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## Thai Regulation on Foreign Companies (1/2) Business Operation under the Foreign Business Act

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### Overview

There are a number of foreigners investing – or interested in investing - in all sectors of Thailand. Hence, in furtherance of our efforts in the June newsletter, this newsletter provides detailed information on applicable laws and regulations concerning foreigner operated businesses in Thailand – specifically, the Foreign Business Act B.E. 2542 (1999) (the “FBA”) and its subordinate regulations. The FBA is the most important regulation in this regard because it prescribes the activities for which foreigners are eligible, as well as the restrictions applicable to such foreigners, when engaging in business in Thailand. Consequently, failure to comply with the FBA could damage a foreign investor and/or its business operations. The purpose of this newsletter is to provide general information for foreign investors who wish to operate a business in Thailand, including whether their business would fall under the scope of the FBA, and to describe the restrictions thereunder.

### Outline of the Foreign Business Act

As described in our June newsletter, Section 4 of the FBA defines “foreigner” as a:<sup>1</sup>

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<sup>1</sup> As noted in our June newsletter, the foreign shareholding ratio under the Land Code and Condominium Act B.E. 2522 (1979) is slightly different from the FBA, i.e. under Sections 97 and 98 of the Land Code, it prescribes that an entity incorporated with a foreign shareholding ratio greater than 49% is regarded as a foreign entity. Section 19(3) of the Condominium Act B.E. 2522 (1979) also states that an entity under Sections 97 and 98 of the Land Code is regarded as a foreigner under the Condominium Act B.E. 2522 (1979). Thus, if the land and/or condominium unit is involved with a business operation, e.g. to purchase land and/or a condominium unit to be used as premises/ registered office, the foreign to Thai shareholding ratio under said two laws will apply for the purchase of immovable property.

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- (1) *Natural person not of Thai nationality.*
- (2) *Juristic person not registered in Thailand.*
- (3) *Juristic person registered in Thailand having the following characteristics:*
  - (a) *Having half or more of the juristic person's capital shares held by persons under (1) or (2) or a juristic person having the persons under (1) or (2) investing with a value of half or more of the total capital of the juristic person.*
  - (b) *Limited partnership or registered ordinary partnership having the person under (1) as the managing partner or manager.*
- (4) *Juristic person registered in Thailand having half or more of its capital shares held by the person under (1), (2) or (3) or a juristic person having the persons under (1), (2) or (3) investing with the value of half or more of its total capital.*

*For the purpose of the definitions, the shares of a limited company represented by share certificates that are issued to bearers shall be deemed as the shares of foreigners unless otherwise provided by ministerial regulations.*

## **Restrictions under the FBA**

The FBA prescribes certain business activities in Thailand from which foreigner participation is prohibited, beginning with the categorisation of business activities into three lists:

- **List One:** includes business activities in which foreigner participation is prohibited due to such business activities being reserved for certain special reasons. The prohibited businesses under List One include but are not limited to the buying and selling of land.
- **List Two:** includes business activities that are prohibited due to such business activities being concerned with national safety and security; business activities that affect art and culture, as well as traditional and folk handicrafts; and business activities that affect natural resources or the environment. While permission may be granted on a case-by-case basis by the Minister of the Ministry of Commerce ("MOC") with the approval of the Cabinet, please note that, in practice, the MOC has never granted a foreign business licence to a foreign business operator under List Two.
- **List Three:** includes business activities that are prohibited due to such business activities being those in which Thai nationals are not ready to compete. However, permission may be granted by the Director-General of the Department of Business Development ("DBD") of the MOC with the approval of the Foreign Business Committee.

A foreigner may apply to engage in a business in Thailand under List Three but not List One. As stated above, a foreigner may theoretically apply to engage in business that falls under List Two but, in practice, the MOC has never granted a foreign business licence to a foreign business operator under List Two. Nevertheless, according to the interpretation of the DBD, finance businesses fall within the scope of List Three; moreover, the DBD regards all service businesses which are not specifically provided under List

One, List Two or List Three as falling under List Three (21) – “Other Services”. Consequently, the activities of money lending, leasing, acting as a guarantor and other finance businesses are considered to fall under List Three.

For businesses under List Three, whether a foreigner will be granted a foreign business licence very much depends upon the DBD’s discretion and its internal policy in considering whether the business will compete with similar businesses owned by Thai persons/juristic persons. The DBD will also consider additional matters, such as whether: (i) the foreigner will invest a large amount of money in Thailand; (ii) the foreigner will employ Thai employees; (iii) the foreigner will transfer technology to Thai nationals; and (iv) the applied-for services are complicated and still require foreign expertise.

Please note that, according to the DBD’s rulings, even if a foreigner subcontracts a local representative to engage in business in Thailand on its behalf (and thus does not directly operate a business in Thailand), the DBD regards such foreigner as engaging in business in Thailand through its representative. As a result, foreigners engaging with local representatives for such purposes are required to apply for and obtain a foreign business licence before the operation of such a business may commence.

### **Exempted Businesses From Foreign Business Licence**

A foreigner can engage in business activities that are:

- i. not listed under List One, List Two or List Three except for certain business i.e. manufacturing and exporting activities.
- ii. specifically described in the FBA as exempt from a foreign business licence requirement;<sup>2</sup>
- iii. promoted under the Investment Promotion Act B.E. 2520 (1977) or granted written permission for operation of business under the Industrial Estate Authority of Thailand Act, B.E.2522 (1979).<sup>3</sup>

Note: Even if being exempted from the foreign business licence requirement, foreigners are still required to notify the Director General of the DBD in order to obtain a foreign business certificate for the business fall within the lists annexed to the FBA (however, the process is much less complicated compared with applying for and obtaining a foreign business licence).

- iv. by virtue of a treaty to which Thailand becomes a party or by which Thailand is bound.<sup>4</sup>

Note: a. same as in iii, foreigners are still required to notify the Director General of the DBD in order to obtain a foreign business certificate.

- b. Thailand is currently bound by several agreements such as the U.S. - Thai Treaty of Amity and Economic Relations of 1833 (the “US-Thai Treaty of Amity”), Thailand - Australia Free Trade Agreement (TAFTA), Japan - Thailand Economic Partnership Agreement (JTEPA), ASEAN Framework Agreement on Services (AFAS), and ASEAN Comprehensive Investment Agreement (ACIA).

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<sup>2</sup> For a sample of exempted businesses described in the FBA please see “Additional Materials” at the end of this newsletter.

<sup>3</sup> Section 12 of the FBA

<sup>4</sup> Sections 10 and 11 of the FBA

c. Only the US-Thai Treaty of Amity allows U.S. nationals and/or companies to hold majority or whole of the shares in companies to engage in business on the same basis as Thai companies but with certain requirements, i.e.:

- A minimum of fifty-one percent of shares must be held by American citizens;
- At least half of directors must be American citizen(s).

However, the US-Thai Treaty of Amity prohibits U.S. nationals/entities from engaging in the following reserved activities:

- Communications;
- Transportation;
- Fiduciary functions
- Banking involving depository functions;
- Land ownership;
- Exploitation of land or other natural resources; and
- Domestic trade in indigenous agricultural products.

v. described in Ministerial Regulations which may be enacted under the FBA from time to time in order to exempt certain service business activities of foreigners.<sup>5</sup>

As a result, a foreigner who will engage a business which falls under (i)-(v) above can operate their business without the need to acquire a foreign business licence.

In relation to item “v.” above, there are four (currently issued) Ministerial Regulations which exempt certain service businesses from the foreign business licence requirement, all of which fall under List Three (21) – “Other Services”.<sup>6</sup> These Ministerial Regulations exempt several service business activities, including those involving financial services, and can be summarised as follows:

- (i) Securities business and other businesses under the Securities and Exchange Act B.E. 2535 (1992);
- (ii) Future contract business under the Forward Contract Act B.E. 2546 (2003);
- (iii) Trustee business under the Trust for Transactions in the Capital Market Act B.E. 2550 (2007);
- (iv) Financial institution business and other businesses relevant to operation of a financial institution and that of its related financial company group under the Financial Institution Business Act B.E. 2551 (2008);
- (v) Asset management business under the. Emergency Decree on Asset Management Company B.E. 2541 (1998);
- (vi) Domestic lending between juristic persons, characterised by at least one of the following:

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<sup>5</sup> **List Three of the FBA**

(21) Other service businesses, **with the exception** of service businesses as prescribed in the Ministerial Regulation.

<sup>6</sup> “Ministerial Regulation on business activities exempted from foreign business licence” B.E. 2556 (2013), (No. 2) B.E. 2559 (2016), (No. 3) B.E. 2560 (2017), and (No. 4) B.E. 2562 (2019).

- (a) more than half of the total shareholders or partners of one juristic person are also more than half of the shareholders or partners of the other juristic person;
- (b) at least 25 percent of one juristic person's capital is held by shareholders or partners who also hold at least 25 percent of the other juristic person's capital;
- (c) one juristic person is a shareholder or partner holding at least 25 percent of the other juristic person's capital; or
- (d) more than half of the controlling power in one juristic person is held by directors or partners who also hold more than half of the controlling power in the other juristic person.

Regardless of whether a foreigner's business activities are exempted from the foreign business licence requirement (above), such foreigners are still obliged to comply with the applicable minimum capital requirement (explained below).

## **Minimum Capital**

In accordance with the Ministerial Regulation on minimum capital and period of inward remittance into Thailand B.E. 2562 (2019), the minimum capital necessary for a foreigner to operate a business in Thailand may differ depending upon their licencing status, as follows:

- i. For a foreigner granted a foreign business licence:

The required minimum capital must not be less than Baht 3,000,000 (three million Thai baht) or 25 percent of the estimated three year average expenses of the applied-for business, whichever is higher.

- ii. For a foreigner exempted from the foreign business licence requirement as described in i. – v. above:

The minimum required capital must not be less than Baht 2,000,000 (two million Thai baht).

However, there are points to note for a foreigner exempted from the foreign business licence requirement, as follows:

- a. If the foreigner is promoted under the Investment Promotion Act B.E. 2520 (1977) or granted written permission for the operation of business under the Industrial Estate Authority of Thailand Act, B.E.2522 (1979), the foreigner must also comply with the capital requirement as prescribed by these laws, which may be higher than Baht 2,000,000 (two million Thai baht).
- b. In case the foreigner or foreign entity will employ foreign expats, and as a result, a work permit will be required for its foreign employees, the foreign employer will need to have required capital of not less than Baht 3,000,000 (three million Thai baht) per each foreign expat under the Order of the Immigration Bureau No. 327/2557 Subject: Criteria and Conditions for Consideration of an Alien's Application for a Temporary Stay in the Kingdom of Thailand.

## **Potential Offence**

A foreigner engaging in any business without a foreign business licence (unless they are exempt from the foreign business licence requirement) shall be subject to imprisonment, a fine or both, pursuant to Section 37 of the FBA. In addition, the person(s) managing

said business will also be subject to the same penalty if the offender is a juristic person under Section 41 of the FBA. Furthermore, a person/juristic person who is subject to a court decision due to committing said offence will be disqualified from applying for a foreign business licence unless he/she/it has been released for a period of not less than five years under Section 16 of the FBA. Only the relevant court is entitled to decide on the punishment. The relevant authorities, such as the DBD and the police, are obliged only to gather the relevant evidence, as well as investigate and present the case to the court. The court is also required to order cessation of the business operation or the dissolution of the offender's business. According to DBD records concerning the years 2000-2020, the DBD granted foreign business licences to 5,706 foreign business operators and issued foreign business certificates to 6,698 foreign business operators. Of those, 2,901 business operators terminated their business in Thailand and three business operators had their foreign business licences withdrawn for failing to comply with the condition requiring a representative manager residing in Thailand.

## **Summary**

Any foreigner / foreign juristic person operating a business, including businesses in relation to finance activities, are required to apply for and obtain a foreign business licence before commencement of operations, unless the intended business is exempted under the Ministerial Regulations issued under the FBA. If a foreigner invests in a company through the purchase of shares or holding of trust units, said foreigner is not required to obtain a foreign business licence, as shareholding and/or trust unit holding are not regarded as engaging in business subject to the FBA.

In case a foreigner is regarded as engaging in business in Thailand, the foreigner must also comply with the minimum capital requirement (even if it engages in business which is exempted from the foreign business licence requirement).

Lastly, foreigners need to consider the specific laws and regulations governing any business they intend to operate in Thailand. In such regard, in our next newsletter, we will provide general information in relation to the appropriate laws and regulations governing specific finance related businesses, i.e. banking business, money lending activities, finance leasing and real estate business.

## Additional Materials

### Sample of exempted businesses described in the Foreign Business Act (List Three)

(10) Construction, **with the exception of:**

- (a) Construction of structures for delivery of infrastructure public services in the sphere of public utilities or transportation requiring the use of special apparatuses, machines, technology or expertise, with the minimum capital of five hundred million Baht or upwards from foreigners;
- (b) Construction of other types as prescribed in the Ministerial Regulation.

(11) Brokerage or agency businesses, **with the exception of:**

- (a) being a broker or an agent in the sale or purchase of securities or in services related to futures trading of agricultural commodities or financing instruments or securities;
- (b) being a broker or an agent in the sale, purchase or procurement of goods or services necessary for the production or the provision of services amongst affiliated enterprises;
- (c) being a broker or an agent in the sale or purchase, procurement, distribution or acquisition of domestic and foreign markets for the distribution of domestically manufactured or imported goods, which is in character the operation of international trade, with the minimum capital of one hundred million Baht or upwards from foreigners;
- (d) being a broker or an agent of other types as prescribed in the Ministerial Regulation.

(12) Sale by auction, **with the exception of:**

- (a) a sale by auction which, in character, involves international bidding of items other than antiques, objects of antiquity or artistic objects that are artistic works or handicrafts or objects of antiquity of Thailand or of historical value of the country;
- (b) sales by auction of other types as prescribed in the Ministerial Regulation.

(14) Retail sale of goods of all types, **except** the minimum capital is from one hundred million Baht per five retail stores.

(15) Wholesale of all types, **except** the minimum capital of each store is from one hundred million Baht.

(17) Hotel business, **with the exception of** the hotel management service



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