

Ensuring your investment is legally sound

By Desmond Hughes and Kris Limcharoen

As high season is upon the Phuket property market and tourist numbers throughout the other regions of Thailand generally increase, an up to date summary – taking into account the military rule in Thailand; the changes to procedures (not the law) at the Ministry of Commerce and the Land Offices in recent months – should provide some guidance for prospective investors, and also sellers who are contemplating and reviewing their own legal sales structures in their developments.

Options for Investment

Condominiums

Investors who wish to make a return solely based on financial speculation but with the minimum amount of complication relating to legal risk should look closely at purchasing a “direct freehold condominium” unit. Forty-nine percent of the registrable area of a condominium in Thailand can be owned by foreigners, and therefore there is no need for lengthy analysis of the foreign ownership restrictions when a foreigner embarks upon such an investment.

Those who have some operating business in Thailand and possess shares in a legitimately incorporated and properly regulated Thai company, and where the 51% of the registrable area only remains for sale to Thai nationals or Thai entities, may consider procuring an investment by that company but with a lease from the Thai company to themselves considering the fact that the Thai company is not supposed to be used as a shell vehicle to circumvent the law. The use of “nominees,” which is still to date being examined by the Thai Ministry of Commerce, should be avoided.

As an alternative, a condominium seller may have set up a leasing system whereby the lessees participate in the lessor company, indirectly to ensure that there is not an implication of an attempt to simply control all of the 51% of the units, through management ar-

rangements. Such a system must be satisfactory to the revenue department in terms of correct taxes being paid on the entity which owns the condominium units and also the rental income received by the same entity from the rental income from leasing the units.

Condominiums are regulated by specific consumer protection driven law, contracts have minimum standards and provided the seller has been advised correctly on what the contents of those contracts should be, the sales process for a condominium should be relatively straightforward.

Villas

It is obviously not appropriate, from the recent tightening of regulations and examination of Thai companies and legitimacy of shareholders, for a foreigner simply to form a Thai company with the sole purpose of purchasing a villa and then attempt to prevent the shareholders in the Thai company from having any rights over their shares or any benefit from involvement in the Thai company. Typically, Thai companies have been used to facilitate deals of this nature and it is clear the authorities have moved away from permitting this to happen or have noticed that some Thai companies are not properly incorporated; maintained; tax compliant nor operating any kind of business generating payable tax.

Therefore, the investment options made available typically comprise:

- Lease of the land under the villa, ownership of the building

The issues to note here are: will the landlord always be in Thailand or be alive when the lease is due to be transferred? Solutions are to lease from a reliable corporate entity which is always present in Thailand with more than one director available to sign a novation/transfer of a lease. Tax, fees and registration costs are payable on transfer of a building and upon registra-

tion of a lease.

- Lease of the land under the villa, some indirect participation through a series of corporate bodies in the landlord and management company

Corporate structures can be managed so that lessees have more control of the contractual (not automatic) renewal of their leases for additional periods after the elapse of the legal maximum term of thirty years. These structures must be carefully constructed to avoid implication of circumvention of the law which is designed to prevent individuals simply arranging a lease to exist for longer than the law permits. Additionally, where there are corporate structures and lessees are expected to be indirectly involved, then the corporate structures must be reviewed for legal compliance, accounting and tax compliance so the lessees are not in the future implicated as having breached rules or regulations relating to the Thai companies.

Issues to note: any corporates offshore or onshore must be reviewed to check for implications of nominee structures. The less robust and flexible the ownership structure is, the more risk

there may be.

Apartments

Apartments can operate on a leasehold basis and the land underneath can be managed and placed into a corporate structure with appropriate Thai and foreign shareholdings to allow lessees to participate in the management of their leases. No nominees should exist in the corporate structure to avoid implications of circumvention of the law. It may be possible to register an apartment as a condominium subject to building regulations and design.

Issues to note: apartments really do need an umbrella management function. If this is operated through a Thai company with foreign shareholdings below the 49% threshold, the question must be asked – what do Thai shareholders in such a company receive for their participation in such a structure? Certainly, there should be a dividend and some correct and proper benefits for the Thai shareholders in such a structure which must be discussed with the Thai shareholders for acceptability before proceeding with the investment. As there is no specific law regulating apartments, the contracts should

be reviewed vigorously including but not limited to the management arrangements.

Summary

Condominiums, Villas and Apartments each have a set of unique issues in terms of ownership or investment associated with a foreign investment. If these are considered prior to shopping for an investment there ought to be an avoidance of unnecessary expenditure of monies or resource in pursuing an investment only to find the ownership structure unsatisfactory for the buyer/investor. There are investment and ownership structures which have been prepared by certain developers which have been carefully scrutinised and analysed prior to the real estate product being launched for sale/investment. A purchase for profit should also be made considering the potential ease or otherwise of a re-sale.

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