

CHAPTER 4 BUSINESS ORGANIZATIONS

The forms of business organization that exist in Thailand are similar to those found in most developed countries.

Sole proprietorships

Definition A sole proprietorship is a business owned by a sole natural person whose liability is unlimited. A sole proprietor can engage in virtually any business permitted by law, unless there is a special law to the contrary. For example, a sole proprietor may not engage in finance or insurance activities, because these are restricted by law to limited companies. Generally speaking, there are few restrictions on sole proprietors.

Tax benefits Sole proprietors are entitled to certain tax benefits. Whilst they are taxed at the progressive natural person tax rates of between 10%-37%, a sole proprietor can, in most cases, choose to be taxed on his gross receipts, less a standard deduction. Although a proprietor must keep a record of his gross receipts, he need not keep a record of his expenditure.

For example, if the sole proprietor is engaged in the sale of goods, the proprietor can elect to pay income tax on gross receipts less itemized expenditure, or to pay income tax on gross receipts less an 80% standard deduction, regardless of what his actual expenditure is, and then pay personal income tax on the remaining 20%.

The fact that a sole proprietor pays income tax at only one rate and can choose between itemizing expenditure or applying a standard fixed deduction can be a substantial benefit.

Restrictions on foreign ownership For foreigners, the difficulty with a sole proprietorship is that it cannot engage in any business that is regulated under the Foreign Business Act (see Chapter 1 *Foreign Business Restrictions*), unless a license is first obtained. Americans, who usually do not need such licenses, can easily establish a sole proprietorship under the provisions of the Treaty of Amity and Economic Relations (see Chapter 2 *The United States - Thailand Treaty of Amity*).

Commercial registration Sole proprietorships engaged in a number of activities, including the sale of goods, auction sales, transportation, money lending, quasi banking services, handicraft industries and hotel keeping, must effect commercial registration with the Ministry of Commerce. Most service related occupations are exempt from commercial registration.

Ordinary (unregistered) partnerships

Definition An ordinary partnership consists of two or more persons who join together for a business purpose. The partnership agreement does not have to be in writing and is not publicly registered.

Although an ordinary partnership may include a company as a partner, such partnerships are considered as Joint Ventures and are discussed separately below.

Liability of the partners All partners are liable without limitation for any acts done by any partner in the course of operating the partnership. Creditors may claim against the assets of any partner, without first claiming against the assets of the partnership.

Tax advantages Ordinary partnerships have certain tax advantages, in that they are taxed as natural persons, but separately from the partners. Ordinary partnerships file income tax returns and pay tax at the progressive natural person rates of 10%-37% with the same standard deductions that are permitted to individuals. Ordinary partnerships, no matter how many partners there are, may deduct two personal exemptions.

Distributions of profits from the partnership are not taxed a second time in the hands of the partners. Since an ordinary partnership is taxed as a separate natural person, it starts to pay income tax at the lowest progressive rate, no matter how high the marginal rate of the partners. In addition, there can be a duplication of personal exemptions. An individual is entitled to claim a personal exemption on his individual tax return which would cover his personal (non-partnership) income. In addition, an ordinary partnership of which he is a member, may claim two personal exemptions on its tax return.

Foreign Business Act While there are many advantages to using an ordinary partnership as a business organization, its use by foreigners is limited by the Foreign Business Act, if it engages in a business that is restricted under the FBA (see Chapter 1 *Foreign Business Restrictions*). An ordinary partnership owned by Americans may apply for treaty protection under the Treaty of Amity and Economic Relations (see further Chapter 2 *The United States - Thailand Treaty of Amity*).

Commercial registration Ordinary partnerships are liable to apply for commercial registration with the Ministry of Commerce, in the same manner as sole proprietorships (see above). Commercial registration does not convert the ordinary partnership into a registered ordinary partnership.

Registered ordinary partnerships

Definition For a partnership to be a registered ordinary partnership ("ROP"), the partnership agreement, including the details of capital contributions, management and objects, must be in writing, and registered with the Ministry of Commerce.

Nature of Registered Ordinary Partnership A ROP is a legal entity distinct from the partners, that is, a juristic person, and subject to juristic person (corporate) income tax.

Taxation Registered Ordinary Partnerships pay the general corporate tax rate of 30% of net income, as opposed to progressive rates of 10%-37%, payable by natural persons and ordinary partnerships.

Profits distributed by a ROP are subject to taxation in the hands of the partners. Distributions of profits to natural persons are now subject to a withholding tax rate of 10%, but a tax credit is allowed. Thus, the profits of a registered ordinary partnership may be subject to two levels of taxation, but because of the tax credit allowed, most problems of double taxation have been resolved.

Partnership assets Where a claim is made against a registered ordinary partnership, a creditor must first look to partnership assets before looking to a partner's separate assets.

Disadvantages On the whole, the registered ordinary partnership form of business organization is not very popular, since it offers little or no apparent tax advantages and little or no protection against liability.

Limited partnerships

Definition A limited partnership ("LP") is a form of registered partnership in which there are one or more managing partners who manage the business and who are personally liable for the partnership's debts, and one or more partners who are not personally liable for the partnership's debts, except for their undelivered or withdrawn capital contributions.

Partnership agreement must be registered The partnership agreement, including the details of capital contributions, management and objects, must be filed with the Ministry of Commerce, in the same manner as a registered ordinary partnership.

Liability of the partners Partners with limited liability become liable without limit, where they actually manage or lend their name to the partnership.

Advantages Limited partnerships are a popular form of business organization, since they provide an element of limited liability with less formalities than are required for limited companies.

Many people who become limited partners are unaware of their liabilities, if they actually manage the business of the partnership.

Foreign Business Act If a foreigner has a minority share in a limited partnership and is a limited partner, the limited partnership would usually not be subject to the Foreign Business Act. It is for this reason that some foreigners choose to become limited partners, but it may be difficult for them to protect their investment, because they are not permitted to manage the business.

Taxation Limited partnerships are subject to juristic person (corporate) income tax, in the same manner as a ROP.

Conversion of a registered ordinary partnerships and registered limited partnership into limited companies With effect from July 2008, a new procedure now enables these juristic partnerships to convert to private company status. Prior to this, a transfer of assets from such partnerships to a company was a tax event, and discouraged partnerships from incorporating.

In future, such partnerships, provided they have at least three partners, may be converted into private companies. All partners must consent and such consent must be reported to the Companies Registry within 14 days. Notice of conversion must be published at least once in a local newspaper and sent to all known creditors. Creditors have 30 days to object. If there are any objections, conversion cannot take place until an objector's claim is satisfied, or security given.

The changes also provide for other procedural steps to be taken, namely the drafting of the memorandum and articles of association, the capital structure and share issue, appointment of directors and auditors and other matters. After payment for shares and transfer of assets, the directors must apply for the registration of conversion within 14 days. After registration, all assets, debts, rights and liabilities of the partnership are transferred to the company.

Private companies

Popularity The private company is the form of business organization that is most popular with foreign businessmen, because there is flexibility, especially in joint venture situations, in formulating how the company may be controlled and managed.

Formation In order to form a private company, the proposed name must first of all be approved by the Ministry of Commerce. Then at least three persons (seven prior to July 2008) must sign and have witnessed two copies of the memorandum of association which must contain the following details:

1. The name (which must include the word "*limited*") and the intended registered location of the company. The name of the company must be in Thai characters, although a translation or transliteration into Roman or other characters may also be registered.
2. The capital structure of the company (that is the number of shares to be issued and the par value of the shares).
3. The objects of the company (See a sample list of objects approved by the Ministry of Commerce at the end of this Chapter).
4. A declaration that the shareholders' liability is limited.
5. The names, addresses and occupations of the promoters and the number of shares to which each subscribes. (Each promoter must subscribe to at least one share).

Anti-nominee provisions A Commercial Registration Department regulation that came into effect in August 2006 enables the authorities to investigate the financial background of Thai shareholders in partly foreign owned companies.

In the case of a partly foreign owned partnership or company where the foreign shareholders or partners:

(a) own 40%-50% of the shares or invest in 40%- 50% of the capital, 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 shares, 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. 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.

Approval of memorandum If the memorandum is approved, the shares may be offered to other persons, but not to the public as a whole. Once the proposed number of shares referred to in the memorandum have been subscribed to, the promoters, with at least seven days advance notice, must call a meeting of the shareholders and provide the shareholders with a statutory report.

Statutory meeting At the first meeting of the shareholders (the statutory meeting), the shareholders adopt the internal regulations of the company (the

articles of association), elect directors and auditors and perform other duties, as required by the Civil and Commercial Code or statute.

Articles of association The adopting of the articles of association is one of the most important steps in the formation of a limited company, because it provides the manner in which the company will be managed. Foreigners with a minority interest should pay special attention to the articles of association. A sample articles of association giving a foreign shareholder an equal say in the management of the company is appended at the end of Chapter 6 *Joint Ventures*.

Payment for shares The newly appointed directors then call for payment of the shareholders' capital contributions. Not less than 25% of the par value of the shares must be paid up. The shareholders remain liable for any unpaid capital, that is, if a shareholder pays up 25% of the par value of his shares, he remains personally liable for the remaining 75%, and may be called upon by the board of directors to make additional payment at any time or where the company becomes bankrupt.

Registration of the company Once the capital has been paid in, the directors must apply for registration of the company. In the application there must be, in addition to certain statutory requirements, a statement concerning the authority of the directors to sign documents to bind the company. This statement will appear on the company's registration certificate, upon which the public may rely.

The registration of the company must be completed within three months of the statutory meeting. There is no time limit within which the statutory meeting must be called.

When the registration has been completed, the company is turned over to the directors for future management. The shares subscribed to by the promoters may then be transferred to the ultimate owners.

Reduction of time to form a company With effect from July 2008, it may be possible to register a company in one day. This is provided that all the necessary steps have been taken, namely the drafting and signing of the memorandum, the articles, and the shareholders list, all shares have been subscribed for and a minimum of 25% has been paid up, the statutory meeting has been held and all necessary matters have been approved.

Shareholders A limited company must initially have three promoters (seven prior to July 2008), and at all times, must have at least three shareholders (seven prior to July 2008).

Under a Department of Business Development ruling in December 2008:

- non-juristic entities (such as ordinary partnerships) are ineligible to be shareholders of companies, and if they do hold shares the company is not in compliance with the law; and
- if more than one person owns a share/shares, one of the holders must be appointed to exercise shareholders rights regarding that share(s).

Directors After the registration has been completed, the company will be managed by its directors. At least one third of the directors must retire annually, but these directors may be re-elected. The laws concerning directors' liabilities and duties are similar to those found in other countries (see further Chapter 5 Duties of directors and rights of shareholders).

Notices for shareholders' meetings With effect from July 2008, a notice to convene a shareholders' meeting, must be: (a) published at least once in a local paper at least seven days prior to the meeting, and (b) sent to all shareholders by registered post with advice of delivery at least seven days prior to the meeting.

If special resolutions will be proposed at the meeting, the notice must be: (a) published at least once in a local newspaper at least 14 days prior to the meeting and (b) sent to all shareholders by registered post with advice of delivery at least 14 days prior to the meeting. The wording must be in a particular form. The articles may not contain any clause to exclude these obligations.

Shareholders' meetings At all shareholders meetings, unless a poll is demanded, each shareholder or proxy holder present has an equal vote, regardless of the number of shares owned or represented. If a poll is demanded by at least two persons entitled to vote, each share is counted and is entitled to an equal vote. In some cases, the articles of association may specify that only blocks of a given number of shares confer a right to vote. If, for example, the articles require that only blocks of ten or more shares may vote, then shareholders holding ten or more shares and those holding less than ten shares who pool their shares together into blocks of ten may vote. A shareholder with only nine shares and no one with whom to pool his shares, may not vote.

The shareholders, in addition to electing directors, appoint the auditors, approve the balance sheet (the preparation of which is mandatory) and the declaration of a final dividend, if any.

Special resolution required for effecting major changes Substantial changes to the company cannot be made except by a special resolution of the shareholders. A substantial change here means: changing the memorandum or articles of association, increasing or reducing the capital, liquidating the company or merging it with another company. Capital reduction, liquidation and merger are subject to additional requirements, for example, press advertisement or notification of creditors.

With effect from July 2008, a special resolution may be passed at only one shareholders' meeting by a majority of not less than three quarters of the votes of the shareholders present at the meeting and entitled to vote (Previously, a special resolution had to be passed by two consecutive shareholder's meetings. The first had to pass the resolution by a three-quarters vote of those present, and the second meeting had to confirm the resolution by a two-thirds vote.)

The articles of association may provide for greater, but not lesser majority votes.

Assuming that the articles of association of the company do not require a vote greater than that provided for in the Civil and Commercial Code, it can therefore be seen that a shareholder must control 75% of all the shares in order to ensure absolute control.

Special shareholder rights Under certain circumstances, where the directors refuse to call a shareholder's meeting, the shareholders may themselves call one. Sometimes this is done to oust unwanted directors. In cases where the company fails to act, any shareholder may bring an action against a director who causes loss to the company.

Taxation Limited companies are subject to corporate income tax at the general rate of 30%. See further Chapter 14 *Corporate Income Tax*.

Public limited companies

The principal Act regulating public companies is the Public Companies Act (1992), as amended by the Public Companies Act (2001). With regard to the rights and duties of public companies, their shareholders, directors and the company secretary, reference must also be made to the Securities Exchange Act (1992), as amended, and regulations and notifications issued by the Securities Exchange Commission ("SEC") or the Securities Exchange of Thailand ("SET").

A public limited company is a company incorporated, or converted from a private limited company, for the purpose of procuring investment from members of the public by means of a public offering of its shares. The shareholders' liability is limited to the amount of the capital in respect of the shares held by them.

Formation A memorandum of association must be drafted containing the following information:

1. The name of the company, which must conclude with the Thai words '*public company limited*', or the abbreviation '*PCL*' in Thai language. The name is required to be followed by the words '*public company limited*.'
2. A statement that the purpose of the company is to offer its shares for sale to the public.

3. The objects.
4. The registered share capital, including the types of share, the number of shares and their par value.
5. The location of the head office which must be in Thailand.
6. Particulars of the promoters, and the number of shares to which each of them subscribes.

A minimum of 15 promoters is required for the formation and registration of the memorandum of association. The application is submitted to the Registrar of the Commercial Registration Department.

Initial public offering After the memorandum of association has been approved, the promoters must apply to the Securities and Exchange Commission for permission to offer the company's shares to the public. After consent has been granted, the promoters must prepare and submit the prospectus and particulars of the initial public offering to the SEC. The prospectus and public offering of the shares become effective within a certain number of days after receipt by the SEC.

Statutory meeting Within a period of two months, after at least 50% of the shares have been subscribed to, but in any event within six months of the date on which the memorandum was registered, the promoters must convene the statutory meeting. At least 14 days must elapse between the date of the notice and the meeting. The notice must be accompanied with an agenda of the matters to be discussed at the meeting.

Quorum A quorum at the statutory meeting is constituted by the presence of shareholders holding not less than 50% of the total subscribed shares. The subscribers may attend in person or by proxy. Any subscriber who has a special interest in a matter, may not vote on such matter. Resolutions are voted on by a show of hands or by secret ballot. Every share carries entitlement to one vote. A secret ballot must be conducted if proposed by not less than five shareholders and a majority of the meeting votes in support of such a proposal.

Articles of association The articles of association must not be in conflict or inconsistent with the memorandum of association and with provisions of the Public Companies Act, and must prescribe at least the matters as follows:

- (1) issue and transfer of shares;
- (2) meetings of shareholders;

(3) the number, method of election, term of office, vacating office before expiry of term of office, meetings and powers of directors;

(4) accounting, finance and auditing

(5) issue of preference shares (if any)

(6) conversion of preference shares to ordinary shares (if any).

Business at the statutory meeting The matters to be considered at the statutory meeting are:

1. Adoption of the Articles of Association.
2. Approval of pre-incorporation transactions and expenditure.
3. Designation of the shares, i.e., whether they are to be ordinary or preferred shares, their number and par value.
4. Designation of the number of shares to be issued as fully paid-up in kind.
5. Appointment of the auditor and determination of his fees.
6. Appointment of directors.

Within seven days of the statutory meeting, the promoters hand over the business of the company to the board of directors. The board must then issue a call for subscribers to pay up the par value of their shares. After the board of directors has received payment for the shares that are the subject of the public offering, they must apply to register the company, within 3 months of the conclusion of the statutory meeting. Within two months of registration or within two months after full payment for the shares has been made, the company must issue share certificates for the shares issued.

Payment must be made in full for shares, unless property has been submitted in lieu of payment, including intellectual property rights or expertise.

Since 2001, payment may be made for shares by set off against debts owed by the company. An issue of shares to be marked as fully paid by setoff of debt, must be approved by a 75% majority of shareholders.

Shares and shareholders Shares may be issued with any chosen par value, there is no minimum par value requirement. The classes of and rights attached to shares that are publicly offered, must accord with the requirements of the Securities and Exchange Act.

Shares may be offered at a premium. Share premiums paid must be retained in a separate share premium account. A company may sell its shares at a discount, where it appears that the company is suffering a loss after at least one year of operation. The issue of shares at a discount must be authorized by a shareholders' resolution and the amount of discount must appear in the prospectus.

Share transfer A public company may not restrict the transfer of its shares, unless such restriction is to comply with any foreign shareholding restrictions under the Foreign Business Act or other law.

A transfer of shares is effected by the transferor endorsing the share certificate with the name of the transferee and the transferor and the transferee signing it and delivering it to the transferee. A share transfer will be effective and binding upon the company when it has received a request by the shareholder to register the share transfer in its share register. A share transfer is effective and binding upon third parties when the company enters the share transfer in the company's share register. If the transfer is legal in the opinion of the company, the company must register the transfer within 14 days. If in the opinion of the company, the transfer is illegal, the company must notify the transferring shareholder within seven days. In practice, transfers of the shares of listed companies are effected by licensed securities companies in scripless form, with the Thailand Securities Depository acting as registrar for the company.

Pledging its own shares In general, a public company may not hold or accept in pledge its own shares.

Re-purchase of shares A public company may buy back its shares from shareholders in the following cases:

1. From shareholders who disagree with a proposal to amend the articles with regard to voting rights or payment of dividends.
2. For the purpose of better financial management, where the company has accumulated earnings and surplus liquidity, and such re-purchase will not cause financial difficulty for the company.

Shares owned by the company do not count towards any quorum, and do not carry voting rights or the right to receive dividends. Repurchased shares must be disposed of within a specific period.

Directors A public company must have not less than five directors, at least half of whom must be domiciled in Thailand.

Qualifications of directors A director must be a natural person and:

- (1) of legal age,
- (2) not bankrupt, incompetent or quasi incompetent,
- (3) has never been sentenced by a final judgment to imprisonment for dishonesty, and
- (4) has never been dismissed from a government service or state organization or agency for dishonesty on duty.

Duties of directors The directors have a duty to observe the Public Companies Act, the company's objects and articles of association. Directors may not engage in any business in competition with the company. Where a director purchases or sells property or does any business with the company, such transactions do not bind the company, unless approved by the board of directors. Loans to directors or employees may only be made after observing certain requirements imposed by the Public Companies Act. A director may not have characteristics indicating a lack of appropriateness in respect of trustworthiness in managing a business whose shares are held by the public.

Further aspects of the duties of directors are discussed in Chapter 5 *Duties of directors and rights of shareholders*.

Appointment of directors Unless otherwise provided in the articles of association, directors shall be elected at a shareholders' meeting in accordance with the following procedure:

- (1) One shareholder has votes equal to the number of shares he holds, multiplied by number of directors to be elected.
- (2) Each shareholder may use all his votes pursuant to (1) to elect one or more directors. Where he votes for more than one director, he may distribute his votes as he pleases.
- (3) Persons who receive highest votes arranged in order from higher to lower in a number equal to that of directors to be appointed, shall be elected as directors. In the event of a tie at a lower place, which would make the number of directors greater than that required, the persons involved shall draw lots for selection.

Where the articles of association provide for the method of election of directors to be otherwise, such provision may not deprive the shareholders of their rights to vote in the election of directors.

Chairman The board of directors must elect one director from among themselves as chairman. Where the board deems it expedient, it may elect one director or directors as Vice Chairman or Vice Chairman. The Vice Chairman or

Vice Chairmen shall have duties under the articles of association in business as assigned by the Chairman.

Removal of directors All the directors resign annually at the annual general meeting of shareholders, unless required otherwise in the articles, in which case one third of the directors must retire by rotation. Directors may stand for re-election. In addition to vacating office on expiry of his term of office, directors vacate office:

(1) on death;

(2) on resignation;

(3) where he does not possess required qualities or possesses prohibited characteristics;

(4) where a meeting of shareholders resolving to remove a director: such a resolution requires the votes of not less than three quarters of the number of shareholders present and qualified to vote and representing an aggregate number of shares not less than half of the number of shareholders present and qualified to vote;

(5) where the court issues an order to remove; and

(6) a director may also be removed, if he possesses any characteristics indicating a lack of appropriateness in respect of trustworthiness in managing a business whose shares are held by the public.

Directors' actions bind the company All business undertaken by the board, a director, or a person appointed by the board, is valid and binding on the company, notwithstanding that it is later found there are defects in the qualifications or characteristics of the directors, or lack of appropriateness.

Executives of public companies An executive means a manager, or a person responsible for the management of a company, whether *de facto* or as authorized by the board. An executive must have qualifications, and not have prohibited characteristics indicating a lack of appropriateness in respect of trustworthiness in managing a business whose shares are held by the public. An executive who lacks qualifications or has prohibited characteristics will be removed from his position.

Duties of directors and executives Directors and executives must perform their duties with responsibility, due care and loyalty, and must comply with the company's objects, the articles of association, and board or shareholders' resolutions. A director or executive must act as an ordinary person undertaking like business under similar circumstances.

Where a director or executive is deemed to meet the required standard of care Where a director or executive, at the time of considering a matter, can prove that his decision met the following requirements, it will be deemed that he has performed his duties to the required standard:

(1) the decision was made with an honest belief, and on reasonable grounds that it was in the best interests of the company;

(2) the decision was made relying on information that was honestly believed to be adequate; and

(3) the decision was made, without his having any direct or indirect interest in the matter.

Factors to be taken into account In considering whether a director or executive has performed his duties, the following factors will be taken into account:

(1) the position held by the person in the company at the time;

(2) his scope of responsibility, and

(3) his qualifications, knowledge, capability, and experience and the purpose of his appointment.

Duties of directors and executives Directors and executives must:

(1) act in good faith in the best interests of the company;

(2) act with proper intentions and;

(3) not act in significant conflict with the interests of the company.

Actions that conflict with the interests of the company The following acts that provide a director, an executive or a related person with any financial benefit, other than that which could be ordinarily obtained, or which causes loss to the company, are presumed to be acts in significant conflict with the interests of the company:

(1) entering into a transaction between the company or subsidiary, and a director or related person, which does not comply with the rules regarding related party transactions (see below) or Capital Market Supervisory Board requirements;

(2) use of inside information, other than that already disclosed to the public or;

(3) use of assets or business opportunities of the company in contravention with the rules or general practice, as specified in regulations.

Meetings of directors The Board of Directors must meet at least once every three months at the place where the head office of the company is situated or a neighbouring province, unless the articles of association provide that the meeting be held elsewhere.

The chairman shall convene the meetings of the board of directors. If two directors or more request a meeting of board of directors, the chairman shall appoint a date for the meeting within 14 days from receiving such request.

In convening a meeting of the board, the chairman or a person assigned by him shall send out a notice of meeting to the directors not less than seven days in advance of the date of the meeting, except in the case of urgency for the purpose of maintaining the rights or interests of the company, the notice of meeting may be served by other means and an earlier date may be fixed for the meeting.

At a meeting of the Board of Directors there must be present not less than half of the directors to constitute a quorum. Where the chairman is not present at the meeting or his unable to perform his duties and if there is a vice chairman, the vice chairman shall preside over the meeting. If there is no vice chairman or if there is one, but he is unable to perform his duties, the meeting shall elect a director to be chairman of the meeting.

Decisions of the meeting shall be by a majority of votes. One director shall have one vote, except that a director having an interest in any matter shall have no right to vote in such matter. In the event that votes are tied, the chairman shall give a casting vote.

Company secretary With effect from February 2008, all public companies must have a company secretary, to be responsible for the following matters:

- (1) preparing and keeping the register of directors; notices and minutes of directors and shareholders meetings, and the annual report;
- (2) maintaining the list of interests disclosed by directors or executives; and
- (3) doing any other things, as specified in regulations.

Where the company secretary resigns or cannot perform his duties, the board must appoint a new company secretary within 90 days. In the interim, any director may be appointed to perform the secretary's duties. The company chairman must notify the SEC of the name of the company secretary within 14 days of appointment, and advise the place where documents under (1) and (2) are kept.

General duties of company secretary A company secretary must perform his duties with care and responsibility, in good faith and must comply with the law, the company's objects, the articles of association and board and shareholders resolutions. The secretary is also subject to the same general duty of care and the standard of duty expected from a director or executive (see above).

Company secretary to submit report The company secretary must submit a copy of the report on interests disclosed to the Chairman, and the Chairman of the company's Audit Committee, within seven business days from the date when the company receives the report.

Shareholders' meetings The directors must convene an annual general meeting of shareholders, within four months of the end of the company's accounting period. In addition, the directors may summon an extraordinary meeting of shareholders, whenever they deem appropriate or whenever requested by shareholders holding at least 20% of the issued shares, or by not less than 25 shareholders holding not less than 10% of the issued shares.

Notice of an extraordinary general meeting must be issued not less than seven days prior to the meeting. All shareholders are entitled to attend and vote at the meeting. A quorum will be constituted if not less than 25 shareholders attend the meeting, or not less than half of the total number of shareholders. A quorum is not constituted if the total number of shareholders attending the meeting represents less than one third of all the issued shares.

A shareholder with a special interest in a matter that is to be voted on, may not vote on that resolution. However, a shareholder may vote in favour of himself on a motion for election to the board of directors. Every shareholder has one vote for each share held, except for preference shareholders, where the preference shares carry the voting rights conferred upon issue. Voting may be by a show of hands or, if requested by not less than five shareholders and subject to an affirmative resolution of the meeting, by secret ballot.

Approval for major transactions The following transactions may be undertaken only if approved by a resolution passed at a general meeting of shareholders by those holding not less than 75% of the issued shares with voting rights:

1. A sale or transfer of the whole or any part of the company's business.
2. The purchase or acceptance of transfer in whole or in part by the company of the business of another company.
3. The execution, termination or amendment of a contract to lease the whole or a substantial part of the company's business or the appointment of a third party to manage the business of the company.

4. The merger of the business of the company with that of another, for the purpose of sharing profit and loss.

Additional rights that shareholders have, and duties imposed by the Securities Exchange Commission as regulator, as discussed in Chapter 5 *Duties of directors and rights of shareholders*.

Challenging resolutions The summoning of a shareholders' meeting or the passing of any resolution that breaches the articles of association or the Act, may be challenged by at least five shareholders or shareholders holding at least 20% of the total shares issued. An application must be made to the court within one month of the act concerned.

Dividends Dividends may be paid only from profits and are issued equally for each share, unless the articles of association state otherwise. A public company may not pay dividends where it is making a loss. The payment of dividends must be authorized by a shareholders' general meeting. The board of directors may pay interim dividends, if there are adequate profits to justify such payment and the articles permit the payment of interim dividends.

Capital increase A public limited company may increase its share capital, where:

1. All the authorized shares have been issued and paid for in full, except for shares that are being reserved for conversion of warrants or debentures.
2. A resolution has been passed at a general meeting of shareholders by those holding not less than 75% of the shares with voting rights.
3. The resolution has been registered within 14 days of its being passed.

The shares that are comprised in the increased capital may be offered in part or in whole to existing shareholders in proportion to their respective shareholdings or to the public or others in accordance with the resolution.

Capital reduction A capital reduction may be effected by reducing the par value of the shares, or reducing the number of shares. A public company may not reduce its share capital to a value that is less than 25% of its registered capital. This is except where there are accumulated losses, and such losses have been compensated from reserves, but there are still losses outstanding. In such case, capital may be reduced to less than 25%. Any capital reduction must be approved by a resolution passed by shareholders holding not less than 75% of the shares carrying voting rights. The resolution must be registered within 14 days of the meeting.

Dissolution A public company may be dissolved where:

1. A resolution is passed at a general meeting of shareholders by those holding not less than 75% of the shares carrying voting rights.
2. A court has issued a decree absolute of bankruptcy.
3. A court has issued an order to dissolve the company upon the application of shareholders holding at least 10% of the total shares sold.

A liquidator must be appointed by a general meeting of shareholders or the court, who must also determine his fees. Dissolution takes effect on the date that the Registrar of Companies registers the dissolution. The law deems that the company continues to exist until the liquidation process is completed.

Merger A public company may merge with another public company or a private company. Merger must be authorized by resolutions of both public companies, by shareholders holding not less than 75% of the shares carrying voting rights present at the meeting. Where the merger is with a private company, the private company must approve the merger by a special resolution of shareholders (see above: private companies).

Objections to merger Where a shareholder objects to merger, the company must request the dissenting shareholder to sell its shares to a party at the price last traded in the Securities Exchange of Thailand, immediately prior to the date that the resolution for merger was adopted or at a price determined by an independent valuer. If the shareholder refuses to sell his shares within 14 days of a request, the company may proceed with the merger and the shareholder will become a shareholder in the merged entity.

A public company must issue a notice to all creditors to notify them of the resolution to merge and that any objection to the merger must be made within two months of the date on which they receive the notice. If an objection is made, the company may not proceed with the merger unless it has paid the debt or provided security to the creditor.

The board of directors of a public company involved in merger must apply for registration of the merger within four days of the expiry of the two month period that is given to creditors to object. Where an objection is made, registration is made within 14 days from the date the debt is paid or security is given to the creditor.

The memorandum and articles of association of the new company must be drafted and filed with the Registrar.

Listing of foreign companies From December 2009, foreign companies are permitted to list on the Securities Exchange of Thailand, subject to conditions as follows:

- (a) the company must have been listed on its home exchange for at least three years;
- (b) it must have a market capitalization in the first quartile of its home country, or at least 10 Billion Baht, as at the date of application to list;
- (c) it must prove to the SET that its shares can trade with sufficient liquidity;
- (d) it must comply with all requirements of Thai companies wishing to list on the SET;
- (e) its home exchange must be a member of the World Federation of Exchanges;
- (f) the home regulator must be a member of the International Organization of Securities Regulators, and is a signatory to the Multilateral Memorandum of Understanding concerning consultation and co-operation and exchange of information or a comparable agreement; and
- (g) prior to the SET listing, the company must have made an IPO either by issue of new shares or offer of existing ones.

Conversion of a private company A private company may be converted into a public company where a special resolution of shareholders is passed (see above: private companies). The new board of directors of the converted company must register the conversion and the minutes of the shareholders' meetings at which the special resolutions were passed. The memorandum and articles of association approved by the shareholders must be filed with the Registrar within 14 days of the second shareholders' meeting. After registration of the conversion, the private company ceases to exist and its assets and liabilities are transferred to the public company.

A public company cannot be converted into a private company. It is possible to de-list the company. It is also possible to transfer assets to a private company, but such asset transfer would give rise to tax liabilities.

Joint Ventures

The term "*joint venture*" has two distinct meanings in Thailand. The meaning discussed in this section refers to a joint venture in the form of an unregistered partnership, in which at least one of the partners is a juristic person and which carries on business whereby the parties maintain joint accounts and share profits.

Examples of a joint venture are a partnership between two limited companies; a partnership between a limited company and a natural person or a partnership between a limited company and a limited partnership. Many other combinations are possible.

Management Joint ventures are managed in accordance with the joint venture agreement between the parties.

Taxation A significant aspect about a joint venture is that it is taxed as a juristic person, the general rate of which is 30% of net income. However, unlike other juristic persons, distributions of profits from a joint venture to its juristic person participants that are domiciled in Thailand are not subject to further taxation.

Distributions to natural persons and companies not domiciled in Thailand are, however subject to international withholding tax at the rate of 10%.

If a joint venture was organized as a limited company with two main shareholders that are juristic persons (rather than as a joint venture, as defined above), then dividends paid from the joint venture company to its foreign shareholders (and in limited cases to its Thai parent) would again be subject to taxation. Accordingly, the use of the joint venture form of business organization has some tax benefits to Thai joint venturers.

Consortium

Consortiums are not specifically referred to in either the Civil and Commercial Code or the Revenue Code. A consortium is similar to a joint venture, in that the parties to a limited degree act together in a business enterprise. However, unlike a joint venture, they maintain separate accounts and do not share profits. A consortium does not pay income tax as such, but the parties to the consortium pay their own taxes in accordance with their status.

Branch offices

A foreign juristic person (whether a limited company, partnership or any other business entity) may do business in Thailand by establishing a branch office and also complying with any relevant laws relating to its business.

Management A branch office is managed by a branch manager, appointed under a power of attorney issued by the company.

Taxation Branch offices pay juristic person income tax, but in certain cases there are modifications in the method of calculating the tax. See chapter below on Corporate Income Tax.

Foreign business restrictions If the branch office intends to engage in a business that is restricted under the Foreign Business Act, then it must apply for a license.

Many petroleum service companies choose to do business as branch offices and licenses are readily granted to these companies, upon the production of a contract with a petroleum concessionaire.

If the company establishing a branch is an American company and can comply with the provisions of the Treaty of Amity and Economic Relations, the branch office may apply for a treaty protection letter from the Ministry of Commerce and thereafter engage in any business, except those excluded by the treaty. If the treaty is applicable, the American company must apply for a certificate, but need not apply for a license under the Foreign Business Act.

Documentation In order to be registered as a branch office, the foreign company must lodge with the Ministry of Commerce copies of its certificate of incorporation, memorandum and articles of association (or other similar documents) and a power of attorney in favour of the branch manager. The power of attorney must be broad enough in the opinion of the Ministry of Commerce so as to give the branch manager adequate authority to manage the branch office. The Ministry may request other documentation.

Copies of all documents must be certified to be true copies by a notary public or other official. Signatures on original documents such as the power of attorney should be certified to be true signatures and the authority of the person should also be certified by a notary public. All such notarized or otherwise certified documents must then be authenticated by a Thai Embassy or Consulate.

Liability of the head office Since a branch office is for legal purposes a part of the parent company, the parent is liable under civil and criminal law for all the acts and omissions of the branch office. For this reason, few foreign companies choose to engage in business in Thailand through a branch of the parent company.

Representative office

A representative office may be established by a foreign company. Normally, a representative office is limited to acting as a buying office, carrying out market research and engaging in quality control. It may not engage in trading activities in Thailand. Representative offices require a license under the Foreign Business Act, since they are regarded as service businesses under Schedule 3 of the Act.

Representative offices must submit with their application the same documents, duly authenticated, as in the case of a branch office.

Work permits and taxation Work permits and visa extensions are available on an expedited basis for two foreign employees of a representative office established under Ministry of Commerce regulations. Representative offices are normally exempt from income tax, since they do not generate income. However,

they are liable to register for tax, since they must pay e.g. withholding income tax on wages paid to employees.

Capital requirements A representative office is normally required to remit into Thailand for its operating expenditure, a total of Baht 5 million over a period of five years, with Baht 2 million being remitted within the first year. These funds may not later be remitted out. The capital may be used for normal working capital requirements, e.g. to pay operating expenditure such as salaries and rent.

Regional offices

The government promotes Regional Offices in a manner similar to Representative Offices. Regional Offices supervise and control their affiliates and subsidiaries in Thailand and elsewhere in the region. They are not permitted to have income but are reimbursed for expenditure.

International trade and support office

A foreign company may establish an International Trade and Support office ("TISO"). Application is made to the Board of Investment and the Ministry of Commerce under the provisions of Schedule 3 of the Foreign Business Act. Such entities are eligible for BOI non-tax incentives, including:

- Permission to own land for an office
- Permission to bring in foreign nationals to undertake investment feasibility studies
- Permission to bring in as many foreign technicians and experts as required
- Permission to take or remit foreign currency abroad
- No limit on foreign ownership.

A TISO may engage in:

- Controlling and advising affiliated companies
- All types of consulting services, except those engaged in: trading securities, foreign currency exchange, accounting, advertising law, architecture and civil engineering.

Note: Exemptions may be granted by the Department of Commercial Registration or other government agencies

- Information services related to sourcing and procurement, but not brokerages or agencies
- Engineering and technical services, except these related to architecture and civil engineering

- Testing and certifying standards of products, production and services standards
- Exporting of all types of products
- Wholesaling of all types of products within the country, excluding local agricultural products, arts & crafts, antiques, and natural resources
- Provision of training on the use of machinery, engines, tools, and equipment
- Installation, maintenance, and repairing of machinery, engines, tools, and equipment
- Calibration of machinery, engines, tools, and equipment
- Computer software design and development.

The BOI will consider other categories of business on a case-by-case basis.

Other conditions for a TISO: Applicants must be either companies established under Thai law, or companies planning to establish under Thai law. In addition:

- licenses must have been acquired from all relevant government agencies
- expenditure must be not less than 10 million baht per year, which shall consist of sales and administrative expenses, in accordance with the Revenue Code
- Operating plans must be approved by the BOI
- Majority or total foreign ownership is allowed
- Non-tax privileges only will be granted.

The parent company must transfer into Thailand at least 5 million Baht as operating capital, of which at least 2 million Baht must be transferred in the first year, and at least 1 million Baht per year after that. The manager of the office must prepare an annual report on activities undertaken, and submit this to the Ministry of Commerce, as a condition for the office to be permitted to continue its activities.

Regional Operating Headquarters

In 2003, two decrees were issued respectively by the Board of Investment and the Revenue Department enabling foreign companies to establish a regional operating headquarters in Thailand. These were revised in June 2010. Tax incentives are available to a ROH, subject to compliance with the requirements below.

Requirements for a ROH A ROH must comply with the following requirements:

1. It must be a Thai registered company or juristic partnership.
2. It must provide *qualifying services*. These are: administration and business management, procurement of raw materials, and finished

products, research and development, technical support, marketing and sales promotion, regional human resources training, financial advice, economic and financial analysis and research, credit control, and other services approved on a case by case basis.

3. It must have annual expenditure of at least 15 million Baht in Thailand or has at least 30 million Baht invested in it.
4. The ROH must provide services to subsidiaries or branches in at least three countries. Under the new provisions, ROHs must service one foreign affiliate within its first fiscal year, two within its third year, and have a total of three serviced affiliates within five years.
5. The ROH must have at least 75% skilled employees and at least five specialised professionals.
6. The ROH's top five executives must each have annual salary and benefits of at least 2.5 million Baht.
7. The ROH must be a real operating company with a physical presence and employees in Thailand.

Tax benefits: The tax benefits available to a ROH are as follows:

1. Corporate income tax exemption for 10 years on income derived from qualifying services provided to overseas affiliated entities.
2. Corporate income tax reduced from 30% to 10% for 10 years on income derived from qualifying services provided to Thai affiliated entities.

Provided that a ROH generates more than 50% of its income from qualifying services and royalties charged to foreign entities, it can claim the following additional benefits:

3. No corporate tax or withholding tax is charged on dividends received from or paid to foreign affiliates for 10 years.
4. Corporate tax on interest received on loans is reduced from 30% to 10% for 10 years.
5. Corporate tax on royalties is reduced from 30% to 10% for 10 years.
6. Personal income tax for foreign employees will be charged at a flat rate 15% for eight years.

7. No personal tax is charged on income of foreign employees working outside Thailand

The tax benefits in 1-5 above may be extended for a further five years up to a maximum of 15 years, if cumulative expenditure of the ROH for years 1-10 exceeds 150 million Baht.

Existing ROHs: Existing ROHs will qualify for the new privileges, but they need to submit new applications within five years from the date the new regulation comes into effect.

As at August 2010, only some 80 or so ROHs have been established. The government hopes that the revised requirements and enhanced tax benefits will make this form of business organisation more popular.

Sample Memorandum of Association

Although the promoters or partners of a company may draft their own objects, there are advantages in using the Ministry of Commerce standard memorandum of association, in that this is always accepted by governmental agencies.

The following is a sample of the details of objects approved by the Ministry of Commerce for limited companies and partnerships that are majority Thai owned. Additional objects may be added.

1. To buy, provide, receive, hire, hire-purchase, own, possess, modify, use and manage by other means, any property, including interests relating to that property.
2. To sell, transfer, mortgage, pledge, exchange and dispose of property by any means.
3. To act as a broker, agent or commission agent, in all types of activities and businesses except in the businesses of insurance, recruitment of members for associations and trading in securities.
4. To borrow money, withdraw money on overdraft from banks, juristic entities or other financial institutions and lend money or grant credit facilities by other means with or without security, including receiving, issuing, transferring and endorsing bills and notes or other negotiable instruments.
5. To establish branch offices or appoint agents, both locally as well as in foreign countries.

6. To participate as a partner with limited liability in partnerships and as a shareholder in other limited companies.
7. To trade in rice, rice products, tapioca products, corn, sesame, beans, pepper, hemp, kapok, cotton, lacquer, castor beans and oil, timber, rubber, vegetables, fruit, forest product, herbs, animal hides, animal horns, live animals, meat, sugar, animal feed and all types of agricultural products.
8. To trade in machinery, motors, mechanical tools, labour-saving devices, conveyances, electric generators and electrical appliances, refrigerators, air-conditioners, electric fans, electric rice cookers, electric irons, water pumps, heaters, coolers, kitchen utensils, ironware, copperware, brassware, sanitary ware, household products, furniture, electrical equipment, waterworks equipment, including spare parts and accessories of the goods mentioned above.
9. To trade in fresh food, dried food, finished foodstuff, canned goods, food condiments, beverages, liquor, beer, cigarettes and other foodstuffs.
10. To trade in cloth, thread, apparel, ready-made clothes, personal adornments and ornaments, cosmetics, beauty aids and beauty equipment and other consumer goods.
11. To trade in medicines for the treatment and prevention of human and animal diseases, medical supplies, chemicals, medical and pharmaceutical equipment, fertilizer, agricultural pest control chemicals, all types of chemical nutrients for plants and animals, scientific tools and utensils.
12. To trade in gold, gold alloys, silver, diamonds, jewellery, gems and other precious stones, including imitations thereof.
13. To trade in paper, stationery, school textbooks, printed forms, books, educational equipment, calculators, printing mechanisms, printing equipment, printed materials, newspapers, filing cabinets and all types of office equipment.
14. To trade in construction materials, equipment and tools used in construction work, all types of workmen's tools, paint, tools used in painting and all types of materials for decorating buildings.
15. To trade in plastics or other things of similar characteristics, both in the form of raw materials and as finished items.

16. To trade in raw rubber, rubber sheets or other types of rubber products or products obtained from any part of the rubber tree, including synthetic rubber, artificial or imitations of the said materials or goods produced by scientific processes.
17. To engage in the activities of farming, gardening, plantation work, salt-farming, forestry work, rubber plantations, animal raising and cattle breeding.
18. To engage in the activities of rice milling, saw milling, timber finishing and timber curing, motorcar body assembly, ceramic and enamelware production, pottery ware production, vegetable curing, hemp-packing, vegetable oil extraction, paper mills, sack plants, weaving mills, spinning mills, dyeing and printing of designs on cloth, manufacturing and retreading of motor vehicle tyres, ironworks, steel casting and lathing, zinc production, manufacture of ready made foodstuffs, liquor production, gas production, cigarette manufacturing, sugar production, plastic ware production, pressing and smelting of metals, production of doors and windows, glass production, manufacture of beverages, rubber molding and motorcar assembly.
19. To engage in the activities of printing presses, undertaking the printing of books, printing books for sale and publishing newspapers.
20. To engage in the activity of ice-making.
21. To engage in fishing activities and private fish markets.
22. To engage in quarrying.
23. To engage in the business of construction contractor for the construction of buildings, commercial buildings, residential buildings, office buildings, roads, bridges, dams, tunnels and all other types of construction work, including undertaking to perform all types of civil works.
24. To operate the activities of mining, smelting, separation, transformation, refining, exploration for analysis, inspection, crushing and transportation of minerals.
25. To operate hotels, restaurants, bars, nightclubs, bowling alleys, massage parlours, cinemas and other places of entertainment, holiday resorts, sports fields and swimming pools.
26. To engage in the business of domestic and international transportation, loading and unloading of goods and passengers on land, sea and air, including undertaking to provide services in clearing goods from ports in

- accordance with customs formalities and handling all types of freight for transportation.
27. To carry on the business of a travel agency, including all types of business connected with travel and tourism.
 28. To engage in the activities of selling, buying and exchanging foreign currency.
 29. To import and export all the goods specified in these objects.
 30. To engage in the activities of hairdressing, hair setting, beauty parlours, tailoring, dressmaking and laundry.
 31. To engage in the business of photography, developing, printing and enlarging photographs as well as photocopying.
 32. To engage in the business of producing and distributing motion pictures.
 33. To engage in the business of petrol stations and providing services in repairs, maintenance, inspection, lubrication and rust prevention for all types of vehicles, including the provision of services in installing, inspecting and rectifying all types of disaster-prevention equipment.
 34. To engage in the business of providing services in the fields of law, accounting, engineering, architecture and advertising.
 35. To engage in the business of guaranteeing debts, liabilities and performance of contracts, including supplying guarantees for persons who enter the Kingdom or who depart for foreign countries in accordance with the immigration, tax and other laws.
 36. To act as adviser and consultant in problems concerning management, commerce and industry, including problems concerning production, marketing and distribution.
 37. To engage in the business of collecting, compiling, preparing, printing and disseminating statistics and data concerning agriculture, industry commerce, finance and marketing, including analysis and evaluation of the results of business operations.
 38. To operate private hospitals, nursing homes, to treat patients and sick persons, to provide teaching and training in medical and health subjects.
 39. To administer, look after the interests, collect debts and manage the property of others.

40. To bid for the sale and manufacture of goods under these objectives, for other persons, groups of persons, juristic entities, governmental bodies and state enterprises.

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