

FOREIGN DIRECT INVESTMENT

A View from the Inside

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THAILAND

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In Thailand's constitutional referendum of 7 August 2016, a vote was made in favour of a new draft constitution. This vote has paved the way toward a general election. The next task of the Constitutional Drafting Committee is to draft organic laws governing the new political system. Thailand should continue to provide an investment-friendly climate.

1. What is the role played by Thailand's government in regulating foreign direct investment?

Foreign investment is generally welcomed in Thailand, although it is subject to a number of restrictions. The Thai government is centralised and it is the authority which has specific influence on regulating foreign investment. Local or regional governments (municipalities) do not have direct authority to intervene in FDI matters, and they are subject to the central government's policies and orders.

Foreign Business Act

The most important law governing foreign direct investment in Thailand is the *Foreign Business Act B.E. 2542 (1999)*, as amended (FBA). The FBA reserves certain business activities for Thai nationals, and limits the ability of foreigners to engage in those activities. Under the FBA, a company is considered "foreign" if half or more of its shares are held by non-Thai natural persons or juristic persons.

The FBA prescribes the categories of restricted business into three lists:

- List 1 covers businesses which are strictly prohibited for non-Thais, and includes, among other things, newspapers, radio broadcasting, operating a television station, rice farming, and land trading.
- List 2 stipulates businesses concerning national security or safety that could have an adverse effect on art and culture, customs, or native manufacture/handicrafts, or with an impact on natural resources and the environment, which covers businesses that are prohibited for non-Thais, unless they receive permission to operate from the Minister of Commerce with the approval of the Cabinet. Businesses included in List 2 involve, among other things, national security, the arts, and the exploitation of natural resources, such as mining.
- List 3 sets out businesses in which Thais are not ready to compete in undertakings with foreigners, which covers businesses that are prohibited to non-Thais, unless permission is granted by the Director-General of the Department of Business Development with the approval of the Foreign Business Board. Restricted businesses under List 3 include, among other things, the provision of professional services, operating restaurants, and wholesale and retail where minimum capital thresholds have not been met. (See Question 3 for more details.)

There are a number of exceptions to the FBA that allow foreigners to conduct certain businesses in Thailand which would otherwise be prohibited to foreigners.

The foreign ownership restrictions under the FBA do not apply to U.S. nationals and U.S. corporations that have secured protection under the Treaty of Amity and Economic Relations between the United States and Thailand. The treaty allows Americans to own and operate almost all reserved businesses in

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Thailand, except for certain businesses reserved under the treaty, which include, among other things, land, inland transportation, and communication, provided that the Ministry of Commerce (MoC) is properly notified and that a relevant certificate is applied for by the concerned party.

Board of Investment

The Board of Investment (BOI) is a key authority which directly promotes investment in Thailand. In principle, the BOI maintains a policy of giving special consideration to investment projects. Under the *Investment Promotion Act*, these promotions include both tax and non-tax incentives.

The tax incentives offered through BOI investment promotion include corporate income tax holidays for a specified number of years. BOI promoted businesses can also obtain an exemption from paying import duties on machinery and raw materials at the initial stages of business development.

The non-tax incentives which the BOI provides include support for obtaining work permits for expatriate employees/laborers, and the potential ability to own land outright, which is generally restricted to Thai nationals. Importantly, BOI promoted companies in a number of sectors can be fully foreign-owned.

Industrial Estate Authority of Thailand

The Industrial Estate Authority of Thailand (IEAT) is a state enterprise under the Ministry of Industry. The IEAT is responsible for the development and establishment of industrial estates. It carries out the government's industrial development policies, which includes allocating land for further expansion, improving land conditions, and providing accommodation and facilities to assist entrepreneurs. Industrial operators are granted special incentives and privileges, including the right to own land in the industrial estate area, obtain work permits for foreign technicians and experts who work for the industrial operator, and take or remit foreign currency abroad.

IEAT's one-stop-service provides a complete service solution, ranging from land purchase and lease, factory location recommendations, approval, and the issuance of factory permits, among other things.

2. What are the most common legal structures used by foreign investors when doing business in Thailand?

Under Thai law, the forms of business organisation are sole proprietorship, partnership (which includes ordinary partnership, registered or unregistered, and limited partnership), branch office, representative office, regional office, limited company, public company limited, and joint venture.

The most common legal structure used by foreign investors doing business in Thailand is the private limited company.

A private limited company's shares may be 100 percent owned by foreign shareholders if:

- its business activities are not reserved for Thais or restricted to foreigners under the FBA or other applicable laws;

- it has obtained a foreign business license or foreign business certificate;
- it has obtained investment promotion from the BOI or the IEAT (as the case may be); or
- it qualifies for protection under an international treaty to which Thailand is a party, such as the United States-Thailand Treaty of Amity and Economic Relations, 1966.

If foreign ownership in the business to be conducted is restricted to foreigners, it is common for a foreign investor to establish a joint venture company with one or more local Thai partners. The foreign investor and Thai partner will generally incorporate a private limited company to act as the joint venture company, in which they will both hold a certain percentage of shares. This type of business structure is often referred to as an incorporated joint venture.

By contrast, a joint venture may take the form of a partnership established by contract or individuals for the purpose of working on a particular project. Even if it is not registered as a legal entity, an unincorporated joint venture is treated as a juristic person/entity by the Revenue Department for purposes of tax liability. The joint venture must, therefore, apply for a taxpayer identification card and value added tax certificate if it engages in a business subject to VAT and will earn an income of more than THB 1.8 million in a fiscal year.

3. Are there specific industries or parts of the economy in Thailand which are barred, or highly restricted, for foreign investors?

The principal law which limits foreign ownership in Thai businesses is the FBA. As pointed out above, the FBA separates businesses into three lists. List 1 covers businesses that are strictly prohibited for non-Thais. List 2 covers businesses that are prohibited for non-Thais, unless they receive permission to operate from the Minister of Commerce with the approval of the Cabinet. List 3 covers businesses that are prohibited for non-Thais, unless permission is granted by the Director-General of the Department of Business Development with the approval of the Foreign Business Board.

List 1

List 1 of the FBA lists businesses which are strictly prohibited to foreigners, including:

- the press, radio broadcasting station, or radio and television station business;
- rice farming, plantation, or crop growing;
- livestock farming;
- forestry and timber processing from a natural forest;
- fishery, only in respect to the catching of aquatic animals in Thai waters and specific economic zones of Thailand;
- extraction of Thai medicinal herbs;
- trading and auction sales of antique objects of Thailand, or objects of historical value in the country;
- making or casting Buddha images and monk alms bowls; and
- land trading.

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List 2

List 2 lists businesses that require permission from the Minister of Commerce and approval from the Cabinet for foreign shareholders to hold a majority interest. These businesses are subdivided into three separate groups, as follows.

Group 1: Businesses Relating to Safety or National Security:

- Manufacturing, distribution, and repair and maintenance of:
 - firearms, ammunition, gun powder, and explosives;
 - parts of firearms, ammunitions, and explosives;
 - military weapons, boats, airplanes, or vehicles;
 - equipment or components of all kinds of warfare devices.
- Domestic land transport, water transport, or air transport, including domestic aviation business.

Group 2: Businesses Impacting Arts, Culture, Customs, and Native Handcrafts:

- Trading of antiques or artifacts which are Thai works of art or Thai handicrafts.
- Manufacturing of wood carving products.
- Silk worm farming, making of Thai silk, weaving of Thai silk, or printing of patterns on Thai silk.
- Making of Thai musical instruments.
- Making of gold ware, silverware, nielloware, bronze ware, or lacquer ware.
- Making of crockery of Thai arts and culture.

Group 3: Businesses Affecting Natural Resources or the Environment:

- Manufacturing sugar from sugarcane.
- Salt farming, including underground salt.
- Mining, including rock blasting or crushing.
- Wood fabrication for furniture and utensil production.

List 3

List 3 lists businesses that are prohibited for foreigners, unless permission is granted by the Director-General of the Department of Business Development, with the approval of the Foreign Business Board. Businesses included in List 3 are those where Thai nationals have been deemed not yet ready to compete with foreigners. In addition to the restrictions under the FBA, other laws also impose limitations on foreign ownership in other types of business such as the provision of financial and insurance services.

Foreign Land Ownership Restriction

In general, land in Thailand may be owned only by Thai nationals; foreign investors are usually prohibited from land ownership, though exceptions apply to investors who have received investment promotion through the BOI or IEAT. If a Thai-majority owned company has significant foreign shareholding, the Land Department may investigate and determine whether there are Thai nominee shareholders who are holding the land on behalf of foreigners. Such a structure is strictly prohibited in Thailand. Foreign investors

can have separate ownership on the building constructed/erected on the land, although they may not own the land.

4. In merger and/or acquisition deals in Thailand, what legal issues are most critical for foreign investors?

There are a number of issues which are important to foreign investors contemplating a merger and/or acquisition in Thailand. The most critical issues will depend on the specifics of a particular transaction.

The structure of the transaction will depend on the particular circumstances affecting the Thai target company. An acquisition can either be structured as an asset purchase or a direct or indirect share purchase.

An asset purchase structure has the advantage of minimizing legacy liabilities, particularly with regard to tax, litigation, and environmental risks. There are, however, a number of drawbacks for an asset transfer structure in Thailand. First, many of the target company's operating licenses will not be transferable, meaning the acquiring business will need to re-submit applications. This can be a lengthy and unpredictable process, depending on the specific license applications in question. Secondly, employees cannot be transferred from one legal entity to another without first obtaining the employees' consent. Employees who refuse to provide such consent will remain in their existing positions or be terminated by their existing employer, which could result in severance payments depending on the length of service and based on the employee's salary at the time of termination.

A share purchase structure is generally more straightforward, since the target company's employees, assets, and most operating licenses will transfer automatically from the seller to the buyer. The principal drawback is that the target company's obligations and liabilities will also be transferred.

Under Thai law, there are three possible types of M&A transactions:

- amalgamation or merger;
- share acquisition; and
- asset acquisition.

Under the *Civil and Commercial Code (CCC)*, there are requirements concerning registration and notice requirements for amalgamation/mergers of limited companies. Under the CCC, amalgamation means the merger or consolidation of two limited companies. Amalgamation of companies constitutes formation of a new company with rights and liabilities.

For M&As of public companies by overseas investors, the *Securities and Exchange Act* and relevant regulations/notifications would also have to be observed and complied with.

In asset acquisition, a transfer of immovable assets (including land and building, registered machineries, and vessels) has to be registered with the competent authorities, and is subject to a registration fee, stamp duty, and specific business tax.

Thailand's *Trade Competition Act* is undeveloped in practice and does not provide concrete guidelines for the Trade Competition Commission, the governmental body responsible for administering the Act, to intervene in proposed merger and acquisition transactions.

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Thailand's merger control regulation is stated in Section 26 of the Act which states: "A business operator shall not carry out a business merger which may result in monopoly or unfair competition as prescribed and published in the *Government Gazette* by the Trade Competition Commission unless the commission's permission is obtained. The publication by the commission under paragraph one shall specify the minimum amount or number of market share, sales volume, capital, shares or assets in respect of which the merger of business is governed thereby."

Currently, the Trade Competition Commission has not adopted concrete guidelines for assessing such proposed transactions under Section 26. Should the parties to a merger or acquisition have a certain amount of market share in a relevant market and also have high annual sales turnover in the relevant market, the Commission's notification requirement may be triggered. As a result, the Commission's approval may be required prior to commencing the proposed merger or acquisition. Failure to obtain such permission may result in the transaction being sanctioned and the parties facing hefty fines or possible imprisonment terms for their violation. To date, such notification requirements/regulations have not yet been passed.

5. Describe how the repatriation of profits, loans between related companies, or the return capital of foreign investors in Thailand is/are structured.

Under the current exchange control laws of Thailand, as a general rule, the authorized financial institutions (for example, the commercial banks in Thailand), which are authorized to approve certain foreign exchange transactions, including the necessary remittance of foreign currency for repatriation of profits or repayment of a foreign loan and payment of interest thereon, fees and other amounts (if any) payable under and in accordance with the terms and conditions of the relevant loan or other agreement, net of all taxes, in the name of the Exchange Control Officer (that is, the Bank of Thailand), may, at the time of each outward remittance for such repayment and/or payment, as the case may be, require:

- 1) submission of certain documentary evidence with respect thereto (for example, the relevant invoice and/or a copy of the relevant loan or other agreement and/or any other relevant agreements, documents and/or instruments, if necessary and/or required) for their records; and
- 2) submission of the application in the relevant exchange control form (the Foreign Exchange Transaction Form) if the relevant amount exceeds US\$50,000.

In addition, under the current anti-money laundering laws of Thailand, financial institutions (as defined under these laws) in Thailand are required to report any transactions that use cash in the amount equal to or greater than THB 2 million, or transactions involving/relating to property/assets of a value equal to or greater than THB 5 million, or any suspicious financial transactions, carried out by such financial institutions to the Money Laundering Prevention and Suppression Office.

It is a crime to transfer, convert or receive funds or property arising from certain criminal offenses for the purpose of hiding or concealing the source of the funds. Violators are punishable by imprisonment for a term of one year to ten years and/or a fine of THB 20,000 to THB 200,000.

Enforcement officials can seize, without a warrant, money or property connected with the commission of certain criminal offenses or a money laundering offense. In such cases, the owner of the seized property must be able to show that the property is unrelated to the commission of such crimes, or a money laundering offense, in order to recover the property.

6. How do local employment laws and regulations in Thailand affect the activities of foreign investors? Are there any specific laws which make it difficult to relocate workers to the country where the business is located, or to terminate workers already employed at the time of acquisition?

The primary sources of labor and employment law in Thailand are the *Labor Protection Act B.E. 2541* (1998) and the CCC. There are a number of other laws that also affect the activities of foreign investors, such as the *Act Establishing the Labor Court and Labor Court Procedure*, the *Labor Relations Act*, and so on. The *Foreign Employment Act* is the primary law which regulates employment of foreign citizens in Thailand. A foreigner may work in Thailand if he/she has a valid visa and work permit, and is able to perform work that does not violate the *Foreign Employment Act*. The term “work” is defined broadly, and can cover both physical and mental activities, regardless of whether the individual receives remuneration for his/her efforts.

A work permit is only valid for the profession and geographic location for which it is issued. A number of professions are closed to foreigners in Thailand, meaning a work permit will not be issued. In addition, a company generally must have registered capital of not less than THB 2 million and employ four Thai citizens for each work permit it will be allocated.

If an acquisition will be made by way of a share purchase, the employees working at the target company will automatically begin working for the acquiring company upon completion. If, on the other hand, the acquisition is structured as an asset purchase whereby the acquirer will establish a new company in Thailand, each employee must provide his/her consent to the transfer of employment. If the employee does not provide consent, the existing employer will be deemed/required to terminate the employee’s employment. Upon termination, the employee will be entitled to minimum statutory severance payments depending on length of service and based on the employee’s salary at the time of termination. The terminating company may also be liable for additional payments to the employee.

7. Are there any unique aspects to intellectual property protection in Thailand of particular importance to foreign investors?

Thailand is a member of the World Trade Organization and bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Thailand is also a member of the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Properties, and the Patent Cooperation Treaty. Thailand is not yet a member of the Madrid System for the International Registration of Marks, but it is expected to accede to this system in the near future.

In Thailand, trade secrets are protected under the *Trade Secret Act B.E. 2545 (2002)*. Trade secrets mean trade information not yet publicly known or not yet accessible by persons who are normally connected with the information, the commercial values of which derive from its secrecy and that the controller of the trade secrets has taken appropriate measures to maintain the secrecy. Trade information means any medium that conveys the meaning of a statement, facts, or other information irrespective of its method and forms. It shall also include formulas, patterns, compilations, or assembled works, programs, methods, techniques, or processes.

8. Are there specific laws in Thailand regulating data exchange and privacy?

As a general matter, Thailand's data exchange and privacy regime is industry-specific, with certain sectors such as telecommunications, banking/finance, insurance, securities, consumer credit, and electronic payment services all having separate approaches to data exchange and privacy laws.

Failing to prevent unauthorised access to personal data, which in turn causes damage to a third party, can constitute civil liability in tort (wrongful act) or potential liability for criminal defamation. Affected persons may claim for damages, which may include punitive damages under the *Consumer Case Procedure Act*.

At present, there is no central data protection authority with which data owners must register/notify/seek approval before processing data. However, wrongful act claims in relation to personal data disputes can be filed and enforced by the Thai Courts.

9. What is the best strategy for acquiring real estate and other tangible property in Thailand? Is it different for foreign investors?

Generally speaking, foreign individuals and foreign companies are prohibited from owning land in Thailand.

A company will be regarded as a "Thai" company, and may own land in Thailand, if no more than 49 percent of the total issued shares in the company are held by foreigners, and if the majority of shareholders are Thai. However, even if foreigners own less than 49 percent of the total issued shares, officials from the Land Office may investigate transactions to ensure there is no attempt to circumvent the prohibition against foreign land ownership.

An exception to the foreign ownership rule applies to BOI and IEAT projects. Under such projects, special privileges are given to foreign-owned companies to own land for business operation, and for residential purposes for management and employees. In addition, foreign oil companies that meet the requirements of the *Petroleum Act* may also own land.

Foreigners may also own buildings on land that is leased, because there are no restrictions on building ownership. Foreigners can therefore lease land and construct a building, office tower, apartment or house on the leased land, and own the structure. The maximum term for a lease of land is 30 years, and leases exceeding 3 years in length must be registered at the Land Office in order to be enforceable.

10. If a foreign investor in Thailand decides to work with a local representative or distributor, what are the potential risks?

Often, there is a potential risk that a trademark owner (foreign investor) brings a case against its former distributor (local representative), for the distributor's alleged unauthorized use of a trademark and/or trade name. Commonly, such unauthorized use materializes at the end of a distributorship, with the trademark owner discovering that its former distributor has imitated its trademark, and perhaps applied for registration of the mark, sometimes even before the expiration of the distributorship agreement. There are also cases in which a distributor began to use the owner's trade name as part of its company name and domain name after the term of the distributorship.

Under the CCC, a trademark owner can obtain a court order prohibiting the former distributor from using the trade name as part of its company name and internet domain name. Moreover, a trademark owner can apply for registration for all of its trademarks or service marks that subsist in the distributed products or services in the territory where the distributorship will be appointed. In order to protect its interests, a trademark owner should engage legal counsel to prepare a well-drafted distributorship agreement that includes comprehensive clauses on the ownership of the intellectual property subsisting in its products or services.

In addition to risks posed by infringement of intellectual property, foreign investors must also be aware of corruption risks. Thailand has laws which criminalize bribery and other corrupt acts which would apply directly to any wrongful acts committed by a local distributor. In the event the local distributor or representative is deemed to be an agent, the foreign investor may risk exposure to prosecution under the laws of its home jurisdiction which have extraterritorial effect, such as the U.S. *Foreign Corrupt Practices Act* or the U.K. *Bribery Act*. Even without the foreign investor's knowledge, corrupt acts carried out by the local representative in furtherance of their commercial objectives may result in severe penalties.

11. When resolving disputes, are foreign investors in Thailand better advised to rely on local courts or to use arbitration for the resolution of commercial disputes?

Foreign investors may use either the local courts or arbitration, whether *ad hoc* or administered through an institution, to resolve disputes. Thai courts are generally seen as impartial and can therefore be relied upon to resolve disputes in a fair manner. On the other hand, arbitration may provide the parties with greater flexibility.

Foreign arbitral awards are recognized and enforced in Thailand if they are governed by a treaty, convention, or international agreement to which Thailand is party, and to the extent that Thailand is committed to be bound. Thailand is party to both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927).

Thai courts are generally impartial and do not discriminate on the basis of nationality or otherwise. Furthermore, for an arbitral award to be recognized

and enforced, it may need to be approved by a Thai court, which can be a lengthy process. As a result, allocating jurisdiction to the Thai courts to resolve disputes is not an uncommon selection for many foreign investors.

Determining whether arbitration would be a preferable dispute resolution forum depends on the nature of the commercial agreement. Some reasons why arbitration may be preferable for foreign investors in Thailand include the following:

- industrial expertise of the arbitral tribunal: if knowledge of a specific sector is required, arbitrators may be able to provide higher industrial expertise than judges;
- streamlined process: in some instances, parties may find arbitration to be less time-consuming than court proceedings;
- confidentiality in the proceedings; and/or
- local procedural constraints, since the Thai legal system may not be suitable to resolve certain disputes, particularly where an agreement is governed by a foreign law.

12. What are the three most important legal issues for a foreign investor to understand before doing business in Thailand?

1) Foreign ownership restrictions

Foreigners are restricted or prohibited from owning companies which operate in many sectors. Investing in a Thai company often requires obtaining a foreign business license or foreign business certificate, obtaining investment promotion, or partnering with a Thai party.

The FBA reserves certain business activities for Thai nationals. Under the FBA, a company is considered foreign if half or more of its shares are held by non-Thai natural or juristic persons. Businesses that are reserved under Lists 1, 2, and 3 of the FBA are subject to foreign ownership limitations imposed by law. Business activities indicated in List 1 of the FBA are strictly closed to foreigners. Foreigners wishing to engage in one of the activities indicated in List 2 of the FBA must obtain permission from the Minister of Commerce with the approval of the Cabinet; or for activities indicated in List 3 of the FBA, permission of the Director-General of the Department of Business Development with the approval of the Foreign Business Committee. Alternatively, foreign enterprises granted promotional privileges by the BOI or the IEAT are permitted to engage in business activities specified in Lists 2 or 3 of the FBA in accordance with the conditions prescribed by such authorities, provided that the Ministry of Commerce is notified and a certificate is applied for.

2) Investment promotion

There are many investment incentives for a wide range of businesses.

Foreign investment is welcome, and various incentives are granted to attract foreign investment through the BOI and the IEAT. In principle, the BOI maintains a policy of giving special consideration to investment projects that

locate operations in provincial areas (in preference to Greater Bangkok). Under current BOI policy, the government has placed an emphasis on attracting investment in six key sectors that have been identified as priority activities for the country's development. The IEAT carries out the government's industrial development policy, which includes allocating land for further expansion, improving land conditions, and providing accommodations and facilities to assist entrepreneurs.

3) Stable legal framework

Thailand's legal framework and governmental agencies are well-established and provide for a stable investment climate. Notwithstanding changes at the top levels of government, governmental bureaucracy remains entrenched and the rule of law is well-established. Administrative decisions tend to be consistent and predictable, creating an investment-friendly environment.

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