



## **Foreign Land Property Ownership Thailand :**

Under the Thailand Civil and Commercial Code foreigners have the same property rights as are available to Thai nationals, however it is under the Land Code Act B.E. 2497 (1954) prohibited for foreigners to own land in Thailand. As ownership of land is an essential element of any real estate (land and house) ownership it leads to the conclusion that, besides an apartment in a licensed condominium, there is NO freehold ownership of real estate (land and house) available for foreigners in Thailand.

### **Foreign ownership under a treaty**

Under the Thailand Land Code Act foreigners may own land under the provisions of a treaty, however the last treaty allowing foreigners to own land in Thailand was terminated in 1970 and there is currently NO treaty with any country allowing foreigners to acquire and own land in Thailand. In fact anyone who contravenes with the above section shall be punished with a fine not exceeding twenty thousand baht or an imprisonment not exceeding two years, or both (section 111 of the Land Code Act).

**Section 86 Land Code Act:** 'Foreigners may acquire land by virtue of the provisions of a treaty giving the right to own immovable properties and subject to the provisions of this Code' .

### **Exemptions for foreign land ownership**

In theory foreign individuals can own land up to 1 rai (1600 square meters) under section 96 bis of Land Code Amendment Act (1999) for residential purposes through the Board of Investment which requires a 40 million baht investment into Thailand in specified assets or government bonds beneficial to the Thai economy. If granted it is under strict conditions and in specified areas and requires approval of the Minister of Interior. In practice, even if you would be able to make an additional investment in the Thai economy of 40 million baht, this is not a viable option. In addition this ownership is **not transferable by inheritance**, therefore limited to the life of the foreigner granted the right to own land under this exception.

### **Foreign companies**

Ownership of land is also not open to foreign companies, including Amity treaty (US) companies, BVI or Hong-Kong limited companies or any other foreign juristic entity. These companies may, similar to foreign individuals, have a minority interest in a Thai company, but may also NOT use nominee structured holding companies for land ownership.

Foreign corporations with substantial investments benefiting the Thai economy may have special privileges and exemptions for land ownership granted for the duration of their business in Thailand under:

- Section 27 of the Investment Promotion Act
- Section 44 of the Industrial Estate Authority of Thailand Act
- Section 65 of the Petroleum Act
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### **Foreigners inheriting land**

Again in theory, a foreigner married to a Thai national may as a statutory heir with approval of the Minister of Interior inherit land under section **93 of the Land Code Act**, however this section must be read in combination with the above **section 86 of the Land Code Act** (i.e. in relation to ownership granted under a treaty) therefore it does not apply to foreigners inheriting land from a Thai spouse. They may inherit land but must dispose of the land within one year of acquisition.

### **Foreign controlled Thai companies**

Up till May 2006 it was common practice for foreigners to form a Thai company and to hold land under a Thai company structure. Since the land office guidelines starting in May 2006 followed by the business registration rules and the proposed amendments to the Foreign Business Act this practice is less common. Recent discussions in the Thai government to further clamp down on this structure through new laws and regulations have led to the conclusion that a Thai company structure is not a viable or secure vehicle to create a long term foreign controlling interest in real estate in Thailand.

### **Land Ownership and Thai Spouse**

Foreigners are not allowed to have co-ownership in land together with a Thai spouse.

If a foreigner has a Thai spouse then land could be bought on the name of the Thai spouse but obviously this carries some risk. The property will be registered in the Thai spouse's name and for the spouse to buy the land proof is required that the money used to purchase the property is legally from the Thai spouse, with no foreign claim to it. The same applies in case of the purchase of a condominium unit exceeding the foreign ownership quota in such condominium. In case of acquisition of land, land and house or in some cases condominium and registration of ownership at the Land Department the Thai spouse;

1. has to show evidence that all money paid is a personal property (*Sin Suan Tua*) according to Section 1471 and Section 1472 of the Civil and Commercial Code, or;
2. must together with his/her foreign spouse at the Land Department's provincial or local land office confirm in a standard certify letter of confirmation that all money paid for the property is personal property (*Sin Suan Tua*) and not a common property (*Sin Som Ros*). It is in this case not the Land Department's policy to investigate the actual sources of funds. (\*) If the foreign spouse does not live in Thailand it can be recorded by ambassador / consular or notary public in such country.

It is only since the Ministry of Interior regulation dated March 23, 1999 (*Most Urgent Letter Mor.Thor 0710/Wor.792*) that a Thai national married to a foreigner is allowed to legally acquire and register ownership of land in Thailand. Prior to the regulation a Thai national married to a foreigner lost the right to acquire land in Thailand because without the procedure the foreign spouse could acquire an illegal interest in land as property between husband and wife (continue: the registration procedure). The procedure in the 1999 regulation issued by the Ministry of Interior is based on the principle of section 1472 of the Civil and Commercial Code that if personal property has been exchanged for other property during the marriage that property becomes and remains a personal property and not a jointly owned property between husband and wife. This way the foreign spouse does not obtain any ownership rights in the land based on Thai family laws (property between husband and wife). Without the joint confirmation in the certify letter or proof the acquisition is paid with personal property of the Thai spouse the request for ownership registration must be referred to the Land Department in order to obtain an approval from the Minister. Without written evidence the land office will not allow registration of ownership.

Note: Any foreigner's minor having Thai nationality may purchase or accept land as a gift with no consideration and register the ownership of such land if it does not appear after investigation that he/she has done so to avoid the law (primarily aimed at tax laws).

Management of the land by the Thai spouse married to a foreigner

The land must become a **separate and personal property** (*Sin Suan Tua*) of the Thai spouse according to section 1471 and section 1472 of the Civil Code, and not a jointly acquired or community property between husband and wife (*Sin Som Ros*). As opposed to *jointly owned* marital realty property (section 1476) the Thai spouse can sell, mortgage, transfer or exchange the property without consent of the foreign spouse .

Inheritance of land by a foreign spouse as statutory heir

In theory a foreigner can acquire land by inheritance as **statutory heir** (as opposed to legatees or heirs who are entitled by last will) and register ownership after having obtained permission from the Minister of interior. **Section 93** of the Land Code Act: 'A foreigner who acquires land by inheritance as statutory heir can have an ownership in such land upon a permission of the Minister of Interior. However, the total plots of land shall not be exceeding of those specified in Section 87'.

It should be noted that the over 55 year old section 93 applies **only** to foreign ownership of land **under a treaty** (section 86 Land Code Act) and NOT to foreigners receiving land as a statutory heir from a Thai spouse. The last treaty allowing foreigners to own land in Thailand was terminated in 1970 therefore there is currently NO legal ground for the Minister of Interior to allow any foreigner to acquire land in Thailand as a **statutory heir**.

This in practice means that any foreign spouse who acquires land by inheritance as a statutory heir has to transfer the land within 1 year to a Thai national. The forgoing applies only to foreigners inheriting land as a statutory heir and not to foreigners heirs who acquire land under a last will.

Inheritance of a condominium

Any foreigner who acquires a condominium unit by inheritance, either as statutory heir or inheritor under will, shall obtain ownership of such unit, but must **qualify** under section 19 of the Condominium Act to actually register ownership with the Land Department. If he does not qualify under section 19 or if he qualifies but his ownership would exceed the allowed 49% foreign

ownership in the condominium building it is required by law that the unit shall be disposed of within 1 year from the date of acquisition of such condominium unit. If the foreigner fails to do so, the Director-General of Land Department shall have power to sell the condominium on the foreigner's behalf, read up 'condominium acquired by inheritance'.

### **Thailand land acquisition by a Thai national married to a foreigner:**

foreigners married to a Thai national can't own land in Thailand, but the land department does allow a Thai national married to a foreigner to own land after a joint statement together with his or her foreign spouse or proof that the money expended on the land is **personal property** of the Thai spouse. This effectively means that the land (and in practice often land and house and in some cases condominium) is purchased as a personal property of the Thai spouse and not becomes a marital or jointly owned property between husband and wife (*Sin Somros*). The foreign spouse has therefore no claim to the property and the Thai spouse has the right to sell, mortgage, transfer or exchange the property without consent of the foreign spouse.

### **Management during marriage of a real estate property owned by the Thai spouse**

Only immovable property that is jointly owned by the spouses must under Thai law be jointly managed by the spouses (section 1476 of the Civil and Commercial Code), unless agreed differently in a prenuptial agreement. In case of real estate purchase by a Thai national married to a foreigner the **land** cannot become a marital property therefore it will always be owned and managed by the Thai spouse.

Note that it's only the land part that is restricted for foreign ownership, not the structures upon on the land or immovable property as a whole. Joint ownership in the house separate from the land would prevent sole management by one of the spouse over the real estate property as a whole as in this case the law requires joint management by husband and wife. If land is registered on the name of the Thai spouse and subsequently a house is build the house could be legally considered marital property, but this will not prevent the Thai spouse as the owner of the land from managing the property.

### **Agreements between husband and wife:**

**Section 1469 Civil and Commercial Code:** 'Any agreement concluded between husband and wife during marriage may be avoided by either of them at any time during marriage or within one year from the day of dissolution of marriage; provided that the right of third persons acting in good faith is not affected thereby'.

Section 1469 means that property between husband and wife is governed by the statutory system of property between husband and wife under the Civil and Commercial Code. Any agreements or gifts made during the marriage between husband and wife cannot change the statutory system of personal and marital or property owned between husband and wife. For the same reason a post-nuptial agreement as opposed to a prenuptial contract is not allowed under Thai law. This system in Thai marriage laws is not different from many Western countries.

Also the Ministerial Regulation and 'letter of confirmation' by which land has been registered as a personal property of the Thai spouse cannot supersede the system of property between husband and wife as laid down in the Civil and Commercial Code. This in effect means that even though real

estate in Thailand has been registered as a personal property of the Thai spouse it will not per definition be allocated to the Thai national in the event of a divorce. In the event of a contested divorce the courts in Thailand must divide the properties according to the Civil Code's system, irrespective the content of the certify or confirmation letter signed during the marriage and registration of the land as a personal property of the Thai national.

Protection in case of land and house purchase on the name of the Thai spouse during their marriage:

What foreigners often want to prevent (because they in fact paid for the property) is sole management by the Thai spouse. They want to prevent that the land is easily sold or encumbered without their consent. This can be done through a usufruct agreement in case of land and house or in case of undeveloped land a right of superficies. Also a usufruct or superficies between husband and wife created during the marriage can be cancelled in a divorce, but the Thai spouse cannot directly cancel the right of usufruct or superficies (as long as it's registered on the title deed). If it's not on mutual consent the Thai spouse would need a Court order to have the usufruct or superficies removed from the title deed therefore making registered real rights such as usufruct and superficies an acceptable protection for a foreign spouse.

**The options are:**

- agree on the registration of a right of usufruct in favor of the foreign spouse, or;
- separate land and house and register the structure upon the land as joint or personal property of the foreign spouse. (in this case an additional right of usufruct is not possible, but as a general protection keep a record of all documents and payments made to be used as proof in case of a divorce), or;
- land and house is registered in the Thai spouse's name and the foreign spouse accepts full management and ownership by his or her Thai spouse.

In case of undeveloped land registered in the Thai spouse's name the options are:

- agree on the registration of a right of superficies in favor of the foreign spouse, or;
- apply for the building permit in the foreign spouse's name (depending on the source of the funds option a an b give joint or sole ownership of the house to the foreign spouse), or;
- the building permit is in the name of both spouses and the house becomes a joint property (in this case a right of superficies is not possible, but as a general protection keep a record of all documents and payments made to be used as proof in case of a divorce), or;
- the land and building permit is in the Thai spouse's name and the foreigner accepts full ownership and management by his or her Thai spouse.

**Division upon divorce**

Shifting personal property from one party to another or encumbering personal property by agreement between husband and wife during marriage can be corrected and voided in case of separation and division of assets in a divorce based on section 1469 Civil and Commercial Code. This also means that real estate property registered during marriage as a personal property in a Thai spouse's name will not automatically be allocated to the Thai spouse in a divorce by a Thai court if the purchase actually came from the personal property of the foreign spouse, regardless the procedure of registration of the property in the Thai national's name. The land or real estate can even be allocated in a divorce settlement to the foreign spouse by the Court. In this case the foreigner has 1 year to dispose of the land.

## **Real Estate Law and Land Ownership Thai Company :**

### Land Holding Company structure

Thai Companies as a vehicle to own land for a foreigner is not allowed under Thai law

Thai law allows land ownership by a partly foreign owned Thai company as long as the foreign shareholding does not exceed 49% of the shares and the majority of the shareholders are of Thai nationality (section 97 land code act). It is not allowed for foreigners to use nominee Thai shareholders to create a majority Thai owned company for the purpose of land ownership. The use of nominee shareholders to circumvent the Thailand Land Code Act or Foreign Business Act is illegal and any foreigner setting up a company with nominee shareholders is violating foreign ownership restrictions and creates an unlawful foreign ownership, irrespective the number of shares he owns in the company.

Up to the May 2006 Land Office guidelines aimed at preventing the use of Thai nominee shareholders by foreigners, it was common practice for foreigners to purchase land or condominium beyond the foreign ownership quota in a nominee structured majority Thai owned foreign controlled Thai limited company. As long as the company had a majority Thai shareholdings there were no practical restrictions when purchasing a property and the partly foreign owned company was treated as any other Thai company. Currently the government has issued new regulation preventing circumvention of the law by foreigners through Thai companies and currently this structure is only possible by circumventing the law and regulations.

### **Is the company foreign or Thai?**

In the Land Code Act a company is defined as '**foreign**' or '**alien**' if more than forty-nine per cent of its capital is owned by foreigners or more than half of whose shareholders are foreigners. Since July 2008 the private limited company must have a minimum of 3 shareholders at all times, and to be considered **Thai** under the Land Code Act the company must have at least **2 Thai shareholders opposite 1 foreign shareholder** who may hold up to 49 percent of the shares.

Under the Foreign Business Act a company is deemed **foreign** if half or more of the juristic person's shares held by foreigners or a juristic person having foreigners investing with a value of half or more of the total capital of the juristic person. A company is still considered Thai under the Foreign Business Act if the company has only **1 Thai shareholder** as long as he owns the majority of the shares in the company.

If it is deemed that the partly foreign owned company is using **Thai nominee shareholders** the company is deemed **foreign** irrespective the number of shares held by the foreigner and the foreigner is violating foreign ownership restrictions as the foreigner will be deemed the actual owner.

**Currently the bar on the use of nominees lies in the source of the capital investments, but there are plans in the Thai government to change the foreigner definition of Thai companies to close loopholes in the law.**

## **The main drawbacks and requirements:**

- Setting up a company with the purpose to circumvent the laws prohibiting foreign ownership of land or condominium exceeding the foreign ownership quota has an illegal purpose and this structure will in court be deemed void pursuant to sections 150 and Section 172 of the Civil Code and its ownership on behalf of the foreigner is illegal.
- Foreigners are restricted from using Thai nominee or proxy shareholders partners in the company. The use of nominees by foreigners is illegal and will lead to unlawful foreign land ownership or unlawful engagement in protected businesses under the Foreign Business Act.
- The foreigner will be a director of a Thai Limited company and will thus be obliged to fulfill his duty as a director, comply with the Foreign Business Act and Alien Employment Act. A foreigner acting on behalf of a company without a work permit could be prosecuted and deported out of Thailand.
- The company must be active and comply with the law and money should pass through the company books, shareholder meetings must be held, minutes of meeting prepared, and yearly accounting must be filed or the director could be liable for fines and even removal from the register of companies .
- The company formation must have a legitimate business purpose which are stated in the company objectives and start operating a business within a reasonable period of time from formation and registration of the company. A dormant company can be removed from the register for companies.
- If land **and** house is owned by a Thai company and the property is used as the director's residence or holiday home the company must pay housing and land tax even if the company does not receive any income out of it or does not operate a business .
- The company structure is not immune for future changes in the law or stricter enforcement of existing laws.

## **New Regulations**

Before the May 25 2006 guidelines and July 21 2006 Standard Practice Letter (how to deal with a partly foreign owned company) the standard practice of the local land offices in the tourist resort areas was to investigate only the number of shares held by the foreigner and if the majority of the shareholders were Thai nationals read initial articles in the press...

### **New regulations restricting the use of Thai nationals as nominee or proxy shareholders:**

In case of foreign involvement in a company applying registration of land the land officer must under the new Land Office Guidelines investigate the Thai shareholders. The Thai shareholders must present themselves at the land office and among others supply proof of income and monthly salary they earned. The Thai shareholders must be financially able to actually invest the amount of capital in the company. In case the purchase price is higher than the registered capital of the company this shall mean the source of the capital used for the purchase of the land and not only the registered capital of the company.

Under the new regulations a shareholder can't be the cleaner from the law office setting up the company.

The guidelines order the officials to enforce **Section 74 of the Land Code:**

**Section 74** of the Land Code:

'In recording rights and legal acts by the competent authority under Section 71, the competent authority shall have the power to interrogate the parties and summon persons concerned to give oral testimony or send relevant written evidence as may be necessary and then proceed as may be appropriate under the circumstances. If there is reason to believe the recording of such rights and legal acts is in evasion of the law or there is reason to believe the purchaser is purchasing on behalf of an alien, instructions shall be asked of the Minister whose word shall be final'.

The **Business registration rules** preventing the use of Thai nominee shareholders also order the Department of Business officials to investigate the Thai shareholders when dealing with registration of a company with more than 40% foreign ownership or when the company has a foreigner managing director. When submitting the application for registration the Thai shareholders must in this case submit evidences showing the source of their investment together with the business registration application.

The planned **Foreign Business Act amendments** did not yet pass, but the idea was to include voting rights and management as a criterion in defining partly foreign owned companies foreign or Thai. Juristic persons incorporated under Thai law which are deemed foreign are not allowed to own land and land owned must be disposed of by the foreigner .

There is still no general restriction on the nationality of directors in a Thai company and foreigners are allowed to control a Thai company, but as every year (section 1152 Civil and Commercial Code) one third or the number nearest to one-third of the directors must retire from office. If the FBA amendments would have become law then this would likely also have affected existing partly foreign companies as re-election of a foreign managing or sole director in a Thai company would simply be restricted. In case of re-election of a foreign director the company would make itself **automatically a foreign company!**

### **Beware of the dodgy advice you get in Thailand**

Most of the local property law and accounting offices in the tourist areas of Thailand aiming their services at foreigners have the same interest as the real estate agents and fully depend for their income on property sales or have a direct interest in the real estate market. Can you trust them? Not really. Local lawyers and accountants still suggest loopholes in the law as it generates income (their main source of income), but it is not using a loophole when you transfer land to a 100% Thai owned company and the next day transfer 49% or 39% of the (preference) shares to the foreigner. If the company uses nominees (currently defined in the Land Office guidelines and Business registration rules) or is not in operation or set up to circumvent the law the foreigner is violating the law and could on investigation at a later date be forced to sell the land and the foreigner will be liable for severe penalties.

**The only reason to set up the company without a foreign shareholding is obviously because the land office would not allow registration as the structure is illegal. Despite the complicated lengths some will go to suggest ways around the law, it is all doubtful if not plain illegal.**

### **Section 100 Land Code Act:**

'If a juristic person who acquired land while not within the scope of the provisions of Section 97 and 98 (meaning foreign), but later comes within their scope, the provisions of Section 95 (forced sale) shall apply mutatis mutandis'

## **Local corruption**

The recent land registration rules from the Land Department and Ministry of Interior must effectively prevent the use of nominee structured limited companies by foreigners for land purchase, but local land officials may turn a blind eye because of corruption and pressure from leading figures with a financial interest in the property market. The law is actually applied in different ways and you could say that because of corruption on a local level the law and latest regulations are not fully enforced. It is well known that several high-end officials were involved in land transactions with foreigners or have a direct financial interest in the property market. Just look at the alleged involvement of Thai Rak Thai politicians in forest encroachment and land speculation on the Samui island or a recent Samui land scam or public land encroachment cases in Phuket involving government men and ranking civil servants. This is just the tip of the iceberg of many more examples where the officials who must apply the law allow a breach of the law because they have a financial interest in the deal where land is in fact sold to foreign investors operating through nominees or a Thai company.

Another 2012 quote in relation to illegal land scams and corrupt officials selling land to foreigners: 'some prime areas were to be cleared and divided into small plots and sold to foreigners who would then build resorts worth more than 80 million baht each.

This latest policy change by the government is not the closing or removing of a loophole but enforcement of existing laws. Even though still offered by local law and accounting firms, setting up companies with nominee shareholders to own land on behalf of foreigners is and always has been illegal. Law enforcement and procedures may change rapidly in Thailand and selective or poor law enforcement in the past is no guarantee for the future.

## **Work permit**

Under present law a foreign managing director acting on behalf of the company (like opening a company's bank account, applying for telephone lines, registering a land transfer, filing balance sheets, applying for updated company documents) may in addition to a passport, minutes of meeting and updated company documents be required to show a work permit issued by the Alien Employment Division of the Labour Department before any signed document will be accepted. Any document signed by the foreign director **could be rejected until a work permit has been issued**. It is in the Bangkok area for example not possible for a foreign director to open a company bank account without a work permit, and if he owns 2 companies he needs a separate work permit for each company.

To comply with the requirements to obtain a work permit could be impossible for a foreigner director of a practically dormant company. Approved and pending amendments (May 2007) to the Alien Employment Act in Thailand will make it even more difficult for foreigners to obtain a work permit.

Work is defined very broadly in the law; 'engaging in work by exerting energy or using knowledge whether or not in consideration of wages or other benefit' (section 5 Alien Working Act). The foreign director acting on behalf of the company without a work permit could in the worst case face criminal charges and even deportation out of Thailand.