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**DEJ-UDOM & ASSOCIATES LTD.
ESTABLISHING A BUSINESS ENTITY IN THAILAND**



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ESTABLISHING A BUSINESS ENTITY IN THAILAND



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Thailand has a civil or codified law system. The main legal codification governing commercial aspects in Thailand is prescribed under the Civil and Commercial Code (“CCC”) and other related Acts which are issued from time to time to govern specific circumstances.



The part of the CCC which refers to companies, called “Company Law” in other jurisdictions, is under Title XXII, “Partnerships and Companies” (Book III of the CCC). The CCC governs the establishment, management, shareholder and partner rights, and liquidation of partnerships and private limited companies. Public Companies are governed by the Public Limited Companies Act B.E. 2535 and the Securities and Exchange Act of the same year and its related Regulations and Announcements. Breaches of the CCC’s provisions concerning “Partnerships and Companies” may be subject to penalties under the “Act on Offence concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundation” B.E. 2499.

The following are the business entity types available in Thailand’s jurisdiction; however, a foreigner’s ability to engage in them is regulated by the Foreign Business Act (“FBA”).

- **Sole Proprietorship** - Under the law, a person acting as a sole proprietor can engage in almost any lawful type of business with the exception of those businesses which have been otherwise regulated by the government. Taxation of a sole proprietorship business is calculated on a progressive personal tax rate.
- **Unregistered Ordinary Partnership** - An Unregistered Ordinary Partnership is when two or more persons join together to conduct business without formally registering their operation. Unregistered ordinary partnerships are taxed as natural persons, but each partner must also separately file their own personal tax return.



- **Registered Ordinary Partnership** - To form a Registered Ordinary Partnership, all particulars, including the partnership contract, capital contribution, management, and objectives, must be submitted to the Ministry of Commerce. Partner profits are subject to taxation, so profits are subject to two levels of taxation.

A Registered Ordinary Partnership which having 3 partners, or more may convert its legal entity to a private limited company. This will be subject to (i) prior consent have been granted by all partners; and (ii) no objection has been raised by its creditors. Unless said debts have been settled or placed with security in the case of objection was made by any creditor.

- **Limited Partnership** - In a limited partnership, the managing partners are jointly held personally liable for the partnership's debts and any non-managing partners are only liable for the amount of any undelivered or withdrawn capital contribution. Partner profits are subject to taxation, so profits are subject to two levels of taxation. A limited partnership will also be able to convert its legal status to a private limited company and subject to certain conditions as mentioned in “**Registered Ordinary Partnership**”, above
- **Private Limited Company** - Basically a corporation, a Private Limited Company must have a minimum of three persons join together to start a business with the capital divided into shares of equal par value. A Private Limited Company is taxed as a juristic entity.
- **Public Limited Company** - A Public Limited Company is formed in order to offer shares

to the general public and must have a minimum of 15 persons join together. A Public Limited Company is a juristic entity and taxed as one. Individual shareholders must pay tax on their earnings, and foreign corporate shareholders pay tax on all dividends. Income Tax imposing on capital gain will be different when trading shares issued by a publicly listed company in the Stock Market of Thailand.

- **Joint Venture** - In Thailand, a Joint Venture is not a legal entity under the Civil and Commercial Code. If two parties both individual and corporate entity do enter into an agreement to work together as a Joint Venture, it is regarded to be a juristic entity under the Thai Revenue Code. A Joint Venture's income is subject to corporate income tax as a new entity and is required to obtain a new Tax I.D. under the Revenue Code.
- **Consortium** – A consortium is not a new legal entity under the Thai Civil and Commercial Code neither the Revenue Code. However, the consortium agreement is a kind of loose partnership, in which each party to the consortium is individually responsible for each work designated under the consortium agreement. Therefore, it does not need to have Tax I.D. and register as a value added tax operator. Each of the consortium party is responsible to pay tax based on profit and loss of its own entity and obtain necessary license.
- **Branch Office** - A Branch Office can only do business on behalf of a company based outside Thailand and must obtain a business license or a business certificate



according to the FBA. However, a Branch Office can only engage in specific business activities granted under the FBA. A company must bring in a minimum capital of at least 3 million Baht; however, this is the minimum threshold and the actual amount is calculated at 25% of the average per year of three years' estimated expenditures. For tax payment, a Branch Office is treated as a juristic person.

- **Representative Office** - A Representative Office (Rep-Office) can only engage in certain business activities on behalf of a company based outside Thailand, such as:
 - Finding a source for the purchase of goods or services in Thailand for the head office;
 - Checking and controlling the quality and quantity of goods purchased or manufactured under hire in Thailand for the head office;
 - Advising on various aspects concerning goods of the head office sold to agents or consumers in Thailand,
 - Propagation of information concerning new goods or services of the head office; and
 - Reporting on movements and trends of business in Thailand to the head office.

Under the new rules, it is required to report the establishment of a Rep-Office with the Ministry of Commerce instead of obtaining a business license under the Foreign Business Operation Act. A Rep-Office is a “non-trading unit” and cannot earn any income or profit under its own independent activities as

notified to the said Authority. It can only obtain financial support from the overseas head office for its office expenditures in Thailand. A Rep-Office is considered a “tax unit” and as such it is required to register itself under the Thai tax system with the Thailand Revenue Office and must comply with all tax filing requirements such as withholding income tax, corporate income tax, etc.

A Private Limited Company (“PLC”) is the most common type of business incorporation in Thailand and its basic characteristics are similar to those of Western corporations. A private limited company is formed by way of registration of its constitutive documents (Memorandum and Articles of Association) as well as other related applications with the Partnerships and Companies Registration Office, Department of Business Development, Ministry of Commerce. The *ultra vires* doctrine is still applicable in Thai law, so a company must specify in detail its objectives in its Memorandum of Association.

Shareholders of a PLC enjoy limited liability up to the amount of the unpaid value of shares invested in the company. This means that a shareholder will not be liable for more than their investment in the company (subject to extreme situations of piercing the corporate veil). A PLC is managed by a board of directors according to the laws and the Company's Articles of Association. Normally, the directors' liability will be limited and indemnified by the company unless otherwise prescribed in the company's Memorandum of Association or Articles of Association. Directors may be personally liable if they act beyond their powers as granted by laws or the Memorandum and Articles of Association or are in breach of their duty of



loyalty and care towards the company and its shareholders.

All shares must be subscribed to and at least 25% percent of the subscribed shares must be paid up on incorporation. Ordinary as well as preferred shares may be issued based upon the discretion of the shareholders' resolution. All shares must carry voting rights which might vary between ordinary and preferred shares. The minimum par value of a private company's shares is Baht 5 per share. Treasury shares for a private company are prohibited.

A Private Limited Company needs to maintain a minimum of three shareholders at all times.

In general, shareholders are entitled to attend any general meeting of shareholders and vote based upon the voting system of such entity. Minority shareholders have no absolute power to control the majority shareholders. However, the Thai Civil and Commercial Code sets some rights and protections for minority shareholders as follows:

- (i) Shareholders holding not less than one-fifth of the shares of the company may request in writing that the board call for a shareholders meeting to discuss any matter requested by such minority shareholders.
- (ii) In case the company refuses to claim against a director for compensation for injury caused by him/her, any shareholder shall be entitled to claim against the director.
- (iii) Shareholders holding not less than one-fifth of the issued shares may request the competent officer to appoint an inspector, designated by the Ministry of

Commerce, to examine the affairs of a limited company.

- (iv) Any shareholder shall be entitled to request the court to cancel any resolution passed at any general meeting of shareholders if such meeting was held in conflict with the law or the company's Articles of Association.

Annual Filing: Upon incorporation, a PLC is granted a Taxpayer ID number, the same number as its Company Registration number. A PLC is obliged to pay corporate income tax on its annual profit to the Thai Revenue Department within 150 days from the date of fiscal year's end. A company's board of directors is also obliged to close the company's books of accounts at the end of every fiscal year and have them audited by a qualified local auditor. The audited financial statements must be submitted to the shareholders at the annual ordinary meeting for approval within four months from the fiscal year-end. The company is obliged to submit the audited financial statement which was approved by the shareholders together with other required documents to the Department of Business Development (DBD) within one month from the date of shareholders meeting via the DBD's e-Filing system.

Tax Filings: A PLC carrying on business in Thailand must file a half-year and an annual corporate income tax return. The tax paid at the half-year is a prepayment calculated on the forecasted net profit for the year and is credited against the full-year tax liability. The latest a half-year return can be filed is two months from the last day of the first six months of the company's accounting period, and the annual return must be filed within 150 days from the last day of the accounting period. The Thailand



Revenue Department has now implemented its e-Filing system for all taxpayers, both individuals and juristic entities, to submit their related income tax applications via the Revenue Department's electronic system. More information is available at <http://www.rd.go.th>.

Social Securities Fund: Thailand also implements a social securities fund for all business entities to participate in and contribute their support to their employees. There are penalties for any non-compliance by an employer.

Works Rules: An employer, when having employees altogether amounting to 10 persons or more, will be obligated to establish a "Work Rules" containing of specific provisions as required by law, announce and disclosure to employees at the working place within 15 days. Any non-compliance will be subject to a specific fine.

Remitting funds out of the country: All foreign exchange transactions must be done through commercial banks or authorized non-banks. Both direct and portfolio foreign inbound investments are freely permitted. Repatriation of investment funds and repayment of overseas borrowing in foreign currency can be remitted freely upon submission of supporting evidences.

Legal Capacity and Limitation: Limitations for undertaking business operations in Thailand will depend upon the type of business transaction and the qualifications of an operator wishing to conduct such business. In principal, **Thai** operators, whether individuals or juristic entities, can conduct all kinds of legal businesses in Thailand, unless a specific law requires certain prior qualifications and specific approvals.

The main legislation concerning **foreigners** who wish to operate a business in Thailand is the 1999 Foreign Business Operation Act ("FBA"). The FBA lists the restrictions on the type of business a foreigner can conduct in Thailand as an individual, as a juristic entity registered overseas, or as a juristic entity registered under Thai law with 50% or more of its shares are owned by foreigners, unless a specific business operation license has been obtained when applicable.

The FBA's three Annexes contain three (3) categories of such restricted activities. Mainly, Annex 1: media, rice farming, forestry and herbs - be restricted from foreigners; Annex 2: national safety or security, arts and culture, natural resources - subject to permission of the Minister of Commerce and the Cabinet; and Annex 3 (the most common case): wholesale and retail, specific services such as accounting and legal services, construction, agency, auction, hotels, and general services - subject to a business license. Non-restricted business includes manufacturing business, export business.

On June 13, 2019, Thai government has announced following Inter-companies servicing activities i.e. domestic loan provisions, office space rental services with public utilities, and consulting services specifically in the areas of administrative management, marketing, human resources and information technology as exempted service businesses that foreign investors (individual/entity) can conduct without obtaining prior permission pursuant to the FBA. The businesses must be made between related juristic persons having one of the following relationships:



(a) More than half of the number of shareholders or partners in one juristic person are also more than half of the shareholders or partners in the other juristic person;

(b) Shareholders or partners that hold shares or are partners valued from 25% of the capital in one juristic person also hold shares or are partners with such value in the other juristic person;

(c) One juristic person that holds shares or is a partner with the value from 25% of the capital in the other juristic person; or

(d) More than half of the authorized directors or managing partners in one juristic person are also authorized directors or managing partners in the other juristic person.

Despite the above-mentioned restrictions, foreigners may still obtain certain privileges for conducting restricted businesses without obtaining a business operation license (but rather merely a business certificate or freely & without a business certificate), as follows:

(i) Being granted a business certificate under the Treaty of Amity and Economic Relations between Thailand and U.S.A. except for the following restricted businesses: a) communications; b) transport; c) fiduciary functions; d) banking; e) exploitation of land and natural resources; f) domestic trade in indigenous agricultural products (Remark: the said Treaty of Amity actually expired but since the FTA between Thailand and U.S.A. has not yet been finalized, the Thai Authority still grants business privilege to U.S.A. nationals and corporations)¹;

(ii) Being granted an investment promotion from the Thailand Board of Investment (“BOI”), and on certain occasions, the Industrial Estate Authority of Thailand (“IEAT”). For your information, the BOI is a government entity which grants support to investors (regardless of their nationalities) which wish to conduct businesses under the promoted businesses governed by BOI. Although there are no clear thin capitalization rules in Thailand, the BOI may prescribe a maximum ratio of equity: debt. You can visit the BOI's website to obtain more details at: <http://www.boi.go.th>

(iii) Being granted a business certificate for rendering each of 12 types of businesses, under Thai – Australia Free Trade Agreement.² This will be subject to certain qualifications, required proportion of shareholding between Thai and Australian investors and related conditions set for each type of such permitted businesses which including Mining (land and marine mining), Construction (Public Utilities Construction/Transportation Construction that uses special equipment, machinery, technology or expertise), Hotel business (Luxurious hotel and resort service), Restaurant (Full range of restaurant), Other categories of Service Business (such as (i). General Consulting Service for ROH / branch or ROH’s subsidiaries; (ii) Meeting Hall; (iii) International Product Exhibition Center; (iv) Wholesale and Retail service relevant to the sale and installation of the products manufactured by the Australian juristic person established in Thailand; (v)

¹ Please visit the DBD’s website, https://www.dbd.go.th/dbdweb_en (accessed October 30, 2019)



Education / Educational Institutes with science and technology expertise such as life sciences, bio – technology and nano technology; (vi) Fun Park and zoo service; (vii) Aquatic animal park service; and (viii) Pier and Anchor service for tourism ships)

In addition, there are 6 types of business that may freely render by a company which having Australian shareholders as part of its investors, without obtaining a business certificate i.e. Retail (Sale of Telecommunication Equipment); Wholesale (Sale of Telecommunication Equipment); Other categories of Service Business (i.e. 1. Telecommunication Consulting Service; 2. Leasing service of Telecommunication Station Equipment; 3. Database Access Services; and 4. Domestic Very Small Aperture Terminal VSAT). However, this will be subject to certain qualification and conditions required for such specific business activities as mentioned in the Thai – Australia Free Trade Agreement.

- (iv) Being granted a business certificate for rendering specific 8 types of business under the Japan-Thailand Economic Partnership Agreement aka JTEPA Agreement. This will also be subject certain qualifications and required proportion of shareholding between Thai and Japanese investors as conditions for each type of business which includes (i-ii) Wholesale or Retail (except for distilled alcohol) of products manufactured by the company or subsidiaries located in Thailand under the same brand; automobile products manufactured by

the subsidiaries in Japan under the same brand, (iii) Advertising Business, (iv) Hotel Business, (v) Restaurant Business, (vi) Management Consulting Service, (vii) Logistics, (viii) Consulting Service, except for every type of transportation service, Maintenance and Repair Service Business for Household electrical appliances that such companies conduct the wholesale businesses in Thailand and such products are manufactured by such companies or subsidiaries in Thailand under the same brand; or Household electrical appliances that the subsidiaries in Japan manufacture under the same brand.

Capital Requirement under the FBA

A foreign entity that wishes to conduct business in Thailand must have a minimum capital to be used at the commencement of the restricted business and non-restricted business. The required minimum capital for **each** restricted business is at least Three Million Baht per business. This is only a minimum which is subject to the following formula: *“25 percent of the average estimated expenditure per business per year for three years. However, this must not be less than three million baht.”* Thus, it will need to calculate the amount of minimum capital to be used for each type of specific business in order to determine how much capital will be required in operating each specific business.

For non-restricted business: the required minimum capital for each business will be at least Two Million Baht.

Please note that full payment of minimum capital must be brought into the Kingdom prior to commencement of such restricted or non-restricted business.



Work Permit & Visa Extension: In addition, please note that foreigners wishing to reside and work in Thailand will need both a non-immigrant visa and a work permit. A non-immigrant visa is initially valid for 90 days and can be extended for one year and is renewable. The procedures to acquire a non-immigrant visa are linked to procedures to obtain a work permit from the Department of Employment, Ministry of Labour, according to its set regulations and compliance. For a BOI or IEAT promoted companies, it is required to follow and comply with such Authority's criteria and regulations set for work permit and visa extension for foreign expatriates.

Guidelines for Incorporating a Thai Limited Company

i) Corporate name reservation

A promoter of a company is required to apply for the company's name reservation, either directly or electronically, with the Registrar's Office at the Department of Business Development, Ministry of Commerce. The result is obtained on the date of filing.

ii) Incorporation

Thereafter, the process for incorporation consists of two steps, namely:

Step 1. Registration of the Memorandum of Association

Information required for this registration includes:

- (i) Corporate Title
- (ii) The Location of the Company's Head Office
- (iii) The Company's Objectives
- (iv) Registered Capital: There is no minimum requirement set by the

Registrar. Therefore, the business owner needs to consider the size of its business. According to Thai law, the par value of shares of a company must not be less than Baht 5 each.

- (v) Name of Promoters: Under Thai law, three individual promoters need to enter their names and subscribe for at least one share of the Company.

Note: The Promoters shall affix the Revenue Stamp of Baht 200 on the original copy of Memorandum of Association prior to filing the same with the authority. Generally, the registration process for the Memorandum of Association takes one day, but it depends on the completeness of the application. Once approved, the registration fee must be paid to the Registrar's Office. The government fee is collected at a single flat rate of Baht 500.

Notice Calling for Statutory Meeting

After registration of the Memorandum of Association, the authorized promoter will issue a notice calling for a Statutory Meeting. The said meeting must be scheduled no less than seven days from the date of issuing the notice, which normally is the day after the Registration of the Memorandum of Association.

Statutory Meeting

At the Statutory Meeting, the Chairman will be elected, and the Agenda contained in the Notice calling for the Statutory Meeting shall be discussed. There are altogether six matters that need to be considered at the Statutory Meeting, as follows:

- (1) Approval of the first list of shareholders.



- (2) Ratification of actions taken, and approval of expenses incurred by the promoters of the company in the process of formation, if any.
- (3) Approval of the Company's Articles of Association.
- (4) Appointment of the Company's Board of Directors and fixing the authority of the authorized directors of the Company.
- (5) Appointment of the Company's auditor and approval of his/her remuneration.
- (6) Other businesses, if any.

Notes:

- (1) The director shall affix the Revenue Stamp of Baht 200 on the original copy of Articles of Association ("By-Laws") prior to submitting the same to the authority.
- (2) According to Thai law, a Company is not required to have a corporate seal. In practice, a Thai company usually has a corporate seal to prevent fraudulent acts by unrelated persons.

Shareholders

Thai corporate law requires a minimum of three shareholders of the Company at all times.

Important Note:

According to new registration criteria:

- (i) Proof of Actual Investment in a new company
 - A company with **more than 5 Million Baht** registered capital is required to **prove** the payments of shares made by the shareholders. For incorporation, the authorized director must collect all shares payments and **deposit** same first

into his/her personal bank account in Thailand and obtain a confirmation letter issued by such bank confirming the outstanding amount that was deposited into such bank account accordingly. This bank letter will be part of documents for registration.

- Once the Registrar approves the incorporation, the Board has the duty to further adopt a resolution for opening a bank account and the related director shall **transfer** such shares capital into the Company's bank account ASAP. Then (in the same manner as above), a Bank confirmation letter from the Company's bank is to also be submitted to the DBD to prove the outstanding balance amount that was deposited into the Company's bank. This step must be completed within 15 days from incorporation. Failure to do so will blacklist (DBD-wise) the company.
 - The above process is **exempted** if all board members are foreigners (as they may not be able to practically open a personal bank account in Thailand), so submitting a clarification letter to the Registrar informing that there is no such bank account in Thailand, would be sufficient instead.
 - However, the Company still has the duty to open a bank account for depositing the shares payments and submit the Bank's Confirmation letter (where the Company will open its account) to the DBD **within 15 days from incorporation date**.
- (ii) Proof of Actual Investment in a new company by any Thai shareholders



- In a case of a company with foreign shareholders that are holding less than 50% of the total registered capital, the Thai shareholder(s) must submit his/her bank confirmation letter confirming the outstanding balance in his/her bank account to prove his/her financial ability for such investment.
 - o The same rule applies for a company that has no foreign shareholders but has a foreign authorized director as one of its board members.

Step 2. Final Registration

After the Statutory Meeting, all directors appointed in the meeting must sign the application form and other related documents needed to register the Company as required by Thai Corporate Law. The application form shall be accompanied with copies of the Memorandum and Articles of Association and details concerning office address, names of directors and authorized directors, name of auditor, etc. Once approved, the registration fee must be paid to the Registrar's Office at a single flat rate of Baht 5,000.

Remark: According to the amendment of the Thai Civil and Commercial Code effective on July 1, 2008, the registration incorporation process for a company can be completed with the Department of Business Development within one day.

Currently, the DBD has implemented its “e-Registration” for the formation of new partnerships and private companies together with the registration of any corporate changes for such juristic entities. For more information, please visit the DBD's website: <http://www.dbd.go.th>.

Dej-Udom & Associates, an independent law firm in Bangkok, Thailand, provides legal services to a diverse client base that ranges from leading multinational corporations to local companies and individuals. The firm supplies partner-led service in the practice areas of Litigation, Immigration & Employment, Intellectual Property, Corporate Law and Services, Taxation, and Financial Markets and Investment to clients who value expert counsel and astute representation coupled with realistic billing policies and personal contact and attention. The Corporate Department is a one-stop corporate solution for all business types and represents multinational corporations, small & medium-sized enterprises, local companies, and Thai and foreign small businesses. The firm's corporate practice handles the formation of all kinds of juristic entities including, but not limited to, public limited companies, limited liability companies, joint ventures, consortiums, and branch and regional offices. Other matters covered include reorganizations and restructurings, investments, mergers and acquisitions, due diligences along with obtaining special benefit privileges and incentives from government agencies including the Thailand Board of Investment (BOI) and Industrial Estate Authority of Thailand (IEAT). This department also advises on and drafts contracts and other business and legal documents and offers full corporate secretary services. The Corporate team combines transactional expertise with comprehensive experience in all areas of law relevant to establishing and operating a business in Thailand and regularly handles a wide range of complex domestic and cross-border corporate and commercial matters.