

## HOW TO OPERATE START-UP IN THAILAND : DIFFICULTIES AND LEGAL PROBLEMS

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Start-up, one of the most powerful business models nowadays, represents a new wave of new generational entrepreneurs that are significantly incorporated and operated by a sole entrepreneur or a group of persons, as the founders, who have business talent with limited capital and resources. Several businesses have been set up as “Start-up” in order to solve problems in daily life, i.e., a life would be more convenient when it was fulfilled by technology and innovation, which would be produced by start-up entrepreneurs .

Although Start-up has a significant impact on contemporary business operations and society, Thai law still lacks sufficient provisions to encourage the activities of Start-up entrepreneurs at a reasonable level. Many provisions of laws continue to overlook the distinctive characteristics of this business model and treat it similarly to other business organisations. Most Thai government authorities are often confused that Start-up are also the same as “Small and Medium Enterprises (SMEs)” and this understanding largely hinders the potential for growth and development.

One of the business entities frequently chosen by entrepreneurs in Thailand is the “Limited Company” . This is because it can be formed with capital divided into shares held by investors as shareholders (minimum two ) and managed by directors (minimum one), who are mostly the owners of business idea. Regarding the limited characteristics of Start-up, although fundraising by issuing shares to the company may seem to be a suitable formula for the business model, but there are still many difficulties and restrictions prescribed by Thailand’s Civil and Commercial Code (the “CCC”), which are the main provisions regulating the management of limited companies.

### Characteristics of Start-up and relevant provisions: -

#### 1. Public Offering (PO)

<sup>1</sup> Nuchapong Samran, ‘Policy & Law to Support Startup in Thailand’ (2020) 4 Humanities and Social Science Academic Journal, University of Thai Chamber of Commerce 200, 200-203.

<sup>2</sup> Michael Doyle, Doyle’s Practical Guide to Thailand Business Law (5th edn, Seri Manop & Doyle, 2019) 3-5.

<sup>3</sup> Amendment to the Civil and Commercial Code Act (No.23) B.E. 2565 (2022), entry into force on February 2023.

Start-up entrepreneurs often acquire capital through fundraising, commonly known as “Crowdfunding”. This strategy involves obtaining capital from numerous non-bank investors who are interested in the idea or business model and willing to support Start-up operations. Crowdfunding is mostly provided via an online funding portal or other electronic network platforms, which would be easy and quick to get access to .

However, the Company Limited is prohibited by law for inviting the public to subscribe for shares (Section 1102 of the CCC) because, during the 1970s, Thailand faced the crisis of public cheating and fraud. For this reason, it led to the 1978 amendment to the CCC prohibiting any actions of invitation to the public for subscription of shares.

At present, the above-mentioned provision is the significant barrier to the improvement of Thailand’s Start-up ecosystem, in which many entrepreneurs and legal professionals are working towards amending this provision.

## 2. Employee Stock Owner Plan (ESOP)

ESOP, one of the major objectives for setting up Start-up, is the proprietorship of the employee, i.e., Start-up company can keep its shares and can provide them to its employee as one of incentives or remuneration for his/her dedication. However, these shares can be forfeited by Start-up company when such employee resigns. This process is called “Treasury Shares” as all shares will initially belong to Start-up company.

The main barrier to Treasury Shares is the law that prohibits a Limited Company from owning or taking a pledge of its own shares (Section 1143 of the CCC), whether it has received from a purchase or a transfer. Moreover, during the formation period of a Limited Company, all shares shall be completely subscribed for or allotted prior to the registration of the company (Section 1104 of the CCC). Consequently, Start-up cannot be the owner of its own shares and cannot decide whether to retain or provide shares to employees pursuant to the aforesaid provisions.

## 3. Convertible Debenture

Due to the fact that Start-up has been set up with limited resources, i.e., they do not have enough money to establish their own business, many Start-up entrepreneurs would frequently instead choose to use Convertible Debenture (or Convertible Bond) as

the option for repayment or set-off of the debt during the formation period. This option changes the creditor of Start-up to implicitly be the shareholder of the Limited Company.

However, the law still prohibits that the whole amount of every share must be paid in full, and in making payment on shares, a shareholder cannot make a set-off against the Limited Company (Section 1119 of the CCC). This provision negatively affects the cash flow of Start-up during such period.

#### 4. Change of rights on issued preference shares

Angel investors, the first group of investors who have a major impact during the time of setting up Start-up, often join with Start-up entrepreneurs with the agenda of influencing the business. If the business is operated successfully, it might be taken over by the investors. On the other hand, if the business falls down, they will not be responsible for any occurrences. The preference shares would be one of the options used by those investors to specify their rights and benefits in the Start-up company, such as the right to vote, or the right to receive priority dividends over the ordinary share, etc.

Although the aforesaid situation seems to be harmful for Start-up entrepreneurs, the law nonetheless states that no alteration of determined preferential rights of preference shares can be made (Section 1142 of the CCC). This provision places Start-up at high risk of being influenced by other parties.

#### 5. Sole Proprietorship

Regarding the characteristics of this type of business, Start-up has mostly been set up by a sole entrepreneur who has the idea, capability, and imagination to serve the daily life activities of humans.

However, the CCC does not allow a sole entrepreneur to set up the Limited Company. The Limited Company can only be formed by any two or more people as the "Promoters," who subscribe their names to a memorandum of association and perform other acts in accordance with the provisions of the CCC (Section 1097 of the CCC). Although many

entrepreneurs and lawyers attempt to propose the concept of the Sole Proprietorship, the law still prohibits the Company Limited from being formed by one entrepreneur.

The above-mentioned restrictions are some of the problems that occur in Thailand's legal system and rooted in the perception of Thai authorities, which cannot be solved overnight. Currently, the problems faced by Start-up are being discussed by the Council of State and we are waiting for further progress. We anticipate that there will be amendments to laws, especially to the CCC, to promote the operation of Start-up, which will have a positive impact on the country's economy.

Currently, numerous nations are fostering Start-up, for instance, the government of Singapore has numerous policies to support Start-up companies, including—but not limited to—offering entrepreneurs promotion programme referred to as "Startup SG Equity." This strategy benefits Singapore-incorporated Start-up businesses not only because Angel Investors invest in them, but also because the Singapore government offers support for investments in such potential Start-up, i.e., by investing in selected venture capital firms that will in turn invest into eligible Start-up, through a fund-of-funds approach, or holding the companies' shares as one of their shareholders alongside other private investors, etc.

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\*Startup SG Equity\* (2023) Startup SG, Singapore Government Agency Website: <<https://www.startupsg.gov.sg/programmes/4895/startup-sg-equity>>.

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