

# Legal 500

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Thailand

Joint Ventures

Contributor



MSC International Law

**Nattaya Tantirangsi**

Partner | [nattaya@msclaw.co.th](mailto:nattaya@msclaw.co.th)

**Kantinan Buraphacheep**

Associate | [kantinan@msclaw.co.th](mailto:kantinan@msclaw.co.th)

**Chawit Khiewtai**

Associate | [chawit@msclaw.co.th](mailto:chawit@msclaw.co.th)

This country-specific Q&A provides an overview of joint ventures laws and regulations applicable in Thailand.

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## Thailand: Joint Ventures

### 1. In what industries or sectors are joint ventures most commonly used in your jurisdiction?

In Thailand, it is common that a joint venture is a popular tool that may be used in all industries, especially by any business that welcomes new investors.

However, we have seen that many joint ventures are formed as project-based entities, where investors wish to limit their liability. Joint ventures (especially unincorporated joint ventures, which will be explained later on in this document) play a prominent role in Thailand's real estate and construction industries.

### 2. What are the main types of joint venture in your jurisdiction?

There are two types of joint venture in Thailand, namely incorporated joint venture (IJV) and unincorporated joint venture (UJV).

#### Incorporated Joint Venture (IJV) or Equity Joint Venture

An IJV is basically a joint venture in the form of a separate legal entity, mostly a private limited company. There are arguably a number of reasons why a public company is adopted to form a joint venture, unless the joint venture parties aim to list that entity in the stock exchange. A public company must carry itself as a publicly accountable entity which is more heavily regulated than a private company, including the responsibility to comply with accounting standards.

#### Unincorporated Joint Venture (UJV) or Non-equity Joint Venture

A UJV is a contractual joint venture where there is **no** separate legal entity formed. The relationship between the JV parties lies heavily on the JV contract, including the right to appoint directors or voting rights. If there is a dispute between parties in a UJV where no clause in the JV contract covers such disputed matter(s), the court may adopt laws on 'ordinary partnership' stipulated under Thailand's Civil and Commercial Code to settle the disputed if such UJV also fits the definition of Thailand's ordinary partnership, where two or more parties agree to undertake business activities in order to share profits arising therefrom.

It is crucial for the parties to a UJV to limit their liability in the UJV contract; otherwise, if the court categorizes the UJV as an ordinary partnership, each party's liability in connection with the UJV will be unlimited.

Although a UJV is not a separate legal entity, Thai tax laws (the Revenue Code) may recognize it as a tax entity, hence the responsibility to prepare a financial statement, file tax returns and pay corporate income tax when due.

A UJV will be considered a tax entity under the Revenue Code when it is a joint venture that operates in a commercial or profitable manner, between a company or juristic partnership on one hand and companies, juristic partnerships, individuals, non-juristic body of persons, ordinary partnerships on the other hand, which undertakes **any of** the following activities.

- The JV parties agree to pool resources, e.g. money, assets, labour or technology or agree to share profit or loss arising from any contract made with a third party; **or**
- A contract is entered into with a third party, where the contract specifies that it is a joint venture; **or**
- A contract is made with a third party, where the contract states that the JV parties are jointly liable for the whole or parts of its work under such contract, and the JV parties will jointly receive the payment under the contract from the counterparty without any provision that separates their obligations and payments among themselves.

### 3. What types of corporate vehicle are most frequently used for equity joint ventures?

A private company is the most frequently used vehicle to form a joint venture.

### 4. What are the key factors which influence the structure of the joint venture and the choice of joint venture vehicle?

#### Key Factors Which Influence the Structure of a Joint Venture

- **Control**

Control in terms of percentage of shareholding commonly dictates board seats and voting power. In Thailand, however, there is the Foreign Business Act, B.E. 2542 (1999) safeguarding Thai nationals' competitiveness in various industries, e.g. service industry, by limiting foreign shareholding to be under 50%, unless a foreign business license (FBL) is obtained.

Acquiring an FBL is a lengthy process. An FBL holder shall comply with certain conditions such as 7:1 D/E ratio.

In some cases, the JV parties may adopt 'preference share structure' to limit the foreign shareholding percentage (which is doable under the current laws) in exchange for additional voting power and premium to be paid to the JV company.

- **Capital Requirement**

The amount of capital required for a business depends mainly on what that particular business requires (*according to the nature of the business or the ability of the JV party to seek funding from creditors, e.g. banks*) and what the law requires.

Certain businesses that the government believes are involved with the public, for example, securities company such as securities broker or underwriter, are required to have certain amount of capital injection (*or as Thai laws call it registered capital*). It is advised that the JV company seek advice from local advisor regarding whether there is any requirement of minimum registered capital for each business it is involved.

#### Key Factors Which Influence the Choice of Joint Venture Vehicle

- **Limitation of Liability**

As explained earlier regarding a UJV, a UJV may be recognized by the court as an ordinary partnership where all parties shall be liable for any damage caused by the UJV. Without careful drafting of the limitation of liability clause in the UJV agreement, the non-defaulting party shall bear the liability it does not cause.

The parties may therefore prefer to form an incorporated joint venture or equity joint venture over a UJV. An equity joint venture in the form of a limited company will provide each JV party with liability shield from any damage caused by the equity joint venture.

- **Legal Requirement**

If a JV operates any licensed business, it is likely that the

relevant laws and regulations require what type of entities are entitled to apply for such particular license. For example, it is required that a financial institution is a public limited company.

There is also a technical reason why a private company is preferable to a public company. This is because of the Public Limited Company Act, B.E. 2535 (1992) (the "PLCA") which states that a public company's articles of association (AOAs) shall comply with the PLCA, which leaves little room for the JV parties to creatively design the mechanism of the JV. Examples include the voting power of a preference share that could only be equal or lower than that of an ordinary share.

- **Fund Raising**

#### Debt Financing

Banks or other types of fund provider of debt financing will dictate the type of entity they will lend the money to.

However, debt financing through Thailand's capital market requires that the lender (aka issuer) be a private or public company. A company may finance its business through an issuance of debt instrument such as debenture, BE or promissory note.

#### Equity Financing

Equity financing by way of issuing shares is a choice available to both private and public companies. However, any raising of fund from the public requires that the issuer is a public company.

### **5. What are the principal legal documents which set out the terms of a joint venture and how does the constitution of the joint venture vehicle interact with the joint venture agreement?**

There are two principal legal documents that set out the terms of a joint venture, namely a joint venture agreement and the company's articles of association (AOAs).

A joint venture agreement binds the JV party, which may or may not include the JV company. The AOAs on the other hand also binds the JV company. It is therefore a normal practice that clauses in the JV agreement (aka shareholders' agreement) are also stated in the AOAs, for example, share transfer restriction and/or quorum of the meetings of board or shareholders.

In some cases, the JV company will also be a party to the JV agreement. However, it should be carefully planned out in the JV agreement that the JV company itself shall

not bear any responsibility that would render it liable in case of breach. This is because of Thailand's Supreme Court decision No. 3402/2548 which ruled that any payments from the company to its shareholders shall be paid in accordance with the company laws, and the company's liability to pay its shareholders due to certain breach of the shareholders' agreement was not statutorily allowed in the company laws. The court added that such a provision would affect the company's stakeholders and, therefore, was void.

## 6. How long does it typically take to form a joint venture in your jurisdiction?

### JV Agreement Negotiation

How long it will take for the parties to conclude the terms of a JV agreement varies. A 50:50 joint venture may be heavily negotiated on its deadlock resolution terms to find a good balance of power, while an 80:20 joint venture may focus on minority protection terms.

### JV Company Incorporation

The process of a JV company incorporation (private or public) takes 1 – 3 business days. The process could take longer than that if the AOA's of the company is complicated (due to the inclusion of the JV agreement terms in the AOA's).

In Thailand, it is advisable that the JV parties (*or their legal representative*) submit a draft of the AOA's to the registrar for a review prior to the actual submission for company incorporation. The registrar will suggest revision where he/she sees appropriate for the company to revise before the actual submission. This is to avoid the submission to be officially rejected. There may be a difference of opinions between the registrar and the JV parties regarding the drafting of the AOA's. It is the JV parties' (*or their legal representative*) responsibility to clarify what is needed to the registrar in order for the AOA's to express the parties' true intention as well as for the AOA's to be lawful, registerable and enforceable.

## 7. Is using a corporate joint venture structure effective in shielding the joint venture parties from liabilities for the operations of the joint venture entity under local law?

It is. The parties to a corporate joint venture (or what we also call it equity joint venture or incorporated joint venture throughout this document) are 'shareholders' of the JV company.

Under Thai laws, a shareholder's liability regarding the undertaking of the company is limited to the amount of capital unpaid.

However, if a JV party also acts as a JV company's director (natural person only), such director's liability may or may not be limited depending on whether it is said in the company's memorandum of association that director's liability is unlimited. That being said, a director shall not be personally liable if he/she acts according to the resolution of the company shareholders' meeting.

## 8. Are there any legal considerations which apply to the financing of the joint venture or the contribution of assets to it?

Under Thai laws, a joint venture may be financed by way of injection of money or assets transferred to it. It is advisable that the company works closely with the registrar as to the type of assets to be used to finance the joint venture because not every type of asset is registerable as a company's capital. Also, different types of assets may require different types of supporting documents to be submitted to the government.

## 9. What protections under local law apply to minority shareholders and what additional or enhanced minority protection mechanisms are typically agreed between the joint venture parties?

### Minority Protection under the Law

Derivative action is available under Thai corporate law. For example, a private company allows any one shareholder to claim a director who cause any damage to the company, if the company itself does not do so.

A shareholder or shareholders holding at least 20% of the company's total share capital may convene a shareholders' meeting and propose agenda for the meeting to resolve. This is considered a minority shareholder protection because in all other cases, it requires a board of directors' resolution to convene a shareholders' meeting.

Other than the above, the law also provides other rights, e.g. company record access to every shareholder.

### Minority Protection under a JV Agreement

There is no limit as to how creative the minority protection is to be designed in a JV agreement so long as

it's lawful.

Common minority protection may include the tag-along right which provide the minority shareholders exit with fair value of shares in exchange. Put option when certain conditions are met is also seen in JV agreements. Some agreements may include veto rights to minority shareholders, where the power to veto significant issues may also depend of the percentages of shares that minority party holds.

### **10. What are the duties of directors of an equity joint venture, including in relation to conflicts of interest?**

Directors are legally bound to have fiduciary duties for the company's and its shareholders' benefit, especially directors of public and publicly listed companies. The degree and punishments in relation to such duties are different in private and public companies, especially a public listed company.

In general, a director shall not have conflicts of interest with the company unless it is approved by the shareholders' meeting.

### **11. What is the typical structure of a joint venture's management body/board?**

It is common that a JV party's board seats are in proportion to the percentage of share capital it holds. That being said, the more board seats a party has, the more power for such party to control the management of the joint venture.

Thai corporate laws allow the chairman of the board of director to have a casting vote when there is a tie in a board or shareholders' meeting (as the case may be). Therefore, there could be a disadvantage to the party that did not elect the chairman. This issue may be solved by agreeing in the joint venture agreement that the chairman shall not have a casting vote. This no-casting vote provision is often seen in joint venture agreements, especially a 50:50 joint venture where no party should have more power over the other unless there is a good reason for it.

### **12. Does local law imply any fiduciary duties or duties of good faith between the parties to a joint venture?**

It is generally stated in Thailand's Civil and Commercial

Code that a person shall exercise his/her rights or obligation in good faith.

### **13. Do any restrictions, such as foreign direct investment rules, apply to foreign joint venture parties?**

A corporate joint venture is treated as a limited company, where all foreign direct investment rules apply.

An example is the foreign limit under Thailand's Foreign Business Act, B.E. 2542 (1999) (the "FBA"). If a share capital of a company is held for at least 50% by any foreigner (natural or corporate), it is considered a foreign entity. Any foreign entity's business operation will be limited or subject to certain conditions under the FBA.

### **14. What competition law considerations apply to the set up and operation of a joint venture?**

Thailand's position is to enhance competition among business operators. Therefore, in case a joint venture is formed by way of acquisition (shares or assets), amalgamation or merger that will significantly limit the competitiveness in certain sector or industry, certain actions shall be undertaken such as to report to the government regarding the acquisition/amalgamation or merger or to obtain permission prior to the acquisition/amalgamation or merger.

### **15. Are there requirements to disclose the ultimate beneficial ownership of a joint venture entity?**

Under Thailand's corporate laws, there is no obligation to disclose beneficial ownership of a joint venture entity. However, if such joint venture is going on an initial public offering (IPO) process, it will be required to disclose the beneficial owner of the entity to ensure symmetry of information to the public for them to have an informed decision whether or not to invest in the company. Also, this will also help avoid conflict of interest which is a major concern during an IPO process.

### **16. What issues relating to the ownership and licensing of intellectual property rights generally apply to the set up and termination of a joint venture?**

Transferring IPs to a joint venture as capital injection requires detailed clarification, including its valuation, to

the government. Also transferring of ownership of IPs required to follow particular legal forms depending on which type of IPs it is, or else the transfer will be void.

As to licensing, it also needs to follow particular legal forms depending on which type of IPs it is, or else the transfer will be void.

Termination of a joint venture entails return of capital to the JV parties. It is wise for the JV parties to agree from the outset how the return of capital will be considered fair according to the injection of capital of each party. Any amount of capital returned that is beyond the capital such party injects will be considered 'capital gain' which is subject to personal or corporate income tax, as the case may be.

### 17. What legal considerations apply when transferring employees into a joint venture?

If a joint venture is formed due to an amalgamation, merger or entire business transfer where the transferring entity ceases to exist, it is considered 'transferring of employee' under the Labor Protection Act, B.E. 2541 (1998), where a consent is required from each employee prior to the transfer. Also, the new employer (the joint venture) shall provide each employee benefits that are not less than what they receive from the transferring (or former) employer. Also, duration of employment shall continue from the previous employer though it is not explicitly agreed in the new employment contract.

For other cases of employee transfer aside from what is already mentioned in the previous paragraph, a prior consent is required from each of the employee. However, there is no requirement regarding the equal (if not better) benefit or continue of duration of employment, unless it is agreed in the contract with the new employer.

### 18. Do any additional requirements apply to joint ventures when a joint venture party is a publicly listed company?

In case a joint venture party is a publicly listed company, it shall comply with the disclosure requirements under the SEC and Stock Exchange of Thailand. An example includes corporate approval required from a shareholders' meeting if there is major acquisition of assets, as well as a detailed disclosure to be made.

### 19. What are the key tax considerations for both

### the joint venture parties and the joint venture vehicle itself?

#### Tax Exposure of a UJV

If a UJV is considered a separate tax entity as already explained under 2. above, such UJV is required to apply for its own tax identification number; prepare its own financial statements; file its own tax returns and pay taxes from the taxable income generated by the UJV itself.

#### Tax Incentives of a UJV

"Section 5 bis of the Royal Decree No. 10 issued under the Revenue Code regarding tax exemption" exempts income tax on the share of profits that a (a) 'company and juristic partnership' incorporated under Thai law or a (b) 'company and juristic partnership' incorporated under foreign law and carrying on business in Thailand receives from a joint venture (in this case, a UJV).

A '**company and juristic partnership**' mentioned above refers to the type of entity under the Revenue Code that is subject to Thai corporate tax.

The above exemption does not apply to the party to the UJV that is a natural person. Any share of profits from a UJV paid to a natural person will be subject to personal income tax.

#### Tax Exposure of an IJV and Its Shareholders

Like a UJV, and IJV is a tax entity separate from the JV parties and it has the same tax exposure as a limited company.

Unlike a UJV, any dividends paid to its shareholders in Thailand or to non-resident shareholders will be subject to Thai income tax.

An exemption of dividend tax is given to a Thai corporate shareholder if it (a) holds at least 25% of voting rights of the dividend-paying company's shares and (b) holds such shares for at least 3 months before and after the receipt of dividend (accrual basis).

If, however, the corporate shareholder is a listed company, the percentage of shares held in the dividend-paying company is irrelevant. Only the condition of 'holding of shares for at least 3 months before and after the receipt of dividend (accrual basis)' is required to be met for the listed company to enjoy such dividend tax exemption.

## 20. Are there any legal restrictions on the distribution of profits by a joint venture entity?

Distribution of profits by way of dividends shall be made only when the entity has accumulated retained earnings. Also, dividends can be declared and paid only when it is approved by the shareholders' or board meeting, as the case may be.

## 21. How are deadlocks in decision making usually dealt with in a joint venture agreement?

The party causing a deadlock event shall provide an exit of some sort to the other party. A put option of shares with fair price may be given to that other party.

Dealing with a deadlock varies depending on what the deadlock relates to. For example, if a deadlock is caused by non-attendance of a board member, it should be allowed in the agreement that a second board meeting shall be duly convened without that previously absent board member.

## 22. What exit or termination provisions are typically included in a joint venture agreement?

A put and/or call option is commonly provided to the parties. What is a major concern is the price the seller will receive from the exercise of the option.

Termination shall follow a material breach or a deadlock which is beyond remedy. Under Thai law, it is also allowed that the injured party is entitled to claim from the other party (causing a damage to the other party) in case of a breach of contract, unless such right is explicitly waived in the JV agreement.

Return of capital following a termination shall be agreed from the outset; otherwise, it may cause both parties considerable amount of time and effort to reach an agreement while they are no longer on friendly term.

## 23. What restrictions under local law apply when joint venture parties agree to restrictive covenants eg non-compete or non-solicitation obligations?

There are not enough cases brought to court to set a

standard for this matter yet. However, from what we see from the current court's decision, a non-competition provision is enforceable so long as it does not restrict the affected party too severely. For example, the court accepts that a two-year non-competition is considered enforceable for an employee to not compete with its former employer (Remark: This court's decision is not relating to a JV company). What is useful for us is to learn that the court will factors in specific circumstance of each particular case in order to make a decision. Since Thailand is not a common law country, previous court decisions do not bind the court in later cases to follow the precedents. It is crucial to know that, in Thailand, specific circumstances in a particular case will have an impact of how court decisions are made.

As to non-solicitation, this provision shall also be complied with in good faith between the parties. As long as the drafting of the provision does not breach public order or good moral or it does not in violation of any specific set of laws, it should be lawful and enforceable.

## 24. What dispute resolution mechanisms usually apply to joint ventures and are there any legal restrictions on the parties' choice of governing law or choice of dispute resolution mechanism?

Normally there is no restriction of the choice of governing law in a joint venture agreement. However, if the matter relates to, for example, land, Thai laws relating to land shall prevail, according to the conflict of law principles.

The parties are free to adopt any choice of dispute resolution mechanism (e.g. arbitration or court).

## 25. What are the key market trends affecting joint ventures in your jurisdiction and how do you see these changing over the next year?

Joint venture has been and will still be a method of choice in Thailand. Thai government may not explicitly state that it promotes a joint venture, but promotion of certain sector or industry will welcome business operators to seek joint operation in order to enjoy incentives the government's policy provide. As we can see from the recent development, more joint ventures are formed in the industries promoted by the government, for example, green businesses like the sale of electric vehicles.

## Contributors

**Nattaya Tantirangsi**  
**Partner**

[nattaya@msclaw.co.th](mailto:nattaya@msclaw.co.th)



**Kantinan Buraphacheep**  
**Associate**

[kantinan@msclaw.co.th](mailto:kantinan@msclaw.co.th)



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