OWNERSHIP OF LAND – WATCH OUT: NOMINEE ARRANGEMENTS UNDER STRONGER SCRUTINY!

This month’s legal article is an extract of the 2013 DFDL Real Estate Investment Guide

Under the Land Code and the Foreign Business Act (FBA), BE 2542 (1999) foreign corporations and foreign citizens are strictly prohibited from owning land. A locally registered company will be regarded as a “Thai” company and may own land in Thailand if more than 51 percent of the total issued shares in the company are held by Thai shareholders and the number of Thai shareholders is greater than the number of foreign shareholders.

Section 36 of the FBA prohibits any Thai national or juristic person from “aiding or abetting or taking part” in any business restricted under the law, including “land-trading”. Nevertheless, foreign investors have often formed Thai corporations to own land in cooperation with Thai majority shareholders.

In recent years the Interior Ministry has adopted a strict enforcement policy and issued a series of regulations to limit the use of Thai land holding companies by foreign investors. The local land offices now require Thai shareholders to provide evidence of the source of funds for capitalization of any Thai corporation with foreign shareholders (or foreign directors) engaged in land development. The Ministry of Commerce also requires evidence of the source of funds of Thai shareholders if the foreign shareholding exceeds 39 percent (or if any directors are foreign citizens).

An Interior Ministry regulation (Mor-Tor- 0515/Wor 2227) dated July 21, 2008 confirms that any Thai person who owns land for the beneficial interest of foreigners shall be subject to both civil sanctions under the Land Code as well as criminal sanctions under the Criminal Code.
Based upon the Interior Ministry’s strict enforcement policy, foreign investors interested in land development are well advised to hold property rights through registered, long term leasehold interests (as opposed to freehold land ownership) or in cooperation with legitimate Thai shareholders who are not considered “nominees”.

There were several news reports in July 2012 that the Department of Business Development (DBD) of the Ministry of Commerce would soon announce six new guidelines for inspecting 27,000 companies in Thailand (out of a total of 32,000 registered companies in which foreigners have shares) that may be breaching the FBA.

The six guidelines concern percentage of shareholding, voting rights, management power, source of funds and investment capital dividend payments, and financial transactions. The guidelines are expected to be applied by the DBD’s legal officers and the Department of Special Investigation (DSI) in inspecting business that may be in breach of the FBA.

If the DBD finds any company at risk of a breach under those guidelines the case will be passed on to the DSI for further in depth investigation.

Business that will be closely inspected are those categorized in annexes I, II and III of the FBA, which are involved with the country’s security or stability, or affect local competitiveness. Included are companies involved in such enterprises as agriculture and land leasing. The six guidelines concern percentage of shareholding, voting rights, management power, source of funds and investment capital dividend payments, and financial transactions. The guidelines are expected to be applied by the DBD’s legal officers and the Department of Special Investigation (DSI) in inspecting business that may be in breach of the FBA.

If the DBD finds any company at risk of a breach under those guidelines the case will be passed on to the DSI for further in depth investigation.

Please note, however, that the reports did not mention that the DSI, DBD and Land Department would investigate land holding companies specifically. Thus land holding companies are not specifically targeted but may be subject to investigation if they operate a business such as land trading, land development, or leasing.

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