

PRIMER FOR FOREIGN INVESTORS

by Piyanuj (Lui) Ratprasatporn



Piyanuj (Lui) Ratprasatporn, Partner & Director
Commercial Department

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 banking, insurance, commercial fishing, aviation business, commercial transportation, and tourism can be found under various statutes.

Foreign Business Act

The Foreign Business Act of 1999 ("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.

Please note that the definition of "alien" is being amended to include companies in which foreigners have the majority vote or management control regardless of their share ownership in the companies.

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 which relate to national safety or security, involve art and culture, or affect natural resources or 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 Department of Business Development ("DBD").

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 foreign majority-owned companies is Baht 2 million in general, and Baht 3 million for companies granted an alien business license to engage in List 2 or List 3 business activities.

License Application

Foreigners wishing to engage in List 2 or List 3 businesses need to obtain an "alien business license" from the relevant authority before commencement of business operations. An application should be filed with the DBD, 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 license application is more likely if it provides significantly more benefits than disadvantages and protects and promotes Thai interests.

Exemptions

Treaty of Amity and Economic Relations between the United States and Thailand. Under this Treaty, Americans enjoy the privilege of being exempted from the foreign ownership restriction under 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 transportation;
- engage in fiduciary functions;
- engage in banking involving depositary 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 DBD 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.

Thai-Australian Free Trade Agreement ("FTA"). Under the Thai-Australian FTA, Australians enjoy the privilege of being exempted from the foreign ownership restriction for 12 businesses reserved under the Act. Maximum ownership, however, is fixed for certain businesses. There are also other requirements such as debt-to-equity ratio, minimum number of Thai directors and minimum capital requirement.

Protection under Various Laws. A foreigner can engage in List 2 or List 3 businesses if granted permission under the Investment Promotion Act, the 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 Director-General of the DBD within 30 days after such permission is granted and to obtain a certificate before starting business operations. ♦