

Legal Challenges of the "Grey Area" in Chinese investment in Thailand

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Abstract

This paper investigates the legal challenges associated with the "grey area" in Chinese investment in Thailand, which pertains to the amalgamation of legitimate and illegitimate economic practices. Data gathering and qualitative analysis indicate that such activities establish various detrimental outcomes, including Economic Distortion: Grey investments can disrupt the local economy by fostering inequitable competition for genuine enterprises. This may result in market inefficiencies and impede the development of local businesses. Regulatory Evasion: grey investments frequently entail the avoidance of local laws and regulations, including limits on foreign ownership. This erodes the rule of law and may result in diminished trust in the regulatory framework. Tax Evasion: illicit enterprises may perpetrate tax evasion, robbing the government of essential revenue. This may affect public services and infrastructure development. Social and Environmental Impact: Grey investments may fail to comply with environmental and social standards, resulting in detrimental effects on local communities and ecosystems. The existence of grey investments may tarnish Thailand's reputation as a secure and transparent investment locale, dissuading bona fide international investors. Therefore, to solve the problem, addressing the ambiguities in Chinese investment in Thailand necessitates a synthesis of legal, regulatory, and collaborative strategies plus enhancing legal aspects. Regulatory Structures: strengthen current laws and regulations to address ambiguities more effectively. This entails more rigorous enforcement of the Foreign Business Act (FBA) and other pertinent legislation to deter unlawful activity. Augmented Investors must perform comprehensive due diligence to verify adherence to local laws and regulations. This entails confirming the legal status of prospective partners and comprehending land ownership legislation. Clarity and Responsibility: foster transparency in business operations and guarantee that all transactions are executed lawfully. This can foster trust and minimize the likelihood of illicit activity.

Keywords: Chinese Investment, Grey Area, Regulatory Framework, Thailand

1. Introduction

In the era of globalization, where nations' economies are intricately interconnected, cross-border investments have become commonplace. Investors worldwide seek opportunities to expand their businesses and generate returns in foreign countries. Thailand, with its economic potential and diverse resources, has emerged as an attractive destination for foreign investors, particularly Chinese investors. Such investments are seen to enhance development

opportunities and stimulate the domestic economy by increasing capital flow and promoting infrastructure development. Over the past few years, many Chinese investors have ventured into the Thai market, notably in the real estate sector. Land ownership is a common component of these investments.

However, cross-border investments are not always seamless, especially when involving critical assets like land. Foreign investors' land ownership often encounters challenges and legal limitations that vary across jurisdictions, potentially leading to disputes and issues. One of the primary constraints on foreign investment is the stringent regulations governing foreign land ownership. These restrictions are designed to prevent widespread foreign land acquisition.

An empirical analysis of foreign land and real estate ownership in Thailand highlights a substantial surge in investments by Chinese nationals, especially during the period from 2018 to 2020. The COVID-19 pandemic, while causing significant disruptions globally, did not deter foreign capital inflows into the Thai real estate market. Chinese investors have been at the forefront of foreign investments in Thai land and real estate, with a particular focus on condominium development

in metropolitan Bangkok and major provincial cities. (WorkpointTODAY, 2022)

Such investments have played a pivotal role in stimulating the Thai economy through increased capital circulation. Nonetheless, the liberalization of the Thai real estate market to foreign investors has not been without its challenges.

Public concerns have been raised regarding the implications of foreign land ownership, particularly the impact on domestic land prices and the circumvention of ownership restrictions through nominee arrangements. These issues have been prominent during the tenure of Prime Minister Prayut Chan-o-cha. (Isarin, 2022)

The rapid acquisition of large land parcels by foreign investors has led to escalating land prices and the utilization of nominees to circumvent ownership restrictions.

1.2 Research Objective

To propose regulatory measures governing foreign real estate investment, particularly by Chinese investors, with a view to mitigating potential negative impacts while maximizing the economic benefits for Thailand.

2. Literature Review

The amendment of laws concerning foreign ownership of land should involve adjustments to the criteria and conditions for granting permission to foreigners to purchase land to suit the current economic situation. There is no need to incentivize foreigners to invest or purchase real estate as during economic booms. Additional conditions should be set, such as requiring foreigners to sell the land they own when withdrawing their investment from Thailand. The government should specifically promote targeted businesses and grant foreigners the right to purchase or lease land only for investments in government-promoted businesses. This aligns with various collaborations such as the ASEAN Economic Community.

Furthermore, relevant laws include the Investment Promotion Act B.E. 2520, the Civil and Commercial Code, and the Commercial Property Lease Act B.E. 2542." (Malinee, 2016)

3. Methodology

This research employed a documentary research approach, involving a comprehensive review of various sources including electronic books, textbooks, journals, articles, and research papers. (Meebua *et.al*, 2023)

4. Discussion and Conclusion

Through a review of the legal landscape, this study has uncovered several laws, regulations, and bylaws that pertain to the ownership of land by foreign individuals.

(1) The Leasehold Estate Act B.E. 2542 prescribes the criteria and procedures for entering into a leasehold estate contract for commercial and industrial purposes for foreign investors who invest in Thailand and wish to lease real estate for business purposes. This Act is of paramount importance as it defines the rights and obligations of both lessors and lessees, including foreign investors. Compliance with this Act will facilitate the smooth operation of foreign businesses and mitigate the risk of disputes. Foreign investors are entitled to lease an area not exceeding 100 rai and the lease term shall be a minimum of 30 years but not exceeding 50 years. However, the lessee and the lessor may agree to extend the term by no more than 50 years from the date of the agreement, subject to the provisions of the Civil and Commercial Code of Thailand regarding the principles of lease. The real estate must be registered with the relevant official, otherwise, the lease shall be null and void. The leased real estate must be located in an area designated by Thailand, such as areas designated as commercial or industrial land under the Land Use Act or industrial estates under the Industrial Estate Authority of Thailand Act. For commercial or industrial businesses, the type of business that allows foreigners to register a lease shall be subject to the consideration of the laws governing the conduct of business by foreigners, such as the Foreign Business Act (FBA).

(2) Section 96 bis of the Land Code of B.E. 2497 constitutes a cornerstone of Thailand's land law. It delineates the specific criteria governing foreign ownership of land, with a particular focus on foreign investors. Under this provision, foreigners who invest an amount exceeding that prescribed in ministerial regulations (currently set at 40 million baht) may apply for permission to acquire residential land not exceeding one rai, subject to the conditions outlined in such regulations. Adherence to these conditions and obtaining ministerial approval is mandatory. The authority to consider these applications has been delegated to the Department of Land. This underscores Thailand's commitment to fostering foreign investment, especially from China, while simultaneously safeguarding against excessive foreign land ownership. As a key instrument for regulating foreign land ownership, Section 96 bis serves as a conduit for substantial foreign investors seeking residential properties in Thailand.

However, upon examination of Section 96 bis, several loopholes can be identified that may lead to inconsistent interpretations and ineffective enforcement, resulting in challenges in defining the conditions for foreign investors to hold land. Firstly, the term "investment" is not

explicitly defined in the law, leading to diverse interpretations of what constitutes a qualifying investment under Section 96 bis. Secondly, the valuation of investments, particularly for the purpose of acquiring land, can be complex and subject to disputes. Thirdly, the term "residence" may have a broad meaning, leading to varying interpretations of what constitutes residential use. Fourthly, there may be attempts to circumvent the restrictions of Section 96 bis through illegal means such as establishing companies using nominees, or transferring ownership to others, creating legal grey areas that hinder effective control over foreign land ownership and may have negative economic and security implications. To address these issues, clear and concrete criteria and procedures for obtaining permits should be established. The complex and lengthy permit process may deter some investors and hinder effective monitoring and compliance with all conditions. Lastly, the enforcement of the law may be inconsistent across different regions, leading to unequal treatment in permit applications. Since the provisions allow for discretionary actions, permits may have an impact on land prices. Allowing foreigners to hold land may rapidly increase land prices in areas of interest to foreigners. (Department of Land, 2019).

Therefore, regulatory oversight must include regulators who must strictly and fairly oversee and enforce the law. This is because foreign land ownership can affect the distribution of wealth in society and is a sensitive issue for Thai people regarding ownership rights. It is crucial to review and update the law to keep pace with current circumstances and the country's needs. For example, the limit on investment and the restriction of land ownership to one rai may not be sufficient to attract long-term investors or those engaged in businesses requiring larger areas, such as resorts or farms. This limitation puts Thailand at a disadvantage compared to countries with more flexible land ownership policies. Further study is needed to determine the appropriate direction for adjustments, as well as the issue of permits as discussed above. Streamlining the permit application process will enhance transparency and expedite the process. By simplifying the required documentation and legal requirements, investors can more easily access permits, reducing the need for nominees and mitigating speculative activities. To further deter the use of nominees to hold land, the government should impose clear penalties and establish a more robust system for monitoring land ownership. While maintaining strict oversight, these measures aim to minimize legal loopholes that could harm society or result in lost economic opportunities. This will also enable the government to better regulate foreign land ownership, alleviate local concerns, and foster investment in designated economic development zones.

In summary, by focusing on flexibility and reducing certain restrictions, the government can enhance its ability to attract foreign investment, particularly from Chinese investors who have shown interest in Thailand. This will promote transparency in land ownership, prevent the exploitation of gaps and contribute to the overall economic development of the country.

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