



Chapter 1

BUSINESS
ESTABLISHMENT

CHAPTER 1 | BUSINESS ESTABLISHMENT

This chapter discusses options available when establishing a business in Thailand, including establishment of a private limited company, and restrictions on foreign investments in Thailand. As at the date of this publication, a draft legislation to amend the Thai Civil and Commercial Code (the “**CCC**”) has been approved by the parliament. Such legislation will become effective after the lapse of 90 days from the publication date in the Government Gazette. Therefore, certain information contained in this publication may not be up to date once the Amendment to the Thai Civil and Commercial Code, B.E. 2565 (the “**Amendment**”) comes into force.

(1) Establishment of Business Entities

There are a few options when establishing a local business presence under Thai law. The CCC is the primary law governing partnerships and private limited companies. The Public Limited Company Act, B.E. 2535 (1992) (the “**PLCA**”) is the primary law governing public limited companies. The establishment of the following types of partnerships and companies are recognized and regulated under these laws:

A. Thai Partnerships and Limited Companies

(i) Partnerships

There are two types of partnership under the CCC, i.e., ordinary partnerships and limited partnerships. Both ordinary partnerships and limited partnerships are considered separate juristic entities from their partners once registered with the Department of Business Development, Ministry of Commerce (the “**MOC**”). In market practice, the partnerships are not commonly used for business operation in Thailand because, for an ordinary partnership, all partners are jointly and severally liable with the partnership for unlimited liabilities, and for a limited partnership, at least one managing partner must be jointly and severally liable with the partnership for unlimited liabilities.

(ii) Limited Companies

The CCC governs private limited companies, while the PLCA governs public limited companies. A private limited company is the most common business form used in Thailand because the liability of the shareholders is limited to the amount of unpaid share value of the company, and the shareholders can establish articles of association to regulate the relationships among them and for the operation of private limited companies as long as the contents of the articles do not contradict the public order under Thai laws and comply with the provisions of the CCC. A public limited company is usually formed to list its shares in the Stock Exchange of Thailand.

B. Branch Office, Representative Office, or Regional Office of a Foreign Entity

The following are alternative forms of Thai juristic entities in which foreign companies may elect to engage in.

(i) Branch Offices

It is common for certain business sectors for foreign companies to establish a branch office in Thailand. A branch office is not considered a separate legal entity from its foreign parent

company. Thus, the foreign head office would be liable to any obligations of the branch office. In addition, branch offices may only engage in business activities to the extent that such activities are not restricted for the foreign company to engage in, or is a permitted business as prescribed in a foreign business license as discussed below.

(ii) Representative Offices

A representative office is considered the same legal entity as its foreign head office. The primary functions of a representative office are to provide local information and support their respective head offices. However, the scope of activities permitted for a representative office are extremely limited and the offices cannot engage in profit-generating activities.

(iii) Regional Offices

Like a branch office and a representative office, a regional office is considered as the same legal entity as its foreign head office. This office can only provide supporting services to its branch offices or affiliates or companies in the group. The activities to be provided by a regional office are limited to certain activities, among other things, coordinating and supervising operations of branch offices or affiliated companies or companies in the group located in Thailand and/or Asia on behalf of the head office. Regional offices cannot engage in profit-generating activities.

C. The Establishment of a Private Limited Company

The following provides a brief overview of incorporation procedures and timelines for incorporation.

(i) Promoters and Share Capital

a. Promoters

There must be at least three individual promoters. The promoter must hold at least one share each at the time of the establishment. However, the share may be transferred to the parent company and/or other entities immediately after incorporation as long as there is a minimum of three shareholders. Promoters are not required to be Thai nationals or residents.

Note that according to the Amendment, there must be at least two individual promoters (instead of three individual promoters).

b. Capital

In general, there is no “minimum capital” requirement, but the value of each share may not be less than Baht five. However, in cases where the business is conducted by a “foreigner” as defined under the Foreign Business Operations Act, B.E. 2542 (1999) (the “FBOA”), registered capital must satisfy minimum registered capital requirements under the FBOA.

(ii) Procedures for Establishing a Private Limited Company

In summary, the process for establishing a private limited company in Thailand involves:

- 1) online reservation of the company's name;
- 2) registration of the memorandum of association;
- 3) holding of a statutory meeting; and
- 4) incorporation of the company.

While the registration of a company can be completed within one day, the entire process for incorporation of a private limited company generally takes approximately two-three weeks from the start of the preparation of documents to the completion of the registration. In some cases, the process could take more time due to logistical issues, especially if the documents require signatures from persons residing in different countries and the requirement of notarization on the application form.

Note that according to the Amendment, the memorandum of association registered at the Department of Business Development before incorporation of a company will be used for registering a company within three years from the date of memorandum of association registration.

D. General Notes

If a company has a registered capital in excess of Baht 5,000,000, additional documents must be submitted as discussed below:

(i) In the Case of Payment in Cash

At the time the application for registration of the establishment of a private limited company is submitted to the MOC, the company's authorized director must provide a confirmation letter issued by a commercial bank evidencing that he has received the paid-up capital from shareholders and the funds are available in his account. After incorporation, the company will open a bank account and deposit such capital into the company's bank account. The company will then provide a confirmation letter issued by the bank to the authority within 15 days after the date of incorporation.

(ii) In the Case of Payment in Kind

At the time the application for registration of the establishment of a limited company is submitted to the MOC, a letter of confirmation must be submitted by the owner of the property verifying that ownership of the contributed property will be transferred to the established limited company. Thereafter, within 90 days from the date of incorporation, the following documents must be provided: (i) in the case of real property or assets that must be registered, evidentiary documentation verifying that the company is the owner; and/or (ii) in the case of assets other than those falling under (i), a list setting forth the details of the contributed property with the values.

(2) Restrictions on Foreign Investment

In Thailand, several laws contain restrictions on percentages of shares that may be held by foreigner or person considered a foreigner under such law. Therefore, it is necessary to have a general understanding of the restrictions on foreign investment when considering setting up or acquiring a business in Thailand.

A. The Foreign Business Operations Act, B.E. 2542 (1999) (the “FBOA”)

The FBOA is the key piece of legislation that regulates the business operations of foreign majority-owned companies in Thailand that are defined as “foreign” under the FBOA.

(i) Definition of “Foreigner”

The FBOA defines “foreigner” to include: (i) foreign individuals; (ii) juristic person not registered in Thailand; and (iii) a corporate entity incorporated in Thailand having 50% or more of its share capital belonging to (i) foreign individuals or foreign juristic entities, or (ii) Thai juristic entities, in which 50% or more of its share capital belongs to foreign individuals or foreign juristic entities. Note that the percentage of foreign capital is determined according to the ratio of capital and not to voting rights.

(ii) Restricted Businesses

The FBOA prescribes three lists of businesses which are restricted for foreigners to engage in. The summary of lists of businesses subject to restriction are as follows:

a. *Businesses in List 1*

List 1 of the FBOA specifies nine types of business in which foreigners are completely prohibited from undertaking for a special reason, for example, agriculture, fishing, extracting local herb, and land trading.

b. *Businesses in List 2*

List 2 of the FBOA specifies 13 types of business in which foreigners may not, in principle, engage (unless special permission from the MOC (with the approval of the Cabinet) is granted) as they are related to national security, the protection and nurturing of traditional arts and culture, and or the protection of natural resources and the environment, for example, domestic transportation (land, maritime, and air transportation and domestic airline business), sale of Thai antiques and handicrafts, and mining.

c. *Businesses in List 3*

Businesses in respect of which Thai nationals are not yet ready to compete on an equal footing with foreigners. These may only be carried out by foreigners if permission is obtained from the director-general of the Department of Business Development (“**DBD**”) of the MOC with the approval of the Foreign Business Operations Committee (the “**Committee**”). The activities restricted under this List include, amongst others, most service, wholesale, and retail businesses. While the requirements for a license for wholesale activities and retail activities can be waived if the company’s paid-up capital meets minimum requirements, the capitalization does not apply or exempt a foreigner from the licensing requirements to conduct operations of ‘other restricted business activities.

(iii) Exception for Service Businesses

Under the List 3 of the FBOA, all service businesses are considered restricted businesses, except for those prescribed under ministerial regulation issued under the FBOA. Currently, there are four ministerial regulations issued by the Ministry of Commerce prescribing certain

service businesses that are not required to request an approval under the FBOA prior to commencing operations. The exempted service businesses include representative offices, regional offices, state enterprises under the law governing budgetary procedures as a contractual party, etc.

B. Restrictions Imposed by Individual Laws Regulating Businesses

In addition to the FBOA, there are also other individual laws imposing direct or indirect restrictions on foreign investment including foreign shareholding limitations and majority Thai director requirements.

Some examples are the restrictions imposed by specific laws related to insurance, banking, and other financial businesses.

(i) Insurance Business

The operations of life insurance businesses and casualty insurance businesses are subject to the restrictions of the Life Insurance Act, B.E. 2535 (1992) and the Non-Life Insurance Act, B.E. 2535 (1992) (the “**Thai Insurance Acts**”) as amended. In general, no more than 25% of the total number of sold shares with voting right engaging in life insurance and casualty insurance businesses can be held by foreigners and at least 3/4 of the board of directors must be Thai nationals. However, such restrictions may be waived or relaxed subject to approvals from the Insurance Commission and/or the Ministry of Finance.

(ii) Banks and Other Financial Institutions

The Financial Institutions Business Act, B.E. 2551 (2008) prescribes foreign investment restrictions for banks and other financial institutions in a similar manner as the Thai Insurance Acts. In summary, no more than 25% of the total number of sold shares with voting right in a financial institution can be held by foreigners and at least 3/4 of the board of directors must be Thai nationals. However, such restrictions may be waived or relaxed subject to approvals from the Bank of Thailand and/or the Ministry of Finance.

Commercial bank businesses, finance businesses, and credit foncier businesses can be conducted only if registered as a public limited company.

Foreign commercial banks can only be established as a branch office in Thailand, and only by recommendation of the Bank of Thailand with the approval of the Finance Minister.

C. Restrictions on Foreign Investment Related to Land Ownership

In addition to the restrictions on foreign investment discussed above, under the Land Code, foreigners generally cannot own land unless specific laws and regulations permit otherwise. Laws concerning real estate including land ownership are explained further in Chapter 8 (*Real Estate*).

D. Responses to Restrictions on Foreign Investment

(i) Foreign Business License or Foreign Business Certificate

Foreign-owned companies seeking to engage in businesses restricted under the FBOA must obtain a foreign business license (the “**FBL**”) which is approved on a discretionary basis, or a

foreign business certificate (the “**FBC**”) which is approved as a formality, prior to commencement of restricted businesses in Thailand.

To obtain an FBL, applications and supporting documents containing particulars of the expected businesses, projected income and expenditures, employment, transfers of technology, and other required information, in Thai, must be submitted to the Foreign Business Administration Division, the Department of Business Development, Ministry of Commerce (the “**FBAD**”). The FBAD also has the discretion to request additional information and documents. Once the documents are submitted to the satisfaction of the FBAD, the approval/rejection of the application will be reviewed within the prescribed period.

An FBL, if granted, will include certain conditions for the FBL holder to comply with, including, amongst others, a specified debt-to-equity ratio, a minimum level of capital and the period for which the business must be maintained in Thailand. Other conditions, for example, may relate to the required contributions in terms of technology and/or assets.

Alternatively, foreign-owned companies having qualifications or rights under a special treaty/ bilateral agreement or being granted a business promotion certificate from the Board of Investment (the “**BOI**”) or being granted permission to operate in the industrial estate areas by the Industrial Estate Authority of Thailand (“**IEAT**”), may choose to obtain an FBC instead of FBL.

(ii) Special Treaty / Bilateral Agreements

As an exception to obtaining an FBL, a “foreigner” may obtain an FBC in connection with treaties and bilateral agreements that Thailand is a party to; for example, the Treaty of Amity and Economic Relations between Thailand and the U.S.A., the Thailand–Australia Free Trade Agreement, and the Japan–Thailand Economic Partnership Agreement.

*a. The Treaty of Amity and Economic Relations between Thailand and the United States of America., B.E. 2512 (1969) (the “**US Treaty**”)*

American nationals and entities may obtain an FBC under the US Treaty allowing them to conduct a wide range of restricted businesses under the FBOA in Thailand except for the activities reserved under Article 4 of the US Treaty, which are communications, transportation, fiduciary functions, banking, land and other natural resource exploitation, and domestic trade in indigenous agricultural products. To qualify as an “American” company and enjoy the privileges under the US Treaty, the majority of directors or officers must be American and/or Thai nationals and all of the directors and officers authorized to bind the corporation alone must be American and/or Thai nationals. The majority of shares must be held by American. Every US juristic entity in the chain of ownership must be established under US laws and meet the shareholding and director requirements until it reaches the level of individual shareholder or a public listed company.

*b. The Japan–Thailand Economic Partnership Agreement (the “**JTEPA**”) effective as of 1 November 2007*

The JTEPA provides relaxation of the restrictions on the percentage of foreign investment in certain businesses in Thailand in a favorable manner to Japanese businesses. However, unlike the broad exception under the US Treaty, under the JTEPA, only listed businesses will enjoy relaxations on foreign shareholding restrictions. The percentage of Japanese

shareholding depends on each type of business. For example, all shares in a company engaging in general management consulting services (excluding legal and audit consulting services) can be held by Japanese individuals or entities. In another example, 60% of the shares in a company engaging in logistics consulting businesses (excluding all transportation businesses) can be owned by Japanese nationals; however, the remaining shares must be held by Thai nationals.

c. *The Thailand–Australia Free Trade Agreement (the “TAFTA”) effective as of 1 January 2005*

Like the JTEPA, under the TAFTA, 12 businesses, including land and marine mining, and luxurious hotel and resort service, are permitted for companies with a majority Australian shareholding. The requirement on percentage of Australian shareholding depends on each type of business. For example, an Australian can hold shares of up to 60% in land and marine mining businesses, and luxury hotel and resort services. Australians can hold shares up to 100% in public utilities businesses.

(iii) The BOI’s Investment Incentives

In addition to the FBC issued under treaties and bilateral agreements discussed above, foreign-owned companies may, alternatively, seek an FBC after receiving investment promotion from the BOI if such business is restricted business under the FBOA. The BOI is a governmental authority responsible for granting investment promotion including tax and non-tax incentives pursuant to the Investment Promotion Act, B.E. 2520 (1977), as amended (the “IPA”).

A BOI privilege is granted based on the project, not the entity. Thus, each entity can obtain several BOI promotions and there is no limitation on the number of BOI incentives that each entity can obtain. A list of eligible activities will be announced and updated by the BOI from time to time in accordance with investment promotion policies during a given period. Each activity will either be eligible for entire (both tax and non-tax) or partial (only non-tax) incentives depending on the category applied for by a company. In order to obtain the privileges under the IPA, an applicant must comply with the conditions set forth for the promoted category.

Currently, activities that are eligible to receive BOI investment incentives can be categorized as following business categories:

- Category 1: agriculture, bio technology and medical industries;
- Category 2: advanced manufacturing industries;
- Category 3: basic and supporting industries;
- Category 4: digital, creative industries and high value services; and
- Category 5: research and development, targeted core technology development.

Generally, the incentives under the IPA can be categorized into two types as follows:

- Tax incentives: including amongst others: (i) exemption/reduction of import duties on machinery, raw or essential materials, materials imported for R&D purposes; and (ii) exemptions from corporate income tax on net profits and dividends derived from the promoted activity; and
- Non-tax incentives: including for example, permission to own land by the foreign majority owned company, permission to hire foreign workers and experts to work in the promoted

activities over the number as permitted under the relevant laws.

In addition, the current investment incentives scheme can be divided into (i) basic incentives and (ii) additional incentives.

a. Basic Incentives

Basic incentives include: (i) the activity-based incentive, of which the corporate income tax will be exempted for the maximum of eight years; and (ii) the technology-based incentive, of which the corporate income tax will be exempted for the maximum of ten years.

b. Additional incentives

Additional incentives include: (i) the merit-based incentives for competitiveness enhancement; (ii) the area-based incentives (decentralization and industrial development); and (iii) the merit on specific measures for SMEs in Special Economic Zones (SEZ). These additional incentives will extend the maximum period for the corporate tax exemption for one to three years subject to the details of the project applied for the business promotion.

(iv) Industrial Estate Authority of Thailand (the “IEAT”)

The IEAT is a governmental authority responsible for the development and establishment of an industrial estate including management of the area for industrial factories with tax and non-tax incentives pursuant to the Industrial Estate Authority of Thailand Act, B.E. 2522 (1979).

Note that if a foreign-owned company having received letter confirming the eligibility under the treaty or bilateral agreement, or investment promotion from the BOI, or having received written permission to operate an industry or trade for export under the law on the IEAT, and its business falls under List 2 or List 3 of the FBOA as referred to above, such foreign-owned company must notify the director-general of the DBD to request an FBC. After the director-general of the DBD or an entrusted competent officer has verified the accuracy of such eligibility under the treaty or bilateral agreement, or investment promotion certificate, or IEAT’s written permission, the FBC will be granted.

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