *Id.*

on this issue yet. In addition, the current Supreme Court's Decision tends to admit that such rights and obligations shall be transferred under section 569.³⁴ Therefore, the heir of the lessor would only be bound by the rights and obligations under the lease agreement. The other rights and obligations which are not the essence of the lease agreement, for example promise to renew the lease agreement clause and the succession clause, are not bound by the heir of the lessor.

4) Leasehold Interest not Regarded as Property Liable to Execution

According to section 285 of Thai Civil Procedure Code,³⁵ it defines that the properties which are not liable to the execution shall be the properties not transferable by law. In general, the leasehold interest is a valued property but, the law has specified the condition of transfer of the leasehold interest by the lessee,³⁶ as a result, it is not freely transferable by law. Nonetheless, such leasehold interest is not strictly prohibited to transfer since such provision provides that the parties can agree otherwise under the lease agreement. Thus, if the lease agreement stipulates that the lessee is entitled to sublease or assign to the other person, it shall be deemed that the leasehold interest is not the exclusive right of the lessee and can be transferable. As a result, the leasehold interest is the property which is liable to the execution.³⁷ On the other hand, if the lease agreement does not specify otherwise, the leasehold interest is not the property which is liable to the execution.

6. Conclusions and Recommendations

³³ *Supra* Note 37 at 194

³⁴ *Supra* Note 37 at 194

³⁵ Thai Civil Procedure Code, sec. 285

³⁶ Thai Civil and Commercial Code, sec. 544

³⁷ ศาสตราจารย์ ดร. มนัส พิทัยภรณ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะ เช่าที่ดิน, พิมพ์ ครั้งที่ 15. (กรุงเทพฯ: จิรรัชการพิมพ์, 2546) 17 (Professor Dr. Mana Pitayaporn, *The Explanation of Civil and Commercial Code, Title: Hire of Property*, Vol. 15 (Bangkok: Jitrarat Printing, 2003)), 17

Since the provisions of Thai Civil and Commercial Code are incompatible for the current real estate property market situation which the form of real estate development business has been evolving. The leasehold condominium, which is a result of the evolving real estate development business, becomes more attractive to many buyers who are looking for the living space for their long term stay. However, there are many problems relating to the lease of leasehold condominium, and fortunately, Thailand has enacted law on the Hire of Immovable Property for Commerce and Industry Act in B.E. 2542. This Act, has adopted some principles of foreign lease laws with the long term lease, and provided some provisions different from Thai Civil and Commercial Code. Some provisions of this Act could be the model law which solves many arising problems. Therefore, the recommendation is to amend Thai Civil and Commercial Code by adding the specific chapter regarding the lease of leasehold condominium, the details of which are described as follows:

1. To Specify Leasehold Interest of Leasehold Condominium Devolved automatically to Heir of Lessor or of Lessee

In this regard, the principles of lease law under the United States of America, Germany and France should be adopted to apply to the lease of leasehold condominium in Thailand, which should stipulate that the lease agreement is not terminated upon the death of the lessor or of the lessee, and the leasehold interest shall be automatically inherited to the heir of the lessor or of the lessee. In fact, this similar legal concept has appeared under section 7 of the Hire of Immovable Property for Commerce and Industry Act B.E. 2542. It has imposed that the rights and obligations in relation to a lease shall devolve upon the heir, unless otherwise specified in the lease agreement. In order to conform to the Hire of Immovable Property for Commerce and Industry Act B.E. 2542, the Thai Civil and Commercial Code should be amended by adding the provision regarding leasehold interest of leasehold condominium upon the death of the lessor or of the lessee as follows;

*“Chapter 4/1
Lease of Leasehold Condominium*

Section 571/1 The rights and obligations in relation to a lease agreement of leasehold condominium including other rights and obligation as specified in such lease agreement shall devolve upon the heir unless otherwise specified in the lease agreement.”

2. To Specify all Rights and Obligations under Lease Agreement Bound by the transferee of the Leasehold Condominium

Based on the study of the foreign laws, most foreign laws have similar principles of law on this issue, which provides that the transferee shall obtain and be bound by the rights and obligations of the lessor towards the lease agreement. Furthermore, the lessor remains having the liability to the lessee in case the transferee breaches the lease agreement. In this regard, such principles should be adopted by the Thai law. Furthermore, the long term lease of immovable property agreement must be in writing and being registered with the competent officer, and therefore the transferee could acknowledge the terms and conditions under the lease agreement before obtaining the ownership of the leased property from the lessor. In order to achieve that objective, the Thai Civil and Commercial Code should be amended by adding the provision regarding the rights and obligations of the lease agreement binding upon the transferee of the leasehold condominium as follows:

“Section 571/2 The lease agreement of leasehold condominium is not extinguished by the transfer of ownership of the leasehold condominium.

The transferee is entitled to the rights and subject to the obligations of the transferor towards the lessee, including other rights and obligation as specified in the lease agreement.”

3. To Specify Leasehold Interest being Assigned or Subleased Freely

Apart from Germany law, most principles of foreign laws allow the lessee to freely assign or sublease the leasehold interest to any other person as long as having no such restriction by the agreement. The Thai law also adopts the same principle as appears under section 7 of the Hire of Immovable Property for Commerce and Industry Act B.E. 2542. Therefore, it should apply the same principle to turn the leasehold interest to be the liquid asset and the property which is liable to execution by adding the provision regarding leasehold interest to be assigned or subleased freely as follows:

“Section 571/3 Unless otherwise specified in the lease agreement, the lessee may freely assign or sublease the leasehold interest of leasehold condominium, whether in whole or in part, to the third person”

REFERENCES

Books

George J. Siedel and Robert J. Aalberts. *Real Estate Law*. 6th ed., Mason, Ohio, U.S.A: Thomson West, 2006.

คำเรียง เมฆกรีงไกร. คำบรรยายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยเช่าทรัพย์. พิมพ์ครั้งที่ 1 กรุงเทพฯ: นิติธรรม, 2555 (Professor Samrieng Mekkriengkrai. *Hire of Property, Hire-Purchase and Leasing*. Vol. 1 (Bangkok: Nititham, 2012))

ศาสตราจารย์ ดร. ไพรพิชิต เอกจิริยกร. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เช่าทรัพย์ – เช่าซื้อ. พิมพ์ครั้งที่ 18. กรุงเทพฯ: วิญญาณ, 2557 (Professor Dr. Phathaichit Ekkachariyakon. *Hire of Property, Hire-Purchase*. Vol. 18 (Bangkok: Winyuchon, 2014))

อำนวย คล้ายสัง. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย เช่าทรัพย์ เช่าซื้อ. พิมพ์ครั้งที่ 8. กรุงเทพฯ: มหาวิทยาลัยธรรมศาสตร์, 2533 (Amnak Klaisang. *The*

Explanation of Civil and Commercial Code, Hire of Property, Hire- Purchase. Vol. 8 (Bangkok: Thammasat University, 1990))

ศาสตราจารย์ ดร. มนัส พิทยาภรณ์ กำลังนิบายนวนวัฒนธรรมไทยแห่งและพาณิชย์ ลักษณะ เจ้ากรรพ์ พิมพ์ครั้งที่ 15. (กรุงเทพฯ: จิรรัชการพิมพ์, 2546) (Professor Dr. Mana Pitayaporn. *The Explanation of Civil and Commercial Code, Title: Hire of Propert.* Vol. 15 (Bangkok: Jitrarat Printing, 2003))

Articles

Brian Bucknall. “Leasehold Condominiums: The Further Flight of the Fee.” *Osgoode Hall Law Journal*, Volume 14, Number 1 (June 1976)

Hiroshi and Melvin A. Reskin. “Leasehold Condominiums.” *Connecticut Law Review*, Vol. 2:37

Committee on New Developments in Real Estate Practice. “Real Property, Probate and Trust Journal.” Vol. 2, No. 3 (Fall 1967)

Mark Freedman. “Condominium Development Update.” *Canadian Institute Condominium Conference*, March 2007

Theses

อาจารย์ ลพินทร์ สาหบูรณ์. “การเช่าช่วงและการโอนสิทธิการเช่า.” วิทยานิพนธ์นิิติศาสตร์รัมมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554. (Artchavid Sahiboon. “Sublease and Assignment.” Master’s Thesis, Faculty of Law, Thammasat University, 2011)

รัศรินทร์ ปลดดํา. “การโอนกรรมสิทธิ์ในสังหาริมทรัพย์ที่ให้เช่า.” วิทยานิพนธ์นิิติศาสตร์รัมมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2554. (Rossarin Plordkhome. “The Transfer of Ownership of Immovable Property Hired.” Master’s Thesis, Faculty of Law, Thammasat University, 2011)

Electronic Media

Thailand Board of Investment. “Why Thailand/Thailand’s Advantages.”

http://www.boi.go.th/index.php?page=thailand_advantages
(accessed June 1, 2016)

กุลชา จรุงกิจอนันต์. “ทำอาคารชุดบนสิทธิการเช่าได้ด้วยหรือ?.” กรุงเทพธุรกิจ, 19 มิถุนายน 2556, ภายใต้ “กฎหมายเศรษฐกิจ.” (Koonlacha Charungkit-Anant. “Can the condominium be developed on the leased land?.” Krungthepturakij, June 19, 2013, under “Economic Law”) <http://www.bangkokbiznews.com/blog/detail/512009>
(accessed June 1, 2016)

Japan Property Central. “What is the difference between Freehold and Leasehold?.” <http://japanpropertycentral.com/real-estate-faq/what-is-the-difference-between-freehold-and-leasehold/#sthash.Q6qlP3Qf.dpuf> (accessed June 1, 2016)

Audrey M. Loeb. “A Resident’s Guide Condominium Ownership – What You Need to Know.” chrome-extension://oemmndcbldboiebfnladdacbdm/adm/http://www.millerthomson.com/assets/files/article_attachments3/MT_A-Residents-Guide-Living-and-Buying-a-Condominium_A-Loeb.pdf (accessed June 1, 2016)

Other Materials

Laws and Regulations

Germany. *German Civil Code BGB.*

United States of America. *Uniform Condominium Act.*

United States of America. 2002. *Uniform Commercial Code.*

United States of America 1977. *Restatement (Second) of Property, Land. & Ten. V Intro. Note (1977)*

Ontario, Canada. 1998. *Condominium Act, 1998.*

Ontario, Canada. 2006. *Residential Tenancies Act, 2006.*

France. *French Civil Code.*

Kingdom of Thailand. 1999. *Hire of Immovable Property for Commerce and Industry Act B.E. 2542*

Kingdom of Thailand, 1979. *Condominium Act B.E. 2522*

Kingdom of Thailand. *Civil and Commercial Code*

Kingdom of Thailand. *Civil Procedure Code*