

**ANALYTICAL APPROACH TO THE IMPLEMENTATION OF
MORTGAGE LAW ON FLAT OWNED BY FOREIGNER
IN INDONESIA AND SINGAPORE**

David Tan

Abstract

Looking at the effects of globalization, the amount of expatriates coming to Indonesia and Singapore is constantly increasing. They come as a foreigner to do business and stay within a period of time. The scarcity of land area and certain national interest against land, are factors pushing the development of flats and strata living area (strata title). This type of dwelling is commonly the choice preferred by foreigner to live on. The flat ownership criteria and its rights to serve as a security interest for loan, especially for foreigner who owns it is then the problems arising out of it. This research is carried out to find out the process of owning a flat and its charge as security interest, such as encumbrance right/mortgage, especially by foreigner, both in Indonesia and Singapore. The prerequisite, process, advantages and disadvantages of methods used by the two countries.

This research is using the normative juridical method of analyzing the laws of Indonesia and Singapore. Sources of data used are in forms of primary legal materials, secondary legal materials and tertiary legal materials. Data collection technique is done through the method of literature study (library research). After all of the data are collected, the data are processed and analyzed. The qualitative analysis is used with the intentions to classify aspects of data studied. Furthermore, it is then concluded that the research associated with this is then described descriptively.

Based on the results of this study and research showed that there are some similarities and differences regarding the process of owning a flat and its charge as security interest, such as encumbrance right/mortgage by foreigner in Indonesia and Singapore. This similarities and differences, especially in the law system implemented by both countries also caused several advantages and disadvantages regarding it.

Keywords: *Strata Title, Security Interest, Encumbrance Right, Mortgage*

A. Research Background

Indonesia as one of the Southeast Asia's archipelago state has a large and wide area of land mass. Total area of Indonesia according to the concept of archipelago is 1.919.440 km² wide and stretch along as long as 3.977 miles.¹ The vast area is a treasure and proof of nation's richness that needs to be protected and maintained. This vast region is one of the supporting factors of life that is very important to every citizen of Indonesia. Almost all aspects of life of the Indonesian population depends on the availability of land. Therefore, the land as one of the nation's treasure and wealth shall be treated appropriately and with proper and appropriate planning.

One of the factors that increase the need for the land itself is the increase growth of the Indonesian Population. The projection shows that the population of Indonesia over the next twenty five years will continuously increase from 238,5 million in 2010 up to 305,6 million in 2035.² The fast growth of the Indonesian population will lead to the increase of the need of land to support the Indonesian population. To support both in terms of residence and livelihood. The increasing need for the land by Indonesian population, unfortunately is not followed by the increasing amount of land area available in Indonesia. The total land area of Indonesia is fixed (static) by nature and does not increase. Ironically it even tends to diminish (decrease) either because of natural phenomenon or due to human activities.

The land and house as a residence is a part of human rights, it is mentioned in the main body of the Constitution of the Republic of Indonesia (Undang-Undang Dasar Republik Indonesia 1945), Article 28H paragraph (1). Necessity for the house as a residence or dwelling in urban areas is very large due to the large population that is concentrated in a certain area. This large population, whether it is derived from the natural growth such as birth or through human activities, such as urbanization. During this time all along, to meet the needs of home as a residential area for Indonesian is through the construction of residential area horizontally, for example the construction of landed residential complex. This method is considered as less effective and cannot be carried out continuously, because the amount of land available for developing houses and residential area horizontally is very limited. To overcome this problem, a solution that arises is the use of land with adequate planning, one of which is by the way of constructing vertical residences, such as flats, apartement or condominium. Siswono

¹ Kedutaan Besar Republik Indonesia Kuala Lumpur, "Tentang Indonesia", <http://www.kbrikuualumpur.org/index.php/tentang-kbri/tentang-indonesia>, accessed on 27 July 2016.

² Badan Perencanaan Pembangunan Nasional dan Badan Pusat Statistik, *Proyeksi Penduduk Indonesia*, (Jakarta: Badan Pusat Statistik, 2013), pg.23.

Judohusodo explained that the building of flats in big cities is a trend of the future that can not be avoided and thus need to be promoted and need to be adjusted to the existing culture in Indonesian society.³

For the region of Southeast Asia, the nation that is quite successful in building, developing and managing housing projects (flats) is Singapore. This proves is due to the many successful development and construction of housing projects (flats) in Singapore. Just like Indonesia, Singapore also experience population growth every year. The percentage of population growth in Singapore in the year of 2015 was 1,2%.⁴ This rate of population growth of Singapore and the amount of foreigner that enter into Singapore is actually one of the factors driving the development and construction of flats in that nation. The high number of average population growth is due to many of foreign nationals that come into Singapore for work and study purposes.

Based on what mentioned above, it can be seen that the trend of rising public interest especially in the property products, including but not limited to flats, not only occurs in other countries, but also in Indonesia. This is due to factor of a limited space of land area whilst the population growth is high and still increasing, resulting in an increase in the needs of housing and residential area for the population to stay. In addition to the needs factor, people also tend to buy property products due to speculative reasons. The tendency of the increasing demand in property products and limited land area, especially in urban areas became the main reason of development and construction of flats in both Indonesia and Singapore.

Therefore, it is necessary and important to know about the legal provisions that is governing the flats units be as a collateral on credit purchases by foreign nationals in Indonesia and Singapore. In connection with the above matters, the Researcher is interested to study and research more on the imposition of flat unit (strata title) as a collateral on credit purchases by foreign nationals in Indonesia and Singapore.

B. Research Questions

From the research backgrounds that have been described above, the problems and questions that can be formulated in this research are:

1. How is the law in Indonesia and Singapore that governs about the acquiring and rights a foreigner has on a flat?

³Siswono Judohusodo, *Rumah untuk Seluruh Rakyat*, (Jakarta: Unit Percetakan Bharakerta, 1991), pg. 27.

⁴Departement of Statistics, Ministry of Trade & Industry, "Population Trends 2015", https://www.singstat.gov.sg/docs/default-source/default-document-library/publications/publications_and_papers/population_and_population_structure/population2015.pdf, downloaded on 10 August 2016.

2. How is the method to charge a flat as loan collateral that is owned by foreigner in Indonesia and Singapore?
3. What are the advantages and disadvantages in ownership and the charge of flat by foreigner in Indonesia and Singapore?

C. Research Methodology

The type of research used in this research is the normative legal research because the object of study is aimed only at the library materials and applied legislation or written law with materials that are then applied to a particular legal issues.⁵ According Soerjono Soekanto and Sri Mahmudi, in the normative legal research approach, library materials constitute the most basic data which in research methodology studies were classified as secondary data.⁶ In this study the juridical approach used to examine and review the existing rules and regulations that have linkage relationships, particularly regarding comparative law which is one of the scopes of the normative legal research. In this normative juridical research, the Researcher uses a comparative law study as a kind of research which emphasizes and look for differences that exist in the legal system of Indonesia and Singapore in relation to how the process of encumbrance of a strata title as a loan collateral for purchase by a foreign nationals.

The type of data used by Researcher in this research is the secondary data obtained from the literature and documents research by collecting and examining or searching documents and literature that can provide information required by the Researcher. Soerjono Soekanto and Sri Mamudi suggests that the secondary data includes primary legal materials (*bahan hukum primer*), secondary legal materials (*bahan hukum sekunder*) and tertiary legal materials (*bahan hukum tersier*).⁷ Data collection techniques in this research will be conducted using the method of literature study. Data will be collected by means of literature study, in this case a search for information from an existing source or collected by others or of library materials by tracking the literature related to the objects of research, such as legislation, books, official documents, research results, journals and other data obtained through primary legal materials, secondary legal materials and tertiary legal materials. The data analysis method that will be used is qualitative analysis. Qualitative research data tends to describe, i.e. data in the form of words and sentences that is obtained from official documents, personal documents and other

⁵Peter Mahfud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2005), pg. 89.

⁶Nomensen Sinamo, *Metode Penelitian Hukum*, (Jakarta: PT Bumi Intitama Sejahtera, 2009), pg. 86.

⁷Soerjono Soekanto dan Sri Mamudi, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 2003), pg. 13.

documents. This research data is collected and processed in a qualitative descriptive analysis manner.

D. Research Findings and Discussion

1. Indonesia

According to the data, it was found that there is an increase in the amount of foreigner in Indonesia. Either just visiting or staying in Indonesia. The period of June – August 2015, there are about 864.982 foreigners that enter Indonesia. This is due to the free-visa facility for several countries. In the same period in the year of 2014, the amounts of foreigner that enter Indonesia only reach 740.718 people. According to the Director General of Immigration, Ronny Sompie, from the data of immigration regarding the limited stay permit issuance, mostly are issued to Chinese, which reaches up to 20.911 people. Ranking two are the Japanese with 17.911 limited stay permits issued. The third are the South Koreans, with 15.495 limited stay permits issued.⁸

Flats in Indonesia mainly comes in many types. There are public housing flats, special flats, state's flat and commercial flats. Public housing flats, special flats and state's flat are usually built by and with the budget of the government while commercial flats are usually built and developed by Indonesian private companies. The example of public housing flats which are developed in 2016 by the government are the housing projects of *Pasar Rumput*, *Pasar Minggu*, *Pondok Kelapa* and Block C2 in Kemayoran. All four of these public housing flats are located in Jakarta and developed by the Ministry of Public Works and Housing (Indonesian: *Kementerian Pekerjaan Umum dan Perumahan Rakyat*), precisely the General Directorate of Housing Provision (Indonesian: *Direktorat Jenderal Penyediaan Perumahan*).⁹

While the commercial apartment that is developed by private Indonesian companies, such as Somerset Grand Citra and Superblock Citra World Jakarta 1 which is located in Jakarta's Central Business District (CBD) and developed by PT Ciputra Development Tbk. Commercial flats/apartments are mostly targeted by foreigner to purchase due to the complete facility, convenience and security.

⁸Directorate General of Immigration – Ministry of Law and Human Rights of the Republic of Indonesia, “Bebas Visa: Jumlah WNA di Indonesia Bertambah”, <http://www.imigrasi.go.id/index.php/berita/berita-utama/816-bebas-visa-jumlah-wna-di-indonesia-bertambah>, accessed on 19 December 2016.

⁹Sekretariat Kabinet Republik Indonesia - Indonesia, “Pemerintah Bangun 5 Rusun Strategis di Jakarta”, <http://setkab.go.id/pemerintah-bangun-5-rusun-strategis-di-jakarta/>, accessed on 04 January 2017.

From the research done by the Researcher, Bank in Indonesia does not give out any information about loan for home ownership by foreigner. The legal condition and regulation in Indonesia is the main obstacle for banking institution to give out financing facilities in Indonesia. Many of banks in Indonesia are reluctant to finance foreigner to purchase home in Indonesia. Although the government already introduces new regulations regarding the home ownership for foreigner in Indonesia, but in practice, there is still a lot of banking institution which haven't ready to facilitate this. This is truly a very unfortunate condition, given if applied right, the market for home ownership in Indonesia can be very profiting, especially foreigner home loan. The condition in Indonesia as stated above is due to the implementation of the Regulation of Bank Indonesia number 7/14/PBI/2005 regarding Restrictions on Rupiah Transaction and Foreign Currency Lending by Banks on 14th June 2005. In Article 3 of the Regulation of Bank Indonesia number 7/14/PBI/2005, it is strictly forbidden to give out credit facility, such as lending to foreigners. The effect of the implementation of this regulation causes banks to be reluctant to give out credit facility for foreigners, until now.

2. Singapore

The trend of increase, does not only applies to Indonesia, but also applies to Singapore. As one of the leading country in South East Asia sector, the number of foreigner in Singapore is still very high. By the end of June 2016, the total population of Singapore is 5,61 million, which consists of 3,93 million resident populations and 1,67 million of non-resident population. Among the resident population, there are 3,41 million which are Singapore citizen and the rest, about 0,52 million people are Singapore permanent resident.¹⁰ This high density of foreigner in such a small country means that the need for the housing sector for foreigner in Singapore is a big opportunity with such a high demand rate.

Same as Indonesian counterpart, in Singapore, flats/apartments are mainly developed by either government through Housing and Development Board or private sectors. Examples of public housing in Singapore are HDB Flats while private housing may consists of Executive Condominium, Condominium and Apartment. Housing and Development Board built slightly over 1 million units since its founding in 1960 (the 1 million flat was completed in December 2010), Singapore Improvement Trust (a government organization set up in response to the housing needs)

¹⁰ Department of Statistics - Singapore, "Singapore Population Highlights", http://www.singstat.gov.sg/docs/default-source/default-document-library/statistics/visualising_data/population-trends2016.pdf, accessed on 19 December 2016.

built about 23.000 units between 1927 and 1960, while JTC Corporation (formerly the Jurong Town Corporation/裕廊集团) and Housing and Urban Development Company (HUDC) built few thousand units between 1960's and 1980's, making a total of about 1,1 million public housing flat units built in the history of Singapore, as 2016.¹¹

In Singapore, the loan given for foreigner who wishes to purchase and acquire a permitted residential property, whether for investment or to live in, are a lot more common. From the official website of the United Overseas Bank (大华银行有限公司), a commercial banking company in Singapore, commonly known as UOB, the documents and requirements needed for a home loan application for foreigner are:¹² duly completed loan application form, copy of passport, copy of identity card (for Malaysian citizen), latest certified true copy of income documents (pay slip for employee or 3 months' bank statements for self-employed) and copy of property's sales and purchase agreement.

The loan given for foreigner who wishes to apply for loan can also receive financing up to 80% of the purchase price or property market value, whichever is lower. Debtor can also enjoy the maximum loan repayment period up to 35 years or 75 years of age at end of loan tenor, whichever is earlier.

1. Law in Indonesia and Singapore that Governs about the Acquiring and Rights a Foreigner has on a Flat

Before charging a strata title, a foreigner must first be allowed to purchase a property, for this instance is a flat/apartment/condominium in Indonesia with a title (strata title). The terms and conditions for purchasing a property, including but not limited to strata title has been regulated by the Indonesian government in certain laws and regulations, which must be followed by the said foreigner, before purchasing the strata title.

Which can be known that building a flat/apartment/condominium can be built above certain rights/titles of land, such as freehold title, building rights title and rights of use title above the State Land, building rights title and rights of use title above the Land Management Right. Which is conformable with the provision of Article 17 of Act Number 20 of 2011 regarding Flats. Although with different base title, the proof of ownership for flat/apartment/condominium unit is only one, that is the

¹¹ Housing & Development Board - Singapore, "Annual Reports", <http://www10.hdb.gov.sg/eBook/AR2016/key-statistics.html>, accessed on 04 January 2017.

¹² United Overseas Bank, "FAQ for Foreigners", http://www.uob.com.sg/personal/loans/property/mortgage_resource/foreigner_faq.html, accessed on 27 December 2016.

Strata Title Certificate (Indonesian: *Sertipikat Hak Milik atas Satuan Rumah Susun*). This certificate of strata title is then given to its owner, upon transaction it is then being processed to the National Land Agency (Indonesian: *Badan Pertanahan Nasional*) to be registered about the transfer of rights and changing the former name into the present owner's name.

The specialized regulation that governs about the ownership of residence or dwelling by foreigner residing in Indonesia is on the Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia. This regulation is effective from the 28th of December 2015 until now. The term residence and dwelling in this regulation doesn't only goes for landed property (which in the regulation referred to as "*Rumah Tunggal*"), but specifically effective for strata title too, as stipulated in Article 1 number 3 of the Government's Regulation said above.

From the provision of Article 2 and Article 4 above, can be known that a foreigner can own a property in a couple of alternatives, weather its landed property with a plot of land but with only the Rights of Use Title or a unit of apartment/flat/condominium with ownership of strata title. The major concern of the Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia, is that the foreigner must bear a Staying Permit (Indonesian: *Izin Tinggal*) in order to purchase and own a property product in Indonesia.

After the said foreigner attained a visa, he/she is then required to obtain admittance permit to enter Indonesia. The admittance permit is granted in accordance with the type of visa that is owned by the foreigner. After that, the foreigner is then obliged to have a staying permit (especially for Diplomatic Purpose Staying Permit, Service Purpose Staying Permit and Limited Stay Permit). As for the Permanent Stay Permit, a foreigner can apply for this kind of permit after he/she has obtained a Limited Stay Permit and has been staying in Indonesia at least 5 (five) consecutive years as of the date of Limited Stay Permit. The Layover Permit (Indonesian: *Izin Singgah*) is effective to 14 days (Article 34 of Government's Regulation Number 32 of 1994), 60 days for Visit Permit (Article 35 of Government's Regulation Number 32 of 1994) and 2 years for Limited Stay Permit (Article 37 of of Government's Regulation Number 18 of 2005 regarding Amendment of Government's Regulation Number 32 of 1994).

The Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia is the implementation of the government's policy to give certainty for foreigner. Thus, this government's policy is regulation in hopes of increasing the foreign investments in Indonesia, increasing the foreign exchange, supporting the housing sector, improving the employment rate and national economic development in general, for the sole purpose of improving the life quality and welfare of the Indonesian people.

Another regulation that regulates about the ownership of property, weather it is landed property of apartment/flat/condominium unit (with strata title) is the Regulation of the Minister of Agrarian and Spatial/Head of the National Land Agency Number 13 of 2016 regarding Procedure of Giving, Release or Transfer of Ownership of Residential Dwelling House by Foreign Person Domiciled in Indonesia, that is in effect from 21st March 2016.

The Regulation of the Minister of Agrarian and Spatial/Head of the National Land Agency Number 13 of 2016 regarding Procedure of Giving, Release or Transfer of Ownership of Residential Dwelling House by Foreign Person Domiciled in Indonesia mainly assert and affirm the provision of the Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia. But beside that, the Regulation of the Minister of Agrarian and Spatial/Head of the National Land Agency Number 13 of 2016, as the "*lex specialis*" regulation for foreign property ownership in Indonesia also adds several new provision as the prerequisite that foreigner should watch out before buying property in Indonesia.

The Regulation of the Minister of Agrarian and Spatial/Head of the National Land Agency Number 13 of 2016 regarding Procedure of Giving, Release or Transfer of Ownership of Residential Dwelling House by Foreign Person Domiciled in Indonesia does not only cover about purchase and ownership of landed house or strata title in Indonesia, but also the encumbrance of landed house or strata title in Indonesia with foreign ownership. The minimum transaction price/buying price for foreigner may vary according to the type of property and its location. The variation of prices in categorized into 2 (two) major kinds of property, those are landed single house and apartment/flat/condominium unit (strata title).

Table 4.1

Minimum Buying/Transaction Price for Apartment/Flat/Condominium Unit (Strata Title)

Number	Location	Price (≥) in Indonesian Rupiah
1	Special Capital Region of Jakarta (<i>DKI Jakarta</i>)	5.000.000.000
2	Banten	1.000.000.000
3	West Java (<i>Jawa Barat</i>)	1.000.000.000
4	Central Java (<i>Jawa Tengah</i>)	1.000.000.000
5	Yogyakarta	1.000.000.000
6	East Java (<i>Jawa Timur</i>)	1.500.000.000
7	Bali	2.000.000.000
8	West Nusa Tenggara (<i>Nusa Tenggara Barat</i>)	1.000.000.000
9	North Sumatra (<i>Sumatera Utara</i>)	1.000.000.000
10	East Borneo (<i>Kalimantan Timur</i>)	1.000.000.000
11	South Sulawesi (<i>Sulawesi Selatan</i>)	1.000.000.000
12	Other areas (<i>Daerah Lainnya</i>)	750.000.000

Source: Compiled by the Researcher

The above explanation is then being formed into the brief explanation version which is the summarized into the form of table to simplify and make understanding easier. Below are the prerequisite condition before a foreigner buys a residence in Indonesia.

Table 4.2
Prerequisite for Foreign Purchase of Property in Indonesia with the
Prevailing Laws and Regulations

Number	Regulation	Provision Under	Explanation	Requirements
1	1945 Constitution of the Republic of Indonesia	Article 33 paragraph (3)	all vital needs of the nation under the State's control and it's use is to achieve prosperity and welfare of Indonesian people, with the exception of foreigner with benefits in Indonesia (Nationality Principle)	The foreigner's presence in Indonesia gives advantages and benefit to Indonesia
2	Act Number 5 of 1960 regarding Base Agrarian Regulation	Article 42	The Rights of Use title can be owned by Indonesian citizen and foreigner	Foreigner can only purchase and obtain property in Indonesia (weather it is landed or strata title) if the said property is built above a land with a Rights of Use title
3	Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia	Article 1 paragraph (1)	Foreigner is not an Indonesian citizen that his/her presence in Indonesia gives out benefit, doing business, work or invest in Indonesia	The foreigner's presence in Indonesia gives advantages and benefit to Indonesia Doing Business in Indonesia Working in Indonesia Invest in Indonesia

		Article 2 paragraph (2)	The foreigner allowed to purchase property in Indonesia has to bear a Staying Permit in accordance with the laws and regulations	Foreigner must bear a Diplomatic Staying Permit, Service Staying Permit, Visit Permit, Limited Stay Permit, Permanent Stay Permit.
		Article 4	Residence or dwelling for purchase by foreigner mainly consists of Landed Single Property and Strata Title, but only with the Rights of Use title	For Landed Single House: the said building/property must be built above the Rights of Use title, weather the Rights of Use title is above a freehold title, above State's Land or Rights of Management Land
				For Strata Title: the said unit must be in a building, built above the Rights of Use title, weather the Rights of Use title is above State's Land or Rights of Management Land
4	Regulation of the Minister of Agrarian and Spatial/Head of the National Land Agency	Article 2 paragraph (1)	Purchase must be a newly built property and not second handed property	Bought directly from the Developer/Land Owner

	Number 13 of 2016 regarding Procedure of Giving, Release and Transfer of Ownership of Residential Dwelling House by Foreign Person Domiciled in Indonesia	Article 2 paragraph (2)	Must not below the minimum transaction/buying price	refer to Table 4.1 and Table 4.2 of this Undergraduate Final Project
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Source: Compiled by the Researcher

One major changes on the Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia, that due to Article 12 of the Government's Regulation, which states that the Government's Regulation Number 103 of 2015 is in effect and the Government's Regulation Number 41 of 1996 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia is repealed and not in effect. Whilst in Article 1 paragraph (1) of the former in effect Government's Regulation Number 41 of 1996 states that the foreigner domiciled in Indonesia can only own a (one) residence for stay or dwelling in Indonesia. While in the Government's Regulation Number 103 of 2015 regarding Ownership of Residence or Dwelling by Foreigner Residing in Indonesia doesn't regulates that anymore, this can only means that the ownership of residential property for foreigner in Indonesia is not limited to only one residence for each foreigner.

The purchase able flat for foreigner in Indonesia is the commercial flat, which according to article 45 paragraph (4) of Act Number 20 of 2011, can be owned by Indonesian or foreigner, by purchase or rent. Foreign person in Indonesia can purchase the commercial flat solely as residence and dwelling, only if the foreign person can comply with the prevailing laws and regulations in Indonesia.

In Singapore, the ownership of a property by a foreigner is mainly divided into 2 (two) types of property, namely restricted property and non-restricted property. The applicant (foreign person) whom intends to purchase residential property in Singapore, only for the purpose of occupation by him/her and his/her family must meet the criteria of Section 25 subsection (5) of the Residential Property Act. Providing the provisions above, if the application of the applicant for ownership of restricted property in Singapore by the Minister of Law of Singapore, then the applicant cannot sell, assign, transfer or otherwise dispose of his or its estate or interest in the residential property within such period of time as may be specified by the Minister of Law of Singapore, as stipulated in Section 25 subsection (7) (aa) of the Residential Property Act.

To better understand the provision of the Residential Property Act mentioned above, the Researcher describes the above provision in a form of table as follows:

Table 4.3

Prerequisite for Foreign Purchase of Restricted Property in Singapore with the Prevailing Laws and Regulations

Number	Regulation	Provision Under	Explanation	Requirements
1	Residential Property Act (Chapter 274)	Section 2 subsection (1)	In order to be able to purchase a restricted property in Singapore, the applicant must be as mentioned in the provision	<ul style="list-style-type: none"> a Singapore company a Singapore limited liability partnership a Singapore society a foreign person that has been granted approval any person, company, limited liability partnership, society, association or other organization or body who or which has been exempted by the Minister under section 32

				any body, corporate or otherwise, declared by the Minister by notification in the <i>Gazette</i> to be a public authority or an instrumentally or agency of the Government
		Section 25 subsection (2)	prerequisite for a foreign person to buy a restricted property as residence in Singapore	application to the Minister of Law of Singapore through Controller
				being natural person
				purchase or acquire residential property for the purpose of his own occupation and that of his family as a dwelling-house
		Section 25 subsection (5)	prerequisite for a foreign person to buy a restricted property as residence in Singapore	Singapore Permanent Resident (PR)
				in the opinion of the Minister, is of economical benefit to Singapore or who, in the opinion of the Minister, makes or is able to make adequate economic contribution to Singapore; or
				not being a citizen, possess professional or other qualification or experience which, in the opinion of the Minister, are of value of benefit or advantageous to Singapore

Source: Compiled by the Researcher

Whilst the property that can be purchased by foreigner as mentioned on the regulations above are the property which is categorized

as restricted property. If the foreign person intends to buy a restricted property in Singapore, he/she is then obliged to follow the procedures mentioned above. If the said foreigner intends to buy a non-restricted property, then he/she (foreign person) is not obliged to follow the steps mentioned above.

Flats, weather it is HDB flat, apartment or condominium are considered as residential property. Residential property in Singapore according to Residential Property Act (Chapter 274) particularly for foreign purchase, mainly categorized into 2 (two) types, namely restricted property and non-restricted property.

While the types of property a foreign person can purchase without approval are condominium unit, flat unit, strata landed house in an approved condominium unit, a leasehold estate in a landed residential property for a term of not exceeding 7 (seven) years (including any further term which may be granted by way of an option for renewal), shophouse (for commercial use), industrial and commercial properties, hotel (registered under the provisions of Hotels Act) and executive condominium unit, HDB flat and HDB shophouse.¹³

2. Method to Charge Flat as Loan Collateral that is Owned by Foreigner in Indonesia and Singapore

If the purchase is done through the loan/credit facility, commonly in practice there are 2 (two) options. Which is the Gradually Paid Option (Indonesian: *opsi Cash Bertahap*) and the Credit Facility Option (Indonesian: *opsi Fasilitas Kredit*). If purchase by foreigner is done through the gradually paid option, then the installments is paid gradually by the buyer (foreigner) in a period of time, periodically, which usually the period of installments is adjusted with the time needed to finish the building of the flat. Which means, when the building of the flat is finished

¹³ Singapore Land Authority, "Foreign Ownership of Properties", <http://www.sla.gov.sg/Services/RestrictiononForeignOwnershipofLandedProperty.aspx>, accessed on 01 October 2016.

completely, the transaction price is also paid fully. As of the flat unit is being handed over to the buyer (foreigner), the price has been paid in full.

If the purchase is done through the loan/credit facility, the certificate of ownership is being held by creditor until the repayment of loan. If loan purchase is chosen, commonly the banking institution steps in as credit provider. Banking institution have a standard in giving out credit to the society, namely by application of “the Five C’s Principle”. Bank is obliged to have confidence based on thorough analysis in the good will and ability of debtor that the debtor will be able to repay all his/her loan in accordance with the agreement. In order to gain confidence in the ability of the debtor to repay his/her loan, bank is obliged to do assessment to the character, capacity, capital, condition of economic and collateral.¹⁴

If in the component of five c’s principle as mentioned above, for example the character and collateral is a foreigner with flat as collateral. Then, the main consideration is the legal certainty for both the foreigner as debtor to obtain credit and for the banking institution as creditor to gain confidence and security for the repayment of loan.

It is stated in Act Number 5 of 1960 regarding Base Agrarian Law and Act Number 4 of 1996 regarding Encumbrance Right Over Land and Land Related Objects that the charge over land and land-related objects is no longer charged using the mortgage instruments as provided in Article 1162 to Article 1232 of the Indonesian Code of Civil Law, but it is charged using Encumbrance Right as charge instrument.

As mentioned before, regarding the charge of flat as loan collateral, the procedures and techniques of charging an encumbrance right over flat as collateral is mainly the same as charging encumbrance right over land due to the common laws and regulations that governs it, which is the Act Number 4 of 1996 regarding Encumbrance Right Over Land and Land Related Objects that the charge over land and land-related objects.

¹⁴Anak Agung Bagus Purnawan, “Pembebanan Benda Bergerak Sebagai Jaminan Kredit Menurut Undang-Undang Fidusia dan Prakteknya pada Lembaga Perkreditan Desa (LPD) di Kabupaten Badung”, (Tesis Universitas Udayana, Denpasar, 2007), pg. 5.

Regarding the type of credit facility the debtor chose, if the payment of transaction price for purchase of flat by foreigner through banking institution, as the building of flat finishes, the credit is then in effect. Causing the banking institution to step in and paid the rest of the unpaid price whilst holding the certificate of ownership for the flat unit. The physique of the flat unit is being handed over by the seller (developer) to the buyer (foreigner), but the certificate of ownership for the flat unit is being held by the banking institution as loan collateral and for the reason of security.

The certificate of ownership for the flat unit is then charged with an encumbrance right instrument for a certain amount of period in accordance with the tenure of loan given, said for instance 5 years. With the encumbrance right charged in the certificate of ownership for the flat unit, then the certificate of ownership for the flat unit is then held by bank. In the event of default by the debtor, the bank that gives out credit facility can auction the flat unit with the encumbrance right that is charged over the certificate of ownership for the flat unit.

The charge of encumbrance right toward flat unit is a follow up contract or *accessoir* (additional agreement) derived from the credit agreement. In the law science, the position of credit agreement is the principle agreement (*perjanjian pokok*). Thus the position of collateral charging agreement acts as follow up contract/agreement or additional agreement (*accessoir*).¹⁵

Commonly in Singapore, a loan is divided into 2 (two) kinds of loan, namely "Unsecured Loans" and "Secured Loans". Unsecured loans are loans given without a collateral in return. Whilst a secured loan is a loan given with a collateral handed over to the lender in accordance with the prevailing laws and regulations. Example of unsecured loan is the credit given in form of plastic cards (credit card). See Figure 4.6 for the

¹⁵ Adrian Sutedi, *Implikasi Hak Tanggungan terhadap Pemberian Kredit oleh Bank dan Penyelesaian Kredit Bermasalah*, (Jakarta: BP. Cipta Jaya, 2006), pg. 22.

rights of recourse of an unsecured creditors compared to a secured creditor in the event that the debtor defaults on repayment.

The foremost decision of purchaser/borrower is the choice of a financier. On the top of the borrower's list of concern is the interest rate charged by the financier. Borrowers will naturally prefer financier who charge the lowest interest rates. Another important concern is whether collateral (security) is required or not. Other concerns include the amount of loan desired, loan tenure and repayment terms.

The idea of taking security is obvious. A financier wants to ensure as far as possible that the loan given will be repaid in full and on time. If the borrower cannot repay the installments, there is no assurance that the financier would be repaid in full. To secure the financier's position, the financier would be in most cases insisting on some form of collateral to be furnished by the borrower. A collateral may be in form of an assurance of payment given by the third party, an individual or an incorporated entity. Another form of security also broadly categorized as real property and personal property. Generally, real property refers to land and buildings. Personal property can be sub-divided into tangible and intangible property. Tangible property is a property which can be physically perceived and possessed whilst intangible property is property without physical attributes but are rights recognized by the law. example of intangible property are life insurance policies and account receivables.

Under Singapore law, all types of collateral may potentially be available to secure lending obligations, provided the grant thereof is not against public policy. Common types of collateral that can be used include real property (land and building), personal chattels, debts and other receivables, stocks and shares and other choses in action. It is possible to give asset as security by means of a general security agreement. The main types of security interests that can be created under Singapore Law are mortgages, charges, liens and possessory pledges.

Flat commonly built above registered land is governed by the Land Titles Act (Chapter 157). With registered land, it is possible to create legal mortgages or charges by using the prescribed forms under the Land Titles Act. A legal mortgage for land under the Singapore Land Titles Act (Chapter 157) has to be in a statutory prescribed form and registration with the Singapore Land Authority (SLA) is compulsory in order for the mortgages or charge to be recognized as legal interest (Section 45 subsection (11) Land Titles Act). Thus, according to the explanation above, the encumbrance of flats and registered land is the same. Using the method of mortgage. Under the Land Titles Act, all mortgages act only as security and do not involve the transfer of title from the debtor to the creditor (Section 68 subsection (3) Land Titles Act).

3. The Advantages and Disadvantages in Ownership and the Charge of Flat by Foreigner in Indonesia and Singapore

The advantages in ownership and charge of flat by foreigner in Indonesia are:

1. A foreigner can directly buys a property in Indonesia (including flat) as long as he/she meets the requirements provided by the laws and regulations of Indonesia. (The law and regulation of each province that regulates this matter may vary and so is not taken into accord in this statement).
2. Foreigner can only buys and charge a property which is already registered into the system of National Land Agency (proved by the issuance of certificate of ownership), thus making forgery, multi documents and theft of data is nearly impossible. This means legal certainty for foreigner that buys a property in Indonesia.
3. The remedy of creditor by selling of the collateral charged with encumbrance right can only be done by the virtue of law which substantially can be done based on agreement of both parties (debtor and creditor) that if the selling is done through this method, believed to

achieve a more higher price and beneficial to all parties. This means more protection for both parties (especially the debtor).

The disadvantages in ownership and charge of flat by foreigner in Indonesia are:

1. Specifically for a foreigner to purchase a flat in Indonesia, he/she can only buys a new flat (bought directly from the developer) and must be bought above the minimum price stated in The Regulation of the Minister of Agrarian and Spatial/Head of the National Land Agency Number 13 of 2016 regarding Procedure of Giving, Release or Transfer of Ownership of Residential Dwelling House by Foreign Person Domiciled in Indonesia. The type of flat allowed to buy is also limited to only the commercial flats that is built above the Right to Use title. This means a much more limitation to the freedom of choice for foreigner who wishes to buy property (especially flat) in Indonesia.
2. In Indonesia, security interest over flat that is owned by foreigner that can be created is only the encumbrance right. This means that the flat as the object of encumbrance right must have a title (especially the right to use title) must be built above a registered land. A foreigner cannot buys a non-registered land, thus the bank/financing institution cannot grant loan due to the security interest that cannot be made throughout.
3. Additional procedure for foreigner who owns a flat with a right to use title above the Land Management Right (Hak Pengelolaan), then the said foreigner must have an approval from the bearer of the Land Management Right (such as Badan Pengusahaan Kawasan Perdagangan Bebas dan Pelabuhan Bebas Batam in the City of Batam) before he/she wants to create security interest over his/her flat.
4. If the foreigner (debtor) defaults, the creditor's remedy are only limited to foreclosure using the parate executie either with or without court's order or selling the collateral (charged with encumbrance right) by parties. The selling of collateral is also limited to only the condition of which both parties believed that this can be done to benefit both parties.

Thus the creditor remedies is very limited, even the parate executie has to be done through court's order if the debtor doesn't want to vacate the property. Foreclosure through parate executie with a court's order is also time consuming (court's order is open for appeal cassation) and cost consuming (such as stamp duty).

The advantages in ownership and charge of flat by foreigner in Singapore are:

1. A foreigner can buy a property (flat) in Singapore without a minimum purchase price (like in Indonesia). The foreigner can also freely buys a non-restricted property, such as mentioned in the Table 4.5 above. This means more freedom of choice for the foreigner to purchase flats in Singapore. For the purchase requirements of restricted property, as long as the said foreigner meets the prerequisite, he/she is entitled to buy such properties, such requirements are the Singapore's Minister of Law approval, a natural person and the foreigner brings an economical benefit to Singapore.
2. In Singapore, mortgage can be created as a security interest over property, either that said property is unregistered or already registered in the Torrens system. This means more freedom for buyer, especially foreigner to choose the flat that he/she wants. This also means that the banks or financing institution can have no problem creating a security interest if the loan is granted.
3. If the debtor defaults, then the creditor (mortgagee) have more freedom of choices in the remedies, such as rights to sell under the power of sale (Section 73 of the Land Titles Act), taking into possession (Section 75 of the Land Titles Act) or foreclosure rights (Section 76 of the Land Titles Act).
4. The creditor (mortgagee) can immediately exercise its power of sale rights, under its own discretion, once the debtor cannot repay the loan and have been served with a notice regarding the conditions or there has been a breach in the provision of the mortgage deed.

The disadvantages in ownership and charge of flat by foreigner in Singapore are:

1. The process of sale and conveyance takes up to 3 (three) months period. Begins with the signing of the contract of sale, in order to do investigation, searches and history of the property's title. After that process, then the step of conveyance can be initiated.
2. If the property falls under the unregistered land category, then the process of sale, conveyance and mortgage is done through the deed system in the Registry of Deed, which is prone to the risk of forgery, multi deeds and theft of deeds.
3. Under the creditor/mortgagee's power of sale rights, the power is solely the discretion of the creditor/mortgagee to effect the power of sale. If the proceeds of sale cannot exceed the outstanding loan (lower than the amount of outstanding loan), then the debtor (be it foreigner or its own citizen) is left with nothing but his/her surety (guarantee) to be liable for the debt balance. This means that the debtor has no protection against the creditor will, even if the creditor chooses to exercise its power of sale below the outstanding loan amount. The creditor merely loses its position of secured creditor, whilst the debtor is still liable to pay the outstanding loan amount, regardless of the way. It is a dilemma if seeing the downed condition of economics, which the selling price cannot fetch the amount needed to pay off the outstanding loan.

E. Conclusion

1. Law in Indonesia and Singapore that Governs about the Acquiring and Rights a Foreigner has on a Flat

As a foreigner, buying a property in Indonesia and Singapore, both comes with its own prerequisite and requirements that need to be met. Both countries have a certain criteria to be met by foreigner to own a property (including flat). Indonesia concerns more about the pricing of the property and the benefit that the foreigner brings to Indonesia. This can be seen by the laws and regulations imposed in Indonesia regarding

this (such as implementing the minimum purchase price for foreigner). The purpose is to maintain the welfare of the citizen of Indonesia itself, by reserving the affordable housing for its own citizen.

While Singapore concern more on the type of property that a foreigner can buy, beside the economical benefit the foreigner brings to Singapore. This can also be seen by the prerequisite the laws and regulations imposed by the Singapore's government. The purpose is mainly the same with Indonesia, to maintain the citizen of Singapore's welfare (by reserving the affordable type of housing, which is subsidized by the government, for its own citizen) and to improve the economy sector of Singapore.

2. Method to Charge Flat as Loan Collateral that is Owned by Foreigner in Indonesia and Singapore

Regarding the charge of a flat as loan collateral that is owned by foreigner, both in Indonesia and Singapore must follow certain procedures that is almost the same in both countries. Both countries dictates that only after owning the flat and conveyance has been done, the encumbrance rights or mortgage can be charged against the flat. Although the credit/loan given comes in many terms and terminology, but the main idea is still the same in both countries.

The charge of flat or other property as a security interest in Singapore can be done by foreigner or Singaporean against a registered land property or unregistered land property (a foreigner can buys an unregistered land property including but not limited to flat built on unregistered land in accordance with the prevailing laws and regulations in Singapore), in contrast, the charge of flat or other property as a security interest in Indonesia cannot be done, either by both foreigner or Indonesian against an unregistered land property. Due to the encumbrance right that cannot be charged upon unregistered land property.

Regarding the charge of flat as a security interest in Indonesia and Singapore, although the law relating to encumbrance right in Indonesia and mortgage in Singapore is relatively well-established, particularly with Singapore's regard to the protection of the mortgagor's right (by implementing the English's court "mortgagor's equity of redemption"). The judicial trend in the United Kingdom and Singapore appears to be leaning towards upholding the mortgagee's right as creditor with the benefit of legal advice than the mortgagor. Unlike in Indonesia where, at least, seems to have implemented a more protective scheme by prescribing detailed steps to be taken by mortgagees who risk losing the loan given. However this Indonesian position has not been implemented in Singapore's laws. It remain to be seen how the Indonesian law and courts will proceed in their efforts to maintain the delicate balance between protecting the principle of freedom of contract and the need to interfere with that freedom, in order to protect the weaker party.

3. The Advantages and Disadvantages in Ownership and the Charge of Flat by Foreigner in Indonesia and Singapore

From the researching findings, the implementation of ownership law and mortgage law in Indonesia and Singapore causes several differentiations in techniques and laws. These then results to the advantages and disadvantages in Indonesia and Singapore regarding the ownership and mortgage rights/encumbrance rights.

The advantages in ownership and charge of flat by foreigner in Indonesia are:

1. A foreigner can directly buys a property in Indonesia (including flat) as long as he/she meets the requirements provided by the laws and regulations of Indonesia. (The law and regulation of each province that regulates this matter may vary and so is not taken into accord in this statement).
2. Foreigner can only buys and charge a property which is already registered into the system of National Land Agency (proved by the

issuance of certificate of ownership), thus making forgery, multi documents and theft of data is nearly impossible. This means legal certainty for foreigner that buys a property in Indonesia.

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Bebas dan Pelabuhan Bebas Batam in the City of Batam) before he/she wants to create security interest over his/her flat.

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(Section 73 of the Land Titles Act), taking into possession (Section 75 of the Land Titles Act) or foreclosure rights (Section 76 of the Land Titles Act).

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