

# Thai Company Nominees: What Are They, Allegedly?



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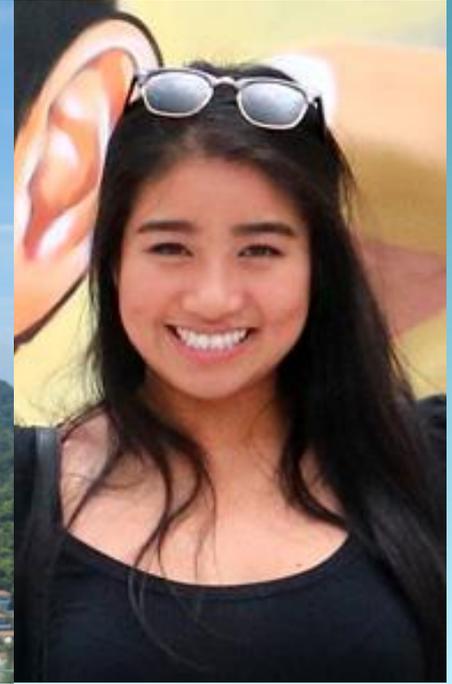
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# Housekeeping Rules for a Sensitive Subject

- Many foreigners inadvertently have nominees
- Some investors have not kept up to date with changes and need time to adjust



Therefore, please:

- No video recordings, audio recordings, photos other than organizer photos
- No use of phones during the presentation, kindly switch off, not just silent
- Kindly avoid naming parties in transactions or situations during questions
- Kindly respect the speakers, their time and effort and the organisers for approaching a sensitive topic in public

# Format and Contents of Presentation

1. Professional Overview of Importance of 'Nominees'
2. Law and Business Environment Affected by Restrictions
3. Every Day Business Issues Foreign Investors Face re Thai Companies
4. Land and Nominees Mixed Together
5. Overview of Authority Activity to Reduce, Eliminate or Penalise Nominee Structures
6. What is a good definition of a 'nominee' today
7. Thai Law moving towards investor friendly laws but tightening on compliance - work permits; company incorporation; intellectual property; arbitration
8. Q and A





## 1. Professional Overview of Importance of ‘Nominees’

### *Desmond Hughes*

- Thai Companies are required to limit liability
- Thai Companies are often required if a business activity is ‘restricted’ under the Foreign Business Act
- Thai Companies are allowed to own land, but not if the purpose is to hold the land for a foreigner
- New Entrants to the Thai Business Environment may wish to conduct urgent business but will not be able to identify or source genuine Thai investors quickly

**Desmond’s favourite quote to foreign clients:**

***“Would you walk into a restaurant or bar in your home country and invite strangers to be investors in your new business without contributing capital, without a shareholders agreement, without any financial benefit for them and without any clear exit arrangements for all parties?”***



## 1. Professional Overview of Importance of ‘Nominees’

### *Robert Krupica*

- Many Other Legal Systems / Countries have a Nominee Shareholder and Nominee Director Option for clients:
  - Allowed: Hong Kong (with ‘Significant Controllers register’); Singapore; Australia; Germany; India; Ireland
  - Not Allowed: China and Indonesia (but in practice circumvented); Thailand
  - Not Recognised: Russia; Spain
- Thailand has a traditional legal focus in the past on drafting legislation to protect “developing” industry and business but has moved to promote itself as a developed country in many respects. The law remains behind the curve. Thailand is not ready to ‘compete’ – Foreign Business Act 1999 section 8(3)
- It is well known that many companies on the Stock Exchange have holding structures which when examined show a significant proportion of shares are held by foreigners although Thai shareholders are *real* and not ‘nominees’ per se

*Robert’s favourite quote to foreign clients “The Foreign Business Act restricts foreigners from engaging in certain business activities on various grounds including activities Thailand is not yet willing or ready to complete and this is the business environment that you are choosing to operate in”*



## 1. Professional Overview of Importance of 'Nominees'

### *Pongsak Daengkaew*

- Foreigners often misunderstand the strictness of Thai law – it is very strict
- The Foreign Business Act section 36 and 37 provide for criminal penalties
  - s.36 and s.37 – criminal and civil penalties
- This would often assist foreigners with 'promoting' a company to be incorporated if the foreigners were not in Thailand to sign documents. However, it is now not accepted and the actual promoters who will be shareholders in best
- The Land Code s. 96 Land Code Act: 'When it appears that any person (including a juristic person) has acquired land as the owner in place of an alien or juristic person under the provisions of Section 97 and 98, the Director-General shall have the authority to dispose of such land and the provisions of Section 94 shall apply *mutatis mutandis*'.
- **Section 113** Land Code Act: 'Any person who acquires land as an agent of an alien or juristic person under the provisions of Section 97 or 98 shall be punished with a fine not exceeding twenty thousand baht or an imprisonment not exceeding two years, or both'.

*Pongsak's favourite quote "Foreigners cannot generally directly or indirectly own land in Thailand"*

## 2. Law and Business Environment Affected by Restrictions

*Desmond Hughes:*

**Phuket:**

- Property Development with Foreign Investors
- Hotel Investment from foreign investors
- Tourism based businesses – travel/tours
- Boat Owning Companies – 70:30 rule
- Professional Service Companies

*Robert Krupica:*

**Bangkok and Other Provinces**

- Joint Ventures in a wide range of businesses including trade/import/industry
- Property/Tourism/Marine/Professional Services
- The Board of Investment does allow businesses to be owned in excess of the normal 49:51 rule – but with conditions and for promoted industries and businesses

# 3. Every Day Business Issues Foreign Investors Face re Thai Companies

*Desmond Hughes*

- What is the 'best' company structure?
- If others have used nominees, why can't I?
- Lying Agents / Brokers / Sellers
- How much share capital/how much debt/loan
- Work permits = 4 Thai employees/1 Foreign employee/Min Regd. Share Capital
- Different Accountants Provide Different Advice. Common Issue: misfiled shareholder lists triggering litigation
- Creating layers of contracts creates additional taxes – 'leasebacks', registration of mortgages and encumbrances on land
- Unenforceable contracts
- Fake documents
- Fraud committed on estates in the event of death / incapacity



## 4. Land and Nominees Mixed Together

*Robert Krupica*

- Correct Company Set Up is a Hurdle/Barrier for any new business
- The next challenge is establishing who joint venture partners will be
- In real estate, the next challenge is understanding whether or not the Land Code is being violated
- Land is a very sensitive cultural subject in Thailand and foreigners often misunderstand how strong cultural feeling regarding ownership and control of land is within Thai culture
- Further challenges exist because various Ministerial Regulations have been released which 'widen' the scope of application of existing law, without officially changing the law through legislative amendment



# 5. Overview of Authority to Reduce, Eliminate or Penalise Nominee Structures

*Pongsak Daengkaew*

- In May 2006, the Ministry of Interior issued new guidelines to the Land Departments in Thailand about 'property trading' and Thai companies
- Guidelines require income of Thai shareholders to be evidenced / investigated; loans to be evidenced through bank statements, loan agreements and company minutes of the meeting to borrow monies; potential reference of a case to the Central Land Department / Ministry of Interior
- In August 2006 new regulations introduced regarding registration – companies with a foreign director or foreign shareholding must show the source of the investment from Thai shareholders. 40:60 Rule and also if shareholding less than 40% but there is a foreign director, still need to show evidence of source of funds for Thai shareholders





## 6. What is a Good Definition of a 'Nominee' Today?

*Desmond Hughes*

- Contravention of the Land Code – see specific regulations 'holding' land for a foreigner. Direct or indirect
- A person/company with no financial means to justify an investment
- A person/company which has not entered into any commercial arrangement with foreign investors – no Memorandum of Understanding/Letter of Intent, no Shareholders Agreement
- A person/company which has loaned the monies to invest from the foreign investors
- A person/company that does not stand to gain financially from the investment
- A person/company that will have little or no voting rights, little or no dividend rights without any commercial reason for disparity
- A person/company that has signed a 'blank stock transfer form'

**Note:** The practices of company incorporations; selection of shareholders; contractual arrangements with investors have evolved in the last 15 plus years to reflect the changes in regulatory environment interpreting the original laws.



# Welcome

## 7. Thai Law moving towards investor friendly laws but tightening on compliance - work permits; company incorporation; intellectual property; arbitration

*Robert Krupica*

- Enforcement and Investigatory Action is Increasing in Thailand for Direct Violations of Law
- Counterbalance to increased enforcement is loosening of laws to allow clearer and wider latitude for investment such as:
  - Better work permit regulations – no longer ‘job’ or ‘location’ specific
  - Better and wider opportunities under the Board of Investment (BOI) promotion incentives for 100% foreign owned companies in certain sectors
  - Thailand acceding to the “Madrid Protocol” to allow better registration of intellectual property recognized in other signatory countries/states
  - A draft new arbitration act proposing that international arbitrators can act in a judicial manner without work permit requirements and that foreign legal counsel can support an international arbitration
  - Increased cooperation between global organisations such as the International Chambe of Commerce and Thailand to promote Thailand trade and business activities such as Thailand Digital 4.0 and introduction of educational/academic learning programs from the ICC into industry and academia

Overall, the movement of Thai law is swinging towards more open foreign friendly laws, but with harsher penalties for violations.

# Q and A

- This is not 'free' legal advice and is not legal advice
- The legal system isn't perfect, neither are we
- Many lawyers / law firms provide differing opinions/perspectives to their clients
- Practices and advice will naturally change over time
- Lawyers get thirsty too

*Thank You*