

## Legal Express

# Foreign Business Operation in Thailand

May 2020

In general, non-Thai persons have the same rights as Thai nationals to own and operate businesses in Thailand, except where specific restrictions apply. This note is principally intended to provide a general overview of such restrictions as prescribed under the Foreign Business Act B.E. 2542 (1999) (as amended) (the “FBA”) and other key legislations as well as certain practical alternative considerations.

## Foreign Business Act B.E. 2542 (1999)

The FBA is the main law regulating foreign participation in business operations in Thailand. Unless otherwise stipulated in other legislations, foreign business operations will be subject to the FBA.

### Restricted Businesses

The FBA prescribes a wide range of business operations and commercial and industrial activities in which “Foreigners”<sup>1</sup> are restricted to engage under certain conditions as follows

- **List One:**

List One covers a variety of businesses, which include newspaper, radio and television broadcasting, rice or animal farming, forestry, fishery within territorial water and specific economic zones of Thailand and land trading, in which Foreigners are strictly prohibited from engaging due to “special reasons”.

---

<sup>1</sup> The term “**Foreigner**” means: (i) natural person who is not a Thai national; (ii) a juristic person not registered in Thailand; (iii) a juristic person registered in Thailand with any of the following characteristics: (x) having 50 per cent or more of the total shares (in case of company) or capital (in case of a limited partnership or a registered ordinary partnership) held or invested by the persons under (i) or (ii) above; or (y) in case of a limited partnership or a registered ordinary partnership, its managing partner or manager is not a Thai national; or (iv) a juristic person registered in Thailand having 50 per cent or more of the total shares or capital held or invested by the persons under (i), (ii) or (iii) above. Further, the shares of a limited company represented by share certificates that are issued to bearers shall be deemed as the shares of Foreigners.

- **List Two:**

Unless permitted by the Minister of Commerce with approval from the Cabinet, Foreigners are prohibited from engaging in businesses listed in List Two for national safety and security reasons, e.g. those concerning armament, transportation, arts, culture, tradition, folk handicrafts or natural resources and environment. Furthermore, a foreign company wishing to engage in these businesses shall have 40 per cent or more of its share capital owned by Thai nationals and 40 per cent or more of its directors shall be Thai nationals. This minimum Thai shareholders requirement may be reduced by the Minister with approval from the Cabinet, subject to a minimum of 25 per cent.

- **List Three:**

List Three covers a variety of businesses, which include accounting, legal, architectural, engineering and other services, in which Thai nationals are considered not yet ready to compete with Foreigners. Thus, Foreigners may be able to engage in these businesses if permitted by the Director-General of the Department of Business Development, the Ministry of Commerce.

Nonetheless, certain ministerial regulations have been enacted to specifically exclude some service businesses from List Three as they are considered the businesses which Thai nationals are competent of competing with Foreigners. These include, for instance, businesses regulated by specific authorities (e.g. financial institutions, securities and insurance businesses), representative office and regional office of foreign juristic person in international trade services, and provision of certain consultancy services to affiliates and subsidiary companies. Thus, these service businesses are no longer subject to the licensing requirements under the FBA and no foreign business license shall then be required prior to the conduct of business.

### Foreign Business Licence

A Foreigner wishing to conduct business activities restricted under List Two or List Three of the FBA may apply for a foreign business licence (the "FBL") with the Ministry of Commerce.

Normally, the application process in respect of the business activities under List Three may take two to four months. This includes one to two months to prepare and to work with the Foreign Business Operation Division of the Ministry of Commerce to finalise the application and another one to two months for the Director-General to reach a decision. If approved, an approval letter may impose certain conditions on the applicant, e.g. a minimum registered capital. In considering granting the FBL for business activities under List Three, the applicant is required to demonstrate to the satisfaction of the Ministry of Commerce, amongst others, that (i) it is able to employ Thai employees; (ii) it has an ability to transfer its know-how or new technology to Thai people; (iii) its investment would constitute positive impact to the country; and (iv) Thai nationals are unable to do such business activities or considered not yet to be ready to compete with foreigners.

As regards the application process in respect of the business activities under List Two, whilst the FBA indicates that the Cabinet shall consider and reach a decision within 60 days from the formal submission of the application which may be extended to up to another 60 days, the Ministry of Commerce has never had any policy nor guideline concerning the assessment criteria for the granting of the FBL

## Other Exemptions

Apart from the above, other exemptions which may enable Foreigners to engage in restricted businesses include (i) temporary permissions from the Government (e.g. government sponsored infrastructure project); (ii) privileges granted under a treaty signed by Thailand (e.g. the U.S.-Thai Treaty of Amity and Economic Relations of 1996, the Thai-Australia Free Trade Agreement of 2004 (TAFTA), the Japan-Thailand Economic Partnership Agreement of 2007 (JTEPA), the ASEAN Comprehensive Investment Agreement of 2009 (ACIA) and the ASEAN Framework Agreement on Services (AFAS)); and (iii) privileges granted under the Investment Promotion Act B.E. 2520 (1977) or the Industrial Estate Authority of Thailand Act B.E. 2522 (1979). Nevertheless, each of these exemptions will enable qualified applicants to conduct solely certain specific businesses as approved or prescribed, rather than all of the restricted business activities listed under the FBA. For example, the AFAS merely enables nationals of AEC member states to hold up to 70 per cent shareholding in a company conducting only restricted business stipulated in the Protocol to implement the 9th Package of Commitments under the AFAS (the “Protocol”). If nationals of AEC member states wish to conduct restricted businesses other than those included in the Protocol, they will be required to apply for the FBL for such restricted business.

If applicable, eligible Foreigners may simply proceed to apply for a foreign business certificate (the “FBC”) under Section 11 and Section 12 of the FBA, instead of applying for the FBL described above. To the extent that an applicant possesses the qualifications prescribed by the Ministry of Commerce and/or relevant government authorities, the process will merely be a formality and the FBC will be expected to be issued within 30 days after submission of the application.

## Penalty

Any Foreigner engaging in business in Thailand in violation of the restrictions imposed by the FBA will be subject to imprisonment of up to three years and/or a fine between Baht 100,000 and Baht 1,000,000. In addition, the courts shall order the closure of the business or shall order termination of the shareholding or partnership. Failure to do so, a daily fine between Baht 10,000 and Baht 50,000 will be imposed for so long as the violation continues without time limit. Likewise, any Thai national acting as a nominee of Foreigners in order to avoid complying with the foreign shareholding limit under the FBA will be subject to the same penalty.

## Other Specific Legislations

In addition to the FBA, a foreigner wishing to engage in certain business activities will also be subject to specific requirements on foreign ownership restriction. The following legislations are some of those stipulating such particular foreign ownership restrictions. Nevertheless, it is important to note that the definition of “foreigners” specified in these legislations may not be the same as the FBA.

### Air Navigation Act B.E. 2497 (1954) (as amended)

The Act imposes a 49 per cent foreign shareholding limit on a company owning Thai flagged aircraft.

### Financial Institution Business Act B.E. 2551 (2008) (as amended) (the “FIBA”)

In general, non-Thai nationals may not hold more than 25 per cent of the total issued shares with voting right in a financial institution. However, the Bank of Thailand is empowered to allow non-Thai nationals to hold up to 49 per cent of the total issued shares with voting right as it considers appropriate.

In addition, the Minister of Finance, on the recommendation of the Bank of Thailand, may allow non-Thai nationals to hold more than 49 per cent of the total issued shares with voting right in case where the financial institution is in financial distress or an increase of foreign shareholding will strengthen the stability of that financial institution or the overall Thai financial system.

#### Land Code B.E. 2497 (1954) (as amended)

Subject to certain exceptions, non-Thai nationals may not own title to freehold land in Thailand. As the term “non-Thai nationals<sup>2</sup>” under the Land Code is defined differently from the term “Foreigners” under the FBA, a non-Thai national wishing to own land and carry out businesses under the FBA will (unless an exception applies) be required to be qualified under both the Land Code and the FBA.

#### Non-Life Insurance Act B.E. 2535 (1992) and Life Insurance Act B.E. 2535 (1992) (as amended)

Similar to the financial institutions, non-Thai nationals may not hold more than 25 per cent of the total issued shares with voting right in an insurance company. However, the Office of Insurance Commission (the “OIC”) may allow non-Thai nationals to hold up to 49 per cent of the total issued shares with voting right as it considers appropriate.

In addition, the Minister of Finance, on the recommendation of the OIC, may allow non-Thai nationals to hold more than 49 per cent of the total issued shares with voting right in case where the insurance company is in financial distress, or its operations may cause damages to the insured persons or public interest, or an increase of foreign shareholding will strengthen the stability of that insurance company or the overall Thai insurance industry.

#### Telecommunications Business Act B.E. 2544 (2001) (as amended)

The Act classifies the telecommunications business licence into three categories<sup>3</sup>. Whilst any person may apply for Type One Licence, Foreigners under the definition prescribed in the FBA are not qualified for applying for Type Two and Type Three Licences.

---

<sup>2</sup> Under the Land Code, apart from a natural person not of Thai nationality, a juristic person with any of the following characteristics: (i) a company having more than 49 per cent of its total shares held by foreigners or more than half of its shareholders being foreigners; (ii) limited partnership or registered ordinary partnership having more than 49 per cent of its capital owned by foreigners or more than half of its partners being foreigners; (iii) associations including the co-operatives in which the foreign members exceed one-half of the total number of members or those which operate particularly or mainly for the benefit of foreigners; (iv) foundations with objectives focusing particularly or mainly on the benefit of foreigners; or (v) juristic person having more than 49 per cent of its shares or capital held or owned by any of the entities set out in (i) to (iv) above, shall be considered as non-Thai nationals.

<sup>3</sup> Three types of the telecommunications business licence include (i) Type One Licence which is for an operator without its own network and its business services being considered appropriate to be liberalised; (ii) Type Two Licence which is for an operator whose business services are limited for certain groups of customers, or have no material impact on free and fair competition or interest of the public and consumers, whether with or without its own network; and (iii) Type Three Licence which is for an operator with its own network whose business services are for general public, or may have material impact on free and fair competition or public interest, or have special reasons to protect customers.

### Thai Vessels Act B.E. 2481 (1938) (as amended)

The Act limits foreign shareholding in a company owning Thai flagged vessels, which engages in coastal trade and international carriage, at up to 30 per cent and 49 per cent of the share capital, respectively.

### Alternative Considerations

In case where non-Thai persons wishing to hold interest in any business operation in excess of the restricted shareholding limit under applicable laws, the non-Thai persons may consider adopting one of the following alternatives

#### Thai Majority Owned but Foreign Controlled Companies

To the extent that non-Thai shareholders hold less than 50 per cent of the total issued shares in a company incorporated in Thailand, it is lawfully permissible to structure the company so that its voting and management control are vested in non-Thai shareholders. Certain structures or measures widely adopted by a large number of companies to ensure that non-Thai minority shareholders have effective management and financial control of the company include (i) creating preference or different classes of shares with different rights with respect to voting, dividend and director appointment; (ii) entering into shareholders agreement (which may include minority protections related provisions, share financing arrangements and put and call options); and (iii) if applicable, arranging technical assistance or other contractual arrangements between the non-Thai shareholders and the company, through which certain level of control over management of the company may be imposed by the non-Thai shareholders.

However, this structure may no longer be a plausible option for financial institutions or insurance companies as the FIBA and the Life and Non-Life Insurance Acts take into account the “total issued shares with voting right” not the “total number of shares” as stipulated in the FBA.

#### Non-Voting Depository Receipts

Introduced in 2001, the non-voting depository receipts (“NVDRs”) are designed to further encourage trading in Thai securities and facilitate foreign investment in shares, transferable subscription rights and warrants issued by Thai publicly listed companies (the “Securities”). In brief, the scheme involves an issue to an investor by Thai NVDR Company Limited (“NVDR Company”) of NVDRs which represent the investor’s rights in the Securities purchased by NVDR Company on its behalf.

NVDR Company is a company wholly owned by the Stock Exchange of Thailand and acts as a special purpose vehicle in purchasing and holding Securities for and on behalf of investors. As NVDR Company is a Thai company, such arrangement is not deemed to constitute a foreign holding for purposes of foreign ownership restrictions.

By investing in NVDRs, investors will receive all financial benefits attached to the Securities, e.g. dividends, rights issues and warrants, as if they invested in such Securities themselves. Voting rights are excluded and will not normally be exercised by NVDR Company. However, NVDR Company reserves the right to attend a shareholders’ meeting but shall not vote unless the meeting has been called specifically to consider de-listing of such company. In such case, NVDR Company will be entitled to vote on such resolution on behalf of and in accordance with the voting instruction of each NVDR holder.

## Thai Partners

Besides the above alternatives, foreign investors may find a suitable Thai partner with whom they can work effectively to carry out the business under the foreign shareholding structure not exceeding the limit restricted by laws.

This document is solely intended to provide an update on recent development in Thailand legislation and is not purported to provide a legal opinion, nor a legal advice to any person.

## Thanathip & Partners

17<sup>th</sup> Floor, Tonson Tower  
900 Ploenchit Road, Lumpini  
Pathumwan, Bangkok 10330  
T. (66) 2089 8902

Should you wish to obtain specific legal advice, please contact:

**Arunee Mahathorn**

(66) 2089 8999 | arunee@thanathippartners.com

**Chawaluck Sivayathorn Araneta**

(66) 2089 8978 | chawaluck@thanathippartners.com

**Nitchaya Vaneesorn**

(66) 2089 8959 | nitchaya@thanathippartners.com