

## **Regulation of Property Ownership by Foreigners**

### **Interview: Notary Rainy Hendriany Provides Latest Update on Rules for Land Ownership by Foreigners in Bali, Indonesia.**

(7/5/2010) Despite failed promises by the Indonesian government to liberalize the rules on foreign land ownership and expectations that the international real estate conference held in Bali in May would herald a change in the rules, little appears to have changed in long-standing prohibitions against property ownership by non-Indonesians.

Against this atmosphere of legal uncertainty and numerous real estate agents offering questionable legal constructs to permit foreign land ownership in Bali, *balidiscovery.com* interviewed well-respected Sanur-based Notary/PPAT, Rainy Hendriany SH, M.Kn, to try to seek a reliable clarification on the do's, don'ts and cautions for foreigners involved in Bali property transactions.

#### **The Interview: Rainy Hendriany, Bali Notary**

**Question:** First, to the extent possible, can we ask you to update us on the status of any pending changes to the regulations regarding property ownership by foreigners in Indonesia ?

**Rainy Hendriany :** *"For the very reason that there have been further delays in any official announcements and because the situation remains fluid, please understand that I can only provide my personal opinions which should therefore be regarded as informed speculation. However, as I predicted when we last met (Editor: See Link), it does seem that the changes now being discussed will only allow a longer period of 'Hak Sewa' (Leasehold); perhaps up to 70 years instead of 25 years permitted at present. As I understand it, outright ownership of property by foreigners will still not be allowed."*

*"Outright foreign ownership or 'Hak Milik' (Freehold) title by foreigners has never been a realistic possibility, but in earlier stages of discussion, there appears to have been an intention to allow a 70 year duration for Right of Use ('Hak Pakai') Land title, in which a Land Certificate is issued in the name of the foreigner. This now appears to have been diluted further and it seems that any reforms will apply only to leasehold, which does not convey any rights of ownership, either directly or beneficially."*

**Question:** What is the history and legal background to Indonesia's apparent legal intransigence on the liberalization of property ownership by foreigners?

**Rainy Hendriany :** *"Allow me to provide some background on relevant regulations and laws."*

*"UUD/1945 (The Constitution) and UU5/1960 (The Basic Agrarian Law) are the basis for all subsequent property laws and regulations. Government Regulation (PP40/1996), the "Rights of Use Regulation" set forth the initial framework on rights of land use ('Hak Pakai') for resident foreigners. Subsequent Government Regulations and Ministerial Decrees further addressed the issues of domicile and extensions of title."*

*"However, none of these regulations provides adequate legal clarity with regard to the time frame for which the 'Hak Pakai' could be extended and/or renewed and, indeed, there is even some contradiction between and within the different regulations."*

*"What is clear is that 'Hak Pakai' title cannot be issued, renewed or extended for any period longer than 25 years at any one time. The Law is silent regarding the allowed period for leasehold."*

*"However, The Basic Agrarian Law establishes a hierarchy of land titles specifying that 'Hak Pakai' title is a higher title than leasehold. This explains why leasehold is normally for a period of no more than 25 years. Logically, if 'Hak Pakai' is a higher title, and it may only be issued for 25 years, it follows that a lower title should not provide more preferential conditions, including duration of tenure."*

*"This helps to explain the difficulties of making any changes to the regulations regarding foreign ownership of property. Even if a 70 year leasehold be the present intention, there remain many legal*

obstacles. Should this be implemented in the form of a Government Regulation, which would bypass the Parliament, as a Government Regulation it would be subservient to existing laws, including the Basic Agrarian law, and could be challenged through the courts. Should it be issued in the form of a new law amending existing law, it would require the approval by Parliament and could still be challenged in the Constitutional Court. Either way, the process would take years before any change is implemented."

"So the difficulty is that without changes to the Basic Agrarian law and possibly also the Constitution, any changes whatsoever to the foreign ownership regulations are very problematic. In my opinion, the political will does not exist to amend higher laws solely for the purpose of allowing foreigners to own property in Indonesia."

**Question:** If such minor reforms are all that will be introduced, why has it taken so long?

**Rainy Hendriany :** *"I don't have any direct insight into official Indonesian Government thinking, but the legal and cultural obstacles we just discussed are not insubstantial. What is clear is that the proposed changes have been progressively watered down since the possibility of liberalizing property rights for foreigners was most recently raised several years ago."*

*"In summary, the impetus for change has always been largely from private property sector interests which, in aggregate, are not hugely influential. On the other side of the debate, the politically powerful Nationalist lobby strongly supports the status quo."*

**Question:** Would these changes to leasehold term be enough to make any practical difference for potential foreign investors?

**Rainy Hendriany :** *"I can't speak for foreign investors in general, but many of my clients express disappointment that they still cannot 'own' property in Indonesia. It is actually the uncertainty which is causing the most problems for many clients who want to make decisions but are reluctant to do so until reform decisions have been made and announced."*

*"It is a fact that neighboring countries already have more liberal regulations for property ownership by foreigners so these limited changes would certainly not be enough to provide any competitive advantages to Indonesia."*

**Question:** If implemented as discussed, can a leasehold be sold to another party before expiry of the lease term?

**Rainy Hendriany :** *"Yes, providing that the original leasehold is constructed appropriately, it may be 'sold' to another party in the form of a sub-lease agreement, which would transfer all the conditions of the original lease, including any options to extend, to a new third party. Should the new Regulations provide for longer Leasehold periods, then unless specifically excluded by language in the proposed new regulations, or the terms of the original leasehold itself, sub-leasing would remain possible."*

**Question:** Would you provide us with a recap on what are now the fully legal options available to foreigners for the tenure of property in Bali?

**Rainy Hendriany :** *"It remains and in all probability will remain the case for the foreseeable future that, under no circumstances, may foreigners hold property anywhere in Indonesia under 'Hak Milik' (Freehold) title. Unlike some would want potential investors to believe, Bali is subject to all Indonesian Laws and Regulations in the same way as is any other Province."*

*"The fully legal options remain as outlined in our previous interview."*

*"Firstly, as we have already discussed, even under existing regulations, 'Hak Pakai' is a fully legal and secure option for a foreigner to hold a property. There are many practical and procedural restrictions on 'Hak Pakai' title and professional legal counsel should always be sought."*

*"Second, leasehold is fully legal in lease periods of no more than 25 years at present, which can, however, include options to extend."*

*"Finally, there are various company ownership options but these are now more limited subsequent to recent revisions to laws and the current interpretation of regulations."*

*All Companies in Indonesia, whether employing local or foreign capital, may only hold property under right to build ('Hak Guna Bangunan,' or HGB) title. This title can also be held by Indonesian individuals but not foreign individuals. Most of the apartments being built in Indonesia employ Strata title over HGB land, which means that individual foreigners cannot own Apartments. Actually, revisions to allow foreign ownership of certain categories of Apartment Units had also been included in earlier reform discussions but now appear to have been dropped."*

*"A PMA (Foreign Investment) Company may be established to conduct any business activity provided that it is not included in the investment boards 'Negative List' which has recently been updated. A PMA Company may hold residential property under HGB title in the name of the Company. However, A PMA Company cannot now be established for the sole purpose of holding a single residential property."*

*"A PMA Company may sponsor residential (KITAS) visas and work permits for company officers (directors and commissioners) appointed by the investor against an approved manpower plan. It should be noted, however, that PMA Companies do involve rigorous monthly, quarterly and yearly reporting requirements and, as foreign investors, tend to attract the attention of the tax authorities."*

*"A PT Biasa Company is a company which must be owned entirely by Indonesians. As a consequence of UU25/2007 (The Investment Law), the use of nominees to establish a PT Biasa Company for any purpose, including as a vehicle to hold property, is no longer legal because the beneficial ownership of any Company through Nominees is now prohibited. Agreements to support such an arrangement would, therefore, not be enforceable."*

**Question:** How about the use of an individual nominee to hold a property, which appears to be quite common in Bali?

**Rainy Hendriany :** *"It must be understood that this approach is, at best, a means to circumvent both the letter and the intent of higher Indonesian law. So there are inherent risks involved with this approach and it must always be remembered that the legal owner of the property, in the context of Indonesian law, is the Indonesian Nominee, whose name is on the Land Certificate."*

*"Irrespective of any side contracts entered into between the parties, in the event of any dispute, these could be seen as having been constructed with the sole purpose to circumvent the letter and/or spirit of higher Indonesian law. In fact, many attempts at creating legal structures to address these inherent potential problems and which grant various powers of attorney, can actually put the foreign investor at greater not less risk, so there is a need for very great caution."*

*"I cannot stress enough the need for trusted professional legal counsel before any decisions are made by a potential foreign property investor in Bali."*

**Question:** Any other final thoughts?

**Rainy Hendriany :** *"What comes to mind is the old French saying, 'Plus ca change, plus c'est la meme chose!' (The more things change, the more they stay the same)."*

*"I know that it is frustrating to foreigners who want to own a property in Indonesia, in particular when an Indonesian national may often own a Freehold property in his/her country of origin. The recent history of Indonesia, having been under the control of the Dutch for 350 years and having only become an independent nation in 1945, may perhaps in part explain the prevailing mindset with respect to land."*

*In particular for Bali, I always try to encourage an understanding that there is a need for restraint and a sensitivity to local culture if the uniqueness of Bali which brought us all here in the first instance is to be preserved. Bali is, indeed, a very special place and Balinese culture has, over the years, been very resilient and, perhaps uniquely, able to absorb from, adapt to and develop foreign influences."*

*"But Bali is a small Island and the recent abuse of zoning regulations, height restrictions and setback regulations has been in the best interests of nobody in the longer term, especially the Balinese themselves. That Villa built today in the middle of nowhere with beautiful views over the sawah, results in unaffordable higher land taxes for the adjacent subsistence farmers, which in turn results in the land being sold to new investors and the sawah views are soon gone."*

*"If this sounds all too familiar to some of your readers, perhaps it is because they live in parts of South Bali where it is already too late?"*