

Critical considerations for foreign investors doing business in Thailand

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Increasingly investors are expanding their businesses to developing countries with a view to reducing costs and selling products in new markets. Thailand is among the most attractive destinations for them.

However, before a commitment is made to a foreign country, the investor needs to study not only the economic and political stability of the country but, more importantly, the local laws and regulations applicable to foreign investors.

The Thai government has announced many incentives to encourage foreign investors to choose Thailand. Investors should consult counsel well versed in local regulations so that they properly establish themselves in the country.

There are various types of business structures available to the foreign investor. This article will focus on for-profit subsidiaries.

Foreigners may set up a wholly owned subsidiary to conduct business in Thailand if the business activity is not reserved for Thais under the Foreign Business Act (FBA) or other local laws. From time to time, we find foreign companies incorporated in Thailand that have unknowingly or unintentionally violated foreign ownership restrictions by engaging in businesses reserved under the FBA.

Under the act, a company is considered foreign if half, or more than half, of its shares are held by a non-Thai natural or juristic persons.

If you operate a foreign company, you must carefully consider whether the business activities in which your company engages are reserved under the FBA. You need to be aware that this applies to both core and non-core business activities.

Businesses reserved for Thais under the FBA are divided into three lists. Foreigners are strictly prohibited from engaging in business activities on List 1 of the FBA, while foreigners wishing to engage in activities on List 2 of the FBA must obtain a Foreign Business Licence (FBL), which requires cabinet approval. Foreigners that wish to engage in activities on List 3 of the FBA must obtain an FBL from the Foreign Business Committee.

Manufacturing activities are mostly liberalised and foreigners are allowed to make and sell products in Thailand. Foreigners, however, are not allowed to buy products from other suppliers and retail or wholesale the products domestically. Nevertheless, they are allowed to export those products.

There is a catch-all under List 3. All service businesses are reserved, and installation, repair, maintenance, after-sale services, leasing and lending are all considered service businesses. Foreigners are strictly prohibited from engaging in these activities.

Even the provision of a loan to a subsidiary or to an affiliated company is deemed to be a service business and is restricted under the FBA.

We have found that many foreign companies mistakenly believe that if they register a Memorandum of Association with broad business objectives with the Ministry of Commerce that they are legally permitted to engage in any business without an FBL or a Foreign Business Certificate. This is a common misconception.

The ministry allows companies, both Thai and foreign, to register objectives that are as broad as they wish. Companies need not conduct all business objectives registered with the ministry; they can conduct only one or a few.

However, companies are not allowed to engage in objectives not registered in their Memorandum of Association. If a company wishes to conduct business not listed in its objectives, it must amend its memorandum _ this is generally the reason companies register broad objectives.

If you plan to operate a foreign-owned company, carefully review your proposed activities. A foreigner who operates a business reserved under the FBA, without the required FBL, with or without intent, will be charged with a violation of the FBA. The punishment is imprisonment for a term not exceeding three years, a fine of 100,000 to 1 million baht, or both. The court will also order the termination or dissolution of the business.

We encourage foreigners to comply with Thai laws and apply for an FBL if they wish to engage in businesses reserved under the FBA, or to seek approval from other competent authorities, such as the Board of Investment of Thailand or the Industrial Estate Authority of Thailand. Both are empowered to grant fiscal and non-fiscal benefits to qualified projects.