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Unlocking the Code Part II: Usufruct

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Usufruct is a legal property right which is rich in history. Pronounced yu-ze-frukt, it is another civil law concept which may be quite foreign to those more accustomed to common legal systems. The term comes from the Latin terms usus et fructus which is literally translated into 'use and enjoyment'. Like most civil law concepts, the term derives from ancient Roman law. In most of today's civil law environment, it is defined as the legal right to use and derive profit or benefit from property belonging to another person. Thailand has adopted this same principle in its Civil and Commercial Code where it is codified in section 1417. Here it states that "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." It goes further to clarify that "the usufruct of a forest, mine or quarry entitles the usufructuary to the exploitation of the forest, mine or quarry."

However, chances are you have no intention on mining iron ore or starting a pineapple plantation on the property of your dreams. You just want a holiday home to maybe retire in or some place you can buy and let. From the legal definition found in the Civil and Commercial Code, it is probably safe to say that the right of usufruct had its foundation in agrarian traditions. Indeed, the term usufruct is used widely when defining land laws for tribal cultures where communal land ownership is common. Individuals had a right to farm on the plots assigned to them but they do not own it in person. The term fruits have traditionally referred to replenishable commodities on the property such as, for example, fruits, vegetables and livestock. However, over the centuries, usufruct has evolved to include prevailing concepts of 'fruits' such as rental payments accrued from the property. This, in effect, means it does have a practical application today for home buyers.

### What it Means for Foreign Property Buyers?

Legal ramblings aside, all this comes down to the simple notion that there are more options available to foreign property purchasers in Thailand. It is another tool in the arsenal of civil codes available for home buyers. Usufruct works in many ways like a lease. It is a legal property right and is registered at the local Land Office to offer the usufructuary the enjoyment to the property. A usufruct can be registered for the life of the usufructuary or for a maximum of thirty years. During the period of the usufruct, the owner cannot sell or transfer the property to other third parties. Another benefit is that it would allow you to apply for a House Registration Certificate providing you with greater security on the property. This also means that you can safely rent out the property and receive a rental income from it. As a usufructuary, you may also lease the property to other parties and obtain profits from this. However, when the usufruct is terminated, the property must be returned to the owner.

### Can Usufructs be Transferred?

Under section 1422 of the Civil and Commercial Code, you as the usufructuary have the legal authority to transfer your right of the usufruct to third parties of your choice. However, it should be noted that the right to a usufruct terminates upon the usufructuary's demise so it cannot be passed on to your heirs. This makes it a slightly less favorable option when compared to other property rights in Thailand such as leases and superficies where a well drafted contract may permit such succession rights.

However, there may be a way around this hurdle. As usufructuaries are allowed to lease the property to other parties, technically they may be able to provide their heirs with a further thirty year lease after the termination of the usufruct. Courts in Thailand have interpreted that a lease on a property granted by a usufructuary survives the usufruct itself. This is a rather complex method of succession planning but it can be effective if done correctly.

### Usufruct vs. Common Law

A usufruct is very much like servitude in common law. This is also largely because the concept of servitude derived from Roman law as well. Indeed it possesses many inherent qualities of a usufruct. For example, an easement, which is form of servitude, allows the holder to enter the land of another and take some natural produce from the land such as mineral deposits, fish or game, timber, crops or pasture. Its cousin, the profit ? prendre, is also similar in that they both can be assigned and dealt with as a valuable interest according to the common law rules of property. The difference, however, is that servitude is an incorporeal hereditament which means it can be passed on to your heirs whereas a usufruct terminates upon the death of the parties involved. In this

situation, a usufruct then shares greater similarity to a life estate, which is still in use in some jurisdictions in the US, however, it has been replaced by the law of trusts in the UK. A life estate is where the ownership of the land is given for the duration a person's life. The owner of a life estate cannot be left to heirs and nor can it be inherited.

#### How to Avoid any Problems

When you are thinking about procuring a usufruct on a property in Thailand, there are a few things to keep in mind. As a usufructuary, you have an obligation to maintain the property in proper maintenance including any petty repairs. This also includes payments for any taxes and duties as well as any interest owing upon it so be sure to check there is no outstanding mortgage on the property unless this is part of the deal. Also, you are not permitted to make any major alterations on the property. You are responsible for any destruction or significant depreciation in value of the property unless you can prove that it is not your fault or the depreciation is caused by reasonable use. Due to this, it is prudent to list the items included in the usufruct in an inventory to avoid any misunderstanding in the future. This should also be registered along with the usufruct at the Land Office.

Another important factor to consider when talking about usufruct is insurance. The owner has the right to compel you to obtain insurance on the property and if insurance already exist, you are duty bound to maintain the insurance. This is also for good reason. The destruction of the property caused by fire or any other accidents will mean that the usufruct terminates and reverts back to the owner unless 'compensation' is paid for its restoration. It is in the usufructuary's interest to have good and proper insurance on the property to fully cover the cost of restoring the property into its original condition.

#### Conclusion

Usufruct provides us with a significant means of securing our property interest in Thailand. Care, however, should be taken to understand the implication such a right offers. Despite its value, it is important to understand its limitations and take steps to avoid any problems in the future.

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