

## CHAPTER 1 FOREIGN BUSINESS RESTRICTIONS

The framework of laws that apply to foreign ownership of businesses in Thailand is complex, and there are several different statutes that may have to be considered.

The Foreign Business Act (1999) is the most important law affecting ownership of businesses by foreigners. It regulates and restricts foreign ownership in 43 specified categories of business activity.

The Board of Investment, the most important government agency to promote investment, has power to grant permission for majority foreign ownership of businesses listed under Schedule 2 and 3 of the Foreign Business Act, (see further, Chapter 3 *Business Promotion Incentives*).

Americans have special rights under a specific treaty called the United States – Thailand Treaty of Amity and Economic Cooperation (see in detail, Chapter 2 *The United States - Thailand Treaty of Amity*).

There are also specific laws that contain foreign ownership restrictions relating to particular industries, including: banking and finance, insurance, securities, telecommunications, airlines and shipping.

Thailand has also entered into bilateral trade agreements or treaties with a number of countries, and these agreements may also contain provisions that apply to foreign ownership of business in Thailand.

Each of these will be discussed in turn. The United States -Thailand Treaty of Amity is discussed separately in Chapter 2.

**The Foreign Business Act** The Foreign Business Act (1999) came into force on March 3, 2000. The Act places restrictions on 43 categories of business activity divided into three Schedules. The foreign ownership restrictions are different, depending on the Schedule in which the business activity is listed.

**Definition of ‘Alien’** The Act places restrictions on the businesses that may be carried on by an Alien. The definition of *Alien* is complex, but it includes a company or partnership which has at least half its shares owned by foreigners, a foreign company, or a foreign individual. Accordingly, a Thai company that has only a minority of its shares owned by foreigners is not an ‘*Alien*’ for the purposes of the Act.

In 2007, a revised Foreign Business Act was published, which included amongst other things a proposal to extend the definition of *alien* to cases where foreigners

hold a majority of the voting rights. The bill was not passed when the military-appointed government ceased to hold office in December 2007.

**Regulation** The Act sets up a regulatory authority called the Alien Business Committee, to supervise and enforce the Act, make proposals to the Minister concerning any regulations to be made under the Act, and grant approval for majority foreign ownership of Schedule 3 businesses.

**Framework of the Act** The new Act imposes restrictions on 43 categories of business activity divided into three Schedules.

As to businesses listed in Schedule 1, only minority foreign ownership is permitted and there is no right to apply for majority foreign ownership.

As to businesses listed in Schedule 2, minority foreign ownership is possible without permission. Up to 60% (with a possibility of applying for up to 75%) foreign ownership is possible with ministerial approval. At least 40% of the directors must be Thai nationals.

As to businesses listed under Schedule 3, minority foreign ownership is possible without permission. Majority foreign ownership is possible with permission of the Commercial Registration Department and approval of the Alien Business Board.

Where permission for majority foreign ownership is granted, other conditions may be imposed under the Act.

**Procedure** An application for majority foreign ownership must be considered within 60 days, subject to a further 60 day extension, if required. The formal permit must be issued within 15 days of it being granted.

Under a regulation issued in 2004, an application must also include proposals for transfer of technology by the foreign parent to the company.

**Criteria for approval of majority foreign ownership** To obtain approval for majority foreign ownership of a Schedule 2 or 3 business, a foreign investor will have to demonstrate that the nature of the business contributes to a number of matters, including: national safety and security; economic and social development; natural resources and energy conservation; environmental protection and consumer protection. Other matters that will be taken into account include: the size of the business; the creation of employment, the transfer of technology, and research and development.

**Conditions on licenses** Any license granted may include conditions in relation to the following matters: the debt to asset ratio of the business, the number of foreign directors to reside in Thailand, the minimum capital levels to be

maintained and the period during which such levels should be maintained, requirements concerning technology or property, and other conditions.

**Capital requirements** The Act and subsequent regulations impose requirements for minimum paid up capital. Foreign shareholders also have to show evidence that such capital has actually been brought into Thailand.

**Anti-nominee provisions** A regulation was issued in 2006 to discourage the use of Thai nominee shareholders by foreigners. The regulation states that in relation to any partly foreign-owned partnership or company in which the foreign shareholders or partners:

(a) own 40 - 50% of the shares, or

(b) own less than 40% of the capital, but a foreigner is a director authorised to sign on behalf of the company,

then all the Thai shareholders or partners must submit information concerning their source of capital to acquire their shareholding, with the application to register the company. The documents should identify the money for investment or share purchase and should include: bank passbooks or statements for the previous six months; and evidence showing the source of money used for investment.

There is no reference in the regulation to penalties. But note that under the FBA, if evidence of nominee activities is discovered, the Thai nominees can be fined or imprisoned, and an order can be made for the business to be closed.

**Certificates** If a business is formed under the provisions of the United States – Thailand Treaty of Amity (see Chapter 2) or has promotional privileges granted by the Board of Investment (see Chapter 3), it is also required to apply for a certificate (not a license) under the Foreign Business Act.

**Appeals against refusal, and stay of enforcement** If an application for a permit under Schedule 2 is refused, the Minister must give written notice of refusal with reasons within 30 days. There is no right of appeal. If an application for a permit under Schedule 3 is refused, the Commercial Registration Department must give written notice of refusal with reasons within 15 days. There is a right of appeal to the Minister, exercisable within 30 days of the refusal. The Minister can grant a stay of enforcement, pending the appeal.

**Transitional provisions, grandfathering clause** The Act contains certain transitional provisions. If an Alien has the right or permission to carry on a business under the old Alien Business Law of 1973, it may continue its business in accordance with the original permission. If an Alien is already carrying on a business that is listed in one of the Schedules of the FBA, then, if that business

was not restricted under the old ABL of 1973, it is necessary to apply to the Commercial Registration Department for a certificate under the FBA.

Such businesses were permitted to continue operations for a period of one year after the FBA came into operation.

**Enforcement** The Act sets out various enforcement mechanisms. There is a right of entry into businesses in order to obtain information and documents, which applies against any person. A compliance notice can be issued that may impose a time limit to remedy breaches. Nominees and evaders face severe punishment - imprisonment and fines. The Act also provides for fines and imprisonment for breaches of other sections of the Act.

**Retailing businesses** In late 2006, the Ministry of Commerce announced that it intended to promote a Retailing Act to regulate the opening of new retailing businesses, on the grounds that the rapid expansion of foreign retailers such as Tesco, Carrefour and Makro threatened the livelihoods of small Thai family owned retailers. As at August 2010, a draft of the legislation is still under review by the Ministry of Commerce.

**Comment** The most significant achievement of the FBA is that foreigners may have majority or 100% ownership of virtually all types of manufacturing business. There are a small number of exceptions relating to sensitive industries or products.

In contrast, services are still generally restricted to minority foreign ownership only, unless a successful application is made for majority foreign ownership under the FBA, or to the Board of Investment (where available). Certain services are partially de-restricted under the FBA, including; construction; trading; wholesaling; distribution and retailing, subject to minimum investment and other requirements being complied with.

If a business activity is listed in any of the three FBA Schedules, then provided that foreign ownership is maintained at less than 50%, no license is required under the Act.

If a particular business activity is not restricted under any of the three Schedules, or under any other law, then there are no limitations on foreign ownership.

**Board of investment** The Board of Investment is the key government agency that promotes investment in Thailand. It has power to grant certain tax privileges and benefits to Thai registered companies, whether Thai or foreign majority owned. It also has a general power to grant permission for majority foreign ownership of a Schedule 2 or Schedule 3 business.

**The United States – Thailand Treaty of Amity** Under this Treaty, American and Thai citizens and corporations are granted special preferential rights concerning the ownership of businesses in each other's countries. Such rights are granted on the basis of reciprocity. Since the United States allows Thai citizens and companies to have majority Thai ownership of an American company, Thailand in return grants American citizens and companies the right to have majority ownership of a Thai company. This is subject to a number of specific exceptions referred to in the Treaty, in which each country may still impose domestic legal restrictions. Note that the Treaty does not confer any special rights in relation to ownership of land in Thailand, which is still in general prohibited to foreigners.

For further discussion of the Treaty see Chapter 2 *The United States - Thailand Treaty of Amity*.

**Industry - specific legislation** There are a number of business activities where the foreign ownership limitations are to be found not in the Foreign Business Act, but in a specific Act or regulation. These are discussed below.

**Banks and financial institutions** As to foreign ownership of Thai banks and financial institutions, the current position is as follows:

- a foreign bank may have up to 25% ownership of a Thai bank, without approval by the Bank of Thailand;
- a foreign bank may have up to 49% ownership of a Thai bank, subject to approval by the Bank of Thailand; and
- a foreign bank may have more than 49% ownership of a Thai bank, subject to approval by the Ministry of Finance.

There are also special creeping takeover rules that apply to banks and financial institutions: if a person owns more than 5% of a bank or financial institution, then such shareholding must be reported to the Bank of Thailand; and if a person wishes to own more than 10% of a bank or financial institution, then consent must be obtained from the Bank of Thailand.

**General insurance and life assurance** The rules regarding general insurance and life assurance companies were revised in February 2008:

- 75% of the directors must be Thai, and Thais must own 75% of the shares.
- The Insurance Commission, as regulator, has power to permit up to 49% foreign share ownership, and not more than 50% of the directors to be foreign.

- The Finance Minister on the recommendation of the Insurance Commission, has discretion to permit greater foreign ownership and a majority of foreign directors, where the operation of the company may cause loss to insured parties or to the public. Such approval may be granted subject to conditions, or for a limited period of time.

Existing companies that do not comply with these requirements have until February 2013 to adopt compliance measures.

**Securities** Securities businesses may be 49% foreign owned.

**Other specific industries** Companies owning Thai flagged ships must be at least 70% Thai owned. Licensed air carriers may be up to 30% foreign owned, and there must be a majority of Thai directors on the board. Telecommunications companies that have a category 2 or 3 license (see Chapter 23 *Telecommunications, IT and e-commerce*) may have up to 49% foreign ownership. Special rules apply to engineering businesses, law firms, credit data agencies and certain other businesses.

The major foreign ownership restrictions discussed above are summarised in the table below.

<b>Business and relevant law</b>	<b>Minority foreign ownership</b>	<b>Majority foreign ownership</b>	<b>Notes</b>
FBA Schedule 1 businesses	No permission required	Not possible	
FBA Schedule 2 Businesses	No permission required	With permission of the Cabinet, up to 60% and possibly up to 75% but three fifths of directors must be Thai.	BOI may also grant permission subject to 1
FBA Schedule 3 Businesses	No permission required	1. With permission of the Foreign Business Registrar, up to 100% foreign ownership no nationality requirement for directors.2	BOI may also grant permission subject to 2

USA - Thailand Treaty of Amity - any businesses	No permission required	No permission required	Businesses excluded from the Treaty: telecommunication s, transportation, fiduciary functions (includes warehousing and security services, banking involving depository functions (includes finance businesses), exploitation of land or natural resources, domestic trade in indigenous agricultural products, liberal professions
Banking and finance businesses	A foreign bank may have up to 25% ownership of a Thai bank, without approval by the Bank of Thailand; a foreign bank may have up to 49% ownership of a Thai bank, subject to approval by the Bank of Thailand;	A foreign bank may have more than 49% ownership of a Thai bank, subject to approval by the Ministry of Finance.	Note special creeping takeover rules: if a person owns more than 5% of a bank or financial institution, then such shareholding must be reported to the Bank of Thailand; if a person wishes to own more than 10% of a bank or financial institution, consent must be obtained from the Bank of Thailand
Securities businesses	No permission required	Not possible	
Insurance businesses	75% of the directors must be Thai and Thais must own 75% of	The Finance Minister on the recommendatio n of the	Existing companies that do not comply with these requirements have

	the shares. The Insurance Commission, as regulator, has power to permit up to 49% foreign share ownership, and not more than 50% of the directors to be foreign.	Insurance Commission, has discretion to permit greater foreign ownership and a majority of foreign directors, where the operation of the company may cause loss to insured parties or to the public. Approval may be granted subject to conditions, or for a limited period of time.	until February 2013 to arrange compliance
Shipping businesses	Foreign ownership up to 30% only permitted where the company owns Thai flagged vessels	Not possible	
Telecommunications businesses	For category #2 and #3 licenses under the Telecommunications Act, foreign ownership up to 49% only	Not possible	Three quarters of the applicant's directors must be Thai nationals, and the applicant's authorised directors who have power to bind the company must be Thai nationals

**Free Trade Agreements** Since 2003, Thailand has entered into Free Trade Agreements with several countries, namely: India, China, Australia, Bahrain, Peru, New Zealand and Japan. By virtue of its membership of ASEAN, Thailand also enjoys a degree of free trade with other ASEAN countries namely: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, and Vietnam, and stemming from its membership of the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), Thailand has

a degree of free trade in its relationships with other BIMSTEC countries namely: Bangladesh, India, Myanmar, Sri Lanka, Thailand, Bhutan and Nepal.

Negotiations for a free trade agreement with the United States broke down some time ago, however Thailand announced in 2008 that it wished to resume such negotiations. It is envisaged that such an agreement would include the rescission of the United-States Thailand Treaty of Amity (see Chapter 2) which currently grants preferential rights of business ownership to American investors. As at August 2010, negotiations for such an agreement have not been resumed.

Whilst such agreements usually deal with matters such as reduction of import duties, the rules of origin of goods, intellectual property and e-commerce, they may also contain provisions relating to foreign ownership of businesses. For example, the Australian-Thailand Free Trade Agreement (“TAFTA”) grants preferential ownership rights to Australian investors and companies in a number of different industries in Thailand, but subject to detailed conditions. Such rights may be greater than the rights available under the Foreign Business Act or other applicable laws (see above). Accordingly, where an Australian individual or company is considering the setting up of a company in Thailand, it may also be necessary to refer to TAFTA, to ascertain whether Australian investors have any special rights to own such a business.

The enhanced rights of business ownership enjoyed by Australian investors in Thailand are summarised in the table below.

<b>Nature of business</b>	<b>Previous foreign ownership limit</b>	<b>New foreign ownership limit under TAFTA</b>
Mining operations	49% (see FBA Schedule 2)	60%
Distribution	49% (see FBA Schedule 3)	100% where the goods are manufactured in Thailand
Construction	49% (see FBA Schedule 3)	100% but must relate to services to the public in utilities or transport requiring special tools, machinery, technology or construction expertise.
Management consulting services	49% (a service business under FBA Schedule 3)	100% but must be provided by a regional operating headquarters or associated company or branch.
Major restaurants or	49%(see FBA Schedule	60%

hotels	3)	
Tertiary education institutions specialising in science and technology	49% (a service business under FBA Schedule 3)	60% but must be located outside Bangkok
Maritime cargo services	49% (a service business under FBA Schedule 3)	60% but limited to port and waterway operation services including marina facilities, provided the facilities included a ship lifter, inland berthing and a ship yard for maintenance and repair.

The Japanese free trade agreement, formally called the Japan-Thailand Economic Partnership Agreement, signed in April 2007, also contains certain provisions granting rights of ownership of businesses in Thailand to Japanese investors that are greater than those enjoyed by other investors under the Foreign Business Act.

Future bilateral, regional or international FTAs should be scrutinised carefully to ascertain whether they contain provisions that confer foreign ownership rights that are greater than those contained in the Foreign Business Act or industry specific legislation.

**Foreign Business Act Schedules** Shown below are the three Schedules of the Foreign Business Act.

### **Schedule 1**

- (1) Newspaper business, radio broadcasting station or radio/television business.
- (2) Farming, cultivation or horticulture.
- (3) Animal husbandry.
- (4) Forestry and timber conversion from natural forests.
- (5) Fisheries, especially fishing in Thai territorial waters and in specific economic areas of Thailand.
- (6) Extracting Thai herbs.
- (7) Trade and auction sale of Thai antiques or objects of historical value.
- (8) Making or casting Buddha images and alms bowls.
- (9) Trading in land.

### **Schedule 2**

### Section 1

- (1) Manufacturing, distribution, repair or maintenance of:
  - (a) firearms, ammunition, gunpowder, and explosive materials;
  - (b) components of firearms, ammunition, and explosive materials;
  - (c) armaments, ships, aircraft, or vehicles; and
  - (d) equipment, or parts of any type of military equipment.
- (2) Domestic land transport, water transport, and air transport; including domestic aviation.

### Section 2

- (1) Trading of antiques or artifacts which are Thai works of art or Thai handicrafts.
- (2) Wood carving.
- (3) Silkworm rearing, manufacture of Thai silk, Thai silk weaving, or Thai silk printing.
- (4) Manufacturing of Thai musical instruments.
- (5) Manufacturing of gold-ware, silverware, nielloware, bronzeware, or lacquerware.
- (6) Making bowls or earthenware, which are of Thai art and culture.

### Section 3

- (1) Manufacturing of sugar from sugar cane.
- (2) Salt farming, including rock salt farming.
- (3) Mining of rock salt.
- (4) Mining, including stone quarrying or crushing.
- (5) Timber processing for making furniture and utilities.

### Schedule 3

- (1) Rice milling and production of flour from rice and plants.
- (2) Fisheries, specifically breeding of aquatic creatures.
- (3) Forestry from re-planting.
- (4) Production of plywood, veneer, chipboard or hardboard.
- (5) Production of lime.
- (6) Accountancy.
- (7) Legal services.
- (8) Architecture.
- (9) Engineering.
- (10) Construction, except:

- (a) Construction of infrastructure in public utilities or communications requiring tools, technology or special expertise in such construction, except where the minimum foreign capital is 500 million Baht.
- (b) Other construction, as prescribed in regulations.
- (11) Agency or brokerage, except:
  - (a) Brokerage or agency of securities or service related to agricultural commodities futures or financial instruments or securities.
  - (b) Brokerage or agency for the purchase/sale or procurement of goods or services necessary to production or providing services to affiliated enterprises.
  - (c) Brokerage or agency for the purchase or sale, distribution or procurement of markets, both domestic and overseas for the distribution of products made in Thailand, or imported from overseas in the category of international business, with minimum foreign capital of not less than 100 million Baht.
  - (d) Other brokerage or agency activities, as stipulated in regulations.
- (12) Auctioneering, except:
  - (a) Auctioneering by international bidding, not being auctions of antiques, ancient objects or artefacts that are Thai works of art, Thai handicrafts or antique objects, or with Thai historical value.
  - (b) Other type of auctioneering, as stipulated in regulations
- (13) Domestic trade in local agricultural products, not otherwise prohibited by law.
- (14) Retailing, unless not less than 100 million Baht capital is invested, or having minimum capital for each shop of not less than 20 million Baht.
- (15) Wholesaling, unless the capital is not less than 100 million Baht.
- (16) Advertising.
- (17) Hotel operation, excluding hotel management.
- (18) Tourism.
- (19) Sale of food and beverages.
- (20) Planting and culture of plants.
- (21) Other services, except those exempted under ministerial regulations.

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