



Fall | 18



INTERNATIONAL LAWYERS NETWORK



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



This guide offers an overview of legal aspects of establishing an entity and conducting business in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.



ESTABLISHING A BUSINESS ENTITY IN THAILAND



“Establishing a Business Entity in Thailand”

Mr. Dej-Udom Krairit
Partner
Dej-Udom & Associates – Bangkok



“Establishing a Business Entity in Thailand”

Mr. Worawut Krairit
Partner
Dej-Udom & Associates – Bangkok



“Establishing a Business Entity in Thailand”

Ms. Nipa Pakdeechanuan
Partner
Dej-Udom & Associates – Bangkok

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.

- **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.
 - **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.
 - **Joint Venture** - In Thailand, a Joint Venture is not a legal entity under the Civil and Commercial Code. If two parties do enter into an agreement to work together as a Joint Venture, it is valid as long as it conforms to Thai laws. A Joint Venture's income is subject to corporate tax as a single entity.
- **Branch Office** - A Branch Office can only do business on behalf of a company based outside Thailand and must obtain a business license 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 Tax Payer 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 tax payers, 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.

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): Services: accounting and legal services, construction, agency, auction, hotels, wholesale and retail - subject to a business license.

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), 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);
- (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>

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.

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.