

RESTRICTIONS ON FOREIGN OWNERSHIP UNDER THE NATIONAL LAND CODE 1965

This short article examines the scope and effect of the restrictions imposed under the National Land Code 1965 of Malaysia. The Foreign Investment Committee's guidelines on acquisition of assets by foreigners are also examined in relation to the restrictions imposed under the Code. The restrictions imposed under the Sarawak Land Code are also noted by way of comparison.

I. LEGISLATIVE BACKGROUND

RESTRICTIONS under the Malaysian National Land Code 1965¹ ("the Code") on land transactions undertaken by foreign companies and non-citizens were first introduced by the National Land Code (Amendment) Act 1984² which was brought into effect on 25 March 1984.³ Section 117 of the 1984 Amendment Act provided for a new Part Thirty-Three (A) in the Code comprising sections 433A to 433E. One of the objectives of the amendment was to control the inflow of foreign funds into the country which had an inflationary impact on the housing industry and the other was to fulfil the government's aspiration in ensuring that its citizens were not deprived of the opportunity of owning land.⁴ However, the amendment generated much discussion on its implications and, following representations by foreign banks, the National Land Code (Amendment)(No. 2) Act 1985⁵ was passed to relax the restrictions so as to allow a charge or a lien to be created, without the approval of the State Authority,⁶ over agricultural

¹ Act 56/65. This Code, which came into operation on 1 January 1966, applies only to Peninsular Malaysia. Sarawak and Sabah have their own land legislation, viz., the Land Code (Cap. 81) and the Land Ordinance (Cap. 68) respectively. This is in view of the fact that the powers of the Federal Parliament in Art. 76(4) of the Federal Constitution 1957 to make laws with respect to land matters in a state are not exercisable with regard to these two states. See Federal Constitution 1957, Art. 95D.

² Act A587, hereinafter referred to as "the 1984 Amendment Act".

³ See P.U.(B) 145/85.

⁴ See Malaysia, *Parliamentary Debates (1984) Dewan Rakyat*, Sixth Parliament, Second Session, Vol. II, No. 19 at 2821-2822.

⁵ Act A624, hereinafter referred to as "the 1985 Amendment Act (No. 2)".

⁶ "State Authority" is defined in s. 5 of the Code to mean the Ruler or Governor of the state, as the case may be. The Ruler or Governor, however, acts on the advice of the State Executive

or building land in favour of a foreign company or non-citizen.⁷ The scope and effect of these two amendment Acts will be considered in greater detail in the following discussions.

Subsequently, the National Land Code (Amendment) Act 1986, which came into force on 1 January 1987, was passed to repeal the whole of Part Thirty-Three (A) of the Code so as to enable non-citizens and foreign companies to acquire land without restrictions.⁸ The primary reason for doing so, as given by the then Malaysian Minister of Land and Regional Development, was that the restrictions were an obstacle in the government's efforts to attract badly needed foreign investment in the agricultural sector at a time when the Malaysian economy was going through a recession.⁹ However, over a space of five years since their repeal and during which the Malaysian economy has been performing strongly, these restrictions have now been re-introduced, in substantially the same form, by section 73 of the National Land Code (Amendment) Act 1992¹⁰ which has yet to be brought into force.¹¹

II. PART THIRTY-THREE (A) OF THE NATIONAL LAND CODE 1965

The 1992 Amendment Act, as is the case with the 1984 Amendment Act, provides for a new Part Thirty-Three (A) in the Code comprising sections 433A to 433E by which non-citizens and foreign companies may acquire

Council in carrying out the duties entrusted to him under the respective legislation (see the Federal Constitution 1957, Sch. 8, Part 1, s. 1(1)).

⁷ This amendment was significant as in the year 1984, foreign banks accounted for 32% of the total loans granted out of which 67% was secured by charges over land, (see Malaysia, *Parliamentary Debates (1985) Dewan Rakyat*, Sixth Parliament, Third Session, Vol. III, No. 23 at 70-71.)

⁸ Act A658, s. 3, hereinafter referred to as "the 1986 Amendment Act".

⁹ See Malaysia, *Parliamentary Debates (1986) Dewan Rakyat*, Seventh Parliament, First Session, Vol. 1, No. 44 at 6422. The Minister concerned had also stated that foreign investment in the agricultural sector would result in savings on foreign exchange on food and other agricultural imports which totalled a hefty M\$3,470 million in 1985. See *ibid.*

¹⁰ Act A832, hereinafter referred to as "the 1992 Amendment Act". This Act was assented to on 9 July 1992 and published in the *Gazette* on 16 July of the same year.

¹¹ In tabling the bill in the *Dewan Rakyat*, Encik Mohamed Noh Rejab, the Parliamentary Secretary to the Land and Co-operative Development Ministry, stated that the re-imposition of the restrictions is to ensure that foreign ownership of certain types of land will bring economic benefits to the country and that the restrictions were earlier abolished effective 1 January 1987 by the 1986 Amendment Act due to the recession and to create a positive investment climate so as to compete with other countries in the region (see *New Straits Times*, 27 May 1992, at 8). He had also earlier stated that when the restrictions were lifted, it was found that between 1 January 1987 and August 1990, foreign nationals and companies owned a total of 4,638.5 hectares of land in Peninsular Malaysia (see *The Star*, 7 May 1992, at 5).

land or an interest¹² therein in Malaysia only with the prior approval in writing of the State Authority.¹³ Section 43 of the Code, which deals with the categories of persons and bodies, whether citizens or non-citizens and whether local or foreign respectively, who can hold and deal in land under the Code, is also made subject to Part Thirty-Three (A). The restrictions also apply to land currently owned by a non-citizen or foreign company in that such land cannot be dealt with in favour of another non-citizen or foreign company unless prior approval is obtained.

1. *Non-citizens and foreign companies*

A non-citizen is defined to mean a natural person who is not a citizen of Malaysia.¹⁴ A foreign company is one defined in section 4(1) of the Companies Act 1965,¹⁵ viz., a company, corporation, society, association or other body incorporated outside Malaysia or an unincorporated society, association or other body which under the law of its place of origin has the legal capacity to take proceedings or have proceedings taken against it or hold property in the name of the secretary or other officer of the body duly appointed for that purpose and which does not have its head office or principal place of business in Malaysia.¹⁶ Thus, a company or body will not be subject to the restrictions if it incorporates itself in Malaysia. There is no additional requirement that the majority shareholding must not be owned by persons who are non-Malaysian citizens. Thus, a foreign bank in Malaysia will, upon local incorporation, change its status to one incorporated in Malaysia.¹⁷ For an unincorporated body, the restrictions will not apply if it has its head office or principal place of business in Malaysia.

In comparison, it may be noted that under section 13A of the Sarawak Land Code,¹⁸ any person who is not a Malaysian citizen and not permanently resident in Sarawak may not hold or acquire any estate, interest or right in any land. It would appear that the restriction also applies to a Malaysian citizen who is not permanently resident in Sarawak. Under section 13B, the restrictions on foreign ownership apply to even companies, corporations, societies, banks or other bodies which are incorporated in Malaysia where the shares held by persons who are non-Malaysian citizens in the aggregate

¹² For example, leases, tenancies, charges, liens and easements. See National Land Code 1965, Division IV.

¹³ National Land Code 1965, s. 433B(1).

¹⁴ S. 433A.

¹⁵ Act 125.

¹⁶ *Supra*, note 13, s. 433A.

¹⁷ In fact, under s. 129(1)(a)(ii) of the Banking and Financial Institutions Act 1989 (Act 372), each of the foreign banks currently operating in Malaysia are given until September 1994 to incorporate itself as a local company.

¹⁸ Cap. 81, Revised Laws of Sarawak 1958.

carry the right to exercise or control the exercise of more than 50% of the voting power at any general meeting of such bodies. In such a case, the consent of the Minister concerned is necessary before any estate, interest or right in land may be acquired by such bodies.

2. *Approval of State Authority*

Part Thirty-Three (A) of the Code in requiring the approval of the State Authority to be obtained, allows the respective State Authorities to draw up rules and guidelines to control the acquisition of land or an interest therein by non-citizens and foreign companies.¹⁹ This will enable the State Authorities to exercise their jurisdiction according to the needs of the state concerned. The guidelines should aim at clarifying areas where non-citizens and foreign companies will be able to acquire land or an interest therein in line with the provisions under the Code so as to remove any uncertainty which may arise in its implementation. It must be made clear in the guidelines when approval will be granted, the nature of the land involved or the type of house concerned. The guidelines should strike a fair balance and cover all aspects of land and property acquisitions. These include land conversion, zoning of land, viability of projects which can contribute to the state's economic development and maintaining the confidence of foreign investors in the Malaysian property market.

Even where approval has been granted, it may still be made subject to such terms and conditions as may be specified by the State Authority.²⁰ For example, in granting approval for agricultural land to be acquired by a foreign company which intends to introduce new farming technology, the State Authority may impose restrictions to prevent land status conversion. Similarly, where approval is granted for land to be developed by a foreign company into a holiday resort, restrictions may be imposed such that only a certain percentage of the residential properties developed in the scheme may be sold as holiday homes to foreigners. The terms and conditions imposed will vary in each case so as to best meet the objectives set out in the guidelines laid down by the State Authority.

3. *Restrictions vary with categories of land use*

The restrictions imposed by Part Thirty-Three (A) of the Code apply notwithstanding anything contained in the Code or in any other written law.²¹ The restrictions imposed, however, vary with the types of land involved, *viz.*, whether the land is subject to the category "agriculture", "building"

¹⁹ *Supra*, note 13, s. 433B(1) and (2).

²⁰ S. 433B(2).

²¹ S. 433B(1).

or “industry”.²² In the case of land or any interest in land which is subject to the category “agriculture” or “building” or to any condition²³ requiring its use for any agricultural or building purpose, a non-citizen and a foreign company may acquire, deal in or hold such land or an interest therein whether in his or its capacity as such or as a trustee or beneficiary or representative but only after the prior approval in writing of the State Authority has been obtained.²⁴ In other words, the restrictions are not absolute which, however, was the case under the 1984 Amendment Act in regard to land subject to the category “agriculture”. Under the 1984 Amendment Act, foreign ownership of agriculture land was absolutely prohibited. In the case of land subject to the category “building”, the restrictions under the 1984 Amendment Act were not absolute as is also the position now. However, in respect of any land or any interest in any land which is subject to the category “industry” or to any condition requiring its use for industrial purposes, no such approval is required²⁵ as was also the case under the 1984 Amendment Act. This means that there are no restrictions under the Code on foreign ownership of industrial land. This relaxation is to ensure that Malaysia will be able to continue to attract foreign investment to spur its industrialization programme which would otherwise be jeopardized.

It may be noted that in Sarawak, a foreign person or body may, with the approval of and subject to such terms and conditions as may be imposed by the Minister concerned, purchase or acquire an estate, interest or right in any area of land declared to be a Development Area for the purpose of a (i) holiday resort and such other projects that would benefit the tourism industry; (ii) recreational centre; (iii) high-rise commercial complex; or (iv) industrial estate, including housing for the approved industrial estate.²⁶ This is to strike a balance between the restrictions which are imposed to protect the interest of the people in the state and viable projects undertaken by foreigners which can contribute to the economic development of the state.

4. *Creation of charges and liens*

A charge or a lien may be created in respect of any alienated land²⁷ or any undivided share in such land or any lease of such land in favour

²² See s. 52 of the Code which specifies the categories of land use to which land alienated under the Code may be subject to.

²³ A condition is an obligation imposed by the State Authority to regulate the use of land for agricultural, building or industrial purposes. As for express and implied conditions, see ss. 114-119 and ss. 120-123 of the Code respectively.

²⁴ *Supra*, note 13, s. 433B(1).

²⁵ S. 433B(1) proviso.

²⁶ *Supra*, note 18, s. 13E.

“Alienated land” means any land (including any parcel of a subdivided building) in respect

of a non-citizen or a foreign company without the necessity of obtaining the approval of the State Authority.²⁸ This is to relax the restrictions applicable to land subject to the category “agriculture” or “building” such that loans from foreign banks or financial institutions may be easily obtained where such land is put up as security. Moreover, such relaxation will also ensure that the development of agriculture or building land can be undertaken with the assistance of foreign banks or financial institutions. As a charge or a lien only amounts to granting an interest by way of security²⁹ over such land to a non-citizen or foreign company, there is no parting of ownership of such land which still remains in the hands of Malaysian citizens or bodies incorporated in Malaysia. What the restrictions aim at is that ownership of such land should not fall into the hands of a non-citizen or foreign company.

This relaxation applies to any charge effected, or any lien created, whether before or after the amendment takes effect.³⁰

Under the Sarawak Land Code,³¹ the restrictions on foreign ownership of land also do not apply to a charge created in favour of foreigners.

5. *Order for sale of land subject to charge or lien*

To ensure that ownership of agricultural or building land which is subject to a charge or lien in favour of a non-citizen or foreign company remains in the hands of Malaysian citizens or bodies incorporated in Malaysia, it is provided that, in the event a court order is made for the sale of such land, a non-citizen or a foreign company, whether or not he is the chargee or a lien-holder, shall not be entitled to bid at the sale of such land.³² This restriction applies to any charge effected, or any lien created, whether before or after the amendment takes effect.³³ The restriction is, however, not absolute as the non-citizen or foreign company may apply for and obtained the approval of the State Authority to bid at the sale of such land. This

of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under the Code or in the exercise of powers conferred by any previous land law, but does not include mining land. (National Land Code 1965, s. 5)

²⁸ *Supra*, note 13, s. 433B(3). The 1985 Amendment Act (No. 2) also provided to the same effect.

²⁹ See *Bank Bumiputra Malaysia Bhd. v. Doric Development Sdn. Bhd. & Ors.* [1988] 1 M.L.J. 462 at 463 and *Malayan United Finance Bhd. v. Tan Lay Soon* [1991] 1 M.L.J. 504 at 506-508 as to the nature of a charge under the Malaysian Torrens system which differs from a common law mortgage in that the former is only a security for a loan without the necessity of the transfer of the legal ownership in the charged land.

³⁰ *Supra*, note 13, s. 433B(6).

³¹ *Supra*, note 18, s. 13C.

³² *Supra*, note 13, s.433B(4).

³³ S. 433B(6).

restriction does not apply to land subject to the category “industry” or to any condition requiring its use for industrial purposes.³⁴

The object of the restriction is not so much to preserve to individual Malaysian citizens the lands that they own but to ensure that such lands shall continue to be owned by Malaysian citizens in general. If it is otherwise, then even a chargee who is a Malaysian citizen cannot levy execution on the land by sale as the interest of the particular proprietor who is a Malaysian citizen will be affected.

Although the Sarawak Land Code does not have a similar provision in this respect, the language used in sections 13A and 13B, as seen above, is wide enough to prohibit foreigners from acquiring land or an interest therein in similar circumstances.

6. *Applicability of restrictions to subdivided building*

A question which arises for consideration is whether the restrictions on foreign ownership of land apply to dealings in parcels³⁵ of subdivided buildings in respect of which strata titles have been issued. It is clearly stated in section 433B(1)(b) of Part Thirty-Three (A) of the Code that the restrictions apply to a dealing under Division IV of the Code and a dealing is defined to mean any transaction³⁶ with respect to alienated land effected under the powers conferred by Division IV thereof.³⁷ The Strata Titles Act 1985,³⁸ which deals with matters pertaining to subdivision of buildings, specifically provides for the Act to be read and construed with the Code as if it forms part thereof.³⁹ It further provides that the Code shall apply in all respects to parcels held under strata titles in so far as the Code is not inconsistent with the provisions of the Act.⁴⁰ There is, accordingly, no reason why the restrictions in Part Thirty-Three (A) of the Code which are applicable to all dealings under Division IV should not apply to dealings in parcels in subdivided buildings unless prior approval of the State Authority, where necessary, has been obtained.

In Sarawak, a foreign person or body may, with the approval of and subject to such terms and conditions as may be imposed by the Minister concerned, purchase or acquire any parcel within a subdivided building.⁴¹ Thus, a foreigner, who is undertaking work which is of economic benefit

³⁴ S. 433B(5).

³⁵ A parcel is one of the units in a subdivided building which is held under a separate strata title. See Strata Titles Act 1985 (Act 318), s. 4.

³⁶ Such as a transfer, lease, tenancy, charge or a lien.

³⁷ *Supra*, note 13, s. 5.

³⁸ Act 318.

³⁹ S. 5(1).

⁴⁰ S. 5(2).

⁴¹ *Supra*, note 18, s. 13E(2)(b).

or advantage to the state, may be granted such approval but to curb real estate manipulations by foreigners, terms or conditions may be imposed to prevent the parcel being leased or sold within a specified period.

7. Disposal/dealings in contravention of restrictions

After the coming into force of the 1992 Amendment Act, any disposal⁴² of land by the State Authority or any dealing with regard to alienated land or any interest therein in contravention of the restrictions in Part Thirty-Three (A) of the Code shall be null and void.⁴³ The effect is that a non-citizen or foreign company will acquire no interest in the land. Accordingly, no caveat can be entered by either to protect their alleged interest in the land pursuant to the impugned transaction.

8. Miscellaneous

The restrictions on foreign ownership of land in the Code will not render invalid any instrument effecting any dealing in any alienated land or any interest therein in favour of a non-citizen or in favour of a foreign company executed before the amendment takes effect and which is stamped in accordance with the provisions of the Stamp Act 1949⁴⁴ either before or within one month after the amendment takes effect.⁴⁵ Similarly, anything done under the Code or any previous land law before the amendment takes effect will also not be rendered invalid.⁴⁶

It is also provided⁴⁷ that the restrictions will not apply to sovereigns, governments and other persons authorised to hold land under the provisions of the Diplomatic and Consular Privileges Ordinance 1957.⁴⁸ Presumably, the restrictions will apply where the land acquired by such bodies or persons is to be dealt with in favour of a non-citizen or foreign company as the language used in sections 433B and 433C of Part Thirty-Three (A) of the Code is wide enough to prohibit such dealings.

⁴² Disposal refers to the granting of certain kinds of rights, whether proprietary or otherwise, by the State Authority in respect of any land in favour of individuals or bodies. The disposal can be by way of alienation, by the issue of a temporary occupation licence or a permit and by the grant of a lease of reserved land. See National Land Code 1965, ss. 5 and 42.

⁴³ *Supra*, note 13, s. 433C.

⁴⁴ Act 378.

⁴⁵ *Supra*, note 13, s. 433D(2).

⁴⁶ S. 433D(1).

⁴⁷ S. 433E. See also s. 43.

⁴⁸ Ord. 53/1957.

III. APPROVAL OF FOREIGN INVESTMENT COMMITTEE

Another matter which should be taken note of is that any proposed acquisition of fixed assets, which would also include landed properties, in Malaysia by foreign interests also requires the approval of the Foreign Investment Committee ("the FIC"). The FIC is the institutional machinery established by the Federal government to oversee major matters on foreign investment.⁴⁹ The requirement to obtain the approval of the FIC is set out in the revised guidelines laid down by the FIC by which its approval is necessary for, *inter alia*, any proposed acquisition by foreign interests of any substantial fixed assets in Malaysia and any other proposed acquisition of assets or interests exceeding in value of the sum of M\$5 million, whether by Malaysian or foreign interests.⁵⁰ This is primarily to ensure that foreigners do not speculate in land and property when they invest in the country.

The question which arises is what are the implications of the FIC guidelines on the restrictions on foreign ownership imposed under the Code? Part Thirty-Three (A) of the Code does not provide that approval by the State Authority for the acquisition of landed properties by a foreigner will be conditional upon approval by the FIC. However, this does not exclude the fact that the State Authority may still take an FIC approval into account in deciding whether it should grant approval. Conversely, where the approval of the State Authority has been obtained, the FIC may still not grant its

⁴⁹ The functions of the FIC are (i) to formulate policy guidelines on foreign investment in all sectors of the economy to ensure the fulfilment of the objectives of the National Economic Policy; (ii) to monitor the progress and help resolve problems pertaining to foreign private investment and to recommend suitable investment policies; (iii) to supervise and advise Ministries and Government agencies concerned on all matters concerning foreign investment; (iv) to co-ordinate and regulate the acquisition of assets or any interests, mergers and take-overs of companies and businesses in Malaysia; and (v) to monitor, assess and evaluate the form, extent and conduct of foreign investment in the country and to maintain comprehensive information on foreign investment. (See *Guidelines for Regulation of Acquisition of Assets, Mergers and Take-overs 1974* (Revised 1990) Introduction para.8, at 4-5.) The FIC consists of (i) the Governor of Bank Negara Malaysia (Chairman); (ii) the Secretary-General of the Treasury; (iii) the Director-General of the Economic Planning Unit, Prime Minister's Department; (iv) the Chairman of the Malaysian Industrial Development Authority; (v) the Director-General of the Implementation and Coordination Unit, Prime Minister's Department; (vi) the Secretary-General of the Ministry of Trade and Industry; (vii) the Secretary-General of the Ministry of Public Enterprises; and (viii) the Registrar of Companies, Malaysia.

⁵⁰ See *Guidelines for Regulation of Acquisition of Assets, Mergers and Take-overs 1974* (Revised 1990) Pt. 1 para. 6, at 8. These guidelines do not apply to specific projects which are approved by the government. See, *ibid.*, Pt. 1 para. 7, at 9-10. There appears to be a tightening of the enforcement of the guidelines recently as can be seen in a letter dated 11 March 1992 sent by the FIC to the Bar Council of Malaya stating that all foreign purchases of properties including terrace units, link houses, bungalows, apartments and condominiums required its approval and that all sale and purchase agreements handled by local legal firms for foreigners must not be executed unless FIC approval has been obtained.

approval. There are, thus, uncertainties as to how these two sets of restrictions operate and their relationship to one another. Legally, they operate independently of each other and can ignore the approval already granted by the other.

There is, as yet, no decided case dealing specifically with the legal relationship between the requirements of the FIC and the restrictions imposed under the Code, even for the period when the restrictions were in force between the years 1984 – 1986. However, there have been a number of decided cases involving foreign acquisition of shares in Malaysian companies in which the FIC guidelines were considered⁵¹ and which may throw some light on its legal status. In the High Court case of *Ho Kok Cheong Sdn. Bhd. & Anor. v. Lim Kay Tiong & Ors.*,⁵² Wan Hamzah J. (as he then was) commenting on the FIC guidelines said:

The guidelines were issued not pursuant to any power given by law, and in my opinion they have no force of law but are of advisory character merely. I do not think that non-compliance with the guidelines can be taken as an act opposed to public policy. The guidelines reflect the Government's political policy, but Government's political policy is not public policy.⁵³

In another High Court case, *MAA Holdings Sdn. Bhd. & Anor. v. Ng Siew Wah & Ors.*,⁵⁴ George J. referred to the above case and took the same view as that of Wan Hamzah J. As his Lordship observed:

My attention has been drawn to the 'Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers' issued by the Government. The 'guidelines' are no more than just that, that is, guidelines for the implementation of the Government's policy of achieving a more balanced Malaysian participation in ownership and control of certain assets, business and companies, an aspect of the so-called New Economic Policy (NEP).

No doubt some aspects of the guidelines have been the motivating factor for the passing of relevant laws but the 'guidelines' themselves have not the force of law and the need to obtain FIC approval for

⁵¹ FIC approval is required for, *inter alia*, any proposed acquisition of 15% or more of the voting power by any one foreign interest or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and business. See, *ibid.* Ft. 1 para. 6, at 8.

⁵² [1979] 2 M.L.J. 225.

⁵³ *Ibid.*, at 226. In the Federal Court (see [1979] 2 M.L.J. 226), no comments were made by their Lordships on the legal status of the FIC guidelines.

⁵⁴ [1986] 1 M.L.J. 170.

the acquisition of assets is not a statutory requirement. In fact a transaction could be in full accord with the NEP although FIC approval was not sought and obtained.⁵⁵

However, in *David Hey v. New KokAnn Realty Sdn. Bhd.*,⁵⁶ Wan Suleiman F.J., in delivering the judgment of the Federal Court, had this to say of the FIC guidelines:

We have studied the 'Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs', ... It would seem to us that it is more than mere political policy, reflecting as it does a national economic policy, the New Economic Policy of which we could properly take judicial notice. Non-compliance with the requirements of the 'Guidelines' can obviously have adverse consequences⁵⁷

What the adverse consequences were was unfortunately not stated by the court. Nevertheless, it is clear that in *David Hey* the Federal Court did not take the opportunity to spell out precisely the legal status of the FIC guidelines and the matter must be regarded as inconclusive and must await further clarification by the courts.

It is obvious that non-compliance with the restrictions imposed under the Code will result in the transaction being rendered null and void.⁵⁸ However, in the situation where there is no FIC approval but approval under the Code has been obtained, it is more likely than not that the transaction in question will be registered by the Land Office. This is primarily because the Code deals specifically with acquisition of and dealings in land by non-citizens and foreign companies⁵⁹ and the restrictions therein are enacted pursuant to the supreme law of the land, *viz.*, the Federal Constitution.⁶⁰ Also, as already noted above, the granting of approval under the Code is not dependent on whether approval has been granted by the FIC. Thus, it is likely that the consequences of not complying with the guidelines of the FIC, which are not issued pursuant to any power given by law, would

⁵⁵ *Ibid.*, at 174. On appeal to the Supreme Court (see [1985] 2 M.L.J. 332), the legal status of the FIC guidelines was not touched upon by the learned judges.

⁵⁶ [1985] 1 M.L.J. 167.

⁵⁷ *Ibid.*, at 170-171.

⁵⁸ See, *supra*, note 43.

⁵⁹ It may be noted that land is a state matter upon which only the state legislature may make laws with respect thereto although the Federal Parliament may, nevertheless, make laws with respect to land matters in a state if such laws are enacted to ensure uniformity of laws and policy in respect of land matters in two or more states. See Federal Constitution 1957, Ninth Sch., List II, Item 2 (State List) and Art. 76(4).

⁶⁰ See the Preamble to the 1992 Amendment Act and see, *supra*, note 1.

probably be less adverse in such a situation where approval under the Code has at least been obtained. The argument that the transaction is opposed to public policy because there is no FIC approval would probably be a weak one as approval under the Code has already been obtained.

One way out of the difficulty would be for the two sets of restrictions to operate harmoniously in relation to each other. The State Authority, when drawing up guidelines for granting approval, can, for example, take into consideration the FIC guidelines while at the same time adhering to the provisions imposing restrictions on foreign ownership under the Code. In any event, the restrictions imposed under the Code are flexible and not rigid. As seen above, the State Authority in granting approval can impose terms and conditions⁶¹ and such terms and conditions may be tailored to meet the objectives set out in the FIC guidelines. In fact it has been reported that the State Authority of Johore will try to match its intended guidelines with that of the FIC.⁶² Similarly, the FIC's guidelines should be modified, if necessary, so as not to thwart the objectives of the respective state governments to attract foreign investment which can contribute to the economic development of the states. In this respect, the FIC should act flexibly in granting approval on a case by case basis. These considerations should be borne in mind so as to enable the two sets of restrictions to work harmoniously despite the fact that there is no direct relationship between the FIC and the State Authority.

IV. CONCLUSIONS

The imposition of restrictions on foreign ownership of land in Malaysia serves as a means by which ownership and control of both the agricultural and housing sectors by foreigners can be regulated to ensure that maximum economic benefits are being derived by the nation. The restrictions are not absolute and approval is likely to be granted where foreign ownership will contribute to the economic development of the country. It is equally clear that foreign ownership of such land which gives no visible benefits to the national economy, such as for speculative purposes only, will be discouraged. The non-imposition of restrictions on industrial land is consistent with the government's efforts to speed up the industrial development of the country's economy. However, it is hoped that a thorough and meticulous study has been undertaken of the implications underlying the re-imposition of the restrictions. This is to avoid a recurrence of the negative aspects of the restrictions which were encountered when implementing the earlier legislation

⁶¹ See *supra*, note 20.

⁶² See *The Star*, 13 October 1992, at 5.

lest the credibility of the legislature be undermined and the confidence of genuine foreign investors affected.

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