

## **SECTION A - FORMS AND STRUCTURES OF AND SOURCES OF FINANCE FOR BUSINESS ORGANIZATIONS**

### ***A1. Forms of business (enterprise) organization***

***a) What are the main forms of business organization for medium and large scale enterprises?***

The main form of business organization for medium scale enterprises in Thailand is a private limited liability company (“private company”). Other forms include ordinary partnerships, limited liability partnerships, branch offices and representative offices.

The main form of business organization for large scale enterprises in Thailand is the public limited liability company (“public company”). Joint Ventures are also a common form for large scale projects.

***b) Is there a system of registration for these business organizations? If so, briefly describe.***

For both private and public companies, registration procedures must be complied with before legal recognition. Registration is through the Ministry of Commerce. Partnerships may be registered or unregistered.

#### **Private Company:**

A private company requires a minimum of seven persons to act as promoters of the company. The capital must be divided into shares each with equal par value. Two witnessed copies of a Memorandum of Association must be drawn up and signed. These should state the following:

- ◆ The name of the Company, which must include the word "Limited", and be written in Thai letters. An English name can be registered at the same time.
- ◆ The intended registered location of the Company.
- ◆ The capital structure of the Company including number of shares to be issued.
- ◆ A statement to the effect that the shareholders' liability shall be limited.

- ◆ The Company's objectives.
- ◆ The names, addresses and occupations of the promoters, and the number of shares to which they subscribe (a minimum number of seven promoters with one share per promoter is required).

Once the Memorandum is approved by the Ministry of Commerce, shares may be offered to others, but not to the general public. Previously the law limited the number of shareholders to 100, but this law was changed in 1992 and the number is now unlimited. After the proposed number of shares have been subscribed, a statutory meeting of the shareholders will be called.

At this meeting the following must take place:

- ◆ Adoption of Articles of Association which outline the internal regulations of the Company
- ◆ Election of the directors
- ◆ Election of the auditors (which is mandatory)

Following the meeting, the Directors will collect the shareholders' capital contributions which must be no less than 25% of the par value of the shares. Then the Directors will proceed to register the company, which must normally take place within three months from the date of the statutory meeting.

#### Public Company:

A public company is formed with the objective of offering shares to the general public. In order to do so the capital of the company is divided into shares of equal par value. It is required that the par value of the shares shall not be less than 5 Baht per share but shares may be offered for sale at a price which is higher than their par value. A minimum of 15 promoters is required to draw up a Memorandum of Association which must be submitted to the Registrar's office of the Department of Commercial Registration (DCR) of the Department of Commerce. Following registration of the Memorandum of Association, permission to invite the general public to subscribe to shares must be requested at the Office of Securities and Exchange Commission. Within six months of registering the Memorandum of Association, a statutory meeting must be held. However, this meeting can only be held when there are a sufficient

number of subscribers and shares subscribed according to the law, but must be called within two months of this number being sufficient.

At the statutory meeting a minimum of five persons must be chosen to serve on the company's Board of Directors. At least half of the Directors must be residents of Thailand. Also at this meeting the company's Articles of Association, outlining the internal regulations of the company, must be adopted.

Following the statutory meeting the Directors must require the subscribers to make payment in full of shares and apply to register the company. Registration must be made within three months of the date of the statutory meeting.

#### Partnership:

When two or more persons join together to conduct business without formally registering their operations, they are considered to be an Unregistered Ordinary Partnership, although to engage in certain types of businesses they must still be registered with the Ministry of Commerce. Despite this registration, these partnerships are still considered to be "unregistered Ordinary Partnerships". In order to form a Registered Ordinary Partnership, full particulars including the partnership contract, capital contribution, management and objectives must be submitted to the Ministry of Commerce. Foreign nationals, with the exception of U.S. citizens, must comply with the Alien Business Law and obtain a license before they engage in these partnerships. Limited partnerships are where one or more partners who manage the business are jointly held personally liable for the partnership's debts. Other non-managing partners are normally only liable for the amount of any undelivered or withdrawn capital contribution. As in the case of a Registered Ordinary Partnership, the partnership contract, management and objectives must be registered with the Ministry of Commerce. Limited partnerships are uncommon.

#### Joint Venture:

Curiously, in Thailand the concept of a joint venture does not appear as a legal entity in the Civil and Commercial Code. However, in cases where

two parties form a Joint Venture, their agreement to carry on business together is valid as long as it conforms with Thai laws. A joint venture is, however, recognised for tax purposes as if it were a single entity. Distribution of profits to juristic parties domiciled in Thailand are not subject to taxation, however distribution to companies or persons overseas is subject to taxes. Joint Venture Agreements can exist between any types of business entities, from partnerships to limited companies to sole proprietorship.

#### Branch Office:

A Branch Office is created to do business on behalf of a corporation or partnership located in another country. In order to create a Branch Office, a foreign company must register and provide information about its background and purpose for entering into business.

Over a period of five years the company establishing a Branch Office is required to remit at least 5 Million Baht of working capital into the country. Two Million Baht must be paid during the first year. Branch Offices are only required to maintain and submit accounts of their activities related to their Thai office.

Under the Alien Business Law, if a foreign company wishes to open a Branch Office in Thailand it must obtain an Alien Business License. Under the Treaty of Amity and Economic Relations between Thailand and the United States, American companies can engage in any business which is not excluded by the Treaty without the need to apply for an Alien Business License.

#### Representative Office:

The difference between a Branch Office and Representative Office is that the latter may not engage in revenue earning activities in Thailand. Representative Offices generally undertake such operations as searching for local sources of goods or services, inspecting the quality of goods to be imported by a local company for the representative's parent, providing advice for companies concerning local product distribution, supplying information about new products and services that the parent company is

selling in Thailand or reporting on local business activities.

A Representative Office is required to remit to Thailand 5 Million Baht over a period of five years, with 2 million Baht paid during the first year. These funds may not be remitted out of Thailand later. As the office is not expected to earn income, it does not have to pay taxes in Thailand.

c) *Are there any minimum capital requirements for these enterprises?*

The minimum capital requirements are as follows:

- |                       |   |  |
|-----------------------|---|--|
| Private Company       | - | The minimum capital requirement is Baht 35   |
| Public Company        | - | The minimum capital requirement is Baht 75   |
| Partnership           |   | Minimum requirements only apply where partner entities themselves have minimum requirements  |
| Joint Venture         | - |  |
| Branch Office         | - | There are no minimum capital requirements, but in practice remittance into Thailand of Baht Five Million over five years will be made a condition. |
| Representative Office | - | same as branch office  |

d) *Briefly describe the main features of each type of these business organizations, by reference to public/private/state ownership and management; accounting and auditing responsibilities (particularly the standards which apply to accounting and auditing practices); director and management responsibility (including, if relevant, possible liability for debts); and the role of regulatory authorities regarding these enterprises.*

Private Company:

The private company constitutes the main form of business organisation in Thailand.

Once a private company has been formed it must operate according to its Articles of Association and provisions of the Civil and Commercial Code. Substantial changes in the company such as modifying the Memorandum or Articles of Association, increasing or decreasing capital, merging or liquidating the company, can only be made by special resolutions adopted and confirmed at two consecutive shareholders meetings. At the first meeting the resolution must pass by a three-quarters majority vote in favour, and at the second meeting the resolution must be confirmed by a two-thirds majority vote in favour.

A Private Limited Company is managed by its elected directors. At least one-third of the directors must retire annually, but they are entitled to be re-elected. Under certain circumstances, if the directors fail to call a shareholders' meeting, the shareholders may call one themselves. This sometimes occurs when they wish to oust an unwanted director.

In a newly formed private company, the Directors are required to collect shareholders' capital contributions which must not be less than 25% of the par value of the shares. The shareholders remain liable for the unpaid 75%, which can be collected even if the company goes bankrupt. Directors are required by law in the conduct of their business to apply the diligence of a careful businessman and are jointly responsible for the keeping of books and documents, as well as the proper distribution of dividend and enforcement of resolutions. Directors are deemed agents of their companies in their relations to third parties. Directors may be sued by their companies or the shareholders thereof.

Thai law requires the election of auditors every year at the ordinary meeting of shareholders. Auditors are required to submit a report to the ordinary meeting on the balance-sheet and accounts. The report must state their opinion as to whether the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of affairs of the company.

In practice, while submission of the balance-sheet is a requirement that is enforced, the balance-sheet is not subject to careful scrutiny. Auditing standards have come into question recently with the economic crisis.

Public Company:

A Public Company must be administered by its Board of Directors according to its Articles of Association and the Public Companies Act. Public Companies are required to hold annual ordinary meetings of the shareholders. At such meetings a quorum shall be constituted by the presence of no less than 25 shareholders, or no less than half of all the shareholders, and the total number of shares represented must not be less than one-third of all the shares subscribed and issued.

A Public Company is required to submit to the Registrar of the Department of Commerce, an annual report, copies of its balance sheet, a profit and loss statement, copies of the minutes of the shareholders meeting approving the balance sheet and the appropriation of profits and sharing of dividends.

Unless otherwise prescribed in the Articles of Association, the entire Board of Directors must be elected at the annual ordinary meeting. Retiring Directors are eligible for re-election.

At least once every three months the Board of Directors are required to hold a meeting. Directors are jointly liable for any damages incurred by the company, unless they can establish that they were not involved in misconduct provoking such damages.

#### Partnership:

The management responsibility of partnerships lies with the partners. While partners may benefit from certain tax advantages because they pay taxes as if they were an individual person, there are definite liability risks. This is especially true of unregistered partnerships where there may not be any agreement in writing to define a partner's rights and obligations. Also, except in the case of limited partnerships, partners have unlimited liability and creditors may claim against the assets of any partner irrespective of the partnership's assets, although the partnership assets will be looked at before the individual partner's assets are taken into consideration.

Limited Partnerships provide the possibility of limited liability with fewer formalities than those which apply to limited companies. However, those managing the partnership potentially bear much greater liability than

the other limited partners.

#### Joint Venture:

Joint Ventures are often entered into by those with businesses which handle the manufacture of products in Thailand to be exported for sale. One party supplies the expertise or technology, while the other supplies labour and local management. They are also a popular form of organization for large scale projects.

As joint venture agreements can exist between any types of business entities, and because the Civil and Commercial Code does not recognise them as distinct entities in their own right, most of the obligations for joint venturers will be defined by the obligations of the joint venturers themselves. However, a joint venture is recognized as a separate legal entity for tax purposes. In practical terms, this means that a separate set of accounting records must be kept for the joint venture - separate from the entities that make it up. Tax-wise, the entities that make up the joint venture (which in most all cases will be limited liability companies) are effectively subcontractors to the joint venture.

Joint venture parties are jointly and severally liable to third parties. For this reason, in practice when a dispute arises a claim will be filed against all of the joint venture parties. While primary liability of a joint venture to third parties will be joint and several, the terms upon which liability is to be shared between the joint venture parties themselves can be agreed upon by the joint venture parties.

#### Branch Office:

A branch office will be treated as the same legal entity as its head office. A designated branch manager must be given a power of attorney by the parent company. The extent of branch manager's personal liabilities will depend on the scope of the power of attorney. In some cases the head office is responsible for liabilities, while in other cases the branch manager may be liable.

#### Representative Office:

As representative offices may not engage in revenue earning activities in Thailand, they are not subject to taxation and there are no auditing requirements. As with branch offices, representative offices are treated as the same legal entities as their head offices.

## **A2. *Controls and influences***

*a) Are there any relevant observations to make concerning political, social (powerful family), financier (bank equity or involvement) or cultural controls or influences in respect of these types of business organization.*

Private and public companies dominate the business landscape in Thailand. While most are relatively small and “independent”, conglomerates of companies are a discernible feature in Thailand. The inter-relationship between companies within a conglomerate is often very complex and a purely legal analysis will not reveal their true nature. The links between companies and individuals within a conglomerate may be through informal reciprocities, understandings and kinship ties. It is of note that banking and commerce is dominated by Thais of Chinese ethnicity, and the emergence of such conglomerates has been viewed by some as a modern manifestation of underlying Confucian values.

The size and wealth of such conglomerates, almost all of which have emerged post World War Two, is impressive. By 1994, the CP Group had 250 companies, 100,000 employees and revenues of US\$7.6 billion. It is one of the largest single foreign investors in China.

The union between big business and government for mutual benefit is a well established trend in Thailand. Politicians and bureaucrats are frequently board members and shareholders, and may have multiple business interests that in other jurisdictions would be perceived to represent a conflict of interest, if not an ethical breach or outright corruption. Political allegiances between the conglomerates and political parties are very thinly disguised. The simple equation of political party funding by the conglomerates (much of which is used for blatant vote buying) in exchange for direct pecuniary benefits once the party is in power, is clear.

The relationship between financiers and big business is also close. Bangkok Bank, the largest bank in Thailand, has for many years taken shares in its corporate borrowers as collateral. Thailand remains a hierarchical society with a strongly conditioned and largely unquestioning respect for seniority and rank. In addition, personal contacts are not merely useful but essential for many business transactions. These two cultural factors partially explain the current level of “bad debt” in Thailand.

Although the corporate conglomerates are large, powerful and for certain business activities, present oligopolistic barriers to entry for potential newcomers, as first noted, small to medium corporates still account for most business activity in Thailand. Political and financial connections will also be important for such businesses, but the extent of such connections is likely to be more limited.

Thais are characteristically non-confrontational and conflict averse in their approach to business. Negotiation and compromise are the expectation and practice. Litigation is resorted to relatively infrequently, although more so in recent years. e.g. it is common practice for banks to require directors to give personal guarantees as security for corporate lending, but there has been a notable reluctance for banks to sue on such personal guarantees, as opposed to looking at other alternatives - extending the term or repayments, etc. This cannot be explained by legal difficulties for creditors, as there are few defences available to guarantors under Thai law.

Many Thai laws appear strict, if not severe, often with a large degree of discretion vested in the administering government entity. In addition, enforcement of laws may often be selective and lax. Some would say this facilitates corruption. In any case, it is a fair comment that there is a significant gap between the letter of the law and its application in Thailand.

*[Having identified the types of business organization, they will now (for ease of reference) be referred to as ‘corporates’ and, thus, ‘corporate borrower’, ‘corporate debtor’ and so forth]*