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LAST BUSINESSES STANDING – COMPLIANT AND SUSTAINABLE

I feel a strange sense of nausea when I have followed the news on the 'Nominee Crackdowns' and the inevitable blame-game and 'pass the accountability parcel' commentaries that followed. Fortunately enough, my firm and the lawyers that work in it have stayed well clear of the nominee practices but for a very long period of time suffered external criticism for not doing something 'everyone else was doing', for being 'uncommercial' and for offering 'expensive' services for structuring and contractual solutions not involving nominee structures.

These days, the art of manipulating the narrative has accelerated to an all-time-peak due to the speed in which news becomes 'viral' and the volume of comments from the general public without filters are disseminated in online communities. It is incredible to watch some of the same persons and businesses who were supporters of quick and easy shortcuts in the name of being 'commercial' now do a complete pivot and jump on the bandwagon of narrators who are trying to polish and positively spin the crackdowns.

In summary, there were practices which were at one end of the spectrum – a complete contravention of law and at the other end – marginally circumvented law but with imperfections. The worst form of these practices involved randomly selecting Thai persons to be shareholders on paper but not in practice, to receive no benefit from an investment they hadn't actually made and to receive a payment for simply not being involved or activating any legal rights at all. Some payments were made to them or advisers for these practices. There were many variations on this.

The government has seen these practices widespread and in very sensitive industries affecting employment of Thais. They often featured in the real estate and hotel sectors with a lack of compliance in relation to buildings, land legality or operations. As a result, it has – in conjunction with international obligations to show compliance enforcement – decided to conduct a 'clear out' of non compliant businesses. The shock factor and foggy memory factor rolls in, with agents and investors perhaps forgetting they may have 'leveraged' their advisers with threats of taking their business elsewhere if they didn't offer the services now being targeted. The advisers that folded to this pressure do obviously have some culpability too, but it is important to be honest that responsibility for non-compliance can be shared and perhaps complex.

Whatever your perspective about compliance, i.e. strict or tolerant, it is a fact that – where investors are not compliant – the situation is not comparable to that of parking in the wrong place and receiving a fine. Non-compliance in relation to investing in a property asset is a big issue, carries a lot of expense, and undermines asset value until the problem is solved. Finding out a dream home has more of an unstable investment platform than anticipated (i.e. underestimating the risk) is not a pleasant experience and doesn't send positive waves through the markets. The powers-that-be take a long term view that it is better to sort out the issues now than let them go on longer or get more prevalent than they already are, carried away by the unrealistic assumption that foreigners will just 'buy condos instead' – and there is a glut of unsold condos anyway. Public officials rarely fully understand private markets and commerce to the same extent as the entrepreneurs operating in them.

So, what exactly are market participants expected to do now? Those that planned their business model and sales practices on non-compliance will now suffer the costs and expense of re-modelling how they sell and what they sell as a legal proposition. Unfortunately, we have even seen that the same perpetrators of non-compliance persist in short cuts in their restructuring plans, clearly not having learned the sharp lessons of the current crackdown and are substituting those practices with sub-optimal alternatives to nominee structures.

There is light at the end of the tunnel, if all key market participants adopt a more compliant and measured mindset. Companies can be restructured in some instances, assets can be transferred to Thai owners including Thai development or property companies who can then offer long lease registered interests to foreign investors. As yet, there is still great inconsistency in content and approach to leasehold interests – with messy renewal clauses, poorly thought-out compensation provisions and default clauses that just don't treat an investor as a long term up front rental payment investor. Successorship, assignment and other aspects of the lease must also be crafted carefully – with cut and paste sloppiness often butchering the objectives of the draftsperson. As yet, AI will reproduce mistakes and not identify the nuances without deep prompt interaction and only if the information is publicly available to 'scrape'.

With any 'market clear out' process, there will be 'winners' and 'losers' and many 'in between'. The last persons still standing, still compliant and still aligned with ensuring that they manage their risk-taking carefully will be able to complete their development projects and secure investors capable of investing. The investors themselves will continue to observe and learn the safe forms of investment in Thailand, provided they aren't bamboozled by false narratives and information designed to 'protect' the information-giver more than the investors themselves.

From start to finish, the investor buying experience and confidence can be improved through:

1. True depiction of the investment options available.

2. Honest guidance on what a normal risk management reservation agreement process involves.

3. Respect of the right to conduct independent due diligence, to check for land title issues deeper than just 'who owns the land' – to the point of where the land originated from and looking for orange and red flags on the documents which show the evolution of possession; use and ownership – from surveys, sub-divisions, consolidations and transfers.

4. Flexibility to offering protections in a 30 years arrangement that will provide peace of mind to an investor, but not deceive them with unenforceable or dubious provisions. If compromises are made, to note those for the record and let the parties decide on the balance of the arrangement – i.e. not simply impose dissatisfactory items.

5. Realistic medium-pressure timelines which do not adopt high pressure sales tactics to try and create leverage on early over-commitment, but which also do not foster tyre-kicking and prevarication.

6. Explaining the difference between legal fees and 'quality' of services rather than simply encouraging the lowest cost approach when legal fees in general are often less than agency commissions and other transaction expenses.

As the second half of 2026 marches on quickly towards another 'high season', we shall see which of the market participants improve their decision making through learning from mistakes of themselves and others of the past. With improved presentation of investment options backed by substance and truth, investor confidence will be boosted and transactions will flow accordingly.


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