

# THE CHALLENGES OF FOREIGN INVESTMENT IN THAILAND

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Foreigners in Thailand derive their legal rights primarily from the domestic laws of Thailand. There are certain rights that are reserved only for Thai citizens, but this is not unusual as all countries have their own restrictions on the rights of foreigners. The rights of foreigners in Thailand are restricted to a certain extent by such statutes as the Nationality Act, Immigration Act, Foreign Business Act, Land Code, Alien Employment Act, etc. Restrictions on foreign ownership in special industries such as commercial banks, insurance companies, commercial fishing, aviation business, commercial transportation, tourism, etc. can be found under various statutes.

## I. **FOREIGN BUSINESS ACT**

The Foreign Business Act of 1999 (“the Act”), which became effective on March 4, 2000, repealed and replaced the 1972 National Executive Council Announcement 281, better known as the Alien Business Law. The Act provides a definition of “alien” and identifies the scope of foreign participation in business in Thailand.

“**Alien**” is defined as:

- a natural person who is not of Thai nationality;
- a juristic entity that is not registered in Thailand;
- a juristic entity incorporated in Thailand with foreign ownership accounting for one-half or more of the total number of shares and/or registered capital;
- a limited partnership or ordinary registered partnership whose managing partner or manager is a foreigner.

### **Businesses Subject to Restrictions**

Business activities that fall under Lists 1, 2, or 3 of the Act (see Appendix 1) are subject to the limitations imposed by the Act.

Activities that fall under List 1 are strictly prohibited to aliens.

Businesses that are covered by List 2 are prohibited to aliens unless permission is granted by the Cabinet.

Businesses that are covered by List 3 are prohibited to aliens unless permission is granted by the Director-General of the Commercial Registration Department (“CRD”).

Based on the above definition, if a majority of the shares of a limited company are held by Thais, it is regarded as a Thai company and thus not subject to the Act. This means that aliens are generally allowed to participate up to 49% in a company engaged in restricted businesses. Beyond that, the approval requirement must be complied with.

The minimum capital requirement for foreigners is Baht 2 million in general, and Baht 3 million for List 2 or List 3 business activities.

### **License Application**

Foreigners wishing to engage in businesses indicated in List 2 or List 3 of the Act need to obtain an “alien business license” from the relevant authority before commencement of their business operations. An application should be filed with the Commercial Registration Department, which will be reviewed by the Cabinet or Foreign Business Committee, as the case may be. Various criteria are used to assess the impact of the proposed business operation, such as the advantages and disadvantages to the nation’s safety and security, economic and social development, size of enterprise, local employment, etc. Approval of business license application is more likely where the authorities view the business as providing significantly more benefits than disadvantages, and as protecting and promoting Thai interests. In general, the application process can be time-consuming with unpredictable outcomes.

### **Exemption**

#### 1. Treaty of Amity and Economic Relations between the United States and Thailand

Under this Treaty, Americans enjoy the privilege of being exempted from the application of the Act. An American-owned Thai company (i.e., a majority of the shares are owned by Americans) or a branch office of an American company is permitted to do almost anything a Thai company does except:

- own land;
- engage in business of inland communications;
- engage in business of inland transportation;
- engage in fiduciary functions;
- engage in banking involving depository functions;
- exploit land or other natural resources; and
- engage in domestic trade in indigenous agricultural products.

To form a company under the Treaty, American shareholders must prove their American nationality. It must also demonstrate to the CRD that American shareholders have majority ownership in terms of number of shares as well as number of shareholders. Furthermore, management of such company must be controlled by either American or Thai directors.

## 2. Protection under Various Laws

A foreigner can engage in businesses indicated in List 2 or 3 if granted permission in accordance with the Investment Promotion Act, the Industrial Estate Authority of Thailand Act, Petroleum Act, or other laws. Similar to the case of Treaty protection, the Foreign Business Act requires such a foreigner to notify the Director-General of the CRD within 30 days after such permission is granted and to obtain a certificate before starting business operations.

## II. **INVESTMENT PROMOTION**

### **Board of Investment**

The Investment Promotion Act B.E. 2520 (A.D. 1977) offers various investment incentives to foreign and domestic investment considered important and useful to the social and economic development of Thailand. The Act is administered by the Office of the Board of Investment of Thailand (BOI). The BOI's general objective is to encourage both Thai and foreign investors to locate their projects in Thai provincial areas. In order to achieve this objective, incentives are given so that those projects which are established in the developing provinces receive greater benefits than those established in the developed provinces.

The BOI is empowered to grant a wide range of financial and non-financial incentives and guarantees to investment projects which meet national economic development goals. BOI-promoted companies are granted incentives and privileges, some of which are as follows:

- (a) Exemption or reduction of import duties on imported machinery, materials and components;
- (b) Exemption from corporate income tax for three to eight years, with permission to carry losses forward;
- (c) Exemption from dividend tax during the corporate income tax holiday;
- (d) Bringing in foreign technicians and experts to work on promoted projects;
- (e) Owning land to carry out promoted projects.

### **Industrial Estate Authority**

In order to alleviate the strain on Bangkok's infrastructure and to spread the benefits of development to the countryside, the Industrial Estate Authority of Thailand Act B.E. 2522 (A.D. 1979) provides assistance and special incentives for investors who operate within industrial estates.

There are two categories of industrial estate:

- 1. General Industrial Zone (GIZ) - an area designated for industrial activities.
- 2. Export Processing Zone (EPZ) - an area designated for industrial or other activities either supporting exporting businesses or exporting directly.

Any person wishing to operate a business in an industrial estate must obtain a permit from the governor of the Industrial Estate Authority of Thailand (IEAT). Industrial operators are granted special incentives and privileges, including the right to own land in the industrial estate area, to obtain work permits for foreign technicians and experts who work for the industrial operator, and to take or remit foreign currency abroad.

Industrial operators within the EPZ are granted additional tax-based incentives and privileges, including:

- (a) Exemption from special fees under the investment promotional law, import duty, value added tax, and excise tax on necessary machinery, equipment, and tools, including those to be used in the manufacture of goods and in constructing, assembling, or installing factory or building;
- (b) Exemption from special fees under the investment promotional law, import duty, value added tax, and excise tax on raw materials used in the manufacture of goods;
- (c) Exemption from export duties, value added tax, and excise tax on products and by-products derived from the production if they are exported; and
- (d) Exemption from or refund of taxes, if goods are taken into another EPZ as if they have been exported.

Foreigners who have obtained investment promotion from the BOI or have been given approval by the IEAT to operate business for export must notify the Director-General in order to get a business certificate.

### **III. FORMS OF BUSINESS ORGANIZATIONS**

The principal forms of business organizations under Thai law are sole proprietorship, partnership, limited company, and public limited company. In addition, branches of foreign corporations are recognized. Representative offices and regional offices, which were recognized by the Regulations of the Prime Minister's Office announced before the promulgation of the Act, are presently deemed as service activities under List 3, item 21, of the Act. Thus, an alien business license must be obtained prior to starting activities.

#### **Sole Proprietorship**

In a sole proprietorship, all of the proprietor's assets (business and personal) are subject to attachment or any other legal action, whether connected to the business or not. Registration is made at the Revenue Department, where the sole proprietor must acquire a taxpayer number. Some sole proprietorships are required to obtain a "Commercial Registration Certificate" from the CRD.

## **Partnerships**

In Thailand, three forms of partnerships are permitted: (1) unregistered ordinary partnership, (2) registered ordinary partnership, or (3) limited partnership. Although the liabilities attached to the partners vary in these different forms of partnership, the general rules governing all types of partnership are similar. Under the Civil and Commercial Code (“CCC”), a partnership is defined as a contract whereby two or more persons agree to unite for a common undertaking with a view to share the profits. The distinctions and similarities between these three forms are discussed below.

### ***Unregistered Ordinary Partnership***

An unregistered ordinary partnership is one in which all partners are jointly liable for all obligations and debts of the partnership. It is not registered with the CRD; therefore, this type of partnership is not a legal entity (juristic person), and the partnership pays taxes at the rates applicable to individuals.

### ***Registered Ordinary Partnership***

A registered ordinary partnership is registered with the CRD, which makes it a juristic person with a separate and distinct personality from each of the partners. A partner of the registered ordinary partnership may pursue any claim of, or any right acquired by, the partnership against third persons, even if he did not actually participate in the transaction. A partner’s liability for the partnership’s obligations ceases two years after he leaves the partnership.

### ***Limited Partnership***

Like a registered ordinary partnership, a limited partnership must also be registered with the CRD. A limited partnership is one in which there are one or more partners whose individual liabilities are limited to their respective contributions, and one or more partners are jointly liable without limitation for all the obligations of the partnership. The contributions of the partners with limited liability must be in cash or other valued properties. A limited partner cannot contribute services alone. As a general rule, a limited partnership may only be managed by the partners with unlimited liability. A partner with limited liability who participates actively in the management of the partnership becomes jointly liable, without any limitation, for the partnership’s obligations.

## **Limited Company**

Under Thai law, there are two types of limited companies: (1) the limited PRIVATE company, and (2) the limited PUBLIC company.

A private limited company, governed by the CCC, is commonly used by those who desire a more permanent business in Thailand. A minimum of seven shareholders is required at all times. Shareholders' liability is limited to the remaining, if any, amount unpaid on the shares respectively held by them. Subject to foreign ownership restrictions mentioned above, all shareholders may be foreigners. A limited company is managed by a Board of Directors in accordance with the law and its Articles of Association under the control of the shareholders.

A public limited company, governed by the Limited Public Company Act B.E. 2535 (A.D. 1992), is a company which is established for the purpose of offering the sale of shares to the public. The rules and regulations concerning the procedures for offering shares for sale to the public are found in the Securities and Exchange Act B.E. 2535 (A.D. 1992) under the control of the Securities and Exchange Commission.

The procedure for incorporating a public limited company is similar to that of a private limited company in registration requirements and shareholders liability; however, some differences exist. A public limited company must, for example, have at least fifteen natural persons as promoters who are 20 years of age or over and at least five directors not less than half of whom must reside in Thailand. Directors of a public limited company are subject to greater duties and responsibilities than those of a private limited company.

A private limited company may be transformed to a public limited company through a special resolution of the shareholders as stipulated by the CCC.

### **Representative Office**

A representative office is defined as an office in Thailand of a foreign company engaged in the business of international trading.

A representative office of overseas companies may engage only in the following activities if granted approval by the authority:

- finding suppliers of goods or services in Thailand for the head office abroad;
- checking and controlling the quality and quantity of goods purchased or hired by the head office for manufacturing purposes in Thailand;
- providing advice on various aspects of goods sold by its head office to agents, distributors and/or customers in Thailand;
- providing information to interested persons in Thailand concerning goods or services of the head office; and
- reporting to the head office on business movements in Thailand.

The activities of a representative office are restricted. A fundamental premise is that the office cannot earn income as a business enterprise in Thailand, buy or sell goods on behalf of the head office, or render any service to any person or juristic person in Thailand. Such a representative office is deemed to receive a subsidy from the head office to meet its expenses in Thailand.

### **Regional Office**

A regional office is defined as a regional office of a multinational company.

The scope of operations of a regional office is as follows:

- perform the duties of contacting, coordinating the work of, and supervising the operations of the branches or affiliated companies located in the same region on behalf of the head office;
- provide advisory services and management services;
- personnel training and development;
- financial management;
- marketing supervision and sales promotion planning; and
- product development and research and development services.

In conducting such activities, a regional office is subject to the same fundamental restrictions applicable to a representative office.

### **Branch Office**

A foreign company which plans to conduct business on its own in Thailand, such as a contract project, usually establishes a branch office to undertake the project.

There is no special registration requirement for the establishment of branches of foreign companies to do business in Thailand. However, most business activities fall within the scope of one or more laws or regulations which require special regulation or license, e.g., VAT, taxpayer identification card, Commercial Registration Certificate, Foreign Business License, etc., either before or after the commencement of the activities. Foreign business establishments must, therefore, follow the generally applicable procedures.

## **IV. ALIEN EMPLOYMENT ACT**

The Alien Employment Act B.E. 2521 (A.D. 1978), with a few exemptions, requires all foreigners working in Thailand to obtain a work permit from the Ministry of Labor and Social Welfare prior to starting work in the Kingdom. The term “work” is defined very broadly, i.e. “working by exerting one’s physical energy or employing one’s knowledge, whether or not for wages or other benefits”. Theoretically, even volunteer or charity work requires a work permit. The use of a work permit is restricted to a particular occupation, particular employer, and particular locality; any change in these restrictions will necessitate a new work permit.

A royal decree under that Act, the Royal Decree Stipulating Work in Occupations and Professions Prohibited to Aliens B.E. 2522 (A.D. 1979), specifies those occupations which are closed to foreigners (see Appendix 2).

Foreigners working in companies promoted by the BOI or under other special laws (such as the Petroleum Act of 1971) can be rapidly issued work permits which are valid for the duration prescribed by such laws. Such foreigners may commence work immediately, but should apply for a work permit within 30 days from the date of entry into the Kingdom.

## **V. VISA AND IMMIGRATION LAW**

Foreign nationals who intend to remain in Thailand to work or conduct business must comply with visa requirements in addition to obtaining a work permit.

A foreigner entering the country to work must obtain a Non-Immigrant Visa type “B” (Business). His spouse and dependents who accompany him must likewise obtain a Non-Immigrant Visa (type “O”). A multiple-entry option is available for an extra fee. A one-year visa may be applied within the Kingdom, renewable each year prior to the expiration date. In addition, foreigners residing in Thailand for more than 90 consecutive days are required to notify the Immigration Bureau every 90 days.

## **VI. FOREIGN EXCHANGE/CURRENCY CONTROL**

The legal basis for exchange restrictions in Thailand is derived from the Exchange Control Act B.E. 2485 (A.D. 1942) and the Ministerial Regulations No. 13 B.E. 2497 (A.D. 1954) issued under the Act. These laws set out the principles of controls under which Notifications and notices that prescribe the detailed procedures were issued.

The Bank of Thailand (“BOT”) has been entrusted by the Ministry of Finance with the responsibility of foreign exchange administration. All foreign exchange transactions are to be conducted through authorized banks, companies, or persons. Authorized persons (money changers) only engage in the purchase of foreign notes and travelers’ checks and the selling of foreign notes.

### **1. Import of Foreign Currency**

Persons living in Thailand are required to surrender foreign exchange received to an authorized dealer or to deposit the same in a foreign currency account within 15 days from the date of receipt. Travelers passing through Thailand, foreign embassies and international organizations are exempted from this rule.

### **2. Import of Local Currency**

There is no restriction on the amount of Thai currency that may be brought into the country. A person traveling to Thailand’s bordering countries and to other countries may take out local currency of up to Baht 500,000 and Baht 50,000 respectively, without authorization.

### 3. Foreign Currency Accounts

Thai individual and juristic persons in Thailand are allowed to maintain foreign currency accounts under the following conditions:

- (a) the accounts are opened with authorized banks in Thailand and with funds that originate from abroad;
- (b) the accounts may be withdrawn either for payments of normal business transactions to persons outside the country upon submission of supporting evidence or for conversion into Baht at authorized banks.

### 4. Trade

#### a. Exports

Exports are free from any exchange restriction, but export proceeds exceeding Baht 500,000 in value must be collected within 120 days from the date of export and surrendered to an authorized bank or deposited in a foreign currency account with an authorized bank in Thailand within 15 days from the date of receipt.

#### b. Imports

Importers may freely purchase or draw foreign exchange from their own foreign currency accounts for import payments. Letters of credit may also be opened without authorization.

### 5. Permissible Transactions by Authorized Banks

The following transactions do not require prior authorization from the BOT:

- Foreign direct investments or lending to affiliated companies abroad not exceeding US\$5 million per year;
- Remittances to Thai emigrants with permanent residence abroad not exceeding US\$1 million per person yearly provided that funds are derived from the emigrants' personal assets;
- Remittances of an estate to a recipient who has permanent residence abroad not exceeding US\$1million per person yearly;
- Remittances of funds to family or relatives who have permanent residence abroad not exceeding US\$100,000 per person yearly; and
- Travel expenses of up to US\$20,000.

## **APPENDIX 1**

### **LIST 1**

Businesses which aliens are not permitted to operate for special reasons:

- (1) Newspaper business, radio broadcasting or television station business.
- (2) Rice farming, farming or gardening.
- (3) Animal farming.
- (4) Forestry and wood fabrication from natural forest.
- (5) Fishing of marine animals in Thai waters and within specific Thai economic zones.
- (6) Extraction of Thai herbs.
- (7) Trading and auctioning Thai antiques or national historical objects.
- (8) Making or casting Buddha images and monk alms bowls.
- (9) Land trading.

### **LIST 2**

Businesses related to national safety or security or involving art and culture, traditional and folk handicraft, or natural resources and environment.

#### **Group 1: Businesses related to national safety or security**

- (1) Production, selling, repairing and maintenance of:
  - (a) Firearms, ammunition, gunpowder, explosives.
  - (b) Accessories of firearms, ammunition, and explosives.
  - (c) Armaments, ships, aircraft, or military vehicles.
  - (d) Equipment or components, all categories of war materials.
- (2) Domestic land, waterway or air transportation, including domestic airline business.

#### **Group 2: Businesses involving art and culture, traditional and folk handicraft:**

- (1) Trading antiques or art objects which are Thai arts and handicraft.
- (2) Production of carved wood.
- (3) Silkworm farming, production of Thai silk yarn, weaving Thai silk or Thai silk pattern printing.
- (4) Production of Thai musical instruments.
- (5) Production of goldware, silverware, nielloware, bronzeware or lacquerware.
- (6) Production of crockery of Thai arts and culture.

**Group 3: Businesses affecting natural resources or environment:**

- (1) Manufacturing sugar from sugarcane.
- (2) Salt farming, including underground salt.
- (3) Rock salt mining.
- (4) Mining, including rock blasting or crushing.
- (5) Wood fabrication for furniture and utensil production

**LIST 3**

Businesses in which Thai nationals are not yet ready to compete with foreigners:

- (1) Rice milling and flour production from rice and farm produce.
- (2) Fishery, specifically marine animal cultures.
- (3) Forestry from forestation.
- (4) Production of plywood, veneer board, chipboard or hardboard.
- (5) Production of lime.
- (6) Accounting service business.
- (7) Legal service business.
- (8) Architectural service business.
- (9) Engineering service business.
- (10) Construction, except for:
  - (a) Construction rendering basic services to the public in public utilities or transport requiring special tools, machinery, technology or construction expertise with a foreign minimum capital of Baht 500 million or more.
  - (b) Other categories of construction as prescribed by the ministerial regulations.
- (11) Broker or agent business, except:
  - (a) Being broker or agent for underwriting securities or services connected with future trading of commodities or financing instruments or securities.
  - (b) Being broker or agent for trading or procuring goods or services necessary for production or rendering services amongst affiliated enterprises.
  - (c) Being broker or agent for trading, purchasing or distributing or seeking both domestic and foreign markets for selling domestically manufactured or imported goods in the manner of international business operations with a foreign minimum capital of Baht 100 million or more.
  - (d) Being broker or agent of other categories as prescribed by the ministerial regulations.
- (12) Auction, except:
  - (a) Auction in the manner of international bidding not being an auction of antiques, historical artifacts or art objects which are Thai works of arts, handicraft or antiques or having historical value.
  - (b) Other categories of auction as prescribed by the ministerial regulations.

- (13) Internal trade connected with native products or produce not yet prohibited by law.
- (14) Retailing of all categories of goods having a total minimum capital of less than Baht 100 million or having a minimum capital for each shop of less than Baht 20 million.
- (15) Wholesaling of all categories of goods having a minimum capital for each shop of less than Baht 100 million.
- (16) Advertising business.
- (17) Hotel business, except for hotel management service.
- (18) Guided tour.
- (19) Selling food or beverages.
- (20) Plant cultivation and propagation business.
- (21) Other categories of service business except those prescribed in the ministerial regulations.

## **APPENDIX 2**

### **Royal Decree Stipulating Work in Occupations and Professions Prohibited to Aliens B.E. 2522 (A.D. 1979)**

1. Labor work
2. Agriculture, animal husbandry, forestry or fishery, except work requiring specialized knowledge or farm supervision
3. Brick-laying, carpentry or other construction work
4. Wood-carving
5. Driving motor vehicles or vehicles which do not use machinery or mechanical devices, except piloting aircraft internationally
6. Front-shop sale
7. Auction sale work
8. Supervising, auditing or giving service in accountancy, except occasional internal auditing
9. Cutting or polishing precious or semi-precious stones
10. Haircutting, hairdressing or beautification
11. Cloth-weaving by hand
12. Mat-weaving or making utensils from reed, rattan, jute, hay or bamboo
13. Making rice paper by hand
14. Lacquer work
15. Making Thai musical instruments
16. Niello work
17. Goldsmith, silversmith, or gold-and-copper alloysmith
18. Stone work
19. Making Thai dolls
20. Making mattresses or quilts
21. Making alm-bowls
22. Making silk products by hand
23. Making Buddha images
24. Knife-making
25. Making paper or cloth umbrellas
26. Making shoes
27. Making hats
28. Brokerage or agency, except brokerage or agency in international trading
29. Engineering profession in civil engineering concerning design and calculation, systemization, analysis, planning, testing, construction supervision, or consulting services excluding work requiring specialized techniques
30. Architecture profession concerning design, drawing-making, cost estimation or consulting services
31. Dressmaking

32. Pottery
33. Cigarette-rolling by hand
34. Guide or tour conductor
35. Hawking of goods
36. Thai typesetting by hand
37. Unwinding and twisting silk by hand
38. Clerical or secretarial work
39. Providing legal services or engaging in legal work

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