

SOME LEGAL CONSIDERATIONS FOR FOREIGN INVESTORS IN THAILAND

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In my experience, Thailand has a straightforward and reasonably efficient legal and administrative environment for the setting up of a business. The rules are well established and the procedures are generally implemented in a predictable and consistent manner.

A foreign investor proposing to do business in Thailand may choose from several forms of legal organization, such as sole proprietorship, partnerships (unregistered ordinary partnership, registered ordinary partnership, limited partnership), private limited company, public limited company, joint venture or consortium, and branch of a foreign company. The most usual form used by the foreign investor is a private limited company registered in Thailand, so that form will be discussed in the following.

A private limited company is routinely registered and has the same fundamental legal characteristics as a United States corporation or an English limited company. It has a Memorandum of Association stating its business objectives and Articles of Association, being its by-laws. The liability of shareholders is limited to the amount, if any, unpaid on the par value of their shares. Subject to the Foreign Business Act and other applicable laws and regulations, all shares may be owned by foreigners and all directors may be foreigners.

There are three Thai laws with which a foreign investor must usually be especially concerned: the Foreign Business Act, the Alien Occupation Law and the Immigration Act.

In 2000 the Foreign Business Act B.E. 2542 (A.D. 1999) (“the Act”) entered into effect, replacing the 1972 National Executive Council Decree No. 281. The Act restricts and regulates the doing of business in Thailand by (i) foreign persons, (ii) foreign incorporated entities, (iii) Thai registered partnerships that are managed by a foreign person or half or more owned by foreigners, and (iv) Thai registered companies that are half or more owned by foreigners (each of (i) – (iv) “foreign businesses”).

Some provisions of the Act affecting foreign businesses:

The Act contains three schedules of therein specified commercial activity in which foreign businesses are forbidden to operate or require a license:

- (i) Schedule 1: nine categories of business which, because of special reasons, foreign businesses are forbidden to operate;
- (ii) Schedule 2: thirteen categories of business which, because of national security, culture, arts, traditional customs, folk handicrafts or natural resources and the environment, foreign businesses can operate with license issued by the Minister of Commerce with Cabinet approval, and which must have (a) to be announced minimum capitalization, (b) specified percentage of minority Thai ownership (which shall be at least forty percent, but may with Cabinet approval be reduced by the Minister of Commerce to not less than twenty-five percent), and (c) not less than forty percent of directors must be Thai citizens; and
- (iii) Schedule 3: twenty-one categories of business in which Thai nationals are not yet ready to compete with foreign businesses, which may be operated by foreign businesses if licensed by the Director General of the Business Development Department, Ministry of Commerce, with the approval of the Foreign Business Board.

The Minister of Commerce, with the advice of the Foreign Business Board, is empowered to issue regulations to be performed by foreign businesses licensed under the Act: (i) a ratio between the equity and loans to be used in the operation of the licensed business, (ii) a number of foreign directors who must be domiciled or reside in Thailand, (iii) the amount and the period of time to maintain minimum capitalization within Thailand (which required minimum capitalization amount for the business operation commencement must not be less than 25% of the average of the estimated expenditure for business operation per year for each business for a period of three years, however it must be at least three million Baht), (iv) technologies and assets, and (v) other necessary conditions.

Foreign businesses may engage in business not listed in the three schedules of the Act (or regulated as to foreign ownership by other laws), but the minimum capitalization to be used in the commencement of foreign businesses in Thailand, except for U.S. owned and managed businesses, must be not less than two million Baht.

Foreign businesses conducting operations under Schedules 2 or 3 of the Act that received promotion from the Board of Investment or under the law of Industrial Estate Authority of Thailand or other laws may operate, after reporting such status to the Director General of the Business Development Department and receiving a certificate under the Act.

In accordance with the Act, the Minister of Commerce has made regulations prescribing requirements and procedures for foreign businesses obtaining foreign business licenses and for foreign business operation.

Investors from the United States of America are generally not subject to the restrictions imposed by the Act. The Treaty of Amity and Economic Relations between the United States of America and Thailand ("Treaty") entered into force in 1968 (and is the most recent of consecutive treaties extending back to 1833). It is effective in perpetuity, but may be terminated by either country on one year's prior notice. The Treaty provides that businesses incorporated in the United States or in Thailand that are majority owned and controlled and managed by United States citizens, and United States citizens themselves, shall be accorded "national treatment" which means that, but for certain exceptions, Americans can engage in business in Thailand on the same basis as Thais. The exceptions are that Thailand may apply restrictions to Americans (as, in fact, Thailand does) from engaging in communications, transport, fiduciary functions, banking involving depository functions, the exploitation of land or other natural resources, and domestic trade in indigenous agricultural products. However, an American business claiming Treaty entitlement must report to the Director General of the Business Development Department and will receive a certificate under the Act. Americans are exempt from many provisions of the Act. Of course, the Treaty is reciprocal and by virtue of it Thai citizens are given privileges by the United States in being allowed to live in the U.S.A. and operate their businesses there.

Since 1973, all non-Thai citizens working in Thailand have been required to obtain work permits in accordance with the Alien Occupation Law, administered by the Department of Employment in the Ministry of Labor. Also, all foreigners who wish to enter or remain in Thailand are subject to the provisions of the Immigration Act, which is in the jurisdiction of the Immigration Bureau of Royal Thai Police in the Office of the Prime Minister. Normally, serious foreign investors should not encounter insurmountable problems in obtaining work permits or permission to stay in Thailand.

While there are legal restraints imposed on foreigners doing business in Thailand, foreign industrial and commercial activities beneficial to the country are generally made welcome.

Board of Investment promotion results from a contract being made between an investor and the Board of Investment. In consideration of the investor establishing a business in Thailand which the Board believes will be beneficial to the nation, the investor may be given various incentives. A foreign corporation may not be a promoted person, so almost all promoted persons are private limited companies registered under Thai law. In deciding whether to seek Board of Investment promotion an investor must weigh its objectives and policy against the concessions that the investor must make to the Board in order to obtain the benefits of promotion. The Board of Investment may specifically fix the shareholding of foreign investors on some promoted projects when it is deemed appropriate. Board of Investment promotion is often not legally essential for a foreign investor to be able to do business in Thailand. However, the possible benefits of Board of Investment promotion should be considered in making an investment decision. Also, if a business is located in an approved industrial estate benefits are available to it under the law of the Industrial Estate Authority of Thailand.

The registration, that is incorporation, of a private limited company may be accomplished within one day. Following information must be supplied for or is relevant to the formation and registration of the private limited company conducting the business:

1. What will the company be named? Every private limited company must have a name in the Thai language; almost any name is acceptable so long as it, or one confusingly similar, is not already in use or has been reserved. A company may in addition to its Thai name use names in other languages, such as English and Chinese. Certain words may not be used in a company name unless the company will engage in a business for which it has received the relevant license. Examples of such words are "bank" and "finance and securities". Also, to avoid misleading the public, a company may not use the word "investment" in its name but a frequently used and permitted alternative is "holding".

2. What type of business will the company be doing? The company must state its proposed business objectives in a Memorandum of Association. The objectives can be very broad and include many types of business, but, of course, must always incorporate the commercial activities that the company actually intends to conduct.

3. What will be the registered capital of the company? Every company must have an authorized capital divided into shares of identical par value. There is no limit on the maximum amount of authorized company capital and for that matter no minimum (except for companies half or more owned by foreigners which must have a minimum capital of at least two million Baht and if licensed under the Act a minimum capital of at least three million Baht, or higher amounts if specified in Ministry of Commerce regulations). However, as a general practice, the minimum authorized capital of a Thai majority owned private limited company is 100,000 Baht. The minimum par value of shares in a private limited company is five Baht per share and there is no maximum par value, but each share of the company, whether a preference share or ordinary share, must have the same par value. When the company is registered at least twenty-five percent of the par value of all shares of the company must be paid in. Subsequent payments on the par value of shares are subject to call by the Board of Directors. Shareholders have a liability for the amount unpaid on the par value of shares held by them and this liability on shares not fully paid-up can continue for two years after shares are transferred. If a company is to have an authorized and paid up capital of less than two million Baht then it may experience difficulty in obtaining work permits for foreign employees.

4. Who will be the promoters? Every company must have a minimum of three promoters who are natural persons and each of whom must sign the Memorandum of Association and subscribe for at least one share of the company. Practically, the only function promoters fulfill is signing the Memorandum of Association and upon the election of the directors of the company they have no further role. The names of the promoters remain forever, whether the Memorandum of Association is amended or not, so it is nice to include, if reasonably available to sign, the names of persons who are actually involved with the venture. Photocopy of identification card (in case of Thai citizen) or of passport pages containing particulars of passport issue and holder's identity (in case of non-Thai citizen) of all promoters, duly certified as true copy by the relevant promoter, must be supplied to the

Registrar at the time of registration of the Memorandum of Association with the Department of Business Development, Ministry of Commerce.

5. Where will the registered head office of the company be located? This is relevant to in which of Thailand's 77 provinces the registration of the company will take place. Because of co-ordination between the Department of Business Development of the Ministry of Commerce in Bangkok and registration offices in provinces other than Bangkok, and the delays that can arise, if possible it is preferable to register initially a company with a head office in Bangkok. Subsequent transfer of a company's head office after registration to another province is easily accomplished. At the time of registration of incorporation, the map showing the location of the registered office must be supplied to the Registrar.

6. Will there be any branch offices? All operating locations of the company, other than the head office, should be registered as branch offices and the map showing the location(s) of branch office(s) must be supplied to the Registrar.

7. What are the provisions of Articles of Association? They are the corporate by-laws of the company, and thus its operating constitution, and may not be in conflict with the relevant provisions of the Civil and Commercial Code. In a joint venture type situation, it is frequently desirable to tailor the Articles of Association to the specific requirements of the investors, especially when providing for such matters as voting at shareholders' meetings, directorships, proxies for shareholders' meetings, quorums and the like.

8. Who will be the initial shareholders of the company? All of the authorized shares of the company must be subscribed for before the company may be organized. A private limited company must at all times have a minimum of three named shareholders.

9. Will there be any post registration share transfer? In many ventures it is common to want to have only the statutory minimum of three shareholders. Therefore, frequently after incorporation the single shares subscribed for by promoters are transferred to their principals, to the extent possible, so as to reduce the number of shareholders to three.

10. Who will be the directors of the company? A private limited company must have at least one director and there is no maximum as to the total number of directors. Directors must be human beings; corporations may not act as directors. It is necessary to provide the Registrar at the time of company registration with the name, age, nationality, complete residential address, and contact telephone number of each director. Photocopy of identification card (in case of Thai citizen) or of passport pages containing particulars of passport issue and holder's identity (in case of non-Thai citizen) of all directors, duly certified as true copy by the relevant director, must be supplied to the Registrar. Also, each director must sign a form accepting election. Directors who are not Thai citizens and who will be working on behalf of the company in Thailand may be appointed directors without obtaining a Thai work permit, but before they actually commence work in Thailand for the company they must obtain a Thai work permit. Non-Thai citizens who are directors but will not be working for the company in Thailand do not require any Thai work permit. While there is no legal requirement that any director of the company be resident in Thailand

(except for companies engaged in businesses to which the Act applies or other specific laws) if the company is to have dealings with the Customs Department, that is, it will be importing or exporting anything, then it must have at least one signatory director who is present in Thailand, that is to say a Thai citizen or a non-Thai citizen who has a work permit. This is because of Customs Department regulations concerning who can represent a company for purposes of dealing with that Department.

11. What will be the authorized director signatory authority? As a matter of public record every private limited company must register with the Registrar of Limited Companies its authorized director signatory. This is the name or names or number of the directors of the company who are authorized to sign on behalf of the company, binding the company, and indicates whether or not the common seal of the company must also be affixed to documents in order to legally obligate the company. This registered information may be relied upon by persons dealing with the company, acting in good faith, and on application the Registrar will issue an official certificate stating a company's registered authorized director signatory authority. Whenever obligations of a substantial nature are undertaken by the company it is normal practice for persons dealing with the company to require that the obligation be executed in a manner stated to be the authorized director signatory authority of the company and a certificate from the Registrar of Limited Companies must be produced to show that the execution of documentation is in conformity with the registered particulars. Also, all documents filed with the Registrar on behalf of the company must be executed by the authorized director signatory authority that is registered with the Registrar. Please note that bank account and check signatories need not in any way be related to the authorized director signatory authority and people who are not directors of the company may be designated to act on behalf of the company with regard to dealing with banks. Also, the company may give powers of attorney to anybody to carry out acts on the behalf of the company; such powers of attorney must be executed by the person or persons constituting the authorized director signatory authority and, if required, bear the company's seal.

12. Who will be the company's auditor? Every private limited company must have an independent, licensed in Thailand auditor and the auditor must audit the balance sheet and profit and loss account of the company for each financial year and issue a report thereon to the company's shareholders. The auditor is appointed by the shareholders, initially at the meeting to organize the company, and thereafter elected at each annual ordinary general meeting of the company. The shareholders determine the auditor's remuneration.

13. What will be the design of the common seal? Every private limited company must have a common seal. The only legal requirement for use of the seal is that it must be affixed to the company's share certificates. However, in general practice many companies require imprint of the seal as a component of the authorized director signatory authority. In Thailand, the most common types of seals are rubber stamps, which contain

the name of the company in Thai and perhaps one or two foreign languages and may incorporate a logo. Embossing type seals are permitted.

14. When will the financial year of the company end? A company may initially select any financial year end so long as it is not more than twelve months after the date of registration of the company.

15. Who can sign the application for registration of the Memorandum of Association and for company registration? The applicant(s) signing the application for registration of the Memorandum of Association shall be any promoter(s) of the company, either Thai or non-Thai citizen; however, if the registration of the Memorandum of Association will be made on the same day simultaneously with the registration of company incorporation, the applicant(s) signing the applications shall be the authorized director(s) having signatory authority on behalf of the company, either Thai or non-Thai citizens. If the application to register the incorporation of the company is filed on a day after the Memorandum of Association has been registered then the applicant(s) signing the application shall be the authorized director(s) having signatory authority on behalf of the company, either Thai or non-Thai citizens. In case of non-Thai citizen signing an application evidence showing that such applicant is in Thailand on the signing date, such as photocopy of passport page showing immigration stamp of entering into Thailand during signing period, must be supplied to the Registrar. In case the application signing is made outside Thailand, the signature of such non-Thai citizen must be affixed before any of the following person(s):

- (i) An authorized official of the Thai Embassy or Thai Consul or a Chief of Office under the Ministry of Commerce who is in charge of operation in such country or their designees; or
- (ii) A person having full authority in providing complete certification in accordance with the applicable laws of such country, such as a notary public; or
- (iii) Two reliable persons signing in Thailand in the presence of the Registrar to certify that the signature affixed on the application is the real signature of such applicant.

Some other matters often of interest to foreign investors:

A. What Government fees are payable to register a private limited company? The Thai Government charges a fee of 500 Baht for up to the first one million Baht of authorized capital to register the Memorandum of Association of a private limited company, and a fee of 50 Baht for each further 100,000 Baht of authorized capital or fraction thereof, with a maximum fee that can be paid to register a Memorandum of Association of 25,000 Baht. Further, a fee of 5,000 Baht is charged for up to the first one million Baht of authorized capital to register the formation of the company and a fee of 500 Baht for each further 100,000 Baht of authorized capital or fraction thereof, with the maximum fee payable being 250,000 Baht. The maximum fees would be achieved if the company had an

authorized capital of fifty million Baht. No annual fees are required to maintain the company's registration.

B. What about repatriation of investment and profits? A foreign investor may remit from overseas its payment for shares in the company. This remittance will be recorded by the receiving commercial bank in Thailand. Remittance in foreign currency (e.g. U.S. dollars) from Thailand to the overseas investor of dividends and proceeds of sale of shares, less applicable Thai taxes, is routinely accomplished through any commercial bank in Thailand when referenced to the investor's recorded remittance into Thailand of foreign currency payment for the shares.

C. What registration and licenses must the company obtain? First, the company must obtain a corporate taxpayer identification number which may be issued as part of the company registration of incorporation procedure. Also, a value added tax registration and specific business tax registration must be obtained if the company is engaged in selling goods or providing services and is not exempted from registration. Difficulty may be experienced if a company director signing the application forms is a non-Thai citizen who does not possess a work permit. Depending on the nature of the company's business and manner in which it will be conducted, various licenses and permits may also be required.

D. What about land ownership? Unless specifically permitted by law, foreigners are not allowed to own land in Thailand. Foreigners, as defined by the Land Code, include (i) any person who does not have Thai citizenship, (ii) any company incorporated under a law other than that of Thailand, and (iii) private limited companies registered in Thailand in which more than forty-nine percent of the shares are owned by foreigners or in which a majority of the number of shareholders are foreigners. Specific legal provisions that allow foreigners to acquire ownership of land include: (i) permission granted under Board of Investment promotion to own land to carry out the promoted activity, (ii) factory land within government approved industrial estates, and (iii) petroleum concessionaires may own land necessary for their activities. However, foreigners may freely lease land, practically for a maximum period of 30 years (but companies with a minimum capital of twenty million Baht or Board of Investment promotion may lease land for up to 50 years), and may build and own buildings constructed on the leased land. Up to forty-nine percent of the total area of the condominium units in a condominium building at the time of applying for registration of such condominium building may be owned by foreigners.

E. What about technology transfer? In conjunction with making an investment in Thailand, either in a wholly owned subsidiary or in a joint venture, it may be desirable to provide technical assistance and to license technology or patents or trademarks to the Thai company. Technical assistance and royalty and license arrangements are allowed under Thai law and remittance of fees is generally permitted, subject to applicable Thai taxes on payments being withheld. (Also, such Thai taxes may be affected by a relevant double tax treaty, Thailand having in effect tax treaties with 54 countries and jurisdictions.) Thailand has a Patent Law which provides protection to inventions and product designs which have received patents under Thai law. Thailand has a Copyright Act. Trademarks can be

registered in Thailand in accordance with the Trademark Act and certification and service marks may also be registered.

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PRIVATE LIMITED COMPANY REGISTRATION REQUIRED INFORMATION

(Numbers correspond to those in explanatory paragraphs on pages 4 through 6)

1. Name of Company
THAI:
ENGLISH:

2. Type of Business:

3. Registered Capital:
Number of Shares:
Par Value per Share: Baht _____
Amount to be paid on each share on first call: Baht ____ (total amount to be paid on first call = Baht _____)

4. Promoters: (Consisting of at least three (3) individuals)

(i)
(ii)
(iii)
...

5. Address of Registered Head Office:

6. Branch Offices:

7. Articles of Association:

8. Initial Share Subscribers:

	<u>Name</u>	<u>Number of Shares</u>	<u>Share Numbers</u>
(i)			
(ii)			
(iii)			
(iv)			
(v)			
...			

9. Post Registration Share Transfers:

10. Directors:

11. Authorized Director Signatory Authority:

12. Auditor (and license number):

13. Seal:

14. Financial Year End: