

RSM Thailand

Issue 12
30th October 2009

Advantage

Tax and business law intelligence for international companies



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THAI COMMERCIAL AND LAND LAWS

Commercial law bends, but land law remains steadfast!

Commercial law

Effective 1 July 2008, the Civil and Commercial Code Amendment Act (No 18) required notices calling for a meeting of shareholders to be published in a local newspaper. And from 26 August 2008, the Dept of Business Development barred directors of private limited companies passing resolutions by circulation of memos by insisting that directors must physically hold their meetings.

“In order to ease the administrative difficulties” of the above laws by private limited companies, the Cabinet has now approved a draft Amendment Act to the Civil and Commercial Code, as follows:

Directors Meetings

Section 1162/1 of the Civil and Commercial Code is being amended to require directors to be present at the place designated in a notice calling for a directors meeting, unless the company’s articles of association provide that a directors meeting can be conducted via an electronic communication channel that permits the identity of each person attending the meeting to be confirmed and permits each person attending the meeting to consult with one another and exchange opinions.

Shareholders Meetings

Section 1175 of the Civil and Commercial is being amended to require a notice calling a shareholders meeting to be sent by registered mail to each person in the company’s shareholder register at least seven days before the meeting, but if share certificates are bearer share certificates, the notice is to be published at least once in a local newspaper at least seven days before the meeting, and if the notice is for a special resolution, the above is required to be done at least 14 days before the meeting.

Land law

Whilst the commercial business laws can swing back and forth as the Thai authorities struggle with their acceptance of change, the authorities administering the land laws are remaining steadfastly resolved that foreigners will not have ownership rights in land.

From 1954 to the present time, the Land Code has clearly prescribed that foreigners shall not have rights in land ownership, except in certain limited cases.

Even after twelve Amendment Acts to the Land Code (the last one being in 2008), the Land Code restricts foreign ownership rights in land to just the following three cases:

1. Under the provisions of Section 87 of the Code for land for industrial purposes, provided the land is approved under the Investment Promotion Act, the Industrial Estate Authority of Thailand Act or the Petroleum Act;
2. Under the provisions of Section 93 of the Code for land that has been devolved to a foreigner as a statutory heir, provided that the land that has been devolved and the land already under the foreigner’s ownership does not exceed the size of land permissible under Section 87, such as 1 rai for residential purposes; and
3. Under the provisions of Section 96 bis of the Code for land for residential purposes at not more than 1 rai, provided the foreigner brings in capital to invest in Thailand of not less than Bt 40 million for a period of at least five years.

Another case is prescribed in the Code under Section 86, which grants land ownership rights to foreigners pursuant to a treaty with a foreign Government, but the last such treaty was terminated in 1970, and from that time no foreigners have been able to acquire land in Thailand under the provisions of Section 86.

Even in the case of foreigners being married to Thai nationals, foreigners are not permitted to have rights of ownership in land and foreigners in marriages must declare that the land is the separate property of the Thai national and that they have no rights in the land.

In 1992, when the Land Code Amendment Act (No 6) was enacted, majority foreign-owned Thai companies were specifically barred from land ownership rights in Thailand.

But despite the Land Code severely restricting land ownership rights to foreigners and specifically barring majority foreign-owned companies from land rights in Thailand, foreign property developers have poured into Thailand, and with the help of local lawyers and accountants, have used so-called "loopholes" in the Land Code laws to carry on property development businesses in Thailand.

The so-called "loopholes" are not actually loopholes at all, but are structuring strategies that have been specifically developed with the aim of circumventing the laws. These structuring strategies have involved one or a combination of the following:

- Nominee structure, whereby Thai nationals hold the majority of the Thai company's share capital with the Thai nationals providing signed blank share transfer forms to the foreign shareholders and proxy forms to the foreign shareholders for the purposes of voting at shareholder meetings, etc;
- Nominee preference share structure, whereby the Thai nationals or the foreign shareholders hold their shares as preference shares with enhanced or reduced voting and dividend rights;
- Loan structure, whereby the foreign shareholders lend money to the Thai national shareholders for the purchase of the Thai national's shares on the basis that the loan interest expense is deemed to be equal to the dividend income; and
- Holding company structure, whereby foreigners set up a Thai holding company to hold the land title deeds, and set up another Thai company to lease the land from the holding company under a long term leasing arrangement.

However, unlike the authorities in charge with the care of the commercial laws, the authorities in charge of the land laws are not entertaining foreigners' ideas to legalize the structuring strategies, and the authorities are remaining steadfastly resolved that foreigners do not have any land ownership rights in Thailand.

In July 2006, the Ministry of the Interior instructed the Land Department officials to perform investigations of the Thai national shareholders in Thai companies acquiring land before registration of the land transfer could proceed.

In August 2008, the requirements for investigation of Thai national shareholders was not only reaffirmed in a further instruction to Land Department officials, but the Ministry of the Interior instructed the land officials to further expanded their investigations to cover any Thai company acquiring land for any purpose when:

- A foreigner is a director of the Thai company;
- A foreigner is a promoter of the Thai company;
- A foreigner holds shares with a majority of voting rights in the Thai company; and/or
- A majority Thai national shareholder of the Thai company does not have the vocational know-how for investment in real estate.

In September 2009, following a Thailand Research Foundation study which concluded that 90% of beachfront land in Phuket was controlled by foreigners, the Dept of Special Investigations were called in to investigate sixty one cases of foreign property developers, and in October 2009, the DSI legal chief indicated that the Land Code would probably be further strengthened against foreign developers, rather than relaxed.

History records one of the reasons the Americans lost the Vietnam War was because they had failed to fully comprehend the deep rooted inseparable connection the Vietnamese people have with their land, and the same could quite possibly prove to be true for foreign property developers waging a Thailand War.

The information herein was contributed by Steven Herring, an experienced and senior RSM International Tax Law Consultant, for RSM Advisory (Thailand) Limited.

LAND CODE BE 2497 (1954)

Chapters 8 and 9 in Relation to Foreigners' Land Rights

Chapter 8 Foreigners' Land Rights

Section 86. Foreigners may acquire land under a treaty granting ownership of land and subject to the provisions of this Code.

Subject to Section 84, acquisition of land by foreigners for residential, commercial, industrial, agricultural, religious, public charity or cemetery use shall be in accordance with rules and conditions prescribed in Ministerial Regulations and the permission of the Minister.

Section 87. The amount of land permissible under the preceding Section shall be as follows.

- (1) For residential use, not exceeding 1 rai.
- (2) For commercial use, not exceeding 1 rai.
- (3) For industrial use, not exceeding 10 rai.
- (4) For agricultural use, not exceeding 10 rai.
- (5) For religious use, not exceeding 1 rai.
- (6) For public charity use, not exceeding 5 rai.
- (7) For cemetery use, not exceeding 0.5 rai.

Provided that foreigners who wish to use land bigger than that prescribed in (3) for industrial use, the Council of Ministers may, if considered appropriate, permit such use under particular rules and conditions, and the provisions of Section 48 shall apply *mutatis mutandis*.

Section 88. Section 87 shall not prejudice foreigners who own, prior to the date this Code comes into force, an amount of land bigger than that prescribed in Section 87. Such foreigners who owned an amount of land less than that prescribed or have heretofore disposed of land may acquire additional land under the condition that the total amount of land shall not exceed the restrictions under Section 87.

Section 89. Foreigners shall use land only for the purpose permitted. Land used for other purposes is forbidden unless permitted under the prescriptions in Section 87. Non-use of land that has been formerly permitted for a certain purpose shall be notified in accordance with the rules and procedures prescribed in Ministerial Regulations within 30 days from the date of non-use of land.

In the case where foreigners wish to use land for purposes other than those permitted, an application for permission to the Minister shall be made in accordance with the rules and procedures prescribed in Ministerial Regulations. The Minister shall have the power to grant permission if it is considered appropriate.

Section 90. Foreigners, who acquire land for a permitted purpose and no longer use it or use it for other purposes without permission, shall dispose of such land within a time period prescribed by the Director-General, which shall be not less than one hundred and eighty days and not more than one year. After such time period, the Director-General shall have the power to dispose of such land.

Section 91. Foreigners, who acquire land for a permitted purpose and use a portion of it for other purposes, shall dispose of the portion within a time period prescribed by the Director-General, which shall be not less than one hundred and eighty days and not more than one year. After such time period, the Director-General shall have the power to dispose of such land.

Section 92. Foreigners, who acquire land under the provision in paragraph two of Section 87 and fail to comply with the rules and conditions prescribed by the Ministers, shall dispose of the land within a time period prescribed by the Director-General, which shall be not less than one hundred and eighty days and not more than one year. After such time period, the Director-General shall have the power to dispose of such land.

Section 93. The Minister may approve the acquisition by foreigners, as statutory heirs, of land that is devolved by succession under the condition that the total amount of land including any existing land prior to the devolution shall not exceed the limitations under Section 87.

Section 94. Foreigners who acquire land unlawfully or without permission shall dispose of the land within a time period prescribed by the Director-General, which shall be not less than one hundred and eighty days and not more than one year. After such time period, the Director-General shall have the power to dispose of such land and the provisions in Chapter 3 for forced disposals of land shall apply *mutatis mutandis*.

Section 95. A person who acquires land while holding Thai nationality, but later changes his/her nationality to become a foreigner shall be entitled to the same rights in land as other foreigners and shall dispose of the excess. The provisions of Section 94 shall apply *mutatis mutandis*.

Section 96. If it appears that any person acquires land on behalf of a foreigner or a juristic person under Section 97 or Section 98, the Minister shall have the power to dispose of such land and the provisions of Section 94 shall apply *mutatis mutandis*.

Section 96 bis. The provision that foreigners may acquire land under a treaty granting ownership of land under the first paragraph of Section 86 shall not apply to foreigners who bring in investment capital of more than forty million Baht as prescribed in Ministerial Regulations for acquiring land for residential purposes not exceeding one rai and approved by the Minister.

The acquisition of land by foreigners under paragraph one shall comply with the rules and conditions prescribed in Ministerial Regulations, and the essential issues that shall be included in the Ministerial Regulations are as follows:

(1) The type of business in which foreigners invest shall be economically and socially beneficial to

the country or which the Board of Investment declares as being eligible for investment promotion.

(2) The period for maintaining the investment shall not be less than three years.

(3) The land that foreigners acquire shall be within the locality of the Bangkok Metropolitan Administration, the City of Pattaya Municipality or a zone designated to be a residential area under the law on city planning.

Section 96 ter. Foreigners acquiring land under Section 96 bis and failing to comply with the rules and conditions prescribed in Ministerial Regulations under paragraph two of Section 96 bis shall dispose of the land within a time period prescribed by the Director-General, which shall be not less than one hundred and eighty days and not more than one year. After such time period, the Director-General shall have the power to dispose of such land.

If land acquired by foreigners under Section 96 bis is not used for residential purposes within two years of the date of registration of the acquisition, the Minister shall have the power to dispose of such land.

Chapter 9 Rights of Particular Types of Juristic Persons

Section 97. The following juristic persons shall have the same rights as other foreigners:

(1) Limited companies or public limited companies with registered capital held by foreigners more than forty nine percent or with foreign shareholders more than one half of the total number of shareholders. For the purpose of this Chapter, a share certificate issued to a bearer shall be deemed as held by a foreigner.

(2) Registered limited partnerships or registered ordinary partnerships with invested capital held by foreigners greater than forty nine percent of

RSM Thailand

the total capital or with foreign partners more than one half of the total number of partners.

- (3) Associations and co-operatives with foreign members exceeding one half of the total number of members or which operate particularly or mainly for the benefit of foreigners.
- (4) Foundations with objectives particularly or mainly for the benefit of foreigners.

Section 98. In the case where a juristic person prescribed in Section 97 holds the shares in or invests in the capital of another juristic person, such other juristic person shall be deemed a foreigner.

Section 99. The provisions in Chapter 8 apply *mutatis mutandis* in relation to rights in land for juristic persons under Section 97 or Section 98, and such juristic persons shall bear the same duties and liabilities imposed upon other foreigners.

Section 100. A juristic person who acquired land at a time when its condition is not under the provisions of Section 97 or Section 98 but subsequently its condition is under the provisions thereof, the provisions of Section 95 shall apply *mutatis mutandis*.

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