FDI and M&A Legal Guidelines[i]: FDI in Thailand

1. Foreign Direct Investment (Greenfield investment)

1.1. What are the principal laws and regulations applicable to FDI in your jurisdiction? Are there special rules for certain foreign investors, including state-owned enterprises (SOEs)?

The key piece of legislation which regulates the business operation of foreign majority-owned companies in Thailand is Foreign Business Operations Act, B.E. 2542 (A.D. 1999) ("FBOA"). The FBOA regulates the operations of certain business activities in Thailand by the foreigners.

In addition, investment promotions are available under the Investment Promotion Act, B.E. 2520 (A.D. 1977) ("BOI Act"). Under the BOI Act, these promotions include both tax and non-tax incentives. Besides, there are also other individual laws specific to industry or business activities imposing direct or indirect restrictions on foreign investment, such as the Air Navigation Act, B.E. 2497 (A.D. 1954), the Land Transport Act, B.E. 2522 (A.D. 1979), the Agricultural Land Leases Act, B.E. 2524 (A.D. 1981), the Job Placement and Job Seekers Protection Act, B.E. 2528 (A.D. 1985), the Life Insurance Act, B.E. 2535 (A.D. 1992), the Non-Life Insurance Act, B.E. 2535 (A.D. 1992), the Telecommunications Business Act, B.E. 2544 (A.D. 2001), the Private Schools Act, B.E. 2550 (A.D. 2007), the Audio Broadcasting and Television Business Act, B.E. 2551 (A.D. 2008), the Financial Institution Business Act, B.E. 2551 (A.D. 2008), and the Tourism Business and Guides Act, B.E. 2551 (2008).

There are no special rules which apply to state-owned enterprises ("SOEs") in relation to FDI in Thailand. All foreign entities are generally treated the same, except where special treaty or bilateral agreements apply.

1.2. Are there any governmental and regulatory approvals required for FDI? If so, please give brief details (such as trigger threshold, relevant authorities and timing requirements)?

A foreign investor is required to obtain a Foreign Business License ("FBL") to operate a business in any of the restricted categories in List 2 or List 3 of the FBOA, unless the foreign investor is exempted under one of the following exceptions:

(i) Foreign investor qualifies under relevant treaty;
(ii) Foreign investor obtains an Investment Promotion Certificate from the Board of Investment ("BOI"); or
(iii) Foreign investor obtains license to operate in the industrial estate from the

Answers are prepared by Chandler MHM Limited in Thailand.

Industrial Estate Authority of Thailand ("IEAT") under the Industrial Estate Authority of Thailand Act, B.E. 2522 (A.D.1979).

If any of the foregoing exceptions apply, then the foreign investor must only obtain a Foreign Business Certificate ("FBC"), which is a less arduous process than obtaining an FBL. The process for obtaining an FBL takes at least approximately four to six months and there is no guarantee that the FBL will be granted. An FBL is generally valid for the duration of the permitted business activity.

For FDI in a business activity under List 2 of the FBOA, the foreign applicant must make an FBL application in the prescribed manner to the Ministry of Commerce ("MOC"). The MOC and the Cabinet have 60 days to consider the application for approval. Once the Cabinet approves the project, the MOC is required to issue an FBL within 15 days from Cabinet's approval. At the time of issuing an FBL, the MOC may prescribe conditions with which the foreign investor must comply in order to operate the approved business activity. If the Cabinet refuses to provide approval, the MOC is obligated to notify the applicant within 30 days along with clear reasons for refusal.

In considering applications for FDI beyond the 60% foreign equity threshold for List 2 activities, the MOC (with Cabinet's approval) has the discretion to increase the FDI limits to 75% on a case-by-case basis, based on the following factors:

(i) Advantageous and disadvantageous effects on national safety and security, economic and social development of the country, public order or good morals, national values in arts, culture, traditions and customs;
(ii) Impact on natural resources conservation, energy, environmental preservation, consumer protection; Size of undertakings;
(iii) Employment of Thai nationals; and
(iv) R&D and technology transfer to Thai nationals.

For FDI in a business activity under List 3 of the FBOA, the foreign applicant must make an FBL application in the prescribed manner to the Director General of the Department of Business Development, Ministry of Commerce ("DG"). Similar to the FBL process for List 2 business activities, the DG has 60 days to consider the application for approval. Once the DG approves the project, the DG is required to issue a FBL within 15 days from the approval. At issuance of a FBL, the DG may prescribe conditions with which the foreign investor must comply in operating the approved business activity. If the DG refuses to provide approval, the DG is obligated to notify the applicant within 15 days of the decision along with clear reasons for refusal. A foreign investor may appeal the DG's refusal to the Ministry of Commerce.

Under the FBOA, foreigners who have obtained a FBL to engage in businesses

categorized under List 2 or List 3 of the FBOA will be subject to the following conditions:

(i) Minimum capital-to-debt ratio. The ratio is currently 1:7.
(ii) At least one authorized director/responsible person must have domicile or residence in Thailand.
(iii) Minimum capital amount of at least Baht 3 million or 25 % of the annual average of three-year projected expenses, whichever is greater.

When considering projects to grant an FBL, the MOC or the DG may take into account whether the new investment will have negative impact on the business of Thai citizens and accordingly prescribe conditions at the time of issuing the FBL, on a case by case basis.

To attract investment into Thailand, investors, whether Thai or foreign, who meet the investment type, size, and eligibility criteria of a promoted business activities specified by the BOI may apply for an investment promotion from the BOI. In this regard, the BOI incentive includes both tax and non-tax incentives subject to any conditions the BOI may stipulates in the Investment Promotion Certificate (IPC). These conditions are varied depending on the nature of business of the investor, they may be in the form of nationality and number of employees and/or shareholders, amount of investment capital, import/ export of machinery, size of business activities, types of products/services, etc. The time required for the BOI's evaluation and approval process is also depending on the nature and size of the proposed project, but it generally takes two to five months or more in practice. If the application is approved, the BOI will notify the applicant within 15 days of the BOI's resolution (may subject to an extension) and the applicant must confirm its acceptance within one month from such notification. Subsequently, the applicant must also commence the project within six months from the acceptance confirmation, provided that the applicant may extend the commencement date up to an additional one year if there is a reasonable ground.

1.3. Are there any industry sector controls on foreign investment?

Yes.

A. *Restricted Businesses in FBOA*

The FBOA prescribes three lists of businesses which are restricted for foreigners to engage in. Foreigners are prohibited and restricted from undertaking a restricted business, unless they have obtained permission in order to legally conduct such activities, i.e., an FBL or FBC, or be exempt from the license requirement.

The summary of lists of businesses subject to restriction are as follows:

(i) Businesses in List 1: List 1 of the FBOA specifies nine types of business in which foreigners are completely prohibited from undertaking for a special reason, for example, agriculture, fishing, extracting local herb, and land trading.

(ii) Businesses in List 2: List 2 of the FBOA specifies 13 types of business in which foreigners may not, in principle, engage (unless special permission from the MOC (with the approval of the Cabinet) is granted) as they are related to national security, the protection and nurturing of traditional arts and culture, and or the protection of natural resources and the environment, for example, domestic transportation (land, maritime, and air transportation and domestic airline business), sale of Thai antiques and handicrafts, and mining.

(iii) Businesses in List 3: Businesses in respect of which Thai nationals are not yet ready to compete on an equal footing with foreigners. These may only be carried out by foreigners if permission is obtained from the Director-General of the Department of Business Development of the MOC with the approval of the Foreign Business Operation Committee. The activities restricted under this List include, amongst others, most services, wholesale and retail businesses. While the requirements for a license for wholesale activities and retail activities can be waived if the company's paid-up capital meets minimum requirements, the capitalization does not apply nor exempt a foreigner from the licensing requirements to conduct operations of other restricted business activities.

B. *Restrictions Imposed by Individual Laws Regulating Businesses*

In addition to the FBOA, there are also other individual laws imposing direct or indirect restrictions on foreign investment including foreign shareholding limitations and majority Thai director requirements.

Some examples are the restrictions imposed by specific laws related to insurance, banking and financial institution, and telecom businesses.

(i) Insurance Business

The operations of life insurance businesses and casualty insurance businesses are subject to the restrictions of the Life Insurance Act, B.E. 2535 (A.D. 1992) and the Non-Life Insurance Act, B.E. 2535 (A.D. 1992) as amended. In general, no more than 25% of all shares in a company engaging in life insurance and non-life insurance businesses can be held by foreigners and at least 3/4 of the board of directors must be Thai nationals. However, such

restrictions may be waived or relaxed subject to approvals from the Insurance Commission and/or the Ministry of Finance.

(ii) Banks and Other Financial Institutions

The Financial Institutions Business Act, B.E. 2551 (A.D. 2008) prescribes foreign investment restrictions for banks and other financial institutions in a similar manner as the Thai Insurance Acts. In summary, no more than 25% of all shares in a financial institution can be held by foreigners and at least 3/4 of the board of directors must be Thai nationals. However, such restrictions may be waived or relaxed subject to approvals from the Bank of Thailand and/or the Ministry of Finance.

(iii) Telecommunication Business

The Telecommunications Business Act, B.E. 2544 (A.D. 2001) forbids a "foreigner" under the FBOA from obtaining a certain types of telecommunication licenses.

C. *Restrictions on Foreign Investment Related to Land Ownership*

Under the Land Code, land ownership by foreigners (defined to include foreign national, entity incorporated under foreign laws and Thai entities with foreign ownership of over 49% of shares of the registered capital or having a majority of shareholders being foreigners) is not permitted in Thailand unless specific laws and regulations permit otherwise. In this regard, exceptions to such restrictions include permission to own land by the BOI and the IEAT, subject to certain requirements. It shall be noted the shareholding percentage requirement under the Land Code is a bit different from those in the FBOA and the Land Code considers the share structure at all tiers of the investment up to the ultimate beneficial shareholder level.

1.4. Are there any government free carry interest requirements on special industry sector?

No. However, note that there may be specific industries of national importance which may be subject to directives or guidelines from the Thailand Government which we may not be aware of.

1.5. Are there any localization requirements (e.g. minimum ratio of local employees, minimum ratio of local procurement) for FDI in your jurisdiction?

The FBOA requires that Thai nationals must make up at least 40% of the total number of

directors of companies operating businesses under List 2 of the FBOA. The Thai law on private limited companies does not stipulate any limitation on the director's nationality or residency, while the law on public limited companies requires that at least half of directors must reside in Thailand. Sector-specific laws may also impose similar requirements. For example, at least 75% of directors of an insurance company and majority of directors in a tour guide company must be Thai. There are no general limitations on the appointment of foreigners to key managerial positions of local companies. Granting of work permits is subject to conditions under Thai laws, for example:

If the employer is a juristic person, the juristic person must have fully paid-up registered capital of at least Baht 2 million and employ four Thai citizens to be able to sponsor one work permit. Each additional foreign employee requires a respective capital increase of Baht 2 million, and the number of work permits available to be sponsored is generally capped at ten unless the juristic person is otherwise qualified and approved under the relevant regulation; and

If the employer is a branch office of the overseas juristic person, the foreign investment amount should be at least Baht 3 million to be able to sponsor one work permit. Each additional foreign employee requires a respective capital increase of Baht 3 million and the number of work permits available to be sponsored is generally capped at 10 unless the juristic person is otherwise qualified and approved under the relevant regulation.

In general, foreign investor are required to employ at least four Thai employees to sponsor one foreign employee. In this regard, employer may be exempted from this requirement by obtaining an investment promotion from the BOI or obtained privileges under the IEAT Act. Note, however, that this BOI investment promotion or IEAT privileges does not exempt the company from justifying the necessity to hire foreigners over Thai nationals when requesting for approval. In considering the approvals, the official, at its sole discretion, will determine the need and appropriateness for employing expats in such positions. The process for granting a work permit is specified in various laws and regulations, including the Emergency Decree on Managing the Work of Aliens, B.E. 2560 (A.D. 2017) and the Ministerial Regulations Regarding the Work Permit Application, Issuance and the Notification of the Work of the Foreigner, B.E. 2554 (A.D. 2011).

1.6. Are there any exchange control restrictions in terms of remittance of capital, profits and dividends?

Dividends may be paid only from the company's profits, and if the company has an accumulated loss, it may not declare a dividend until it has paid off the accumulated loss. In this regard, repatriation of investment funds and dividends to non-Thai residents are

freely allowed upon submission of supporting documents to an authorized bank. This requirement applies to all companies operating in Thailand, not just foreign owned companies.

1.7. What are the most common types of corporate legal entities established for FDI? For each type of corporate legal entities, please introduce the internal corporate governance structure. What types of corporate legal entities are recommended for partially or wholly foreign owned corporate legal entities?

Generally, there is no restriction in business entities establishment by a non-Thai national, i.e., a non-Thai national can establish any business entities just as a Thai national, but a foreign owned entity may be subject to foreign investment restriction.

The form of business entities in Thailand are: (a) private or public limited liability company, (b) partnership, (c) branch office, (d) representative office, or (e) regional office of a foreign entity.

In this regard, a private limited company, a business form most used in Thailand, is the most common types of business entities established for FDI, whether partially or wholly foreign owned.

The reason why private limited company is best suit for not only FDI but also by Thai national is due to its characteristic in liability limitation and flexibility in regulating its operation. Under the Thai Civil and Commercial Code ("CCC"), a primary law governing private limited company, the liability of shareholders is limited to the amount of unpaid share value of the company, and shareholders can establish articles of association to regulate the shareholders relationships and operation of the company as long as it does not contradict to the public order under Thai laws.

A. *Limited Liability Company*

Sections 1096 – 1273/4 of the CCC governs private limited companies, while the Public Limited Company Act, B.E. 2535 (A.D. 1992) ("PLCA") governs public limited companies. Both types of limited liability company are solely composed of shareholders who bear indirect and limited liability.

(i) Private Limited Company

A minimum of three promoters is required for the establishment of a private limited company. Each promoter must subscribe to at least one share in the company. A private limited company must always have at least three shareholders, otherwise the court may order the company to dissolve. There

is no requirement that the shareholders be residents of Thailand. At least 25% of the par value of shares must be paid-up. It is possible to issue the shares at a premium if stipulated in the memorandum of association (this is usually included as one of the business objects).

There is no minimum capitalization requirement, however, each share shall have a nominal value of not less than Baht five. There must be at least three shareholders at all times. Therefore, it could be deemed that the minimum capital for incorporation is Baht 15. Nevertheless, the registrar has the discretion to raise objections if it appears that the registered capital is too low for purposes of conducting the proposed business.

It is important to note that a private limited company can have a minimum of one director. All of the directors may be foreigners and reside outside of Thailand, although this is subject to specific restrictions under certain laws. It is usually more convenient to have at least one director with signatory authority to be resident in Thailand for purposes of signing contracts and other important documents, including filings with government authorities.

(ii) Public Limited Company

The PLCA requires at least 15 promoters to incorporate a public limited company. The shares in a public limited company must be fully paid-up. There must be a minimum of at least 15 shareholders at all times. The board of directors must have no less than five members, at least half of whom must reside in Thailand. The directors must make full disclosure of their shareholdings in the company or its affiliates. Directors of a public limited company would generally have greater responsibility than the directors of private limited companies.

Securities offered by a public limited company to the public or any person are subject to the requirements under the Securities and Exchange Act, B.E. 2535 (A.D. 1992) under the supervision of the Security and Exchange Commission of Thailand. Only the shares of public limited companies may be offered publicly and traded on the Stock Exchange of Thailand or Market for Alternative Investment. Public limited companies may also issue debentures and other forms of securities to the public.

B. *Partnership*

A partnership is a form of business organization in which two or more parties join for a common business purpose and share the profits. The CCC governs both ordinary

partnerships and limited partnerships. In the case of an ordinary partnership, all of the partners together bear joint and several liability for the partnership's obligations. Ordinary partners may contribute money, other property, or labour to the partnership.

Limited partnerships have both: (i) limited liability partners who bear indirect limited liability to the extent of their equity investments (who cannot contribute labour, participate in the management of the partnership, or have their name included in the name of the partnership), and (ii) general liability partners who are jointly and severally liable for all of the partnership's obligations. If limited liability partners contribute in ways other than an equity contribution, they will lose their status as limited liability partners and assume full liability, along with any general liability partners.

Both ordinary partnerships and limited partnerships acquire a juristic personality when they are registered. Whereas registration of an ordinary partnership is voluntary, registration of a limited partnership is mandatory. Note that the use of partnerships is not common in Thailand in current practice.

C. *Representative Office*

Foreign companies can establish representative offices in Thailand whose primary functions are to provide local information and support to their respective head office or an affiliated company or a group company overseas. However, the scope of activities permitted for a representative office are extremely limited and the office cannot engage in profit-generating activities. The only exception is that the representative office receives funds for its expenses from the head office. The scope of services of a representative office is limited to five categories as follows:

(i) procurement of supply sources for goods and services in Thailand for the head office or an affiliated/group company;
(ii) inspection and control of the quality and volume of goods by the head office or affiliated/group companies or hire by the head office or affiliated/group companies for production in Thailand;
(iii) consultation on various aspects pertaining to the goods distributed by the head office or affiliated/group companies to the distributing agent or consumer of goods;
(iv) dissemination of information pertaining to new goods or services offered by the head office or an affiliated/group company; and
(v) reporting business movements in Thailand to the head office or an affiliated/group company.

The representative office is regarded as a service activity under List Three (21) annexed to the FBOA. Before the representative office commences business operation, an FBL

was required from the MOC. However, on 26 May 2017, the MOC issued a ministry regulation (No. 3) to exempt representative offices from the service activity under List Three (21). Therefore, it is no longer a requirement to obtain a FBL. However, a representative office must give notice of the place used for storing the accounts and the supporting documents needed for making accounting entries in order to obtain a juristic person registration number with the MOC.

At least Baht 2 million (which is approximately USD 65,000) must be remitted to Thailand for operational expenses of the representative office. Remittances can be made after the juristic person registration number is granted.

In considering what type of entity to set up, it is important to take into account the fact that a foreign company and its representative office are considered to be the same legal entity. The consequence of this is that the foreign company would be bound to third parties by the acts conducted by its representative office within the scope of the authority granted to it.

D. *Regional Office*

Foreign companies can establish regional offices in Thailand whose primary functions are to provide services on behalf of the head office, branches and/or affiliates located in the same region as the regional office (there must be at least one branch or affiliate located in Asia). Such regional office must not derive any income from its activities or have any power to accept a purchase order or make a sale offer, nor negotiate and enter into any business arrangement with a person or juristic person in the country where the office is established. The supporting funds for expenses of the regional office shall only be received from the head office.

The scope of activities permitted for a regional office are limited to seven categories. The activities would be on behalf of the head office or branches and/or affiliates located in the same region as follows:

(i) coordinate and supervise;
(ii) advisory and management;
(iii) training and personnel development;
(iv) financial management;
(v) marketing control and sales promotion plan;
(vi) product development; and
(vii) research and development.

In the past, a regional office is regarded as a service activity under List Three (21) annexed to FBOA. However, regional office it is no longer required to obtain FBL under

a ministry regulation (No. 3) issued on 26 May 2017. Same as representative office, the regional office shall notify of the place storing the accounts and the supporting documents needed for making accounting entries in order to obtain its juristic person registration number with the MOC. In addition, at least Baht 2 million must be remitted to Thailand for operational expenses of the regional office. Remittances can be made after the juristic person registration number is granted.

Note that a regional office is considered to be the same legal entity as its head office.

E. *Branch Offices*

An alternative structure worth considering would be a branch office. Whilst there are no requirements for the registration of a branch office, in practice, registration in one form or another will usually be required since the business activities of a branch office will fall into one of the categories requiring a FBL under the FBOA.

A foreign entity may establish a branch office or subsidiary in Thailand. If the branch office or subsidiary will engage in a business reserved under the FBOA, it must obtain a FBL from the competent authority prior to commencing operation. It is important to note that a branch office may derive income from its activities, enter into contracts, make a sales offer, negotiate and enter into business arrangements unlike in the case of representative or regional offices above.

A further condition to receiving the FBL is that capital of at least Baht 3 million for each reserved business must be brought into Thailand within a three-year period. There is no special registration requirements for the establishment of branches of foreign companies doing business in Thailand, however, most business activities will fall within the laws and regulations which will require special regulation or licenses, e.g., VAT, certificates of incorporation, FBL, social security and compensation funds etc., either before or after the commencement of activities.

In order to establish a branch office, the company will have to appoint a branch manager and submit certain documents to the MOC including its certificate of incorporation, by-laws, articles of incorporation, affidavit and a power of attorney appointing the branch manager. Under Thai law, a branch office (like the Representative Office outlined above) is not a separate distinct legal entity from its parent company. Therefore, the parent company can be held liable for the losses and liabilities of its branch in Thailand.

There is no Thai law specifically governing the rights and powers of a foreign company. Generally, a foreign company enjoys the same rights and powers as a Thai company unless any specific legislation provides otherwise.

1.8. What is the procedure of registration and incorporation of foreign-owned companies?

Private limited company is the most common option for foreigners to incorporate a business entity in Thailand. It is important to be aware that the business activities of majority foreign-owned companies are subject to the FBOA.

The process for establishing a private limited company in Thailand involves:

(i) online reservation of the company's name;
(ii) registration of the memorandum of association;
(iii) holding of a statutory meeting; and
(iv) incorporation of the company with the MOC.

1.9. What are the documents and materials that the foreign investors need to prepare for that purpose? Is notarization or certification required?

The key documents required for the incorporation of a private limited company are a duly signed MOC's application form and a self-certified true and correct copy of passport (or Thai national identification card for Thai citizen) of the persons nominated as authorized director who signed the application form. In this regard, if the registration application form (Bor. Or. Jor. 1 form) is signed outside of Thailand, a notarization will be required.

1.10. How long does it normally take to complete the entire registration and incorporation process?

While the registration of a company can be completed within one day (if all documents are in order), the entire process for incorporation of a private limited company generally takes a minimum of three weeks from the start of the preparation of documents to the completion of the registration. In some cases, the process could take more time due to logistical issues, especially if the documents require signatures from persons residing in different countries and the requirement of notarization on the application form.

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[i] ***The series on the investment and M&A laws in the member countries of RCEP is launched by DeHeng Law Offices. In each article of the series, a leading local law firm is invited to offer an overview of investment and M&A laws in the jurisdiction.***

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