

Corporate Counsellor

TILLEKE & GIBBINS

Primer for foreign investors

Limits imposed by various laws

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, and Alien Employment Act. Restrictions on foreign ownership in special industries such as commercial banks, insurance companies, commercial fishing, aviation business, commercial transport, and tourism can be found under various statutes.

Foreign Business Act. The Foreign Business Act of 1999, which became effective on March 4, 2000, repealed and replaced the 1972 National Executive Council Announcement 281, better known as the Alien Business Law.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 are subject to the limitations imposed by the Act. Activities that fall under List 1 are strictly prohibited to aliens for special reasons. Businesses under List 2 that relate to national safety or security, involve art and culture, or affect natural resources or the environment are prohibited to aliens unless permission is granted by the Cabinet. Businesses under List 3 in which Thai nationals are not yet ready to compete with foreigners are prohibited to aliens unless permission is granted by the director-general of the Business Development Department (BDD).

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 49.99% in a company engaged in restricted businesses. Beyond that, the approval requirement must be complied with.

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

Licence application. Foreigners wishing to engage in List 2 or List 3 businesses need to obtain an "alien business licence" from the relevant authority before commencement of business operations. An application should be filed with the BDD, 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, and local employment.

Approval of a business licence application is more likely if it provides significantly more benefits than disadvantages and protects and promotes Thai interests. In general, the application process can be time-consuming with unpredictable outcomes.

Exemptions. Under the Treaty of Amity and Economic Relations between the United States and Thailand, Americans enjoy the privilege of being exempted from the application of the Act. An American-owned Thai company (i.e., 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 transport;
- ◆ 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. The applicant must also demonstrate to the BDD 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 and/or Thai directors.

Protection under various laws. A foreigner can engage in List 2 or 3 businesses if granted permission under the Investment Promotion Act, Industrial Estate Authority of Thailand Act, Petroleum Act, or other laws. Similar to the case of Treaty protection, the Act requires such a foreigner to notify the BDD director-general within 30 days after such permission is granted and to obtain a certificate before starting operations.

◆ *Written by Piyanuj Ratprasatporn of Tilleke & Gibbins International, www.tillekeandgibbins.com*