

Tilleke & Gibbins

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THAILAND LEGAL BASICS



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Investing in Thailand



PART 1

Starting a Business: A Guide for Multinational Corporations and Small and Medium Enterprises

This chapter provides an outline of the legal requirements for starting a business in Thailand. Other topics covered include choice of business type and issues concerning commencing a business such as land ownership and insurance.

Investing in Thailand

Part 1 – Starting a Business: A Guide for Multinational Corporations and Small and Medium Enterprises

Foreigners are generally permitted to start a business in Thailand, subject to the Foreign Business Act B.E. 2542 (A.D. 1999) (FBA). The FBA places restrictions on the types of business that may be conducted by foreigners, and provides licensing requirements for other types of businesses.

However, Thailand has several foreign investment schemes which operate as exceptions to the Foreign Business Act. The most notable of these schemes are administered by the Board of Investment and the Industrial Estate Authority of Thailand. Several free trade agreements also permit certain types of businesses to be undertaken by foreigners.

In Part 1 of the Tilleke & Gibbins guide to investing in Thailand, you will find information on:

- ▶ the requirements of the FBA and exception schemes;
- ▶ common business types and their set-up and licensing requirements;
- ▶ franchising arrangements; and
- ▶ land ownership by businesses.

1. Foreign Business Act

The most important law governing foreign direct investment in Thailand is the Foreign Business Act B.E. 2542 (A.D. 1999)—commonly called the FBA. The FBA reserves certain business activities for Thai nationals and limits the ability of foreigners to engage in those activities. Under the FBA, a company is considered “foreign” (sometimes translated as “alien” in other publications) if half of its shares or more are held by non-Thai natural persons or juristic persons.

The FBA has prescribed three categories of restricted businesses, laid out in schedules.

- **Schedule 1** covers businesses that are strictly prohibited to foreigners. The nine types of activities listed are:
 - Newspaper business, radio broadcasting, or television station business
 - Rice farming, farming, or gardening
 - Animal farming
 - Forestry and wood fabrication from natural forests
 - Fishery for marine animals in Thai waters and within Thailand specific economic zones
 - Extraction of Thai herbs
 - Trading and auctioning Thai antiques or national historical objects
 - Making or casting Buddha images and monk alms bowls
 - Land trading
- **Schedule 2** covers businesses that are prohibited to foreigners unless they receive permission to operate from the cabinet. Foreigners wishing to engage in one of the activities indicated in schedule 2 of the FBA must obtain permission from the minister of commerce with the approval of the cabinet. Foreigners may operate a business under schedule 2 only if Thai nationals or juristic persons not considered to be foreigners under the FBA hold shares of not less than 40% of the capital of that foreign juristic person. Unless there is a reasonable cause, the minister of commerce, with the approval of the Cabinet, may reduce the proportion requirement, but it shall not be less than 25%, and the number of Thai directors shall not be less than two-fifths of the total number of directors. If the cabinet approves the application, a permit will be issued within 15 days after approval has been granted. The minister may attach to it such conditions as imposed by the cabinet, or as stipulated by the ministerial regulations issued under section 18 of the FBA. The minister will issue a permit within 15 days after approval has been granted. The activities included on this list are:

Under the FBA, an alien or foreigner is:

- a. A non-Thai natural person.
- b. A legal person not incorporated in Thailand.
- c. A legal person incorporated in Thailand with at least half of its company shares held by persons under the two foregoing categories or a legal person with at least half of its total registered capital invested by such persons.
- d. A limited partnership or registered ordinary partnership, in which the managing partner or manager is a non-Thai natural person.

- **Group 1:** Businesses related to national safety or security
 - ▶ Production, sale, repair, and maintenance of:
 - firearms, ammunition, gun powder, and explosives;
 - accessories of firearms, ammunition, and explosives;
 - armaments, ships, aircraft, or military vehicles; or
 - equipment or components and all categories of war materials.
 - ▶ Domestic land, waterway, or air transportation, including domestic airline business.
- **Group 2:** Businesses affecting arts and culture, including traditional and folk handicraft:
 - ▶ Trading antiques or art objects that are Thai arts and handicrafts
 - ▶ Production of carved wood
 - ▶ Silkworm farming, production of Thai silk yarn, Thai silk weaving, or Thai silk pattern printing
 - ▶ Production of Thai musical instruments
 - ▶ Production of gold ware, silverware, nielloware, bronze ware, or lacquer ware
 - ▶ Production of crockery of Thai arts and culture
- **Group 3:** Businesses affecting natural resources or the environment:
 - ▶ Sugar manufacturing from sugarcane
 - ▶ Salt farming, including underground salt
 - ▶ Rock salt mining
 - ▶ Mining, including rock blasting or crushing
 - ▶ Wood fabrication for furniture and utensil production
- **Schedule 3** covers businesses that are prohibited to foreigners unless permission is granted by the director-general of the Department of Business Development (DBD). Foreigners seeking to perform a schedule 3 activity must apply for permission in accordance with regulations issued under section 18. The director-general will issue a permit within 15 days after permission has been granted. The director-general may attach conditions to it as imposed by any ministerial regulations issued under section 18.

Any foreign business licenses granted for businesses under schedules 2 or 3 may be accompanied by license conditions. Violation of the FBA is punishable by imprisonment not exceeding three years and/or a fine not exceeding THB 1 million. Further, the court shall order termination of the business operation, or dissolution of the business, or termination of the status of the shareholder or partner, as the case may be. In the case where the company commits the offense, the directors or persons authorized to act on behalf of the company who collaborate with it in committing the offense, or does not reasonably manage to prevent such offense, shall be subject to imprisonment not exceeding three years, or a fine ranging from THB 100,000 to THB 1 million, or both.

1.1 Exceptions to the Foreign Business Act

There are several exceptions to the Foreign Business Act which allow foreigners to conduct business which would otherwise be prohibited to a foreigner. The exceptions are derived from and found in the following:

1. Legislation establishing and regulating the Board of Investment (BOI)
2. Legislation establishing and regulating the Industrial Authority of Thailand (IEAT)
3. Treaties or free trade agreements

Foreign enterprises granted promotional privileges by the Board of Investment or the Industrial Estate Authority of Thailand are permitted to engage in certain business activities specified in schedules 2 and 3 of the FBA. The regulations issued thereunder and the administering government agencies determine which conditions may be fixed for qualifying businesses, such as minimum percentage of Thai ownership, amount of investment, permitted activities, etc. After the business has obtained approval from either of the above authorities, the business shall apply for a Foreign Business Certificate in accordance with the procedures stipulated by the director-general pursuant to section 12 of the FBA. The application process is an administrative rather than an approval procedure.

Board of Investment

Thailand was the first country in Asia to introduce investment promotion laws (tax and non-tax incentives) to encourage investors to invest in Thailand. Investment promotion laws were first enacted in 1954 and have been revised several times since then.

Under the Investment Promotion Act B.E. 2520 (A.D. 1977), the BOI—a policy-making body—was established to promote domestic and foreign investments considered important and useful to the country's economic and social development.

The privileges that the BOI offers are not absolute. The BOI still retains the right to stipulate certain conditions, such as amount and source of capital, nationality and number of shareholders, manpower training, and distribution of products, all of which investors must comply with to qualify for privileges.

The BOI has also published a list of activities that are eligible for promotion. The list covers mainly manufacturing and agricultural activities, but also includes mineral exploration, mining, service sectors, etc.

In granting privileges, the BOI does not discriminate between foreign and Thai investors. Under certain circumstances, however, the BOI may impose conditions on foreign investors who wish to enter into joint ventures with Thai investors.

Potential investors who wish to explore business opportunities in Thailand may contact the Investment Service Center for general or specific information and advice. The center also offers matchmaking services to both Thai and foreign potential investors who seek cooperation in technology, marketing, or joint venture partnerships.

A detailed manual on how to apply for investment promotion is available to assist investors in preparing their applications. The applications generally take 2-3 months to process. If an application is not approved, the applicant can appeal to the Secretary General of the BOI in writing within 60 days after receiving notification.

Industrial Estate Authority of Thailand

The Industrial Estate Authority of Thailand (IEAT) was established under the Industrial Estate Authority of Thailand Act B.E. 2522 (A.D. 1979). The IEAT is another agency that grants incentives to investment projects located in industrial estates. In addition to benefits from the industrial environment and infrastructure, promoted investors are granted special incentives and privileges including the right to own land in the industrial estate area, obtain work permits for foreign technicians and experts who work for the industrial operator, and take or remit foreign currency abroad. Industrial operators that are within the IEAT Free Zone are granted a number of additional tax-based incentives and privileges.

Treaty/Free Trade Agreements (FTAs)

At present, Thailand has entered into five treaties or FTAs with the United States, Australia, Japan, and ASEAN countries, which may allow their nationals to own more than 50% of some businesses in Thailand without being subject to a foreign business license under the FBA. These treaties and FTAs are discussed in more detail below.

Qualified investors wishing to operate a business in Thailand under a treaty or FTA must notify the director-general to obtain a Foreign Business Certificate in accordance with the rules and procedures stipulated by the Ministerial Regulations.

1.2 United States-Thailand Treaty of Amity and Economic Relations

The Treaty of Amity and Economic Relations B.E. 2509 (A.D. 1966) between the United States and Thailand allows certain businesses in which foreign ownership may exceed 50% to be exempt for the foreign business license requirements under the FBA. With respect to most businesses, the word “foreigner”, as used in the FBA, does not include American natural persons or American juristic persons who qualify for the privileges under the provisions of the Treaty of Amity. Under this treaty, an American-owned Thai company or branch office of an American company is permitted to do almost anything a Thai company does, except:

- own land;
- engage in the business of inland communications;
- engage in the business of inland transportation;
- engage in fiduciary functions;
- engage in banking involving depository functions;
- exploit land or other natural resources; or
- engage in domestic trade in indigenous agricultural products.

To receive protection under this treaty, the qualifying party must pursue the administrative processes to show registration thereunder. Although on paper the treaty appears self-executing, in practice, the Thai government will not recognize an American company or branch office until it is officially registered, as required by section 11 of the FBA.

A copy of the treaty can be found at the American Chamber of Commerce, the Commercial Affairs Section of the American Embassy, or at international law firms in Bangkok.

1.3 Australia-Thailand Free Trade Agreement

Thailand concluded FTA negotiations with Australia at the end of 2004 and the Australia-Thailand FTA was implemented in January 2005. Under the FTA between Thailand and Australia, an Australian-owned Thai company engaging in the following 12 businesses is permitted to have Australian ownership exceeding 50% without being subject to the foreign business license requirements of the FBA, according to the conditions stipulated under the FTA:

- Onshore and offshore mining
- Construction rendering basic services to the public in public utilities and transport requiring special tools, machinery, technology, or construction expertise
- Luxury hotel business
- Restaurant
- Advisor to regional operating headquarters
- Convention hall
- International exhibition center
- Wholesale and retail service relevant to the sale and installation of goods manufactured by an Australian-owned Thai company
- Higher education institution specializing in life sciences, biotechnology, and nanotechnology
- Amusement park and zoo
- Marine park
- Pier and anchor service for tourism ships

1.4 Japan-Thailand Economic Partnership Agreement

Thailand signed the Japan-Thailand Economic Partnership Agreement (JTEPA) in November 2007. Under the JTEPA, a Japanese-owned Thai company engaging in the following eight types of business is permitted to have Japanese ownership exceeding 50% without being subject to the foreign business license requirements of the FBA:

- Retailing business (except distilled alcohol) for products manufactured by the company or subsidiaries located in Thailand under the same brand or automobile products manufactured by subsidiaries in Japan under the same brand
- Wholesaling business (except distilled alcohol) for products manufactured by the company or subsidiaries located in Thailand under the same brand or automobile products manufactured by subsidiaries in Japan under the same brand
- Advertising business
- Hotel business
- Restaurant
- General management consultancy
- Logistics advisor (except transportation)
- Household electronic equipment repair and maintenance

1.5 ASEAN Comprehensive Investment Agreement (ACIA)

Thailand signed the ASEAN Comprehensive Investment Agreement (ACIA) in February 2009. Under the ACIA, a Thai company engaging in the following four businesses is permitted to have more than 50% of its ownership held by non-Thai ASEAN nationals without being subject to the foreign business license requirements of the FBA:

- Mining
- Production of flour from rice and economic plants
- Fishery (only in respect to the hatching and raising of tuna sea cage culture and certain types of spiny lobsters)
- Cultivation, propagation, or development of onions

1.6 ASEAN Framework Agreement on Services (AFAS)

Thailand signed the ASEAN Framework Agreement on Services (AFAS) in December 1995. Under the AFAS, as of May 27, 2016, a Thai company engaged in one of a list of 88 types of business, including the following, is permitted to have more than 50% of its ownership held by non-Thai ASEAN nationals without being subject to the foreign business license requirements of the FBA:

- Provision of legal services
- Provision of accounting services
- Provision of architectural services
- Provision of engineering services
- Advertising business
- Transportation business
- Construction
- Brokerage or agency business
- Retailing business
- Hotel business
- Other service businesses

1.7 Other Business Investment Treaties and Free Trade Agreements

While Thailand is not a signatory of the 1969 Vienna Convention on the Law of Treaties, it does comply with international laws and principles established by the Convention.

Thailand has also signed FTAs with other countries to establish economic relationships, attract foreign investors, and increase exportation opportunities. However, these FTAs do not allow foreign nationals to have foreign ownership exceeding 50% to engage in some businesses in Thailand which are restricted under the FBA without being subject to an alien business license under the Act.

Thailand has been working with other ASEAN member states to establish a free trade area with other countries such as India, China, Japan, South Korea, the European Union, and the Closer Economic

Relations Trade Agreement between Australia and New Zealand. The negotiations between ASEAN and each of these countries are expected to be concluded, leading to full FTAs, by 2020 at the latest.

Key Points on Starting a Foreign Business in Thailand:

- The Foreign Business Act restricts or prohibits foreigners from undertaking most businesses listed in schedules 1, 2, and 3 of the Act.
- Other businesses are subject to approval and/or licensing requirements.
- Exceptions operate under BOI, IEAT, treaties, and free trade agreements.

2. Forms of Business Organization

The principal forms of business organization under Thai law are:

- Sole proprietorship
- Ordinary partnership (unregistered)
- Ordinary partnership (registered)
- Limited partnership
- Representative office
- Regional office
- Branch office of foreign company
- Private limited company
- Public limited company
- Joint venture

A person, whether Thai or foreign, may engage in business in the form of a sole proprietorship, a partnership, a representative office, a regional office, a branch of a foreign corporation, a joint venture, or a limited company, provided the restrictions of the FBA are not breached.

2.1 Sole Proprietorship

With a sole proprietorship, all of a proprietor's assets (both business and personal) are subject to attachment or any other legal action, whether connected to the business or not. The sole proprietor must acquire a taxpayer number and a VAT certificate if applicable. Some sole proprietors are required to obtain a Commercial Registration Certificate at the Ministry of Commerce.

2.2 Partnership

In Thailand, three forms of partnership are permitted:

- An unregistered ordinary partnership
- A registered ordinary partnership
- A limited partnership

The types of partnership differ primarily in the liability of the partners.

Thai national partnerships, which are defined as partnerships with two Thai natural or juristic persons for each foreign partner, can engage in all forms of business. However, partnerships which have a foreigner as the managing partner or as the manager, or in which foreigners' investments amount to half or more of the total capital, shall be regarded as foreign partnerships, and are subject to the Foreign Business Act.

The three forms of partnership generally do not conform to the needs of most foreign investors. The Board of Investment does not promote partnerships, because businesses of this sort often conflict with the Foreign Business Act. Furthermore, changes in ownership and control may jeopardize the good standing of a partnership or its license.

Unregistered Ordinary Partnership

An unregistered ordinary partnership is one in which all partners are jointly liable for all of the obligations and debts of the partnership. It is not registered with the Ministry of Commerce.

This type of partnership is not a legal entity (juristic person), and the partnership (not the partner) pays taxes at the rates applicable to individuals. Under the Revenue Code, an unregistered partnership, although not a juristic person, is considered a separate entity for tax purposes. However, if a partner receives a salary, as opposed to a share of profit as a partner, then he or she would be liable for personal income tax on his or her salary. As the partnership is taxed as an entity, the partner would not have to pay tax a second time on his or her share of the profit.

Each partner must contribute money, property, or services to the partnership. If the partnership agreement does not fix the value of any services which it provides, it is presumed that the contribution of those services will be equal to the average shares from the other partners who contributed cash or other valuable properties.

Registered Ordinary Partnership

A registered ordinary partnership is registered with the Ministry of Commerce, which makes it a juristic entity with a separate and distinct personality from each of the partners. The partnership must be registered at the registration office of the district in which the principal place of business of the partnership is located, or at the DBD, Ministry of Commerce, in Bangkok.

All partners of a registered ordinary partnership are jointly and unlimitedly liable for all the obligations of the partnership. A registered ordinary partnership partner may pursue any claim of, or any right acquired by, the partnership against third persons, even if he or she did not actually participate in the transaction. A partner's liability for the partnership's obligations ceases two years after he or she leaves the partnership.

Limited Partnership

A limited partnership is one in which the individual liabilities of one or more partners are limited to their respective contributions, and one or more partners are jointly liable without any limitation for all of the obligations of the partnership.

A limited partnership must be registered at the registration office in the district where the partnership's head office is located. In Bangkok, this can be done at the DBD, Ministry of Commerce. Until it is

registered, the limited partnership remains an ordinary partnership for legal purposes, and all of the partners continue to be jointly and severally liable for all of the obligations of the partnership.

The firm name of a limited partnership may not contain the names of those partners with limited liability. If the names of partners with limited liability are included in the firm name, they become liable to third persons to the same extent as partners with unlimited liability.

The contributions of the partners with limited liability must be in cash or other valued properties. A limited partner cannot contribute services alone. No dividend or interest may be distributed to partners with limited liability except out of partnership profit. As a general rule, a limited partnership may only be managed by the partners with unlimited liability. A partner with limited liability who participates actively in the management of the partnership becomes jointly liable, without any limitation, for the partnership's obligations.

Conversion of a Partnership to a Limited Company

A registered partnership or a limited partnership that has three or more partners may be converted to a limited company after the following steps have been taken:

- All partners must give their written consent to the conversion, after which the registrar must be notified within 14 days.
- The intended conversion must be publicized at least once in a local paper.
- Forwarding notices must be given to all creditors of the partnership, informing them of the proposed conversion and requesting that concerned creditors forward their objections to the conversion, if any, within 30 days from the date on which the notices are given.
- If there are any objections, the partnership cannot be converted unless obligations to the objecting creditor have already been fulfilled or security provided to the objecting creditor.

All partners shall hold a meeting to give consent and carry out actions on the incorporation of a company (e.g., preparing a memorandum of association, fixing share capital which shall be equivalent to the share proportions of all partners in the partnership, fixing the amount of paid-up capital for each share, fixing the number and conditions of ordinary shares and preference shares, appointing directors, auditors, and other businesses, if any).

The managing partner shall hand over the business, properties, and accounting documents and evidence to the company's board of directors within 14 days from the date of the partners' meeting.

The company's board of directors shall apply to register the conversion to a limited company within 14 days from the date on which the managing partner completes the handover of the business, properties, and accounting documents and evidence to the company's board of directors.

Once the registrar has registered the conversion from registered partnership or limited partnership to a limited company, the conditions of the registered partnership or limited partnership shall come to an end and the limited company shall be entitled to all properties, debts, and liabilities of the former registered partnership or limited partnership.

2.3 Representative Office

A representative office is defined as an office in Thailand of a foreign company engaged in "international trading business." A representative office in Thailand cannot engage in any profit-seeking or profit-making enterprises. A representative office can only undertake certain approved activities. If it

undertakes activities beyond the scope of the approved list, the income of the parent or affiliated companies may be deemed to have been earned in Thailand, and will be subject to taxation.

International trading business means activities concerning:

- The finding of purchase sources by the head office or its affiliated group / companies.
- The checking and controlling of quality and quantity of goods purchased for manufacturing in Thailand by the head office or its affiliated group / companies.
- The provision of advice on various aspects concerning goods of the head office sold to agents or consumers in Thailand or its affiliated group / companies.
- The dissemination of information concerning new goods or services of the head office or its affiliated group / companies.
- The report of movements of business in Thailand to the head office or its affiliated group / companies.

A representative office that undertakes one or more of the approved activities in Thailand without rendering any service to any other person and refrains from prohibited activities is not subject to Thai taxation. Such a representative office is understood to be receiving a subsidy from the head office to meet its expenses in Thailand. Gross receipts or revenues which a representative office receives from the head office are not characterized as revenue to be included in the computation of juristic person income tax.

All representative offices are required to obtain a corporate tax identification number and submit income tax returns and audited financial statements to the Revenue Department. Representative offices are also required to submit income tax returns and audited financial statements to the Department of Business Development. All foreigners and local staff of a representative office are required to obtain taxpayer cards and pay personal income tax.

International trading business activities are regarded as a service activity under schedule 3 of the Foreign Business Act. A representative office carrying on one of these activities requires an alien business license from the Director-General of the Department of Business Development.

The representative office may not act on behalf of third parties. Any such business or income-earning activities could amount to a violation of the conditions of the license to establish and operate a representative office, which in turn could result in revocation of that license.

The application fee (nonrefundable) is THB 2,000. If the application is approved, a government fee will be charged at the rate of THB 5 for every THB 1,000 or fraction thereof of the registered capital, with a minimum fee of THB 20,000 and a maximum of THB 250,000.

2.4 Regional Office

A regional office means an office that is:

- established by a transnational corporation in a country other than the country of registration of the head office; and
- not registered as a juristic person under the laws of the country where the office is established.

A regional office is permitted to:

- contact, coordinate, and supervise on behalf of the head office the activities of branches and/or subsidiary companies located in the same region as the regional office; and
- provide services to the head office's branches and subsidiary companies with such services being advisory services, management services, training and personnel development services, financial management services, marketing control and sales promotion planning, product development, and research and development services.

While a regional office is permitted to engage in the above activities, the regional office cannot derive income from them. A regional office cannot accept a purchase order, make a sales offer, or negotiate or enter into any business arrangement with a person or juristic person in the country where the office is established. All expenditures incurred by the regional office in connection with the permitted activities must be borne by the head office. The head office will be the only source of funds.

The permitted regional office activities listed above are regarded as service activities under schedule 3 of the Foreign Business Act. Establishing a regional office therefore requires an alien business license from the director-general of the Department of Business Development.

Like representative offices, the regional office is required to obtain a corporate tax identification number and submit income tax returns and balance sheets, even if nil. Foreign individuals and all local staff are required to obtain taxpayer cards and pay personal income tax.

The application fee (nonrefundable) is THB 2,000. If the application is approved, a government fee will be charged at the rate of THB 5 for every THB 1,000 or fraction thereof of the registered capital, with a minimum fee of THB 20,000 and a maximum of THB 250,000.

2.5 Branch Office

A foreign company which plans to conduct business in Thailand, such as a contract project, usually establishes a branch office to undertake the project. There are no special registration requirements for the establishment of branches of foreign companies to do business in Thailand. However, most business activities fall within the scope of one or more laws or regulations which require special registration or licenses (e.g., VAT registration, taxpayer identification card, commercial registration certificate, foreign business license, etc.) before the activities commence. Foreign business establishments must therefore follow the generally applicable procedures. If the intended activity is restricted under the Foreign Business Act, the branch must apply for an alien business license prior to performing any of the intended activities.

2.6 Private Limited Company

Under Thai law, there are two types of limited companies—the limited public company and the limited private company. The formation of a private company is governed by the Civil and Commercial Code (CCC). According to the CCC, private limited companies are required to have a minimum of three shareholders at all times. The initial step in forming a private limited company is to reserve a name with the Department of Business Development and, if approved, file a memorandum of association. This must contain the following information:

- Name and location of the company
- Objectives of the company
- Amount of capital, divided into shares and par value

- Name, address, and occupation of each promoter (subsequently called shareholder), and number of shares subscribed by them

The government fee to register the memorandum is THB 500 per THB 1 million of the registered capital, with a minimum fee of THB 500 and a maximum of THB 25,000.

After the memorandum has been approved and all shares have been fully subscribed, the promoters are required to call a statutory meeting of the share subscribers to formally bring the company into existence. The statutory meeting determines the following:

- Articles of association (by-laws)
- Ratification of any contracts entered into and any expenses incurred by the promoters in promoting the company
- Remuneration, if any, to be paid to the promoters
- The number of preferred shares, if any, to be issued, and the nature and extent of the preferential rights
- Appointment of the initial director(s) and auditor(s) and determination of the respective powers of the directors

After the statutory meeting has been held, the promoters shall hand over the business to the director(s). The directors shall then have the promoters and subscribers pay not less than 25% of amount payable for the shares, after which the company is registered as a legal entity (or juristic person).

All steps, including the completion of necessary documents and having them duly signed by all promoters, directors, and shareholders, can be done in one day.

A Thai limited company is managed by a board of directors, which is appointed by the shareholders. Meetings of shareholders and directors must conform to the requirements set forth in the CCC or the company's articles of association. The CCC requires an annual general meeting of the shareholders to be held.

The government fee to establish a limited company is charged at the rate of THB 5,000 per THB 1 million of the registered capital, with THB 5,000 as the minimum and THB 250,000 as the maximum, not including miscellaneous certification fees and stamp duties.

2.7 Public Limited Company

A public limited company is governed by the Public Limited Company Act B.E. 2535 (A.D. 1992), as amended. A public limited company is a separate form of entity which is established for the purpose of offering shares for sale to the public. The rules and regulations concerning the procedure of offering shares for sale to the public are set by the Securities and Exchange Act B.E. 2535 (A.D. 1992) and the amendments thereto, under the control of the Securities and Exchange Commission.

The procedure for incorporating a public limited company is similar to that of a private limited company in registration requirements and shareholders' liability. However, some differences exist. A public limited company must:

- have at least 15 natural persons as promoters who are 20 years of age or over;
- have not less than half of the promoters domiciled in Thailand;

- have the promoters subscribe for shares which shall be paid up in money equal to not less than 5% of the total registered capital;
- have at least five directors, a majority of whom must be domiciled in Thailand;
- hold a meeting of the board of directors at least once every three months; and
- have greater flexibility in issuing securities of various kinds (e.g., debentures or warrants).

Conversion of a Private Limited Company to a Public Limited Company

A private limited company may be converted to a public limited company by passing a special resolution of the shareholders, as stipulated by the Civil and Commercial Code, at which time the following matters shall also be considered and/or amended:

- The memorandum of association
- The articles of association
- The appointment of a board of directors
- The appointment of an auditor
- Other matters as necessary for the conversion

A new board of directors consisting of not less than five members will be appointed. The board of directors of the private limited company shall hand over the business, properties, and accounting documents and evidences to the new board of directors within seven days from the meeting date and the new board of directors will be responsible for registering the conversion and submitting the required documents (e.g., minutes of shareholders' meetings and the approved company memorandum and articles of association) to the director-general of the Department of Business Development within 14 days of the date on which the special resolution was approved.

- Once the registrar has registered the conversion from a private limited company to a public limited company, the conditions of the private limited company shall come to an end and the public company shall be entitled to all properties, debts, and liabilities of the former private limited company.

2.8 Joint Venture

A Thailand limited company which is owned by two or more companies is often referred to as a joint venture. Conceptually, this type of limited company can be viewed as an incorporated joint venture, although this term does not appear in the Civil and Commercial Code or elsewhere in Thai law. However, unincorporated joint ventures are also prevalent in Thai law, and are the type of joint venture referred to below.

In a contracted project which cannot be carried out by a single company, it is common for a company to join with others in the form of a joint venture. A joint venture has no legal personality under Thai law. A joint venture is formed by contract between two legal persons (whether companies, juristic partnerships, or individuals), and exists only for a particular project or specific venture. Although it may engage in business, it cannot be registered. However, the Revenue Department treats a joint venture as a juristic company for purposes of tax liability. The joint venture must therefore apply for a taxpayer identification card. Moreover, Value Added Tax registration is required if a joint venture is qualified under the requirements of the Revenue Code.

A foreign company which participates in a joint venture is required to obtain an alien business license under the Foreign Business Act, if its intended activities are restricted under the FBA, and create a branch office in Thailand to engage in business as a partner of the joint venture. A foreign partner does not need to register for its own taxpayer identification card. However, the joint venture itself must still register. Registering the permit of the foreign partner and the taxpayer identification card of the joint venture takes about eight to ten weeks to complete.

The government fee, collected upon issuance of the business permit to the foreign partner, will be charged at the rate of THB 5 for every THB 1,000 or fraction thereof of the registered capital, with a minimum fee of THB 20,000 and a maximum of THB 250,000.

2.9 Registration Duties

An application to register a company must be filed with the Department of Business Development, Ministry of Commerce, if the principal registered office of the company is in Bangkok. If the registered office is outside of Bangkok, the application must be filed with the Provincial Registration Office in the province where the registered office is located.

Key Points on Choice of Business Structure:

- Each business structure has its own advantages and disadvantages. It is prudent to seek professional advice when deciding on a structure for your business.
- There are three different types of partnerships. The types of partnerships differ primarily in the liability of the partners.
- A representative office in Thailand cannot engage in any profit-seeking or profit-making enterprise. Activities which can be undertaken by a representative office are limited to approved activities.
- A regional office can contact, coordinate, and supervise the activities of branches and/or subsidiary companies located in the same region as the regional office, on behalf of the head office. It can also provide services to the head office's branches and subsidiary companies. A regional office cannot, however, derive income from these activities.
- The formation of a private limited company is generally the preferred structure for doing business in Thailand since shareholders' liability is limited (only to the amount remaining unpaid, if any, of the shares respectively held by them).

For further information on or assistance with insurance matters and corporate formation, please contact Tilleke & Gibbins at +66 2056 5555.

3. Franchising

Franchise agreements arise in many contexts in Thailand. Industry research indicates that there are currently more than 350 franchisors (majority foreign-owned) and more than 15,000 franchisees in Thailand. The most popular franchise operations, according to the Department of Business Development, occupy the food and restaurant sector, followed by services, education, and retailing.

While there are no specific regulations governing franchising in Thailand, the Ministry of Commerce regularly announces plans to commence drafting regulations, such as the Franchising Business Act. It is widely considered that Thailand may follow the China model as set out in the 2005 PRC Ministry of Commerce's Administrative Measures on Commercial Franchising and the subsequent 2007 Franchise Regulations. An important point to watch here will be whether Thailand follows the China model by requiring a franchisor to prove the viability of its business model by showing a track record of profitability at two or more outlets before selling a franchise contract to a franchisee.

Towards the end of December 2016, the Council of Ministers returned the draft Franchising Business Act to the legislators for further amendments over policy issues. At the time of writing, the act's first reading by the National Assembly has yet to be scheduled, and its promulgation is apparently not among the current government's priorities.

Franchise terms may be dictated by legislation, negotiation, or by practical considerations that have critical importance in Thailand. Specifically, although Thailand is generally a "freedom of contract" jurisdiction, some provisions are required in certain franchise agreements, while other terms are not permissible or advisable in such agreements.

3.1 Relevant National Legislation

No specific legislation offers a comprehensive guide to franchising in general. Instead, a franchise agreement in Thailand will generally need to conform to the following sources of law.

- Civil and Commercial Code
- Trademark Act B.E. 2534 (A.D. 1991), as amended by Trademark Act (No. 2) B.E. 2543 (A.D. 2000) and Trademark Act (No. 3) B.E. 2559 (A.D. 2016)
- Patent Act B.E. 2522 (A.D. 1979), as amended by Patent Act (No. 2) B.E. 2535 (A.D. 1992) and Patent Act (No. 3) B.E. 2542 (A.D. 1999)
- Copyright Act B.E. 2537 (A.D. 1994), as amended by Copyright Act (No. 2) B.E. 2558 (A.D. 2015) and Copyright Act (No. 3) B.E. 2558 (A.D. 2015)
- Trade Secrets Act B.E. 2545 (A.D. 2002), as amended by Trade Secrets Act (No. 2) B.E. 2558 (A.D. 2015)
- Unfair Contract Terms Act B.E. 2540 (A.D. 1997)
- Trade Competition Act B.E. 2542 (A.D. 1999)
- Act Relating to Price of Merchandise and Service B.E. 2542 (A.D. 1999)
- Revenue Code B.E. 2481 (A.D. 1938)

Each act cited above is implemented by a set of Ministerial Regulations, and they each touch on only a few basic aspects of franchise arrangements. The parties must therefore negotiate most of the terms of a given agreement. A deal between parties of equal bargaining power will generally not be disturbed by the Thai courts unless there is a clear public policy reason to do so.

3.2 Basic Premises

A franchise agreement must protect the rights of the franchise system. There is, however, no absolute requirement that the agreement must be truly balanced.

There are two basic issues to be considered with a franchise agreement:

1. How much protection is required for the franchisor to achieve the desired result?
2. To what extent should market/commercial considerations affecting franchise sales and the past success of the franchisor's business model be taken into account in building the franchise agreement?

Franchising in its infancy was often built on very short basic contracts. The earliest known agreements in franchise operations, such as those of Kentucky Fried Chicken and Dairy Queen, were based on one-page agreements. With added complexity (and less trust), the agreements have required more comprehensive treatment. Territoriality, supply requirements, technology, genetically modified food, e-commerce, third-party guarantee, unfair competition—all of these factors have created the need for contractual controls never before imagined when franchise systems were first created.

In certain situations, a franchisor must be reasonable in setting terms, or the term may be held to be unenforceable as an unfair limitation on competition. For example, in the context of a franchising arrangement involving use of technology, a “tying arrangement” may be prohibited under the Ministerial Regulations B.E. 2540 (A.D. 1997) dated February 14, 1997, issued under the Copyright Act B.E. 2537 (A.D. 1994). In a tying arrangement, the franchisor establishes a requirement that the franchisee must purchase materials from the franchisor (or his or her agent) for use in the production of a particular item. This type of tying arrangement might be seen as anticompetitive and might be unenforceable.

For further information on permissible terms in franchise agreements, please see the section on **Unfair Contract Terms** and **Consumer Protection**.

3.3 Trademark Licensing and Franchising

In the franchising context, very often, one of the most important components of the franchise is the trademark portfolio of the franchisor. Trademarks and branding are always associated with the notion of quality control and serve as an indicator to the consuming public that goods or services bearing a particular trademark will have a consistent level of quality, no matter when or where the goods and services are purchased.

The rights to a trademark application or registered trademark are transferable and inheritable. The proprietor of a registered trademark may grant a license to other persons to use it for any or all of the goods for which it was registered.

The use of the trademark or service mark by the licensee will be deemed as use of the mark by the licensor, which can be raised as a defense in the event of a cancellation action for non-use. Both the licensor and the licensee may take action against infringers, although the licensee's ability to take action is restricted by the terms of the agreement. Since Thailand is a freedom of contract jurisdiction, the contracting parties can adopt any terms or conditions they deem appropriate and agreeable concerning the ability to take action, as long as the terms and conditions are not expressly prohibited by law, are impossible, or are contrary to public order or good morals.

Trademark License Agreements

The license agreement may either be contained within the franchise agreement or it may be a separate stand-alone agreement. According to the Notice of the Department of Intellectual Property B.E. 2543 (A.D. 2000), a trademark license agreement shall at least provide:

- conditions and terms of the agreement between the trademark proprietor and the person applying to be an authorized licensee which enable the former to control the quality of the goods manufactured by the latter;
- the goods for which the licensed trademark is to be used; and
- provisions specifying that only the authorized licensee has the right to use the trademark, or that the proprietor shall authorize any person in addition to the authorized licensee to use it.

A trademark license agreement must be in writing and registered with the Trademark Office Registrar of the Department of Intellectual Property. Trademark or service mark license agreements are governed by the provisions of the amended Trademark Act (sections 68 to 79/1), the Ministerial Regulations, and the general laws of contract under the Civil and Commercial Code. A trademark shall be deemed as registrable if it is distinctive, not forbidden under the Act (essentially, nothing making reference to the monarchy of Thailand and no official emblems or documents), and not identical or similar to those already registered by others. The registrar may issue an order accepting the license agreement, imposing conditions or limitations as he deems suitable for the wellbeing of the public.

The quality level indicated in the agreement enables the licensor to monitor and control the quality of the goods manufactured or of the services rendered by the licensee. Registering a trademark allows the owner to have exclusive right to the use of the mark in respect to the goods or services registered and to prevent any unauthorized use of an identical or confusingly similar mark. A license to use a registered trademark allows the licensee to use the mark without subjecting himself or herself to infringement liability.

For further information regarding trademarks, please see the chapter on [Protecting IP in Thailand](#).

3.4 Patents and Franchising

Another important component of the franchise is the franchisor's patented technology. In Thailand, the law of patents is primarily enshrined in the Patent Act B.E. 2522 (A.D. 1979), as amended, together with various ministerial regulations. Section 41 of the current Patent Act contains a mandatory requirement that a patent license agreement should be similarly registered with the Department of Intellectual Property.

The requirements to register patent licenses are as onerous as those applicable to trademarks, and the foregoing discussion in relation to trademark requirements can be equally extended to patents (i.e. failure to comply with the registration requirement renders the agreement unenforceable, pursuant to section 152 of the CCC). Similarly, there is no clear definition as to what will be regarded as a patent license—presumably, any contractual relationship which contains provisions directed to the license of any of the rights conferred on a Thai patentee. In theory, a technology transfer agreement that incorporates license provisions for know-how plus exclusive rights under a patent would be liable to registration.

One major area where patent licenses may be subject to even greater scrutiny than trademarks before being permitted to be registered is in the area of competition law. There are certain procedural hurdles to be surmounted in the registration process. It is a requirement under section 39 of the Patent Act and Ministerial Regulation No. 25 B.E. 2542 (A.D. 1999), issued on September 24, 1999, that the license agreement does not contain any provisions that unfairly restrict competition; hence, upon receipt of the application for registration, the patent examiner will examine the license agreement to ensure that it does not contain any anticompetitive provisions. The presence of such anticompetitive provisions will have the effect of barring the agreement from registration.

The 1999 ministerial regulation further explains the various prohibited restrictions. There are now categories of restricted provisions: a type of “gray list” of provisions that may be prohibited, and a “black list” of provisions that are entirely prohibited with no chance of exception.

Provisions That May Be Prohibited – the ‘Gray List’

In respect of the gray list, it is within the purview of the director general of the Department of Intellectual Property to analyze the agreement to determine if there is an unauthorized unfair restriction. The director general will consider “the object or intent of the parties” as to whether they intended to cause unfair practice or not, including the result which may occur. Therefore, there is scope for a certain “rule of reason” type of approach to be employed in the analysis of the relevant patent license and its background. The gray list generally may include such questionable activities as tying obligations, obligations on the licensee to hire specific persons for production of the invention except where the person to be hired is required to work the patent, and restrictions on sales and distributions and production quantities. Resale price maintenance and unfair royalty rates are also open to scrutiny.

Provisions That Are Prohibited – the ‘Black List’

“Black list” clauses are anticompetitive and their presence in a patent license will automatically cause the registration of that license to be refused. There is no opportunity for the director general to apply a rule of reason analysis to clauses such as these. These clauses include the following.

- Requiring the licensee to use another patent/technology of the licensor upon payment of a royalty, except where it can be shown that this additional patent is required so that the product to be produced by the licensee under the patent conforms to the invention in the main licensed patent (form of tie-in).
- Prohibiting the licensee from challenging the validity of the licensed patent of the licensor.
- Requiring the licensee to disclose and allow the licensor to take advantage of improvements which the licensee has made without suitable remuneration.
- Requiring that royalties be paid after expiration of the patent.
- Requiring the licensee to act in a manner that has been determined by the courts or other competent competition law officials to be anticompetitive.

3.5 Trade Secrets and Franchising

Trade secrets in Thailand are protected under the amended Trade Secrets Act B.E. 2545 (A.D. 2002) (TSA). The TSA contains provisions to protect against unauthorized disclosure of trade secrets, including a framework that enables the court to issue injunctive relief against disclosure of trade secrets.

A franchisor must be vigilant to identify and carefully control the use and disclosure of its proprietary trade secrets, such as secret know-how, formulas, recipes, inventions, client lists, and sales data. This can be done either in a separate nondisclosure or confidentiality agreement or with an airtight confidentiality provision within the franchise agreement itself, or preferably both.

The TSA provides for broad protection and severe penalties for trade secret infringement. However, one can only resort to the TSA for enforcement purposes if careful steps have been taken (and can be demonstrated) to maintain the secrecy of whatever proprietary information is in dispute. The expansion of such protection should be viewed as a benefit for a trade secret owner in seeking remedial action for unauthorized disclosure of secrets.

3.6 Recent Legal Updates

The Act Amending the Civil and Commercial Code (No. 20), B.E. 2557, effective from February 12, 2015, has amended the previous sections for suretyship. The new provisions require a creditor to send notice to the guarantor within 60 days from the date of default of the debtor and the guarantor's obligation to pay will begin only on actual receipt of the notice. This amendment is important to note as on expiry of the 60 day period the guarantor is no longer obligated to pay interest chargeable after this period. This essentially puts the burden on the creditor to ensure adequate notice is sent to the guarantor, failing which, the creditor will forfeit its right to pursue the guarantor for payment of interest, cost and expenses incurred after the 60 day notice period.

Furthermore, the new law requires guarantees to clearly specify the duration and amount of guaranteed obligations and also to specify the main agreement which is being guaranteed. The provisions also state that a creditor cannot require a guarantor to be jointly liable with the debtor, and any provision purporting to do so would be void. There are also new additional requirements regarding specific terms which must be included in the agreement between debtor and guarantor.

For further information on trade secrets, please see the chapter on **Protecting IP in Thailand**.

4. Land Ownership

Under the Land Code, foreign individuals and foreign companies are prohibited from owning land in Thailand. There are, however, a number of exceptions:

- Companies where foreigners hold no more than 49% of the total issued shares
- Residential land of up to one rai in certain circumstances (please see the section on **land ownership** in the chapter on *Living in Thailand* for more information)
- Concessions/special privileges granted to foreigners from the Board of Investment (BOI), the Industrial Estate Authority of Thailand (IEAT), petroleum concessions, or other specific laws.

In addition to the above exceptions, foreigners are allowed to own buildings constructed on leased land and own condominium units, and they are allowed to lease land and buildings.

4.1 Land Ownership by Majority Thai-Owned Companies

A company will be regarded as a "Thai" company and may own land in Thailand if no more than 49% of the total issued shares in the company are held by foreigners, and the majority of shareholders are Thai. By internal policy of the Land Office, officials may investigate a land purchase transaction if a buying company has foreign shareholders or directors to make sure it is not an attempt to circumvent the prohibition against foreign land ownership.

4.2 Foreign Land Ownership Restrictions

Foreigners (individuals or companies) are generally not allowed to buy or hold land unless they obtain permission from concerned governmental authorities; permission will not be granted unless the foreigners obtain promotion from the BOI or the IEAT or obtain permission under other specific laws. A foreigner may obtain the rights to land under the following laws:

- Land Code Amendment Act (No. 8) B.E. 2542 (A.D. 1999), section 96 *bis*:

- The provisions governing the acquisition of land by foreigners by virtue of treaty under the Land Code Amendment Act do not apply to foreigners who have brought in money for investment in an amount fixed in the Ministerial Regulations. The investment amount must be over THB 40 million, the land must be less than one *rai*, and permission must be obtained from the Minister.
- The acquisition of land by foreigners shall be per the bases, procedures, and conditions prescribed in the Ministerial Regulations (please see the section on **land ownership** in the chapter on *Living in Thailand* for more information).
- The Ministerial Regulations must include the following:
 - ▶ Category of business invested by the foreigners which must be beneficial to the country's economy and society, or which must be a business prescribed by the BOI as a business that may apply for investment promotion under the law governing investment promotion.
 - ▶ Period of time for maintenance of the investment, which must not be less than three years.
 - ▶ The area permitted to be acquired by the foreigners must be within Bangkok, Pattaya City, or municipalities or areas designated as residential zones under the law governing city planning.
- Investment Promotion Act B.E. 2520 (A.D. 1977), Section 27:
 - A promoted entity is permitted to own land required for the promoted business in such size as the BOI may prescribe, even if it exceeds the limit prescribed under other laws.
 - In case a promoted entity that is a foreigner under the Land Code dissolves or transfers the promoted business, the promoted entity shall dispose of the land which it has been permitted to own within one year from the date of the dissolution or transfer thereof. Otherwise, the Director-General of the Land Department shall have the power to dispose of said land under the Land Code.
- Industrial Estate Authority of Thailand Act B.E. 2522 (A.D. 1979), Section 44:
 - Industrial operators and operators of trading for export may be permitted to own land in an industrial estate or in an export industrial zone, whichever the case may be, for the operation of business in an area deemed reasonable by the Board, even though it may exceed the limit fixed under other laws.
 - In the event of an industrial operator or an operator of trading for export who is a foreigner having dissolved his or her business or having transferred his or her business to other persons, the industrial operator or the operator of trading for export shall sell the land over which he or she was permitted to hold ownership and the land's appurtenances to the IEAT or the transferee, whichever the case may be, within three years from the date of dissolution or transfer of business. Otherwise, the Director-General of the Land Department shall sell the land and appurtenances to the IEAT or any other person under the Land Code.
- Financial Institution Business Act B.E. 2551 (A.D. 2008):
 - Under Section 4 of this Act, financial institution business means commercial bank business, finance business, credit foncier business, or specialized financial institution business. Commercial bank means a public limited company licensed to undertake the business of commercial banking and includes retail banks and branches of foreign banks licensed to carry on such business.
 - Under Section 80 of the Act, no financial institution shall purchase or permanently hold immovable properties except:

- ▶ For use as premises for the business of the commercial bank or as facilities for its officers and employees, with the approval of the Bank of Thailand. Such approval may be granted with any condition;
 - ▶ Those acquired as a result of a debt settlement or a guarantee in respect of credit granted or as a result of the purchase of an immovable property mortgaged to the financial institution at an auction conducted pursuant to an order of a court or an official receiver, but such immovable property must be sold within five years from the starting date of ownership by the financial institution. In necessary cases, the Bank of Thailand may extend the period for selling such immovable property with any condition; and
 - ▶ Immovable property that a finance business engaging in the business of finance for housing or a credit foncier business purchases or holds to engage in its business according to the regulation prescribed by the Bank of Thailand.
- Petroleum Act B.E. 2514 (A.D. 1971), Section 65:
 - For the purpose of conducting petroleum operations, the Petroleum Committee shall have the power to permit the concessionaire to own land to such extent as it is necessary for the petroleum operations, even in excess of the limits permissible under other laws.

4.3 Building Ownership

Foreigners (individuals or corporations) may own buildings constructed on leased land, because there are no restrictions on building ownership. Foreigners may therefore lease land and own a constructed or bought building situated on the leased land.

4.4 Condominium Ownership

Under the Condominium Act, certain groups of foreigners (both juristic persons and individuals) may purchase and own condominium units in Thailand, provided that foreign ownership in a given condominium project does not exceed, in aggregate, 49% of the total area of all condominium units in the condominium project, and the foreign purchaser presents the requisite documents/evidence as specified by the Department of Land.

A foreign company may hold ownership in a condominium unit, provided that they meet the following qualifications:

- Foreign majority-owned companies that are registered as juristic persons under Thai law. One of the most important documents required is a certificate of registration issued by the Ministry of Commerce.
- Foreign juristic persons that bring foreign currency into Thailand or withdraw money from a Thai Baht account of a nonresident, or withdraw money from a foreign currency account to pay for the purchase of condominium units. The documents required are evidence of bringing foreign currency into the Kingdom, or evidence of withdrawal of money from a Thai Baht account of a nonresident or withdrawal of money from a foreign currency account in an amount not less than the price of the unit to be bought.

For information on private land ownership and condominium ownership,
please see the chapter on **Living in Thailand**.

4.5 Lease Options

Under the Civil and Commercial Code of Thailand, the maximum duration of a lease of immovable property is 30 years with an option to renew for another 30 years. However, the Act Governing Leasing of Immovable Property for Commercial and Industrial Purposes B.E. 2542 (A.D. 1999) provides for lease options for commercial or industrial purposes. The lease period is fixed at 30 to 50 years. The lease can be renewed for a further period of not more than 50 years. A lease of this type, and the renewal thereof, must be made in writing and registered with the competent officer; otherwise, it shall be void.

The registration of a lease under the act, the category of commerce and industry which may lease the immovable property, and the use or change of category of use of the leased property shall be subject to the bases, procedures, and conditions prescribed in relevant ministerial regulations. The following material conditions are currently in force, as specified in the Ministerial Regulations B.E. 2543 (A.D. 2000):

- A lease for commercial or industrial purposes may be registered only for commerce with investment of not less than THB 20 million, or for an industry that is permitted to apply for investment promotion under the law governing investment promotion, or commerce or industry that is beneficial to the economy and society of the country as announced and published by the minister with the approval of the cabinet.
- The immovable property, the lease of which is to be registered under the act, shall be located within an area designated to be land of commercial or industrial category under the law governing city planning, or an industrial estate area under the law governing the IEAT.
- The category of commerce or industry, the lease of which may be registered by a foreigner under section 97 of the Land Code, must be listed as one which foreigners are entitled to operate under foreign business law.
- The applicant shall submit an application together with supporting documents and evidence as prescribed in the ministerial regulations, such as a work plan, environmental impact assessment report, certificate from the Provincial City Planning Office or IEAT, permission from related government authorities, and, if the applicant is a foreigner under section 97 of the Land Code, evidence of bringing foreign currency into Thailand, or evidence of a foreign currency deposit account, or evidence of a Thai Baht account of a non-resident.

The right of lease under the Act may be used as a security against the debt repayment by mortgaging and may be inherited by the heir. The lessee may sub-lease or transfer the right to lease, either wholly or partly, to a third person, except where it is stated otherwise in the lease agreement.

Additionally, leasing land that totals an area exceeding 100 *rai* requires approval from the director-general according to the bases, procedures, and conditions prescribed in Ministerial Regulation No. 2 B.E. 2543 (A.D.2000), which specifies that the lease of land for commercial or industrial operation of an area exceeding 100 *rai* shall be subject to any of the following bases:

- Being used for the operation of a business that increases the value of exports or supports employment in the country.
- Being used for the operation of a business that does not yet exist in Thailand, or does exist but in insufficient quantities.

- Being used for the operation of a business with modern manufacturing processes or a business that involves development of technology.
- Being used for the operation of a business that is highly beneficial to the economy and society of the country, as announced and published by the minister with the approval of the cabinet.

For more information on private leases, please see the chapter on **Living in Thailand**.

Key Points on Land Ownership by Corporations:

- A company will be regarded as a “Thai” company and may own land in Thailand if foreigners hold no more than 49% of the total issued shares in the company and the majority of shareholders in the company are Thai.
- Foreigners (individuals or companies) are not allowed to buy or hold land unless they obtain permission from the relevant governmental authorities under specific laws.
- Foreigners (individuals or companies) may own buildings constructed on leased land.
- Qualifying foreigners (individuals or companies) can own condominium units provided that no more than 49% of the total area of all condominium units in the condominium project is foreign owned.
- Foreigners (individuals or companies) may lease land for more than 30 years, but no more than 50 years for commercial or industrial purposes.

For further information on land ownership by corporations or assistance with corporate property transactions, please contact the Tilleke & Gibbins Property Practice at +66 2056 5555.



PART 2

Commercial Transactions & Corporate Conduct

This chapter sets out the standards of conduct required of businesses in Thailand. Topics covered include regulation of trading activities and transactions and corporate responsibility.

Investing in Thailand

Part 2: Commercial Transactions & Corporate Conduct

The business climate in Thailand continues to be positive and welcoming to foreign investment. Currently, deregulation and trade liberalization are taking place on many fronts, driven partly by Thailand's participation in the Association of Southeast Nations (ASEAN) Economic Community. Ultimately, this should result in freer movement of goods, services, capital, and natural persons. Changes can already be seen, such as in the elimination or substantial reduction in tariffs on many goods originating from ASEAN member states and harmonization of securities regulations.

In this chapter, you will find information on:

- ▶ protection of consumers and other businesses through price controls and consumer protection legislation; and
- ▶ corporate responsibility requirements in Thailand, including environmental responsibility.

5. Engaging in Trade

5.1 Contracts

Thai law allows persons to freely enter into contractual agreements which establish the rights and obligations of the parties involved. The general legal requirements for contracts are contained in the Thai Civil and Commercial Code (CCC). Restrictions on certain types of contracts or certain terms can be found in the CCC and the Unfair Contract Terms Act B.E. 2540 (A.D. 1997), among other laws and regulations.

General Requirements for a Valid Contract

The CCC, Book II, Title II, provides the basic elements of formation and effect of contracts. The CCC also includes rules on earnest and stipulated penalties and rescission of contract. The CCC Book III also provides requirements for several specific types of contracts (such as contracts for sale, hire, mortgage, and insurance). The requirements of the CCC are largely similar to the law of contracts in other countries/jurisdictions.

Generally, a contract is an act made by two or more parties expressing their intention to have a legally binding agreement between themselves. An act is void under the CCC if its object is expressly prohibited by law, is impossible, or is contrary to public order or goods morals. Contracts do not have to be in a particular form, unless the law provides otherwise. As such, a contract which is not in a form prescribed by law is void (e.g., the sale of immovable property must be in writing and registered with the competent officials, a share transfer document must be signed by the transferor and transferee and signed by at least one witness etc.). Therefore, a contract which is prohibited by law, is impossible, is contrary to public order or good morals, or is not in the form prescribed by law will be void.

Contract Terms

The principle of freedom of contract is recognized under the CCC and by the Thai courts, provided that the terms and conditions agreed upon by the contracting parties are not contrary to the public order or good morals of Thailand and are not otherwise illegal.

When drafting a contract, it is customary to put all necessary terms in writing. A verbal contract is recognized by Thai law, but due to the certainty provided by a written document, written contracts are preferred and recommended. Common terms which should be considered include:

- Names of parties
- Finance terms and payment
- Termination
- Liabilities and penalties
- Choice of laws and jurisdiction

Special clauses may be needed, such as those relating to price escalation, environmental issues, insurance, and arbitration. Some contracts (such as international sale and purchase contracts) may include the International Commercial Terms (INCOTERMS). INCOTERMS are published by the International Chamber of Commerce and are designed to delineate the allocation of risk and certain duties for sale of goods agreements. It is important that the parties know and understand the meaning of the general standard and commercial conditions under the INCOTERMS before the contract is

executed. Once they are adopted and incorporated into the contract by the parties, they will be binding, regardless of whether or not both parties are aware of and understood their meaning .

INCOTERMS are a set of trade terms and conditions used internationally by those selling or buying goods and commodities across borders. They were created by the International Chamber of Commerce and approved by the United Nations in 1936. The mandate behind the project was to create a language of trade terms and laws that every nationality could use and understand, making the exchange of goods and payment easier.

INCOTERMS are included in a contract in order to eliminate possible misunderstandings between importers/exporters and buyers/sellers. However, special provisions can override INCOTERMS, and the use of such terms does not necessarily guarantee a legal position.

Before finalizing any contract in Thailand, financing and payment procedures should be scrutinized.

The contract should include a dispute resolution clause to protect the parties in the event of a dispute arising. Thai law permits parties to an agreement to determine which country's law will govern their substantive obligations. Generally speaking, parties are free to select the law of another jurisdiction. The Thai courts will enforce any terms and conditions governed by foreign law, unless such law is contrary to Thai concepts of public order or good morals. In practice, evidence of such laws would need to be submitted to the relevant court. If the laws of other countries are proven to the satisfaction of the Thai courts, and

they do not offend the Thai concepts of public policy or good morals, the tribunal may apply them. Should evidence of such laws not be submitted, or if they are not applied for any reason, Thai law will be applied.

Thai courts do not, under any circumstances, enforce the judgments of foreign courts. The Thai courts may, at their discretion, allow foreign judgments to be admissible as evidence in any legal proceedings in Thailand, when re-trying an entire case on its own merit.

For further information on enforcing a contract in a Thai court, please see the chapter on **Litigating in Thailand**.

Unfair Contract Terms

In principle, the Unfair Contract Terms Act B.E. 2540 (A.D. 1997) addresses certain contractual terms that may be regarded as "unfair." The purpose of the Unfair Contract Terms Act is to protect the interests of contractual parties who have a weaker bargaining position. When a contractual term is deemed unfair, the Unfair Contract Terms Act may limit its operation. The Unfair Contract Terms Act empowers courts to order that terms deemed unfair shall be enforceable only to the extent that they are fair or reasonable, according to the circumstances.

The Unfair Contract Terms Act is applicable only to contracts executed after May 15, 1998. All such contracts are immediately subject to the act. Any contract terms that purport to prohibit the applicability of the act, whether wholly or in part, are void.

The following situations are examples of when the Unfair Contract Terms Act would be relevant:

- Consumer contracts involving delivery of property

Consumer contracts governing the payment of a debt through the delivery of real property to a consumer by a trading company or professional business operator may not contain terms exempting or restricting the liability of the trader or professional business operator for a defect of the property (or for eviction therefrom). However, if the consumer was aware of the defect at the time of entering into the contract, terms can exempt liability if it is fair and reasonable to do so in the circumstances.

- Standard-form contracts

Standard form contracts which are prescribed by one party and which give that party certain advantages are considered unfair. In case of doubt, the contract will be interpreted in favor of the party who did not prescribe the contract.

- Contracts for sale with right of redemption

The terms of contracts which, among other things, fix the redemption price to be higher than the selling price plus interest at a rate exceeding 15% per annum are considered unfair.

- Hire-purchase contracts

Contracts that prescribe an excessive hire-purchase price or unduly burden the hire-purchaser are unfair.

- Credit card agreements

Credit card agreement terms that obligate a consumer, in default of payment obligations, to pay unreasonably high interest, penalties, expenses, or other benefits are unfair.

- Employment contracts and covenants not to compete

Terms which infringe on a person's right to enter into juristic acts and unreasonably restrict a person's right and/or freedom to pursue his or her profession or trade are unfair. In determining whether terms limiting a person's professional pursuit are unreasonable, the court is to consider the type of profession being restricted, the length of time of the restriction, and whether the party being restricted has other available occupational opportunities, along with other factors.

Other terms deemed to be unfair under the Unfair Contract Terms Act are terms that:

- exempt or restrict liability arising from breach of contract;
- allow contract termination without reasonable grounds or without any material breach by the other party;
- force one party to shoulder more obligations and/or liabilities than those prescribed under the law;
- allow one party to delay or not to comply with its contractual obligations without reasonable grounds;
- allow one party to enforce further obligations upon the other party than those agreed to on the date of contract execution;
- prescribe a method of compound interest computation that causes the consumer to shoulder an excessive burden;
- allow for confiscation of deposits that are excessively high in relation to the damages arising/resulting from a contract under which said deposit was placed, in which case the court will have the power to reduce the confiscation level to that of the actual damages incurred; or
- constitute terms, notices, or statements made in advance that restrict or exempt liability for infringement or breach of contract with respect to injury to life, body, or health of a third person caused by a deliberate or negligent act committed by the party who sought to restrict or be exempt from such liability, or by other persons to whom said party must also be liable. These terms, notices,

or statements will be considered ineffective, as will agreements or consents of the injured parties restricting or exempting the liability for wrongful acts arising from unlawful action contrary to public order or good morals.

The Unfair Contract Terms Act gives the courts great discretionary power in determining whether contract terms are unfair and unreasonable. The act does, however, provide general guidelines under which the court is to consider whether certain terms are unfair or unreasonable. For example, the court is to consider:

- the time and place of executing or performing the contract;
- whether one party shoulders a much heavier burden than the other;
- the normal practice within the industry concerned; and
- the integrity, bargaining power, economic positions, and adeptness of the parties.

The Unfair Contract Terms Act allows for the use of expert testimony during court hearings.

Guidelines for Specific Contract Types

The law regarding most contract types can be found in the CCC. The CCC Book III provides requirements for several specific types of contracts. Generally, an act or juristic act does not have to be in a particular form unless the law provides otherwise. As such, an act or juristic act which is not in the form prescribed by law is void. Act or juristic acts with special requirements as to form can generally be placed into the following four categories:

- Acts or juristic acts that must be made in writing and registered with a competent official
These acts or juristic acts include, among other things, the sale of immovable property, sale with right of redemption, exchange, gift, mortgage, company memorandum of association, etc.
- Acts or juristic acts that must be made with a competent official
These type of acts or juristic acts include, among other things, a protest against non-payment of a bill of exchange, a will as a public document, a verbal will, a will as a secret document, etc.
- Acts or juristic acts that must be registered with a competent official
These types of acts or juristic acts need not be made in writing, but they must be registered with competent officials. These juristic acts include, among other things, registration of ordinary partnerships, registration of limited companies, registration of marriages, registration of divorces, etc.
- Acts or juristic acts that must be made in writing, but do not need to be registered with a competent official
These acts or juristic acts include, among other things, a letter of acknowledgement of debt, transfer of claims, a written instrument representing a gift, a hire-purchase, an agreement with respect to computation of compound interest, a share transfer document, a pre-nuptial agreement, etc.

Additionally, some types of contract are subject to further legal restrictions under different legislation, provided that the validity or enforceability of acts or juristic acts will be principally governed by the principle of contracts under the CCC.

Contracts with the government

Generally, contracts entered into with a government entity (e.g., ministry, department, state enterprises, etc.) would be subject to special requirements.

Under the Budget Procedures Act B.E. 2502 (A.D. 1959), as amended, state enterprises include the following:

- a) Government agencies or organizations owned by the government.
- b) Limited companies or registered partnerships of which more than half of the shares in the capital are owned by an official agency.
- c) Limited companies or registered partnerships of which more than half of the shares in the capital are owned by the government agency and/or state enterprises as stated in (a) and/or (b) above.
- d) Limited companies or registered partnerships of which more than half of the shares in the capital are held by the government agency and/or state enterprises as per (c) and/or (a) and (b) above.
- e) Limited companies or registered partnerships of which more than half of the shares in the capital are held by the government agency and/or state enterprises as per (d) and/or (a) and/or (b) and/or (c) above.

Generally, government contracts cover a wide variety of activities, including hire of work, supply of goods, provision of services, and construction and engineering projects, in relation to which various procedures and bureaucratic requirements must be complied with before any activity can be commenced. Relevant requirements are primarily contained in:

- the Act Governing Permission to Allow Private Bodies to make Joint Investment in State Businesses B.E. 2556 (A.D. 2013) (commonly known as the PPP Act);
- the Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992) (Regulations on Procurement), as amended;
- relevant cabinet resolutions; and
- notifications of the National Anti-Corruption Commission.

The Act Allowing Private Entities to Make Joint Investments in State Businesses, B.E. 2556 (A.D. 2013) (the PPP Act)

The PPP Act is relevant to private enterprises making joint investments in state business, with the exception of petroleum and mining concessions under other laws. There are two separate procedures under the PPP Act, each depending on the estimated value of the project, as follows.

- Small projects

Projects valued at less than THB 1 billion are deemed as small projects, which undergo a streamlined approval procedure. If the relevant government agency responsible for a project has its own rules and regulations for project approval and implementation, those rules will apply. Once the project has been approved by the relevant agency, it will be submitted for public tender, unless there are grounds for exemption, as prescribed by notice. For example, if any delay in implementing a state project in need of immediate funding would cause damage to the public, the relevant agency may forgo the tender process.

- Medium-sized projects
- Projects valued at more than THB 1 billion but not exceeding THB 5 billion are considered medium-sized projects. The proposing agency or the project owner must commission feasibility studies and detailed project analyses to be conducted by independent consultants. The study and analysis results of the project shall be prepared in accordance with the details announced by the PPP Board under the Act. The proposing agency or the project owner shall send the independent consultant's report to the relevant minister for consideration and approval. In general, the selection procedure for these projects involves the following five stages: reviewing the project proposal, screening the project, implementing the project through public tender, supervising and monitoring, and amending the PPP contract, if necessary.

The PPP Act makes provisions for procedures and mechanisms for supervising and monitoring a project. It also addresses renewal or amendment. Finally, it contains provisions to promote the PPP Act as a central part of public policy.

The Regulations on Procurement

The Regulations on Procurement are applied to every government agency that handles procurement by using budget monies, loans, and subsidies from foreign governments, international organizations or international financial institutions, etc. Government agencies are required to follow procurement procedure as stated in the Regulations. The six procurement methods for procurements and services are:

- Price agreement
- Price inquiry
- Bidding
- Special methods
- Special case methods
- Auction through electronic system pursuant to procedures prescribed by the Ministry of Finance

In principle, procurement is required to be carried out openly and transparently. There must be opportunity for fair competition taking into consideration the qualifications and capabilities of the tenderers or bidders for work (except in a specific case constituting an exception under the regulations). Throughout the procurement process, officials must record evidence of actions taken and the reasons for these actions or decisions.

The regulations provide sample forms for government contracts and documents. The execution of a procurement contract is under the power of the government agency chief, and the contract shall be made in the Thai or English language, following the form of the sample contract and documents in the regulations. A contract may contain provisions or particulars which are different from those of sample contracts and the documents prescribed, provided that it retains material provisions contained in the sample contracts and documents and does not put the government agency at a disadvantage. If, however, the head of the relevant government agency is of the opinion that an issue of disadvantage to the government agency may arise, the government agency chief shall send the draft contract to the Office of the Attorney-General for review.

If it is possible to make a contract in the form of the prescribed sample contracts or documents, and it is necessary to prepare new draft contracts and documents, the draft contracts and documents must

first be sent to the Office of the Attorney-General for review. If, however, the head of the relevant government agency deems it appropriate to make contracts or documents in a form previously reviewed by the Office of the Attorney-General, then such contracts and documents may be made.

Contracts and documents with state enterprises that are not subject to the Regulations on Procurement generally do not require approval from the Office of the Attorney-General, provided that they are subject to the internal regulations on procurement of the relevant state enterprise.

Enforcement of contracts against the government is discussed under the heading **Debt Collection** below.

Electronic Contracts

The Electronic Transactions Act B.E. 2544 (A.D. 2001) contains provisions addressing the validity of electronic records as contracts and sets out standards for their reliability. In principle, the Electronic Transactions Act takes the approach that a contract will not be invalid simply because the formation of the contract was conducted electronically. However, due to registration requirements, many contracts still need to be made in writing (e.g. contracts for the sale and purchase of immovable property).

For more information on the Electronic Transactions Act, please see the section on **Electronic Commerce** below.

Summary of Key Points on Contracts:

- ❑ The CCC is based on the principle of freedom of contract.
- ❑ The general requirements for a valid contract are set out in the CCC and are similar to those of other countries/jurisdictions.
- ❑ Specific rules apply to certain contracts (e.g. loans above a certain threshold, mortgages, and government procurement contracts).
- ❑ Unfair contract terms are only enforceable to the extent that they are fair or reasonable.

5.2 Debt Collection

Payment procedures in Thailand tend to follow international norms. Standard credit terms allow 30 days before payment is due and interest begins to accumulate. Monthly payments are generally accepted for regular customers and those with good reputations. If credit terms are not discussed or invoicing is not standard procedure, payment by cash or check is usually due within one week. Some establishments, however, will demand payment up front or upon delivery of goods or services, giving the customer no choice but to make a direct payment at that time.

Loans of money in excess of THB 2,000 are not enforceable unless made in writing and signed by the borrower. Therefore, in any loan transaction, should there be no written evidence signed by the borrower, the loan is still valid but cannot be enforced by legal action. This affects not only loan agreements, but

also overdrafts, promissory notes, other negotiable instruments, sales agreements, and other specific contracts.

Parties may agree to have their debt expressed in a foreign currency. However, payment may be made in Thai currency according to the rate of exchange current at the place and time of payment. It should be noted that payment in a specific currency can be made essential, and lawsuits can be filed for claim amounts in foreign currencies. Registered collateral security (e.g., land mortgage and machinery mortgage, etc.), even if denominated in foreign currency, must be expressed in Thai currency to register with the relevant authorities.

Procedural information on bringing a claim against a debtor can be found in the chapter on **Litigating in Thailand**.

Government as a Debtor

Although the Royal Family has sovereign immunity, there is no state immunity in Thailand. A suit may not be brought against Thailand or the Kingdom generally, but must be brought against the appropriate juristic person (i.e. the specific government ministry, department, or state enterprise that entered into the contract).

Attachment

is a legal process where, at request of the creditor, property of the debtor is transferred to the creditor.

Appropriated fund

is money which the government has budgeted for a specific purpose.

Although a creditor can commence debt collection against the government, the actual collection of money may be problematic. State lands and certain state properties cannot be subject to attachment. Debts, therefore, must be paid out of appropriated funds.

In practice, unless there are appropriated funds to pay a specific debt, collection will not be successful within the Kingdom.

Summary of Key Points on Debt Collection:

- ❑ Payment of debts is generally due within 7-30 days of the debt occurring (unless the contract specifies otherwise).
- ❑ Loans of money over THB 2,000 must be in writing and signed by the borrower to be enforceable.
- ❑ A debt collection action may be brought against government institutions, but is unlikely to be paid upon unless there are appropriated funds to pay the specific debt.

5.3 Price Controls

There are several acts which regulate trade competition and fair pricing in Thailand. The primary acts are the Trade Competition Act B.E. 2542 (A.D. 1999), the Act Governing Prices of Goods and Services B.E. 2542 (A.D. 1999) and the Act Countering Market Dumping and Subsidy of Goods from Abroad B.E. 2542 (A.D. 1999). By enacting these statutes, the Parliament intended to establish a set of rules allowing for the development of equitable private sector competition in Thailand. Further, these acts protect consumers from price fixing and unfair service charges, and ensure that the supply of goods is sufficient to meet domestic demand.

Trade Competition Act

The Trade Competition Act B.E. 2542 (A.D. 1999) applies to all enterprises and business activities in Thailand (with the exception of state enterprises, cooperatives, agricultural and cooperative groups, government agencies, and certain other exempted enterprises).

The act establishes a Trade Competition Commission with authority to:

- oversee and ensure compliance with the act;
- determine key criteria for the purposes of the act, such as determining the market share that would constitute a dominant position;
- consider applications for mergers; and
- provide recommendations to the Ministry of Commerce regarding forthcoming ministerial regulations.

Abuse of Dominant Position

A business operator deemed as having a dominant position or influence over a market, comprises one or several business operators in any market of goods or services with a market share in the past year of 50% or more, and with total sales in the past year of THB 1 billion or more, or the first three business operators in any market of any goods or service having a total market share in the past year of 75% or more, and with total sales in the past year of THB 1 billion or more.

Section 25 of the Trade Competition Act B.E. 2542 (A.D. 1999) provides that no business operator who has an influence over the market shall:

- unfairly fix or maintain the purchasing price level or unfairly sell goods or collect service charges;
- unfairly set conditions in a description that compels, either directly or indirectly, other business operators who are his own customers to limit the rendering of services, the manufacturing, the purchase or the sale of goods, or to restrict their opportunity in buying or selling goods, acquiring or rendering services, or in procuring credit from other business operators;
- suspend, reduce, or limit the rendering of services, the manufacturing, the purchasing, the sale, the delivery, the importation, without reasonable ground, or destroy or cause damages to the goods so as to reduce the quantity thereof to be lower than the demand of the market; or
- intervene with the business operation of others without reasonable grounds.

Anti-Monopoly Provisions

Sections 25 to 34 of the Trade Competition Act stipulate the following restricted monopoly practices:

- No business operators shall merge businesses that may cause a monopoly or unfair competition.
- No business operator shall jointly act with another business operator in a way that is a monopoly, a reduction of competition, or a restriction of competition in any market of any goods or any services.
- No business operator who has business with a business operator abroad, irrespective of whether it be relations through contract, policy, partnership, shareholding, or relations of any other similar description, shall take any action so as to cause the persons who are in the Kingdom who wish to buy goods or services for their own use to be deprived of an opportunity to buy goods or services from the business operator abroad directly.
- No business operator shall take any action which is not one of free and fair competition and which causes destruction, damage, obstruction, impediment, or restriction to the business operation of other business operators, or which prevents others from operating a business, or which causes them to terminate their business operation.

Failure to abide by the provisions of the Trade Competition Act could result in imprisonment of up to three years and/or a fine of up to THB 6 million, plus a daily fine of THB 50,000 during the period of the violation. Note that these penalties may be applied not only to the enterprises, but also to their managing director, managing partner, or person in charge of operations, unless the offense in question was committed without his or her knowledge or consent, or reasonable measures were taken to prevent the offense. A multiple penalty may also be imposed on repeat offenders.

Act Governing Prices of Goods and Services

The Act Governing Prices of Goods and Services B.E. 2542 (A.D. 1999) applies to businesses, enterprises, and business activities in Thailand (with the exception of central, provincial, and local agencies, and certain activities exempted by ministerial regulations).

The act establishes a Central Board Governing Prices of Goods and Services. The board has authority to:

- prescribe goods and services to be controlled by the act;
- fix the sale/purchase prices of controlled goods and services;
- ensure that there is sufficient supply of goods or services to meet the domestic demand;
- consider complaints of distress or damage arising from unfair price practices;
- make regulations governing the payment of rewards and money; and
- prescribe bases, procedures, and conditions regarding the display of prices for goods and services.

The act generally applies only to “controlled” goods or services—to be announced from time to time—and covers all types of unfair pricing of products and services. Under the act, a person is prohibited from:

- stockpiling controlled goods by having an amount of controlled goods in their possession which exceeds the amount prescribed by notification of the commission;
- storing controlled goods at a place other than a place of storage declared to a competent official;
- not distributing controlled goods which are held for distribution or normal sale; and
- refusing distribution or delaying distribution or delivery of controlled goods without reasonable grounds.

A business operator of a controlled service is prohibited from halting normal services, refusing to provide services, or delaying the provision of services without reasonable grounds.

Business operators are prohibited from doing anything that would cause the prices of goods or services to be too low or too high, or which may cause confusion regarding the prices of any such goods or services. Note that this prohibition is not confined to the pricing of controlled goods or services, and appears to apply to the pricing of any goods or services. “Anything” that would cause the prices of goods or services to be too low or too high does not only refer to selling, but also covers any actions, including reducing production to less than market demand, dumping, etc. Moreover, the price of goods or services cannot be considered too low or too high only between the individuals—it must be compared with all prices of the same goods in the whole market.

The penalty for violating any section of the act can include a fine of up to THB 140,000 and/or imprisonment not exceeding seven years. Note that such penalties may be applied not only to the enterprises but also to their managing director, managing partner, or person in charge of operations if the wrongdoing of the juristic person is caused by the order or action of the natural persons; or if the natural persons were negligent in their duties to prevent the enterprises from committing the offense in question.

Act Countering Market Dumping and Subsidy of Goods from Abroad

The Act Countering Market Dumping and Subsidy of Goods from Abroad B.E. 2542 (A.D. 1999) is intended to benefit domestic industry, consumers, and the public interest by acting as a countermeasure against market dumping and subsidization of goods from abroad. It applies to:

- all foreign manufacturers, exporters, and importers of listed goods and goods under consideration;
- governments of countries exporting goods under consideration; and
- trade associations consisting primarily of manufacturers.

Market dumping means exporting goods into Thailand for commercial gains, so that the exported price is lower than the normal value of goods of the same type.

The **exported price** refers to the price of goods when exported from the country of origin to Thailand according to payment actually made or that should have been made.

Normal value refers to the price an independent buyer in the country of origin normally pays for goods of the same type sold for local consumption in a quantity not less than 5% of that exported to Thailand.

The Committee Considering Market Dumping and Granting of Subsidies was first established in 1999 to consider imposing countermeasures under the act, to approve agreements to eliminate market dumping and subsidization, and to oversee and ensure compliance with the act.

Under the act, market dumping that damages a domestic industry is an illegitimate practice and may warrant counteraction.

In considering imposing counter market dumping measures, the Foreign Trade Department has the duty and power to conduct inquiries into market dumping and the resulting damages. Upon completion of the inquiry into market dumping and damages, the Foreign Trade Department summarizes the results and submits its opinion to the committee for a decision.

If the committee concludes that the offender dumped goods into the market to the extent that

it caused damage to the domestic industry, it may collect a temporary duty or security against the payment of such a duty in an amount necessary to counteract the damage caused. If the exporter and

the Foreign Trade Department can compromise regarding a change in price or elimination of exports at market dumping prices, the countermeasures may be canceled without imposing temporary measures or collecting duties. Such a compromise shall become effective only upon committee approval.

A subsidy is a benefit received from the originating government (which may be in the form of financial aid or price support) to increase exports or reduce imports of goods. The act provides a list of subsidies that may warrant counteraction.

In the case of subsidizing goods from abroad, the Foreign Trade Department will contact the subsidy-granting country to hold a discussion and propose that the dispute be solved under World Trade Organization procedures. The Committee will order any countermeasures it deems suitable, including fixing a counter-subsidy duty.

Summary of Key Points on Pricing and Competition:

- ❑ A business operator who has an influence over the market cannot abuse their dominant position. More importantly, the business operator cannot unfairly fix prices.
- ❑ Anti-monopoly laws prohibit businesses from merging or joining to create a monopoly or unfair competition.
- ❑ Business operators are prohibited from doing anything that would cause the prices of goods or services to be too low or too high, or which may bring confusion regarding the prices of any such goods or services.

5.4 Consumer Protection

Consumer Protection Act

The Consumer Protection Act B.E. 2522 (A.D. 1979) (the CPA) was passed to protect consumers by requiring truth in advertising and full disclosure in labeling. The CPA empowers concerned authorities to take corrective measures against unscrupulous business operators.

The Office of the Consumer Protection Board monitors all forms of advertising labels and looks for violations of the CPA. The Food and Drug Administration must approve any food and drug advertisement before it is launched publicly. The National Broadcasting and Telecommunication Commission has issued a notification to prescribe the time limit for advertisements via digital terrestrial television.

Product Liability

The Unsafe Goods Liability Act B.E. 2551 (A.D. 2008) was passed to address product liability concerns. The act, which became effective on February 20, 2009, is designed to protect consumers who incur damage from defective products by imposing strict liability on business operators involved in the manufacture and/or sale of defective products that then cause harm to a consumer. The operator is held liable if the product is defective, regardless of whether the operator was negligent in making or selling the product.

Under the act's strict liability rule, an injured user needs only to prove that he or she was injured or suffered damage from the defective product while using it in the way it was intended to be used. Product liability cannot be waived or limited by means of contract or by any waiver or limitation of liability statement by an operator.

Moreover, the operator may not be released from liabilities by means of agreements entered into between the consumer and the operator before the damage took place. Nor can the operator be released from liabilities based on their statement to disclaim or limit liability for damages caused by unsafe products after the damages have been incurred.

The act empowers the court to award compensation for mental damages resulting from the injured users' bodily, health, or hygiene damages, separately from any compensation awarded under tort claims made under the Civil and Commercial Code. In case of death of the injured users, their spouse, parents, or inheritor will be entitled to receive compensation for mental damages.

The act also provides defenses for a defendant operator. For instance, an operator will not be liable if it can prove that the product was not defective, that the injured party was already aware that it was defective but used it anyway, or that the damage was due to improper use or storage of the product. In addition to the Unsafe Goods Liability Act, the provisions of the Civil and Commercial Code applicable to contracts and wrongful acts continue to be generally applicable to product liability. There are also some royal decrees which are broad enough to encompass criminal liability arising from what would be called a "product liability case" under Anglo-American law.

Sellers are liable for any defective goods sold in which the goods value or fitness for ordinary purposes, or for the purposes of the contract, is impaired. It doesn't matter whether the seller knew of the defect beforehand or not. Sellers are not liable for defective property if the buyer knew, or should have known, of the defect at the time of sale, if the buyer accepted the defective property at the time of delivery without reservation, or if the property was sold by public auction. Buyers have one year after discovering a defect to file a claim in court.

5.5 Direct Sales and Direct Marketing

Direct sales of goods are governed by the Direct Sales and Direct Marketing Act B.E. 2545 (A.D. 2002), as amended (the DSA). The DSA supplements other legislation which may also affect direct sales, including the CCC, the Act on the Price of Goods and Services B.E. 2542 (A.D. 1999), and consumer protection-related laws.



Direct sales refers to the presentation and offer of goods or services for sale directly to consumers in their dwelling or at any place other than in a retail shop specifically visited by the consumer through direct sales agents or independent sellers engaged in either a one-level or multi-level sale.

Direct marketing is marketing goods and services by way of communicating a long-distance message to promote goods or services directly to consumers, with the expectation that the consumers will respond by purchasing goods or services.



The purpose of the DSA is to protect consumers from business operators who appear to be taking "willful advantage" of them through such undefined means as deception or coercion, and thus

are depriving consumers of their freedom of choice. The majority of the DSA focuses on restricting who can do direct sales or direct marketing business and the ways that such business can be carried out.

Consumer Protection under the Direct Sales and Direct Marketing Act

The DSA protects consumers by requiring that all sales documents be in the Thai language and contain the following information:

- The seller's and buyer's names.
- The purchase date.
- The delivery date of goods or services.
- Information describing the consumer's right to terminate (this last item must be printed more prominently than the other data).

Warranties for goods and services must also be written in Thai and clearly outline the consumers' rights under those warranties. For specific products (to be determined in future regulations), the sales documents must also contain additional information.

The consumer is entitled to, and must be provided with, a copy of the goods or services sales documents or else he or she is not bound by the particulars therein.

Cooling-Off

More importantly, the DSA provides consumers with a "cooling-off period," in that a direct sales agreement is only legally binding seven days after the goods or services are delivered. Before the expiration of those seven days, a consumer is given the right to change his or her mind by terminating the agreement and returning the product(s). A full refund must be given within 15 days of the termination notification being received, provided that the customer must take financial responsibility for any damage which he or she has caused. A description of the goods and services to be excluded from this seven-day period will be provided in future regulations, as will the general procedures for returning goods.

Direct Sales and Direct Marketing

Direct sales business operators and direct marketing business operators are prohibited from operating businesses which operate by persuading any person to join a direct sale or direct marketing business network by offering benefits for such solicitation which is computed from the increased number of persons joining the network.

A direct sale business operator must operate a direct sale business according to a compensation plan which has been submitted to and approved by the registrar, as required by the DSA.

In addition, the DSA protects consumer privacy by prohibiting independent sellers or direct sales agents from offering the goods for sale to consumers at residences, places of work, or other places that are not usual places of retail work, unless he or she has already been granted permission to do so by the consumers.

Penalties under the Direct Sales and Direct Marketing Act

The DSA provides penalties for any violations of its rules. The penalties vary, depending on the offense. The maximum imposable sentence is imprisonment not exceeding five years, and fines not exceeding THB 500,000. However, for a repeat offender, if within five years after punishment they commit any offense under the Act again, they shall be punished with twice the punishment prescribed for such an

offense. Such penalties may be applied not only to the enterprises, but also to managing directors, managers, or persons in charge of operations, unless the offense was committed without their knowledge.

Direct Sales and Direct Marketing Board

A Direct Sales and Direct Marketing Board (the Board) is established under the DSA. The Board:

- considers consumer complaints;
- supervises direct sales and direct marketing operators;
- adjudicates appeals against the order of the registrar;
- advises the cabinet on direct sales and direct marketing issues;
- oversees the performance of competent officials and government agencies in the area, lays down rules and notifications, and suggests regulations to assist in the execution of the DSA;
- publicizes information relating to the goods or services that may cause damages to consumers; and
- sees to other matters assigned by the minister.

The Board is empowered to apply settlements and conditions as it sees fit. It also, importantly, has the power to warn the public away from certain goods and services that may be “detrimental or prejudicial” and to disclose the identity of the direct sales business operator, direct marketing operator, agent, or distributor offering such products or services.

Registration of Direct Sales Business

A direct sales business operator must register before conducting his or her business. The secretary-general of the Consumer Protection Board acts as Registrar under the DSA and is responsible for reviewing and registering direct sales and direct marketing applications. The application to the registrar must be accompanied by various requested documents providing information on the business, as well as a description of the offered goods or services, the procedure for selling the goods or services, and a remuneration payment plan. In reviewing applications, the registrar may request further explanations or documents for examination.

Pursuant to the DSA, complete applications must be processed and registered within 45 days of receipt, whereas incomplete applications must be altered or changed within a “reasonable time.” Upon receipt of a completed application following such alterations or changes, the application must be processed and registered within 30 days of receipt.

A business operator has 30 days to appeal either a rejection of his or her application or a cancellation of his or her registration under the DSA. The appeal is made to the Board, and the Board’s decision is final.

A direct sales business operator is further required to enter into a written agreement with its independent sellers or direct sales agents. The agreement must contain details of the remunerative payments and details of the fees payable to the direct sales business operator, including the membership admission fee and promotion material costs (which shall not exceed rates to be fixed by the Board). In the independent seller’s case, the agreement must allow for and further state the procedure and timeline for reselling a product and the promotion materials back to a direct sales business operator.

5.6 Import and Export of Goods

The Importation and Exportation of Goods Act B.E. 2522 (A.D. 1979), as amended, regulates the conduct of international trade in Thailand.

International trade is subject to controls by the Ministry of Commerce in the form of licensing requirements. Import and export of goods also involves certain other laws; particularly the customs and exchange control laws. Controls of imports and exports also exist in several other laws, as amended, such as the following:

- Ancient Monuments, Antiques, Objects of Art, and National Museum Act B.E. 2504 (A.D. 1961), as amended.
- Armament, Ammunition, Explosives, Fireworks, and Imitation Firearms Act B.E. 2490 (A.D. 1947), as amended.
- Cosmetics Act B.E. 2558 (A.D. 2015).
- Drugs Act B.E. 2510 (A.D. 1967), as amended.
- Export Standards Act B.E. 2503 (A.D. 1960), as amended.
- Merchant Marine Promotion Act B.E. 2521 (A.D. 1978), as amended.
- Minerals Act B.E. 2510 (A.D. 1967), as amended.
- Hazardous Substance Act B.E. 2535 (A.D. 1992), as amended.
- Food Act B.E. 2522 (A.D. 1979).
- Medical Device Act B.E. 2551 (A.D. 2008).
- Thai Customs Act B.E. 2469 (A.D. 1926), as amended.

Violators of these laws and relevant regulations may be subject to criminal penalties.

Some classes of goods are subject to import and export controls under the Import/Export Act. Control is usually exerted by licensing requirements or prohibitions. The classes of goods which are subject to controls under the Import/Export Act change from time to time. Current lists of controlled goods can be found by checking the Ministry of Commerce's notifications.

The Export Standards Act B.E. 2503 (A.D. 1960), as amended, classifies certain classes of goods as controlled goods. The export of such controlled goods requires licenses from the Commodity Standards Office of the Ministry of Commerce.

For information on customs duties, please see the section on **Taxation** in
Part 4 of the chapter on **Investing in Thailand**.

5.7 Exchange Controls

Exchange control restrictions are set out in the Exchange Controls Act B.E. 2485 (A.D. 1942) as amended and are regulated by the Bank of Thailand (BOT) under supervision of the Ministry of Finance. Presently, the Thai baht is allowed to "float" and thus the baht value is now determined by market forces.

As a general rule, all matters involving foreign currency are regulated by and require permission of the BOT. In particular, no person other than such authorized financial institutions/dealers may buy, sell, lend, exchange, or transfer any foreign exchange without permission from the BOT. However, an

exception exists for sale of foreign exchange by authorized financial institutions/dealers (i.e., authorized banks, companies, or persons) which have been authorized and delegated certain powers to approve certain foreign exchange transactions on behalf of the BOT.

Generally, foreign currencies can be transferred or brought into Thailand without limit. However, any person receiving foreign currencies from abroad is required to repatriate such funds immediately by selling the funds to an authorized bank or depositing them in a foreign currency account with an authorized bank within 360 days of receipt. Exceptions to this requirement are foreigners temporarily staying in Thailand for not more than three months, foreign embassies, international organizations, staff with diplomatic privileges and immunities, and Thai emigrants who are permanent residents abroad or working abroad.

Any person purchasing, selling, depositing, or withdrawing foreign currencies with an authorized bank in the amount of USD 50,000 or more shall be required to report such foreign exchange transactions to the authorized bank in the form prescribed by the BOT.

5.8 Electronic Commerce

The primary law governing electronic transactions is the Electronic Transactions Act B.E. 2544 (A.D. 2001) (the ETA). Certain provisions of the ETA are based on the UNCITRAL Model Laws on Electronic Commerce 1996 and on Electronic Signatures 2001.

The ETA takes the approach that contracts existing in electronic form should not be denied effect simply because they are conducted electronically, and it sets out provisions for determining their reliability. It also provides a framework for the recognition of electronic signatures and for licensing of electronic commerce service providers.

Electronic Transactions and Electronic Signatures

Subject to some explicit and practical exceptions, the ETA takes the general approach that an offer and acceptance may be expressed in the form of a data message, and that a contract shall not be denied legal effect on the sole ground that the offer or acceptance of that contract was made in the form of a data message. The concept of “data messages” includes information generated, sent, received, stored, or processed by electronic means, such as electronic data interchange (EDI), electronic mail, telegram, telex or facsimile. The framework allows for considerable latitude by not explicitly requiring the use of any particular commercial standard or system.

“ Clients often ask about the use of electronic signatures. However, when we delve further into their questions, we tend to find there is a misunderstanding as to precisely what this means.

Often, what they really mean to ask is whether they can sign a contract with a pen and then fax it, or scan and email it, and whether the copy that is printed at the other end will be effective in the same way as an original. This is something altogether different from an electronic signature.

”

Regarding transactions that, by law, must be made or evidenced in writing, a data message is deemed to meet such requirements if that message is accessible and usable for subsequent reference without alteration of its meaning. Similarly, when a signature is actually required by law on a particular document, the ETA provides that it will be deemed signed if the electronic method used is capable of identifying the signatory and indicating that the signatory approved the information in the data message as his/her own

and, if that method is reliable and appropriate, with regards to the parties' agreement and the surrounding circumstances. Similar provisions are made with respect to the equivalent of data messages to original documents, where documents are required by law to be retained. Where any of this information might be introduced as evidence in court, the law sets out provisions for determining whether such evidence is reliable.

The ETA defines an "electronic signature" as a letter, character, number, sound, or any other symbol created in electronic form and affixed to a data message in order to establish the association between a person and a data message for purposes of identifying the signatory and showing that they have approved the information contained in the message. An electronic signature is considered reliable if the signature creation data is, within the context in which it is used, linked to the signatory and no other person; if the signature creation data was, at the time of signing, under the control of the signatory and no other person; if any post-signing alteration is detectable; and if, where the signature is meant to indicate that the signatory attests to the completeness and integrity of the information, any post-signing alteration to such information is detectable. However, the law is clear that these criteria should not function to limit other possible ways of proving whether an electronic signature is reliable.

The law sets certain legal obligations for electronic signatories. Among these, they must exercise reasonable care to avoid unauthorized use of their signature creation data. In addition, one must quickly notify any person who may reasonably be expected to act in reliance on the electronic signature and/or the electronic signature service provider if the signatory knows or should have known that the signature creation data has been lost, damaged, compromised, unduly disclosed, or known in a manner inconsistent with its purpose, or if the signatory becomes aware there is a substantial risk that the signature creation data may have been lost, damaged, compromised, unduly disclosed, or known in a manner inconsistent with its purpose.

Finally, where a certificate is issued to support the electronic signature, a signatory must exercise reasonable care to ensure the accuracy and completeness of all the signatory's material representations which are relevant to the certificate, throughout its validity. Parties relying on electronic signatures are expected to take reasonable steps to verify the electronic signature, and where supported by a certificate, to verify the validity, suspension, or revocation of the certificate, and observe limitations with respect to the certificate. The law also sets out a framework for electronic signature service providers.

Licensing under the Electronic Transactions Act

Chapter 3 of the ETA provides for regulation of electronic transaction-related service providers. Service businesses relating to electronic transactions that are set out by royal decree must be licensed, be registered, or give notice of their operations, as applicable. Regulated types of business include electronic money services, credit card network services, EDC network services, payment system switching services, clearing services, balance settlement services, electronic payment services, and payment agent services. In addition to the ETA, specific regulatory requirements applicable to electronic payment business operators are contained in royal decrees and ministerial notifications. These address, among other things, rules with respect to security, reliability, protection of service users, financial requirements, "Know Your Customer" obligations, and reporting obligations.

For further information on any of the topics mentioned in this chapter, or for advice on commercial transactions or regulations, please contact the Tilleke & Gibbins Commercial Transactions and Corporate Services teams at +66 2056 5555.

6. Corporate Responsibility

6.1 Directors' Duties

Legally, foreign directors and Thai directors are not treated differently. A director has power to manage a company by all lawful means necessary, within the bounds of the company's memorandum of association, articles of association, resolution of shareholders' meetings, and applicable Thai laws. As long as directors act within that scope, their actions are legally binding on the company and they shall not be held personally liable to the third party.

It is a general rule of law that directors of a limited liability company must exercise their powers honestly and in the best interests of the shareholders and the company. Thus, directors must exercise the judgment of careful businesspersons and should not put themselves in a position where their duties and personal interests are likely to conflict with those of the company.

The general role of directors is setting goals, policies, and strategies, overseeing, and decision making. Directors could also undertake management responsibilities. The directors' legal positions are as representatives of the company. When dealing with a third party, agency law shall apply and the director is treated as an agent of the company (principal). The duties of directors toward the company may be described as fiduciary, performing their duties with care and skill and complying with the resolutions of the shareholders, the company's articles of association, and the law. Directors may delegate their powers to any manager(s), who may then exercise powers according to what has been delegated to him/her/them by the directors.

In the performance of their duties, directors must apply the diligence of a careful businessman. Under the CCC, directors and persons representing directors are jointly responsible for:

- payment being made for shares by the shareholders;
- maintenance of company books, records, and documents, as prescribed by law;
- proper distribution of dividends or interest as prescribed by law; and
- proper enforcement of resolutions of general meetings of the shareholders.

Directors acting in a fiduciary relationship with a company must not directly or indirectly enter into:

- a competing business;
- a business dealing with the company for their own benefit; or
- a business in which they have a special interest, without the consent of the shareholders and/or the board of directors.

If a director enters into one of these activities, he or she may be accountable to the company for all profits or losses.

Public limited companies are governed by the Public Limited Company Act B.E. 2535 (A.D. 1992), which imposes higher and more extensive standards and duties on directors. Directors of public limited

The concept of a *careful businessman* has been expanded on by the Thai Supreme Court in a past ruling. The judgment of a careful businessman should be comparable to that of businesspersons in the same industry or business.

companies which are listed on the Stock Exchange of Thailand are subject to even greater duties and standards of compliance under the Securities and Exchange Act B.E. 2535 (A.D. 1992), as well as regulations of the Securities and Exchange Commission and the Stock Exchange of Thailand.

Binding Signatory Power

Foreign directors should be aware of binding signatory power. Only directors who are registered as binding signatories with the Ministry of Commerce can sign documents on behalf of a company. Such signatory power is often checked by third parties (e.g. banks and authorities) before dealing with a company. It is common practice to affix the company seal along with a director's signature. Non-director personnel may be delegated such powers through a power of attorney.

Civil Liability of Directors

Directors are not personally liable to any third party if they act within the scope of their authority. The fundamental civil liability of directors is stipulated in the CCC which empowers the company, its shareholders, or its creditors to hold the directors liable to pay compensation for damages suffered by the company due to breach of any fiduciary duty, such as duty of care, duty of loyalty, and duty of disclosure. The burden of proof belongs to the party who initiates the civil lawsuit. Directors could avoid liability if they seek prior approval or post-action ratification from the shareholders. Resigning from the board will not bring immunity, since directors are still liable for breach of fiduciary duty for two years after resignation. Directors' and officers' liability insurance is becoming an increasingly popular means of protection.

Criminal Liability of Directors

Directors, including non-director managers, are criminally liable when they commit acts or omissions which are expressly prescribed by certain laws to be wrongful and subject to prescribed criminal penalties. Wrongful acts are generally fraudulent or intentional, but in some cases, negligent or even unintentional acts are punishable. Breaches of fiduciary duty do not lead to criminal liability unless the company is listed. Non-compliance with basic corporate duties, such as the timely submission of audited financial statements, is also a criminal offense and subject to the penalties under the Act on Offenses Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations B.E. 2499 (A.D. 1956), as amended.

It is not uncommon for directors to be prosecuted as co-defendants. In the past, there were approximately 100 different statutes concerning the liability of the representative of the juristic person, most of them containing a standard provision that directors and managers are automatically presumed guilty and would serve the same penalties if the company is found guilty of any prescribed crime. A full list of laws that impose liability on directors is available on the Tilleke & Gibbins website at: www.tilleke.com/sites/default/files/ListofLaws-Director-Liability.pdf.

However, in a landmark ruling in 2012, the Constitutional Court held that such standard provision was unconstitutional, and thereby unenforceable. This decision effectively shifts the onus of proof to the public prosecutor, i.e., the public prosecutor has the burden to prove that the company's wrongdoing was committed by, or on the orders or directions of, the directors. Accordingly, in February 2017, the Act Amending the Law on the Criminal Liability of Representatives of Juristic Persons B.E. 2560 (2017) was enacted and came into effect in order to replace the standard provision in 76 statutes with a new provision to reflect the Constitutional Court's ruling. The new provision now reads, "The director, manager, or person responsible for the business operations will be liable for the same offense committed by the company if the offense results from the instructions or actions of the director, or the

director, manager, or the person responsible for the business operations has a duty to give instructions or take action, but omits to do so, which results in the legal entity committing an offense.”

For information concerning directors’ liability for taxation offenses, please see the part on **Taxation** in the chapter on **Investing in Thailand**.

6.2 Anti-Corruption and Anti-Money Laundering

Anti-Corruption

There are a number of laws in Thailand that contain anti-corruption measures, the most prominent being the Organic Act on Counter Corruption (OACC). Under the OACC, a state official, foreign state official, or international organization official is prohibited from demanding, accepting, or agreeing to accept property or any other benefit that affects his or her duties.

The giver or offeror of the corrupt payment is also criminally liable. Under a 2015 amendment to the OACC, a legal entity—such as a private company—can be criminally liable for the bribery offenses of its “associated persons,” which are defined as its employees, agents, and others acting on behalf of the company. More importantly, the entity can be criminally responsible even if the associated person gave the bribe without the management’s authorization.

The private entity is liable for the corrupt act if the bribe was made for the company’s benefit, and the entity failed to implement proper internal measures to prevent it. The law does not expressly state what internal measures would be acceptable to limit or exclude liability. However, this is generally presumed to be a compliance program.

Under the OACC, a government official is not entitled to receive property or any other benefits, except those authorized by a separate regulation called the Notification of the National Counter Corruption Commission Concerning the Provisions of the Acceptance of Property or Any Other Benefit on an Ethical Basis by State Officials (the Gift Notification). The Gift Notification sets a threshold of THB 3,000 per occasion for the value of property/benefits which can be given by one person. The Gift Notification allows the giving of such “business courtesies” to a state official on a traditional, customary, or cultural occasion, or on an occasion in which a societal norm requires giving. The law states that a “benefit” could be anything that has value, including a discount, entertainment, service, training, meals, etc.

The definition of “state official” under the OACC is broad and includes people holding a political position, civil servants, employees working for a state-owned enterprise or agency, and members of a board or commission of those state agencies or enterprises. In other words, the definition covers any person who receives a salary originating from public funds.

Bribe receivers or solicitors, which, under the law, include foreign state officials and international organization officials, can be punished with imprisonment of five to 20 years, or life, or the death penalty. They can also be fined THB 100,000 to THB 400,000, in addition to facing imprisonment. Furthermore, corruption brokers, who accept property to induce a state official to commit a corrupt act, can be punished with imprisonment not exceeding five years, or a fine not exceeding THB 100,000, or both.

Bribe givers can be punished with imprisonment not exceeding five years, or a fine not exceeding THB 100,000, or both. Legal entities that are criminally liable can be punished with a maximum fine of twice the actual damage or amount of benefits obtained.

The following six criminal offenses are prescribed in law:

1. Bribery of public servants
2. Solicitation or acceptance of gifts by public servants
3. Abuse of political positions for personal advantage
4. Possession of unexplained wealth by a public servant
5. Secret commissions made by agents or employees in the case of private sector corruption
6. Cases of bribes and gifts to voters.

These offenses, with the exception of private sector corruption, are dealt with in a variety of Thai laws

Thai Penal Code



There is no universal or comprehensive definition of what constitutes corrupt behavior. The most prominent definitions emphasize the abuse of public power or public position for personal benefit. These definitions—placing the public sector at the center of the phenomenon—do not cover private-to-private corruption.

The Thai Penal Code deals with different types of corruption, including bribery. The regulations are, however, limited to public corruption or other types of abuse of public office for personal gain. The law distinguishes between a number of scenarios by including active (offering) as well as passive (accepting) bribery and even penalizes the promise to bestow a benefit.

Title II in Book II of the Penal Code entitled “Offenses Relating to Public Administration” contains several regulations that deal with bribery of officials, members of the State Legislative Assembly, members of the Provincial Assembly, or members of a Municipal Assembly.

Offenses against Officials

Section 143 attempts to cover cases in which an intermediary accepts a benefit as compensation for influencing a public official or a member of any of the national assemblies (which it provides a list of) to perform or omit any of his or her functions resulting in an advantage or disadvantage. The mere demand of or agreement to accept a benefit is penalized. Penalties for breach of section 143 include imprisonment not exceeding five years, or a fine not exceeding THB 10,000, or both.

Section 144 punishes the bribing of a public official or assembly member to incite him or her to undertake, avoid, or delay an act. The law requires that the desired act must be contradictory to the functions of the official, with the result that the act of bribing with the intention to induce an official to act in accordance with his or her functions goes penalty free. It is unclear whether this result was intended by the legislature. Again, the mere offer or agreement to give a benefit is punishable under section 144, regardless of whether an advantage or disadvantage was established. Penalties include imprisonment not exceeding five years, or a fine not exceeding THB 10,000, or both.

Malfeasance in Office

Section 148 punishes the abuse of public power through coercion or inducing in order to procure a benefit. The members of the different assemblies are not included in this section. Penalties include

imprisonment of five to 20 years, or imprisonment for life, and a fine of THB 2,000 to THB 40,000, or death.

Section 149 prohibits public officials and assembly members from accepting a benefit as compensation for exercising or avoiding any of their functions. Again, the demanding or agreeing to accept a benefit is treated equally by the law. It is not important whether the act or the avoidance of it is wrongful, nor is it necessary that an advantage or disadvantage shall result from the official's behavior. Penalties include imprisonment of 5 to 20 years, or imprisonment for life, and a fine of THB 2,000 to THB 40,000, or death.

Section 150 extends a penalty to a situation where an official exercises or avoids any of his or her duties in return for a benefit that he or she accepted, demanded, or agreed to accept prior to his or her appointment as an official. Penalties include imprisonment of five to 20 years, or imprisonment for life and a fine of THB 2,000 to THB 40,000.

Sections 151 through 154 address other abuses of authority for personal gain.

Offenses Relating to Justice

Offenses against Judicial Officials are stipulated in Sections 167 to 199. Judicial officials, for the purpose of this law, are persons holding a judicial post, public prosecutors, officials conducting official cases, or inquiry officials.

Section 167 imposes a penalty on anyone who gives or agrees to give a benefit to a judicial official in order to induce him or her wrongfully to act, or not act, or delay an act. Again, the question arises whether such an action is penalty-free if the benefit or property is given with the intention to ensure that a rightful act is carried out (e.g., paying a bribe to induce a judge to pass a judgment that is in accordance with the facts and the law). Penalties include imprisonment not exceeding seven years and a fine not exceeding THB 14,000.

Malfeasance in Judicial Office

Section 201 provides for the punishment of any officials holding judicial posts who wrongfully demand, accept, or agree to accept a benefit for themselves or other persons in order to exercise or not exercise any of their functions. It is not important whether the performance or nonperformance of such act is wrongful. The simple fact that an official accepts benefits for exercising his or her duty is considered punishable. Penalties include imprisonment of 5 to 20 years, or imprisonment for life, and a fine of THB 2,000 to THB 40,000, or death.

Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (A.D. 2014)

On May 22, 2014, the National Council for Peace and Order (NCPO) took control of the administration of the state and announced the annulment of the Constitution of the Kingdom of Thailand B.E. 2550 (A.D. 2007), except for the provisions of Chapter II, The King. The new Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (A.D. 2014) was subsequently enacted. On May 23, 2014, the NCPO issued Announcement No. 24/2557 Subject: The Continued Validity of Certain Organic Laws, in order to enable organizations under the Constitution of the Kingdom of Thailand B.E. 2550 (A.D. 2007) to carry out duties continuously and justly. The Organic Acts mentioned in the announcement are as follows:

1. Organic Act on State Auditing B.E. 2542 (A.D. 1999)
2. Organic Act on Counter Corruption B.E. 2542 (A.D. 1999)
3. Organic Act on Election Commission B.E. 2540 (A.D. 1997)

4. Organic Act on Ombudsman B.E. 2552 (A.D. 2009)
5. Organic Act on Criminal Procedure of Persons Holding Political Positions B.E. 2542 (A.D. 1999)

Other Sources of Anti-Corruption Law

Name of Legislation	Effect of Legislation
<p>Organic Act on Counter Corruption B.E. 2559 (A.D. 2016), as amended</p>	<p>The act is promulgated to support the performance of the duties of the National Anti-Corruption Commission (NACC) to be faster and more suitable. The act appoints an investigating official and chief investigating official to acquire facts and gather evidence prior to and during factual inquiries. The act also prescribes appropriate qualifications for the investigating official and chief investigating official in performing their duties.</p>
<p>Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (A.D. 1999), as amended</p>	<p>The act describes the procedures for cases that are subject to a follow-up by a special commission of the Criminal Court. The cases can be brought by the NACC or the attorney general. The Supreme Court of Justice will be in charge of cases that involve persons holding political positions and those who are deemed to have gained unusual wealth from corruption.</p>
<p>Management of Partnership Stakes and Shares of Ministers Act B.E. 2543 (A.D. 2000), as amended</p>	<p>The act prohibits ministers from holding any profitable position or being an employee in partnerships, companies, or other organizations.</p> <p>In addition, a minister is not allowed to be a partner or shareholder in any type of profit-making organization.</p> <p>If occupying one of these positions at the time of appointment, the minister is legally obliged to transfer his or her shares to a juristic person to manage the property for the benefit of other people.</p>

Important New Corruption Laws Issued in B.E. 2559 (A.D. 2016) and B.E. 2560 (A.D. 2017)

Name of Legislation	Effect of Legislation
<p>Act on Establishment of Criminal Court for Corruption and Malfeasance Cases B.E. 2559 (A.D. 2016) (“the Corruption Court”)</p>	<p>The Act on Establishment of Criminal Court for Corruption and Malfeasance Cases B.E. 2559 (A.D. 2016) was published in the <i>Government Gazette</i> on August 16, 2016, and came into force on August 17, 2016. The purpose of the Corruption Court is to expand the prosecution of corruption offenses to state officials and the private sector and to resolve corruption cases more quickly.</p>
<p>Corruption and Malfeasance Procedure Act B.E. 2559 (A.D. 2016)</p>	<p>The Corruption and Malfeasance Procedure Act B.E. 2559 (A.D. 2016) prescribes the judicial process for the Corruption Court, so that its judgments will be issued with equality, timeliness, and justice.</p>
<p>Regulation of the President of the Supreme Court Governing Corruption and Malfeasance Procedure B.E. 2559 (A.D. 2016)</p>	<p>The Regulation of the President of the Supreme Court Governing Corruption and Malfeasance Procedure B.E. 2559 (A.D. 2016) specifies details for certain sections of the Corruption and Malfeasance Procedure Act B.E. 2559 (A.D. 2016).</p>
<p>Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560 (A.D. 2017)</p>	<p>The Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560 (A.D. 2017) rectifies the provisions of the laws relating to criminal liability of juristic person representatives so that they are not contradictory to or inconsistent with the Thai constitution. In addition, section 18 of the Management of Partnership Stakes and Shares of Ministers Act B.E. 2543 (A.D. 2000), which is a law related to corruption, was amended by section 3 (49) of its act.</p>
<p>Organic Act on the Election Commission B.E. 2550 (A.D. 2007), as amended</p>	<p>The Act on the Election Commission (EC) sets forth the duties of the EC, which includes organizing elections and exercising certain legislative powers.</p> <p>Importantly, the EC is also empowered to conduct investigation and fact-finding inquiries, and to adjudicate and make decisions on problems or disputes that may arise with respect to the implementation of legislation falling within its purview (such as the Organic Act on the Election of Members of the House of Representatives and the Selection of Senators).</p>

Name of Legislation	Effect of Legislation
<p>Organic Act on the Election of Members of the House of Representatives and the Selection of Senators B.E. 2550 (A.D. 2007), as amended</p>	<p>The act attempts to prevent electoral fraud and corruption by establishing a fast and transparent electoral process.</p> <p>Prior to the announcement of election result, the EC can conduct an investigation and inquiry into a candidate if it deems:</p> <ul style="list-style-type: none"> (1) that the candidate violated or infringed the law, facilitated another person to do so, or knew about this action but did not inform anyone; and (2) that this act is likely to cause the election to be dishonest and unfair.
<p>Civil Service Act B.E. 2551 (A.D. 2008), as amended</p>	<p>The act regulates the conduct of government employees in office. Implementation of the law is supervised by the Office of the Civil Service Commission (OCSC). The act provides for the follow-up of penalties for corrupt practices in the public sector through disciplinary action.</p>
<p>Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (A.D. 1996)</p>	<p>The act establishes the concept of corporate responsibility for government entities. Government work units can be held responsible for wrongful acts committed by officers in the course of their duty.</p> <p>The act also provides for the government to claim damages from an officer if a wrongful act is committed against a government work unit.</p> <p>It is notable that the Prime Minister is in charge of executing this Act.</p>

Name of Legislation	Effect of Legislation
<p>Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992), as amended</p>	<p>The act requires an open and transparent procurement process that allows for fair competition by taking into account the qualifications and capabilities of the tenderers or bidders.</p> <p>However, the act provides that these principles shall not apply in specific cases constituting an exception under these regulations, thereby giving great latitude to the person in charge to sidestep the requirement for transparency and fair competition.</p> <p>The act has been repealed by the enactment of the Act on Purchasing, Contracting for Works and State Procurement Administration B.E. 2560 (A.D. 2017), which was published in the <i>Government Gazette</i> on February 24, 2017, and became effective 180 days later.</p>
<p>Act on Offenses Relating to the Submission of Bids to State Agencies B.E. 2542 (A.D. 1999), as amended</p>	<p>The act defines the procedures for cases of allegations of infringement of the procurement regulations.</p> <p>The act covers and punishes the actions of bidders, state officials who received an advantage, and any intermediaries. The main concept is that any bid which is not done fairly shall be punished accordingly.</p>
<p>Official Information Act B.E. 2540 (A.D. 1997)</p>	<p>The act provides the public with the opportunity to peruse most official data and information. This is Thailand's Freedom of Information Act.</p>
<p>Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (A.D. 1999), as amended</p>	<p>The court has the function of adjudicating administrative cases of dispute between a private individual on one side and a state agency, government organization, state enterprise, and/or local government organization on the other side.</p> <p>Members of the public can sue state agencies or individual officials for corruption, negligence, abuse of power, or any other wrongdoing in their performance of their duties.</p>

For further information on Anti-Corruption, and for in-depth analysis of the abovementioned legislation, please refer to the Tilleke & Gibbins [Overview of Thailand's Anti-Corruption Legislation](#) available on the Tilleke & Gibbins website.

Anti-Money Laundering Law

The Anti-Money Laundering Act B.E. 2542 (A.D. 1999) has the purpose of combating the drug trade and other illicit activities such as corruption, criminal fraud, and prostitution.

The act targets a wide scope of offenses, provides broad powers to conduct investigations and seizures, and requires financial institutions and nonfinancial businesses—such as jewelry traders, automobile dealers, and real estate brokers—to report transactions that exceed the values prescribed in the relevant ministerial regulations.

The Anti-Money Laundering Prevention and Suppression Office (AMLO), which was established under the act, has reported that financial institutions have cooperated in reporting transactions subject to the act, with the AMLO receiving over 10,000 reports a week from commercial banks alone shortly after implementation of the act. Of the total number of transactions reported to the AMLO, only a small portion result in further investigation for violation of the act.

What Are Targeted Crimes?

Thai law enforcement officials initially proposed the enactment of money laundering legislation to target the regular transfer of money and property derived from the rampant trade in illegal narcotics, as well as to comply with requirements for membership under the 1988 Convention against Illegal Traffic in Narcotic Drugs and Psycho-toxic substances. In February 2013, amendments not only added 12 new categories of predicate offenses, but they also confirmed the application of the act to predicate offenses committed outside of Thailand, provided that such acts would have constituted a predicate offense had they been committed in Thailand.

Currently, the act covers the transfer or conversion of funds or property obtained from the following predicate offenses:

1. Drug trafficking
2. Prostitution and other sexual offenses
3. Fraud against the public
4. Fraud involving financial institutions
5. Abuse of position by a government official
6. Extortion
7. Trade in contraband
8. Terrorism
9. Gambling offenses, with particular emphasis on large-scale organization of gambling games
10. Participation in racketeering groups or participation in a criminal association
11. Receiving stolen property only as it constitutes assisting in the selling, buying, pawning, or receiving, in any way, of property obtained from the commission of an offense with the nature of business conduct
12. Counterfeiting or alteration of currencies, seals, stamps, and tickets with the nature of business conduct
13. Criminal trading only where it is associated with the counterfeiting or violating of intellectual property rights to goods or the commission of an offense under the laws on the protection of intellectual property rights with the nature of business conduct

14. Forgery of a document of right, electronic cards, or passports with a nature of regular or business conduct
15. The unlawful use, holding, or possessing of natural resources or a process of illegal exploitation of natural resources with a nature of business conduct
16. The commission of an offense relating to murder or grievous bodily injury which leads to the acquisition of assets
17. Restraining or confining a person only where it is to demand or obtain benefits or to negotiate for any benefits
18. Theft, extortion, blackmail, robbery, gang-robbery, fraud, or misappropriation with a nature of regular conduct
19. Acts of piracy under anti-piracy law
20. Unfair securities trading practice under the law on securities and stock exchange
21. Offenses related to arms and arms equipment which is or may be used in combat or war under the law on arms control

What Does the Law Prohibit?

Under the act, it is a crime to transfer, convert, or receive funds or property arising from the prescribed offenses for the purpose of hiding or concealing the source of the funds. Penalties for violators include imprisonment not exceeding ten years, or a fine not exceeding THB 200,000, or both. Violators are defined as persons who commit or attempt to commit a money laundering offense or aid another person in committing a money laundering offense.

It is also important to note that the 2008 and 2015 amendments include provisions targeted specifically at government officials, whereby the aforementioned fines and maximum prison sentences are doubled for government officials, and can even be tripled for certain categories of government officials if they are involved in a conspiracy to commit a money laundering offense. This represents a concerted effort to tackle the consistent problem of institutional corruption in Thailand.

Banking transactions are a primary activity subject to scrutiny under the act, but other financial transactions are also covered. For example, an individual who secretly uses money from a drug sale to purchase shares of publicly traded stocks on the Stock Exchange of Thailand could be prosecuted under the act. Further, a corrupt government official who uses money obtained from a bribe to then purchase land runs the risk of being exposed, having the land confiscated, and being subject to double scale fines. Even property developers can be subject to enforcement under the act if they knowingly hold or accept monies for concealment that they know are derived from one of the stated criminal offenses.

Perhaps the most effective tool in combating crime is the ability of enforcement officials to seize, without a warrant, money or property connected with the commission of one of the above-mentioned criminal offenses or a money laundering offense. In such case, the owner of the seized property must convincingly demonstrate that the property is unrelated to the commission of one of the above-mentioned crimes or a money laundering offense in order to recover the property.

Reporting Requirements

A key provision of the act is the requirement that financial institutions and other businesses prone to use as vehicles for money laundering report all cash transactions of THB 2 million or more, property transactions of THB 5 million or more, and all transactions that:

1. are suspicious and may be related to one of the above-mentioned criminal offenses;
2. are more complex than normal;
3. lack economic plausibility; or
4. appear to have been undertaken to avoid compliance with the anti-money laundering law.

Financial institutions must require their customers to provide a detailed record of any such transactions. The latter requirement is generally left to the practical discretion of each financial institution, which must then choose between customer confidentiality concerns and compliance with the act.

It is pertinent to note that section 16 of the act, as contemplated by the 1999 act, has been replaced by the 2009 amendments to provide for an exhaustive list of professions that fall within the purview of reporting requirements under the act. This is a notable change because it ensures that it is not only transactions by financial institutions that are put under legislative scrutiny, but also several other transactional activities undertaken by scheduled professionals during the course of day-to-day business.

The AMLO has also implemented separate regulations which require anyone entering or leaving Thailand to declare currency in their possession if the amount meets or exceeds certain statutory minimum levels.

Failure to comply with these requirements is punishable by a fine of up to THB 500,000 and also a daily fine of THB 5,000 per day throughout the period of violation or until the violator complies. Filing a false report is punishable by a fine not exceeding THB 500,000 and imprisonment not exceeding two years.

Amendments to the Anti-Money Laundering Act B.E. 2542 (A.D. 1999) After 2014

The Anti-Money Laundering Act (No. 5) B.E. 2558 (A.D. 2015)

1. Additional predicate offenses have been added, including offenses relating to human trafficking, online gambling, unfair practices concerning derivatives, agricultural commodity futures, and trading in armaments for the purpose of terrorism.
2. The scope of money laundering offenses has been expanded with the addition of “obtaining, possessing or using an asset, knowingly at the time of obtaining, possession, or usage of such asset, that the asset is connected with the commission of a predicate offense” as one of the acts that is considered a money laundering offense.
3. Policy and customer due diligence has been included in paragraph 3, section 20/1, which stipulates that all types of reporting entities must issue customer acceptance and risk management policies related to money laundering, and undertake customer due diligence when the customer’s first transaction is carried out, in accordance with ministerial regulations.
4. Non-disclosure obligations have been added to section 21/1, which prohibits financial institutions and reporting entities from disclosing information or acting in any way which may cause the customer or a third person to know of the customer due diligence, the reporting of transactions, or the sending of any information to the office, except in certain cases. Violation of this non-disclosure obligation shall be punished by imprisonment for a term not exceeding five years, or a fine not exceeding THB 100,000 or both.
5. The Anti-Money Laundering Office (AMLO) has the duty to provide training on anti-money laundering and the combating of financing of terrorism for financial institutions and reporting entities. Financial institutions and reporting entities must make arrangement for their trained staff to prepare reports or to control the preparation of report, the identification of customers,

and customer due diligence under the Anti-Money Laundering Act. Failure to comply with this obligation is punishable by a fine not exceeding THB 500,000.

6. The customer due diligence record-keeping period has been extended to 10 years from the date of closing the account or the termination of relationships with the customer.
7. Other additional amendments are related to coordination with other regulators, assets connected to illegal activities, reporting of transactions, penalties, as well as composition, powers and authorities of the Anti-Money Laundering Board and Transaction Committee.

Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560 (A.D. 2017)

Section 3 (38) of the Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560 (A.D. 2017) amended the provisions of section 61 of the Anti-Money Laundering Act B.E. 2542 (A.D. 1999), with the new provision of Section 61 as follows:

“Any juristic person that commits offenses under Section 5, 7, 8, or 9, shall be liable to a fine ranging from THB 200,000 to THB 1 million.

The director, manager, or person responsible for the business operations will be liable for the same offense committed by the company under Paragraph 1 if the offense results from the instructions or actions of the director, or the director, manager, or the person responsible for the business operations has a duty to give instructions or take action, but omits to do so, which results in such legal entity committing an offense. Punishment for such liability of a natural person may include imprisonment from one year to 10 years, or a fine from THB 20,000 to THB 200,000, or both.”

6.3 Environmental Responsibility

There are numerous acts and regulatory notifications that address environmental regulatory matters in Thailand, which involve a variety of different government bodies. One of the primary acts governing environmental issues is The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (A.D. 1992) (NEQA). The NEQA provides a framework for protecting the environment by apportioning environmental responsibilities among various government agencies, and establishing committees to deal with environmental issues. Among the requirements imposed under the NEQA are environmental impact assessments.

Environmental Impact Assessments

Environmental impact assessments (EIAs) are the mainstay of environmental regulatory planning in many countries. In Thailand, EIAs are required by the NEQA for 34 types of project, including:

- dams/reservoirs; highways/roads; commercial ports; commercial airports; mass transit system; coastal land reclamation; projects in watershed areas; petrochemical plants; oil refineries; natural gas separation and processing plants; chlor-alkali plants; iron/steel works; cement plant; smelting plants; pulp plants; pesticide plants; and
- chemical fertilizer plants; central waste treatment plants; sugar plant; industrial estate; thermal power plant; petroleum development; mining; hotels/resorts; residential buildings; building proximal to water or national parks; commercial or residential developments; and hospitals.

In 2007, a new constitution was enacted, which contained enhanced environmental protections. Based on the provisions of that constitution, the Ministry of Natural Resources and the Environment later issued

regulations imposing not only EIA requirements, but also requirements for health impact assessments (HIAs) and public consultations for certain projects, including:

- land reclamation projects of over 300 *rai*, excluding beach rehabilitation projects;
- specified types of mining;
- specified types of industrial estates;
- specified types of petrochemical plants;
- specified types of ore or metal smelting plants;
- production, disposal, or configuration of all sizes of radioactive substances;
- hazardous waste disposal or incineration plants of all sizes except concrete incinerators that use hazardous waste as supplementary material or fuel;
- airport runways extending to a length of at least 3,000 m;
- specified types of ports;
- specified types of dams or reservoirs; and
- thermal power plants, including all nuclear plants and other plants of at least 100 MW (for coal fired), 150MW (for biomass), and 3,000 MW (for natural gas combined cycle or cogeneration systems).

Specific requirements with respect to EIAs, HIAs, and public consultation are set out in ministerial regulations.

Other Laws

Environmental regulatory provisions are also found in laws addressing other topics. These include, for example, the following:

- Factories Act B.E. 2535 (A.D. 1992)
- Public Health Act B.E. 2535 (A.D. 1992), as amended
- Navigation in Thai Waters Act B.E. 2456 (A.D. 1913), as amended
- Act for the Cleanliness and Orderliness of the Country B.E. 2535 (A.D. 1992)
- Hazardous Substances Act B.E. 2535 (A.D. 1992), as amended
- Building Control Act B.E. 2522 (A.D. 1979), as amended
- Industrial Estate Authority of Thailand Act B.E. 2522 (A.D. 1979), as amended
- Land Transportation Act B.E. 2522 (A.D. 1979), as amended
- Land Traffic Act B.E. 2522 (A.D. 1979), as amended
- Energy Policy Act B.E. 2535 (A.D. 1992), as amended
- Highway Act B.E. 2535 (A.D. 1992), as amended
- Non-Smokers' Health Protection Act B.E. 2535 (A.D. 1992)
- National Forest Act B.E. 2507 (A.D. 1964), as amended
- Plant Varieties Act B.E. 2518 (A.D. 1975), as amended
- Fisheries Act B.E. 2490 (A.D. 1947), as amended

- Forest Act B.E. 2484 (A.D. 1941), as amended
- Industrial Product Standards Act B.E. 2511 (A.D. 1968), as amended
- Thai Vessels Act B.E. 2481 (A.D. 1938), as amended
- Energy Development and Promotion Act B.E. 2535 (A.D. 1992), as amended
- Investment Promotion Act B.E. 2520 (A.D. 1977), as amended
- Energy Conservation Promotion Act B.E. 2535 (A.D. 1992), as amended
- Town and Country Planning Act B.E. 2518 (A.D. 1975), as amended
- Act on Control of Killing Animals and Selling Meat B.E. 2535 (A.D. 1992), as amended
- National Parks Act B.E. 2504 (A.D. 1961), as amended
- Minerals Act B.E. 2510 (A.D. 1967), as amended
- Wildlife Preservation and Protection Act B.E. 2535 (A.D. 1992), as amended
- Petroleum Act B.E. 2514 (A.D. 1971), as amended
- Act Controlling Advertising by Using Amplifiers B.E. 2493 (A.D. 1950)
- Atomic Energy for Peace Act B.E. 2504 (A.D. 1961), as amended

Liability and Strategies for Compliance

In addition to potential civil liability under the Civil and Commercial Code, some laws contain provisions allocating civil liability for particular environmental damage. Some of these and other laws also impose criminal penalties in respect of environmental damage, which may include fines and/or imprisonment. Liability for oil spills, for example, can accrue under a variety of different laws.

Regardless of industry, those subject to the rules of the Thai jurisdiction would be well-advised to take the necessary steps to ensure compliance with the applicable environmental statutes. The sheer number of laws can make this task appear daunting, but the reality is that, aside from EIAs, HIAs, and public consultations, many of the provisions of law relevant to environmental matters function to impose environmental obligations as part of already-existing licensing or permitting obligations. In this regard, Thailand has crafted an environmental regulatory regime that, whilst protecting the environment, is also business-friendly.

For example, the Hazardous Substances Act, under which the import, export, production, storage, transport, possession, sale, and use of dangerous substances is regulated, delegates authority to a variety of different agencies, depending on the particular substance at issue, and imposes requirements which may include notification, registration, and/or licensure, as well as handling storage, disposal, and other requirements, where relevant.

Similarly, under the Factories Act, the Ministry of Industry uses its authority to regulate factory operations to also impose environmental protection requirements. These may take the form of standards with respect to air pollutants, effluents, and/or other waste from factories, and/or requiring the installation of particular equipment to reduce or eliminate damage to the environment.

Further to the above, business operators should observe local regulations to assess whether or not their intended business is considered a hazardous business activity in that specific area as certain activities could trigger additional local licensing requirements.

For further information on the Factories Act, please see the section on Factory **Operations** in the sector-specific guidance part of this chapter.

For further information on any of the topics mentioned on this chapter, or for advice on corporate responsibility, please contact the Tilleke & Gibbins Corporate Services team at +66 2056 5555.



PART 3

Sector-Specific Guidance

This chapter provides guidance on the operation of businesses in specific sectors. The sectors covered include industrial operations and life sciences.

7. Industrial Operations

7.1 Factory Operations

The Factories Act B.E. 2535 (A.D. 1992) regulates factory construction and operation, factory expansion, and safety and environmental requirements. Under the Factories Act, factories are divided into three categories:

- **Factory Type 1:** Factories that may operate immediately, as desired by the operator, without notification to, or approval of, the Department of Industrial Works, Ministry of Industry.
- **Factory Type 2:** Factories that must notify the Department of Industrial Works, Ministry of Industry before operating.
- **Factory Type 3:** Factories that must obtain a factory operations license before operating.

“

A **factory** is defined as a building, premises, or vehicle which uses a machine from five horsepower or an equivalent thereof or more, or which employs seven workers or more with or without any machinery for manufacturing, assembling, packing, repairing, maintaining, testing, improving, altering, storing, transporting, or destroying anything.

”

There are currently 107 categories of factories listed in the ministerial regulations issued under the Factories Act. The classification of factory categories depends on the capacity of the machinery and manpower. Generally, Factory Type 1 is a factory with a machinery capacity of 20 horsepower or less and has the manpower of 20 persons or less. A factory with machinery capacity ranging from 21-50 horsepower and manpower ranging from 21-50 persons will be classified as Factory Type 2 and notification to the Department of Industrial Works, Ministry of Industry, will be required. For Factory Type 3, for which a license is required, it must be a factory with machinery capacity of more than 50 horsepower and manpower of more than 50 persons. However, factories in particular industries may be classified as Factory Type 1, 2, or 3, regardless of their machinery capacity and manpower. For example, all shoes or leather repairing factories are classified as Factory Type 1 and all recycling factories and liquor factories are classified as Factory Type 3.

In addition to the classification of factory categories, other ministerial regulations generally stipulate location and construction requirements of the factory, environmental requirements, various application forms, government fees, safety measures, standards and methods of inspection, and worker qualifications.

Licensing Requirements

Factories for industrial purposes are regarded as controlled buildings under the Building Control Act B.E. 2522 (A.D. 1979), which require a construction permit prior to construction. This construction permit must be issued by the local authority in the area where the factory is located. In addition, if the factory is classified as Factory Type 3, an application for a factory operations license must be submitted to the Department of Industrial Works, Ministry of Industry. The layout and floor plan of the factory must be in accordance with the construction requirements of both the Building Control Act and the Factories Act.

In order to obtain a factory operation license, requirements on the following matters must be met:

- Location and environmental requirements of factory, construction, and interior design of the factory.
- Type of machines and equipment required to operate the factory.
- Expertise of the workers in specific areas necessary for factory operations.
- Manufacturing process, equipment or tools to prevent or mitigate the danger, injury, or trouble that they may cause to persons or property in the factory.
- Requirement on the disposal of waste, pollutants, or anything that affects the environment.
- Requirement on safety and prevention to stop or mitigate the dangers or injuries that may result from the factory operations.

Applications for a factory operations license normally take 90 days to process. A successful applicant can commence the construction and installation of machinery after the license has been granted. The license is valid for a period of five years and is renewable. In case of factory expansion (for example, increase of machinery or factory space), approval from the Department of Industrial Works is required.

Operation of a Type 3 factory without a Factory Operations License is subject to a fine not exceeding THB 20,000, or imprisonment not exceeding two years, or both.

The operation of a factory in certain industries, which may have a significant impact on environment or public health, requires conducting an Environmental Impact Assessment (EIA) or Health Impact Assessment (HIA) according to the notifications of the Ministry of Natural Resources and Environment.

Factory Operations in an Industrial Estate

The Industrial Estate Authority of Thailand (IEAT) is a state enterprise under the Ministry of Industry. The IEAT is responsible for the establishment and development of industrial estates in Thailand. The industrial estates established and developed by the IEAT offer the basic infrastructure, public utilities, waste management systems, and other facilities as necessary for the operations of factory in various industries. Other than these benefits, the IEAT provides tax incentives (free zone) and grants exemptions on land ownership of foreign enterprises. Please refer to these incentives described in Section 1, Starting a Business, and Section 4, Taxation, of this chapter. Currently, there are more than 54 industrial estates located throughout Thailand.

Other than the regulations prescribed by the IEAT, a person who wishes to operate a factory in an industrial estate must comply with the requirements on the establishment of a factory and the construction of the factory under the Building Control Act and the Factory Act. However, the granting of approval or a license(s) will be subject to the authority of the IEAT, not the Department of Industrial Works, Ministry of Industry, unlike other factories that operate outside the IEAT.

An application for a permit to use the land and operate a business in the industrial estate must be submitted to the IEAT, and it takes 30 days to learn the outcome. If approved, the IEAT will issue a Permit for Land Utilization and Business Operation to the successful applicant. Operators in industrial estates also require construction permits, as factories are controlled buildings under the Building Control Act. A construction permit can only be applied for after the Land Utilization and Business Operation Permit is issued.

The Land Utilization and Business Operation Permit is valid for up to five years, and is renewable. The licensee must comply with the regulations of the IEAT Committee regarding criteria, procedures, and conditions for conducting business in an industrial estate.

Environmental Concerns Regarding Sources of Water

Certain areas (currently some districts in Ayutthaya and Pathum Thani provinces) have been assigned by the cabinet to be reserved as sources of water by the Metropolitan Waterworks Authority. In order to control the establishment or expansion of factories in such areas, regulations have been imposed forbidding setting up or expanding factories which release wastewater containing heavy metals or poisonous substances used in agriculture, or other chemicals such as PCBs, cyanide, arsenic, and phenol.

It is forbidden to set up or expand factories in areas reserved for water supply. The only exceptions are factories which release wastewater with a biochemical oxygen demand of less than one kilogram per day or those which are set up in Navanakorn Industrial Estates I and II.

Under Ministerial Regulation No. 3, factories specified by the Ministry of Industry notifications as severely affecting the environment are required to provide environmental impact studies.

For more information on Thailand's environmental laws, please see the section on
Environmental Responsibility.

7.2 Petroleum Operations

The petroleum industry is governed by a group of Thai laws which specify the regulations for exploration and operation in Thailand or its territorial waters. Petroleum belongs to the state and exploration for and production of petroleum must only be by concession under the Petroleum Act B.E. 2514 (A.D. 1971).

The petroleum industry is managed by the Department of Mineral Fuels and a Petroleum Committee under delegated authority from the Ministry of Energy. The Petroleum Act, as amended, establishes guidelines for petroleum companies to explore and operate in Thailand.

The petroleum industry must follow competitive bidding procedures for concession areas, formalize production areas, acknowledge special privileges, and adhere to strict royalty requirements and separate taxation laws. Technical information relating to these topics can be found in the aforementioned acts. Prior approval must be granted by the Ministry of Energy before any petroleum venture may be commenced. Upon approval, the companies must comply with the Petroleum Act, as well as the rules and regulations of the Petroleum Income Tax Act.

7.3 Mining Operations

The mining industry is highly regulated by Thai laws addressing exploration and mining projects. The mining industry is under the jurisdiction of the Department of Primary Industries and Mines (DPIM) of the Ministry of Energy. The Mining Council is, however, the intermediary between companies and the government. All parties interested in mining must become members of the Mining Council before any business venture is considered.

The mining industry is controlled under and guided by the following:

- The Minerals Act B.E. 2510 (A.D. 1967), as amended

- The Royal Proclamation Amending the Minerals Acts B.E. 2510 (A.D. 1967) and B.E. 2526 (A.D. 1983)
- The Royal Proclamation Amending the Minerals Act B.E. 2510 (A.D. 1967), and No. 2 B.E. 2528 (A.D. 1985), which gives further guidance to mining companies

Interested companies must apply for various exploration and mining licenses. Upon approval for exploration or mining they must also gain the consent of the owners of the surface rights, for which a fee is usually paid. Forestry Department clearance is often required.

If actual mining is initiated, the mining company pays royalties under the Mineral Royalty Rates Act B.E. 2509 (A.D. 1966) and its amendments, and are subject to the Revenue Code taxes. The DPIM can provide further information on all mining issues.

Under the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (A.D. 1992) and the Constitution of the Kingdom of Thailand, mining businesses are required to submit environmental impact analysis reports to the Office of Natural Resources and Environmental Policy and Planning under the Ministry of Natural Resources and Environment.

For more information environmental impact reports, please see the section on **Environmental Responsibility**.

8. Life Sciences

The key piece of legislation regulating the manufacture and sale of drugs in Thailand is the Drug Act 1967, as amended, together with ministerial regulations and notifications. Parties wishing to manufacture, test, or market medicinal products must adhere to these rules.

The regulation of medicinal drugs in Thailand is overseen by the Ministry of Public Health (MOPH). The Drug Control Bureau of the Food and Drug Administration (FDA), a department of the MOPH, handles the four main aspects of drug regulation:

1. Pre-marketing control (including licensing and registration)
2. Post-marketing monitoring and surveillance
3. Consumer education and dissemination of information
4. Promotion of technological development and research for export

8.1 Biological and Combination Products

All pharmaceutical products, including chemical drugs, biological drugs and vaccines, and combination products, are regulated by the Thai FDA in accordance with the Drug Act. Before launching any pharmaceutical products in Thailand, companies must first obtain a license from the FDA to produce, sell, or import the products into the country. In addition, companies must also obtain marketing approval, i.e., by registering their product for actual sales.

The marketing approval procedure and post-approval regulations of chemical, biological, and combination products are largely the same. The FDA requires an applicant to follow the ASEAN Common Technical Dossier (ACTD) as the technical document template for submission of both biological and chemical drugs. Since January 2016, electronic submission (eSubmission) has been mandated for “New Chemical Entity” (NCE) drugs, and new biological drugs and vaccines for humans. It is expected that eSubmission will be mandated for other types of drug registrations in 2018.

In particular, the approval process and requirements for new biological products are similar to those of new chemical (low-molecular-weight) drugs. The approval process for generic biological products (i.e., biosimilars), however, is more stringent than the approval process for generic chemical drugs. For a biosimilar product, the application dossier must include: (1) administrative and product information; (2) information regarding drug quality (drug substance and manufacturing process); (3) preclinical and clinical trial data; and (4) a risk management plan.

As for a combination product, if the combination is new then the FDA classifies it as a new drug. An application dossier must contain documentation similar to that of a new chemical or a new biological product.

8.2 Medical Devices and Diagnostics

In Thailand, the key legislation that regulates medical devices and diagnostics is the Medical Instrument Act B.E. 2551 (A.D. 2008) (also known as the Medical Device Act), together with ministerial regulations and notifications of the Ministry of Public Health.

Place of Business Registration (an establishment license) by a local company is required for both importers and manufacturers of medical devices/diagnostics.

Currently, medical devices are divided into three classes, depending on the level of control by the Thai FDA.

1. Licensed Medical Devices: This is the most rigorously controlled class, comprised mainly of condoms, HIV diagnostic kits, contact lenses, etc. The following details of medical devices in this class must to be submitted to the FDA:

- Certificate of Free Sales
- Certificate of Quality System of Manufacture, e.g., the relevant ISO certificate
- Clinical evaluation
- Sterility and stability
- Raw material and finished product specifications
- Thai label and leaflet
- Product photo
- Manufacturing process

The FDA requires applicants to use the ASEAN Common Submission Dossier Template (CSDT) as the technical document requirement for submission of licensed medical devices.

2. Notification Medical Devices: The level of control in this class is less stringent than class (1). Examples of medical devices in this class include physical therapy products, silicone breast implants, alcohol detectors, etc. The documents required for submission to the FDA are similar to those of class (1). An applicant must prepare the dossier according to the CSDT.

3. General Medical Devices: This class is subject to the least stringent control by the FDA. All medical devices which are not classified as class (1) or class (2) fall within this class. The following documents are required:

- Certificate of Free Sales
- Catalogue/product photo
- Specifications
- ISO 13485 (in some human use product categories, e.g., implant products, sterile products, etc.)

There are no specific regulations regarding health I.T. issues and mobile medical applications. According to the Medical Instrument Act, software and I.T. systems are also classified as medical devices. Normally, an importer will register these components together with the main instrument.

8.3 Clinical Trials and Import of Drugs for Research

There is no centralized regulation for clinical trials. However, a draft bill covering human research is currently under the consideration of the cabinet and is likely to be passed into law in the near future.

At least six regulatory authorities have jurisdiction over various aspects of clinical trials, including:

- FDA of the MOPH
- Department of Medical Sciences of the MOPH
- Department of Communicable Diseases Control of the MOPH
- Ethical Review Committee for Research in Human Subjects of the MOPH
- National Sub-Committee of HIV Vaccine of the MOPH
- Medical schools and hospitals with specific regulations and/or ethics committees

The FDA does not have a direct mandate to regulate clinical trials in humans. Instead, the FDA's authority to control the import of drugs for research purposes is frequently used to indirectly allow the FDA to regulate clinical trials of drugs in humans.

Thailand also endeavors to adhere to the following treaties, although Thailand has not ratified these treaties and is not bound by their operation:

- The World Medical Association Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects 1964.
- International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals for Human Use, Guidelines on Good Clinical Practice 1996 (ICH GCP), which sets out a standard for the design, conduct, performance, monitoring, auditing, recording, analyses, and reporting of clinical trials. This ensures consistency in relation to the quality of data and ethics.

Licensing of Clinical Trials

The sponsor must first obtain approval to conduct a study in humans from the Ethical Review Committee for Research in Human Subjects of the MOPH (ERC) and/or the ethics committee of the research institute or university that will conduct the trial. This can take two to three months. If approval is obtained from the ethics committee of the research institute or university conducting the trial, approval from the ERC is usually optional (unless it is further required by the internal rules and regulations of that research facility).

Once the drug developer/sponsor receives approval from the relevant ethics committee, it can apply to the FDA for a license to import investigational drugs into Thailand for research purposes.

To obtain this license, the drug developer/sponsor must submit approval from an authorized (or FDA approved) ethics committee, together with documentation, including:

- details of the drugs to be imported;
- pre-clinical trial reports;
- a complete clinical trial protocol;
- the estimated amount of drugs required; and
- a power of attorney.

The license is only valid for four years. If the clinical trial is not complete within that time, a new import license must be obtained.

Consent

Issues relating to consent are regulated by the Civil and Criminal Code, and the National Health Act B.E. 2550 (A.D. 2007). Trial subjects are required to sign an informed consent form before commencement of clinical trials. The consent forms must emphasize that participation is voluntary and, therefore, subjects have the right to withdraw from the trial at any time.

To be valid, the consent form must be signed and dated by the volunteers. However, if they are unconscious, an authorized legal representative can sign the form on their behalf. Participants in the study cannot act as witnesses to the signature. Legal representatives may provide consent for volunteers or patients who are not capable/authorized to give consent.

Trial Pre-Conditions

The trial pre-conditions and recruitment of the participants are in the protocol submitted to the Institutional Review Board (IRB)/Ethics Committee (EC). A sponsor must have a local representative (that is, an investigator or co-investigator) to fulfill the appropriate local responsibilities. A sponsor is also responsible for the appropriate selection of investigators.

Procedural Requirements

The following procedures must be complied with during the conduct of a clinical trial (ICH GCP):

- **Investigator brochure.** This brochure will gather the clinical and non-clinical information of the drug intended to be studied. The aim is to provide information to the investigator and the relevant persons in order to understand the Research Protocol (e.g., frequency/interval of drug administration, route of administration and safety monitoring). Only the sponsor and the investigator have access to the entire brochure and it is not made available online. The brochure should be attached with the project proposal and submitted to IRB/EC. There is no formal time limit for submission.
- **Source data.** The original documents must be archived for at least 15 years and include:
 - signed and dated consent forms;
 - patient OPD cards;
 - doctor's notes (or any other medical professional's note);
 - lab tests;
 - study evaluation tests; and
 - any other documents related to the research.

- **Monitoring by the sponsor and ethics committee.** To ensure the study does not raise any ethical or other issues, the sponsor and ethics committee must:
 - check all source data;
 - verify the quantity of medication delivered; and
 - prepare a report on any adverse effects.
- **Safety report.** This report must list any adverse events, serious adverse events, adverse drug reactions, or suspected or unexpected serious adverse reactions, and should be submitted to the ethics committee. According to the ICH guidelines, the sponsor should report the serious/unexpected adverse drug reactions (ADRs) to the investigator/medical center and IRB/ECs as early as possible. The report should conform to the ICH Guideline for Clinical Safety Data Management: Definitions and Standards for Expedited Reporting.
- **Auditing.** This step ensures that the trial is conducted in accordance with the GCP guidelines.

8.4 Medicinal Products

Manufacture of Medicinal Products

Applications for approval to manufacture medicinal products are made to the FDA for Bangkok and its territories. Applications are made to the appropriate provincial public health offices for other provinces.

A license from the FDA is required for the manufacture of “modern medicines.” The FDA may issue a license to manufacture, sell, or import modern medicines, or order them into Thailand, if the applicant:

- is the owner of the business and has sufficient property or status to be able to establish and operate the business;
- is at least 20 years of age;
- is resident in Thailand (foreign applicant must be a resident of Thailand to obtain a license to manufacture, sell or import drugs);
- has not been convicted for an offense against certain laws, such as laws concerning narcotics and psychotropic substances;
- has premises to produce, sell, import, or store drugs and equipment for use in the production, sale, or storage of drugs, and the control or maintenance of drug quality and quantity as prescribed in ministerial regulations; and
- uses a trade name that is not a repetition of, or similar to, the trade name used by a licensee whose license is suspended or has been revoked for less than a full year.

All of the above conditions must be met to obtain a license to manufacture in Thailand. Licenses for modern medicines are valid until December 31 of the year in which they are issued. An application for renewal must be submitted before expiration of the current license.

An application for a license to manufacture is submitted to the Drug Control Division of the FDA. The applicant’s buildings and facilities are then inspected by the MOPH to assess compliance with Pharmaceutical Inspection Cooperation Scheme (PIC/S) Good Manufacturing Practices (GMP). The MOPH then determines whether the applicant has adequate facilities and the appropriate personnel to manufacture these medicines.

Application fees are listed on the Drug Control Bureau's website. A license to manufacture modern medicines is THB 8,000. A license to manufacture traditional medicines is THB 5,000. Fees may change from time to time.

Compliance and Penalties

Regulators can inspect manufacturing sites for GMP compliance, and monitor manufacturing process changes to ensure that there are no compromising issues on the quality of products, and no adverse effects on the safety or efficacy of the medicines being produced.

The regulator can suspend or revoke the manufacturing license if the licensee violates any provision of the Drug Act. Licensees can appeal to the Minister of Public Health within 30 days of notification of an order to suspend or revoke a license.

Further, the authorities can impose fines and terms of imprisonment for manufacturing without a license. Manufacturing modern medicines without a license is punishable by imprisonment not exceeding five years and a fine not exceeding THB 10,000. Manufacturing traditional medicines without a license is punishable by imprisonment not exceeding three years and a fine not exceeding THB 5,000.

Registration of Medicinal Products

Companies and individuals wishing to place a drug on the market must obtain a license from the FDA to manufacture, sell, or import drugs in Thailand, then obtain FDA registration for the medicine to market and sell the drug.

Companies and individuals wishing to place a drug on the market must:

- Obtain a license from the FDA to manufacture, sell, or import drugs in Thailand. The fee for a license to market a drug is THB 2,000;
- Then obtain FDA registration for the medicine to market and sell the drug in Thailand. Registration requirements differ for modern drugs (which include generics, new medicines and new generics) and traditional drugs. Registration of a new modern drug requires an application to the Drug Control Bureau of the FDA for permission to import a drug sample into Thailand or, less frequently, permission to manufacture a sample; and
- Then submit a full marketing approval application, together with samples, to the FDA for review and registration.

The FDA review of a marketing approval application can take at least nine months, depending on the type of drug, with different timelines for new drugs and generic drugs. The review can take up to two years for a new drug that has never been the subject of a marketing license application in Thailand. The timeline also depends on the credibility and comprehensiveness of the information submitted along with the application.

Once the review has been passed, new drugs must undergo a two-year safety monitoring period, during which the product can only be prescribed in hospitals and clinics. Safety reports must then be submitted to the authorities for consideration as to whether general marketing will be permitted.

Once approved, the certificate of product registration is valid as long as the product marketing remains active. If the product is not on the market for longer than two years, the FDA will automatically cancel the registration.

The Department of Medical Sciences under the MOPH is the main authority responsible for testing products and ensuring the quality and safety of drugs on the market in Thailand. Samples are regularly tested at its laboratories to monitor the safety of new drugs.

The FDA can, if necessary, remove drugs from the market. The authorities can also suspend or revoke a license. A breach of a marketing authorization is considered a criminal offense and is subject to both imprisonment and a fine. Licensees can appeal to the MOPH within 30 days from the date of notification of an order to suspend or revoke a license.

Registration of Generics

Generics enjoy an abridged registration process. To benefit from the streamlined procedures, the product must meet the criteria for a generic. Generics are pharmaceutical products with the same active ingredients and the same dosage forms as those of the original products, but they are made by different manufacturers.

To register generics, an applicant must submit an application for permission to import or manufacture drug samples. The requirement is similar to that for registration of new drugs.

The applicant then submits various details about the drug production process to be used, including:

- manufacturing methods;
- in-process controls;
- specifications of the active ingredients and finished products; and
- inactive ingredients (excipients) used in the production process.

Information about the drug storage conditions and details about the stability of the drug are also required. The applicant then submits a formal application for a drug registration certificate. The entire process can take nine to 12 months.

There are also “new generics” or medicines with the same active ingredients, doses, and dosage forms as those of new compounds registered after 1992. To register new generics, the FDA only requires dossiers of bioequivalence studies, in addition to the required documentation for a generics submission (please see above).

Relevance of Foreign Authorizations

An existing market authorization issued in a foreign jurisdiction does not provide fast-track approval for an application filed with the FDA. However, the application requires the applicant to inform the FDA of any approved and pending marketing authorization for the product in other countries.

If the foreign authorization belongs to a country where regulatory practice is credible and globally accepted, this adds credibility to the authorization application and the evidence submitted to the FDA with the application for marketing approval.

Marketing Medicinal Products

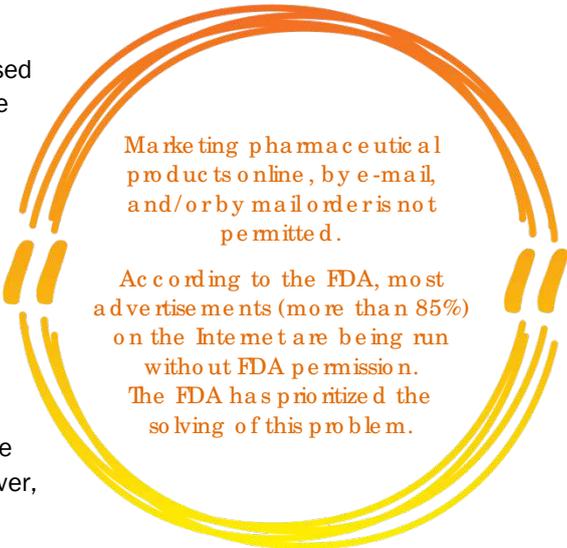
Sections 88 to 90 of the Drug Act regulate the advertising of medicinal products and are enforced by the FDA. The authorities also take the Consumer Protection Act 1979 into consideration when regulating advertising practice. Further, pharmaceutical companies that are members of PReMA must comply with the PReMA Code. Although the PReMA Code is not considered to be law, and the FDA does not have the

authority to enforce it, a violation of the PReMA Code can be reviewed by the PReMA Committee, which can sanction its members.

Restrictions on Marketing Medicinal Products

Advertisements for prescription or pharmacy dispensed medicines can only be targeted to professionals. Drugs in the household remedy category can be advertised directly to consumers and the general public, but such advertising is subject to FDA review and approval before dissemination.

Drugs that can be advertised directly to consumers and the general public must not be classified as dangerous. Drugs classified as dangerous must be dispensed by a pharmacist or doctor. Drugs that are not classified as dangerous (e.g., traditional drugs or household remedies) are specifically listed by the MOPH. Patients can buy these drugs without the need for a pharmacist to dispense it. However, most drugs are classified as dangerous under Thai law.



Marketing pharmaceutical products online, by e-mail, and/or by mail order is not permitted.

According to the FDA, most advertisements (more than 85%) on the Internet are being run without FDA permission. The FDA has prioritized the solving of this problem.

Advertising must be approved by the FDA before dissemination (section 88 *bis*, Drug Act). Section 88 of the Drug Act states that advertisements must not:

- boast that a medicine can miraculously or absolutely treat, cure, or prevent disease or illness;
- exaggerate or falsely declare properties of the medicine;
- give the impression that the drug has a substance as its chief or component ingredient that it either:
 - does not have; or
 - has in a lower quantity than believed to be present;
- give the impression that it is an abortifacient or a strong emmenagogue;
- give the impression that it is an aphrodisiac or a birth control drug;
- advertise specially controlled drugs or dangerous drugs;
- contain certification or endorsement of its therapeutic properties by any other person; or
- show its therapeutic properties as being capable of curing, mitigating, treating, or preventing diseases (or symptoms of them), as notified by the MOPH under Section 77 of the Drug Act.

Further, according to the FDA Internal Rules 2002, advertisements must not:

- be contrary to traditions, e.g., local beliefs, norms, and morals;
- persuade patients to consume the product more than necessary or create a misunderstanding that the product should be used regularly;
- make a comparison that would defame other products;
- cause consumers to misunderstand that the drug is equivalent to other products, such as food or cosmetics; or
- encourage acts or activities contrary to law.

Advertisements must meet the FDA information requirements (e.g., contain the drug name, ingredients, and manufacturing source).

Packaging and Labeling

The Drug Act deals with packaging and labeling. The regulations relating to the packaging and labeling of medicinal products are overseen by the MOPH. The Drug Control Bureau of the FDA handles enforcement. The label and the current size of the packaging must be submitted to the FDA to obtain FDA marketing approval.

Information Requirements

For labeling, the Drug Act requires that either a package insert, a summary of a product's characteristics, or a patient information leaflet are submitted. Required information is listed in the FDA Guidelines. If an applicant submits a patient information leaflet, he or she must also submit the package insert.

Package inserts must contain the following:

- Product name
- Name and strength of the active ingredients
- Product description
- Pharmacodynamics/pharmacokinetics
- Indications
- Recommended dose
- Instructions for use, including modes of administration, contra-indications, general warnings and precautions, interactions with other medical products, warnings and precautions for pregnant and lactating women, undesirable effects, and possible overdose and treatment
- Dosage forms and packaging available
- Name and address of manufacturing/marketing authorization holder
- Date of revision of package insert

A package label must include the following mandatory information:

- Product name
- Registration certificate number
- Content
- Composition or active ingredient with the quantity/potency
- Lot/batch number
- Manufacturer's name and country of origin
- Date of manufacture
- If applicable, and on a red label, a statement that the drug is classified as a specially controlled drug, dangerous drug, or common household drug in Thailand
- Expiration date and the word "expiry" in Thai

Other Conditions

All of the above information can be in Thai or English, except for the information noted above that must be expressly stated in Thai (please see above, Information Requirements). Furthermore, the FDA will periodically issue ministerial notifications to set out specific required information to be included on the label of specific drugs such as antibiotics, antihistamines, sedatives, and hypnotics.

For information about consumer protection in relation to marketing medicinal products, please see the section on **Consumer Protection** in Part 2 (Commercial Transactions) of **Investing in Thailand**.

8.5 Pharmaceutical Patents

Pharmaceutical patents are treated in the same way as inventions in other fields. Nonetheless, the Department of Intellectual Property (DIP) has issued specific guidelines and examination guidelines for pharmaceuticals. A claim for a pharmaceutical innovation must meet the usual criteria of novelty, non-obviousness, and industrial applicability.

The following subject matter is not patentable:

- Micro-organisms that naturally exist and their components, animals, plants, or extracts from animals or plants.
- Scientific and mathematical rules and theories.
- Computer programs.
- Methods for diagnosing, treating, or curing human or animal diseases.
- Inventions that are contrary to public order or morality, public health, or welfare.

This exclusion from patent protection is absolute. The most problematic issues for the pharmaceutical sector relate to biologics, diagnostic methods, and methods of treatment.

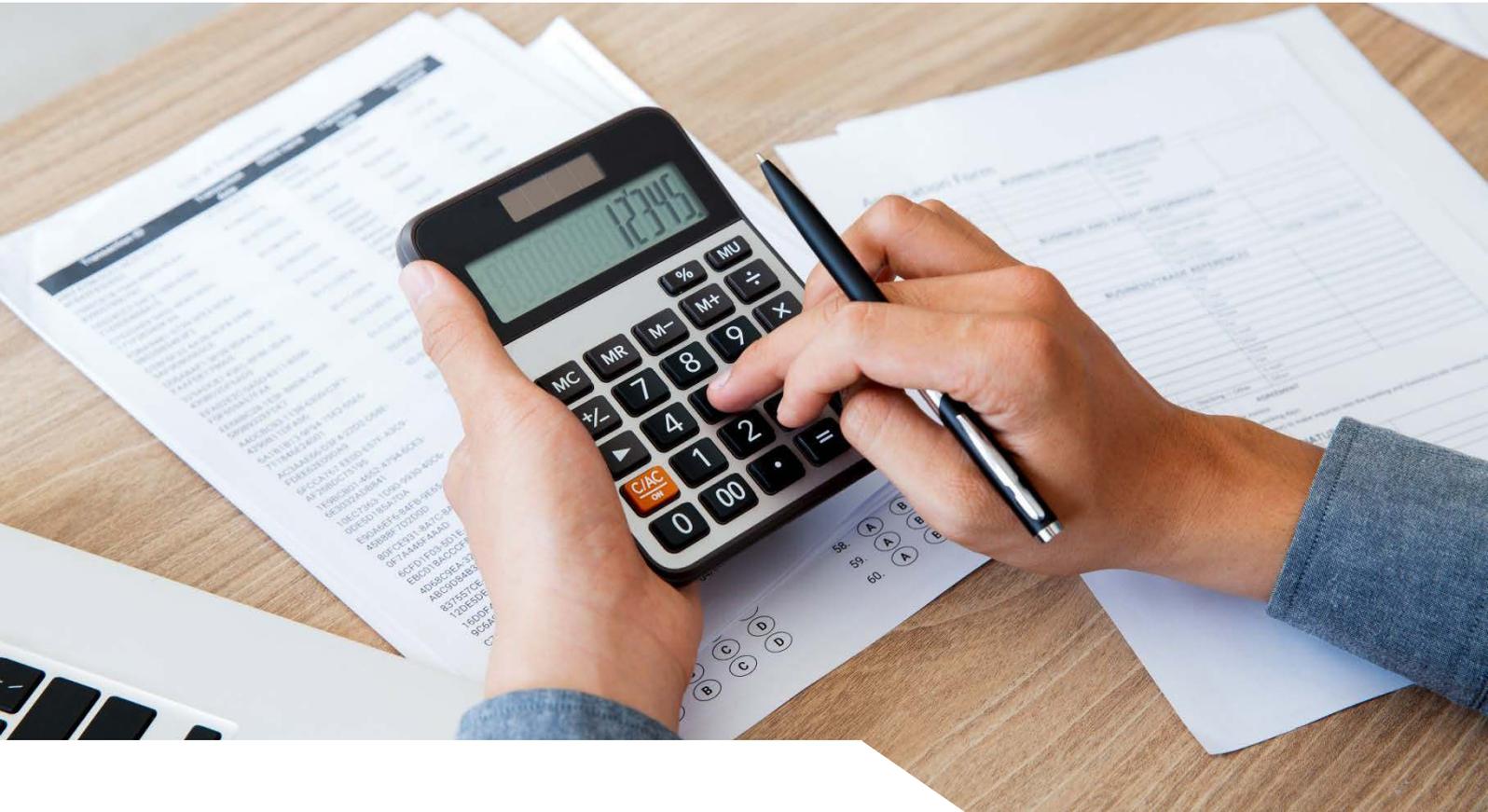
Generally, the following can be patented if it is novel, non-obvious, and useful:

- Polymorphic forms (such as solvates or different crystalline forms of a known chemical compound).
- Formulations (i.e., pharmaceutical compositions).
- New therapeutic use of a known chemical compound.
- Combination and dosage form.
- Methods for preparing medicinal products or related substances.

Until September 30, 2013, there were no specific examination guidelines for pharmaceuticals. In an attempt to clear the longstanding backlog of patent applications for pharmaceutical and chemical inventions, the Department of Intellectual Property issued patent examination guidelines for these sectors. One of the most debated issues was the acceptance of “use claims,” with the guidance now that a claim indicating a process or method which results in an actual/concrete outcome is considered a patentable process according to the Patent Act 1999, so long as use is not directed to a method of treatment of human or animal disease pursuant to Section 9(4), which is not patentable.

Additionally, in the past, a “Swiss-type claim” would be readily acceptable. Under the new examination guidelines, however, this is not the case, and the Department of Intellectual Property will consider whether the specification sufficiently disclosed the claimed subject matter.

For further information on obtaining a patent, please see the chapter on **Protecting Intellectual Property in Thailand** or contact the Tilleke & Gibbins Intellectual Property or Regulatory Affairs teams at +66 2056 5555.



PART 4

Taxation

This chapter provides information on Thailand's taxation system as it applies to corporate entities and individual taxpayers.

Investing in Thailand

Part 4: Taxation

Taxes are imposed at both the national and local levels in Thailand, with the central government being the main taxing authority. The principal taxes levied by the central government are as follows:

- Direct taxes
 - Personal Income Tax
 - Corporate Income Tax
 - Petroleum Income Tax
- Indirect taxes
 - Value Added Tax
 - Specific Business Tax
 - Customs Duties
 - Excise Tax
 - Stamp Duties

The principal tax law in Thailand is the Revenue Code, which governs personal and corporate income taxes, value added tax, specific business tax, and stamp duties. Customs duties are regulated by the Customs Act. The Excise Act governs excise tax. The Petroleum Income Tax Act governs petroleum income tax.

The Ministry of Finance administers the majority of tax collections through:

- The Revenue Department, which is in charge of collecting income tax, value added tax, specific business tax, and stamp duty;
- The Customs Department, which is responsible for collection of import and export duties; and
- The Excise Department, which collects excise tax.

Property tax and municipal tax are collected by local authorities.

In general, tax administration follows the self-assessment system. A taxpayer has a legal duty to declare their income and pay tax to the authorities. The declaration and tax payment are regarded to be correct. Additional assessments, however, may be made by authorities in case of failure to file tax returns or filing of false or inadequate tax returns. Appealing against additional assessments is permitted.

9. Direct Taxes

9.1 Personal Income Tax

An individual Thai citizen or alien who lives in Thailand for one or more periods totaling at least 180 days in any tax (calendar) year is, for tax purposes, deemed a resident of Thailand. A resident of Thailand is subject to tax on:

- all assessable income derived from sources within the country, whether paid within or outside Thailand; and
- all assessable income derived from foreign sources to the extent that it is brought into Thailand in the year in which income is received.

A nonresident individual is subject to tax only on assessable income from Thai sources, regardless of payment location. Nonjuristic partnerships (unregistered ordinary partnerships) and nonjuristic bodies are also subject to personal income tax.

Individual taxable income includes money, assets, taxes paid by the payer of income, and all other benefits received which are not exempt from taxes under Thai tax laws. Some examples of taxable income are listed below:

- Wages paid in Thailand
- Wages paid abroad as a result of work in Thailand
- Income (wages, interest, dividends, etc.) from abroad brought into Thailand in the year earned. This applies only to those who reside in Thailand for a total of 180 days or more in that taxable calendar year
- Vacation pay earned in Thailand
- Housing and meal allowances or their value
- School fees for dependents paid for by an employer
- Cost of home leave for taxpayer and dependents
- Any other benefit received or obligation paid for by an employer
- Taxes paid by an employer for an employee, including taxes paid on taxes
- Capital gains arising from a transfer of assets, except proceeds of a sale of movable property acquired by bequest or acquired with no intention to trade or make profit, as well as those from selling securities listed on the Stock Exchange of Thailand, but not in the form of debentures or bonds
- Royalties
- Interest of more than THB 20,000 on a deposit with a bank in Thailand that is repayable on demand
- Inheritance that is over THB 100 million in value (spouses of the deceased are exempt)
- Gifts received from ascendants, descendants, or spouses that are worth more than THB 20 million in a taxable calendar year
- Gifts other than those from ascendants, descendants, or spouses that are worth more than THB 10 million in a taxable calendar year

The following list shows examples of nontaxable income, assuming that concrete proof is available:

- Income earned abroad by a person who does not reside in Thailand for a total of 180 days or more in the year the income is brought into Thailand
- Moving expenses received by an employee to assume employment for the first time or to return to his place of origin at termination of employment
- *Per diem* or transportation expenses spent by an employee exclusively and wholly for carrying out his or her duties
- Medical expenses paid by an employer for an employee and his or her family
- Compensation for wrongful acts, sums derived from insurance or from a funeral assistance scheme
- Scholarships

Allowable Deductions – Expenses

A standard deduction in percentage of assessable income or the actual expenses incurred in deriving income is allowed, depending on the category of income. For employment income, the standard deduction is 50% of the wages up to a maximum of THB 100,000.

Allowable Deductions – Allowances

Various kinds of allowances can be deducted from total assessable income. Examples are set out in the table below.

Allowances	Amount (THB)
For the income earner	60,000
For the spouse	60,000
For each child (maximum of three)	30,000
For the father and the mother of the income earner if such parent is above 60 years old and earns less than THB 30,000 (per person)	30,000
For the father and the mother of the spouse if such parent is above 60 years old and earns less than THB 30,000 (per person)	30,000

Other allowances provided for in the Revenue Code are as follows:

- Social security allowance
- Old age allowance (for a person aged 65 years or more) of THB 190,000 per person
- Taxpayer life insurance premiums covering a period of at least ten years from an insurance company in Thailand, but not exceeding THB 100,000
- Interest paid on loans granted for acquiring houses not exceeding THB 100,000
- Provident fund contributions not exceeding THB 500,000

- Payment for the purchase of investment units in a Retirement Mutual Fund under the law governing Securities and Exchanges, not exceeding 15% of gross income, and when combined with the amount paid to the provident fund or the government pension fund, not exceeding THB 500,000
- Payment for the purchase of investment units in a Long Term Equity Fund under the law governing Securities and Exchanges, not exceeding 15% of gross income and for the portion not exceeding THB 500,000
- Charity allowance, not exceeding 10% of the balance after deduction of other allowances

A tax credit with respect to dividends is permitted for an individual who is domiciled or resident in Thailand and who receives dividends from any company organized under Thai law. Such credits are computed by multiplying the dividend by the result of dividing the corporate income tax rate that the company paying the dividends is subject to by the balance of 100 minus such corporate income tax rate. The formula is shown below.

$$\text{Credit} = \text{Dividend} \times \left[\frac{A}{100 - A} \right]$$

A = the corporate income tax rate of the dividend-paying company

Tax Rates

The tax due is computed on the net assessable income (income after deduction of expenses and allowances) at progressive rates ranging from 5% to 35%, as illustrated below. All figures are in Thai Baht.

On income after deductions	Rate	Amount	Cumulative
First 150,000	0%	0	0
Next 150,000	5%	7,500	7,500
Next 200,000	10%	20,000	27,500
Next 250,000	15%	37,500	65,000
Next 250,000	20%	50,000	115,000
Next 1,000,000	25%	250,000	365,000
Next 3,000,000	30%	600,000	1,265,000
Over 5,000,000	35%	variable	variable

Personal Income Tax Violations

An individual who fails to file his or her annual tax return is subject to a penalty of twice the amount of the tax due plus a surcharge of 1.5% per month of the tax due. In the case of an improperly filed tax return, the individual will have to pay a one-time penalty in the amount of the tax due and a surcharge of 1.5% per month of the tax due. In both cases, the surcharge shall be capped at the amount of the tax due.

9.2 Corporate Income Tax

Companies and juristic partnerships organized under Thai law (Thai companies) are subject to taxation on their worldwide income. Companies and juristic partnerships organized under foreign laws (foreign companies) are subject to taxation only on income from sources within Thailand. The Revenue Code takes the view that if foreign companies carry on business in Thailand, their income arising from or in consequence of such business constitutes Thai-source income.

Tax Liability of Foreign Companies

A juristic entity incorporated in Thailand is subject to tax on its worldwide income, derived from both domestic and foreign sources. A juristic entity incorporated abroad but carrying on business in Thailand is subject to tax only for income arising from or in consequence of the business carried on in Thailand. The computation of net profits and the rate applied to foreign corporations carrying on business in Thailand is the same as domestic corporations. However, a branch remitting its net after-tax profits to its head office, or the keeping of profits abroad if the head office has received a payment abroad for a service rendered in Thailand, is subject to a further income tax (profit remittance tax) at the rate of 10% of the amount actually remitted or deemed remitted.

Wholly-owned subsidiaries of foreign companies established as companies or juristic partnerships under Thai law are deemed Thai, not foreign, and are subject to corporate income tax.

A joint venture is also subject to corporate income tax.

Foreign corporations not carrying on business in Thailand but deriving certain types of income from or in Thailand, usually in the form of service fees, royalties, interest, dividends, capital gains, rent, or professional fees are subject to a flat rate of corporate income tax. This is a final tax but is collected in the form of withholding tax based on gross income (see below for more information on "Withholding Taxes").

The term *carrying on business in Thailand*, for income tax purposes, is very broad.

Foreign juristic entities are deemed to be "carrying on business in Thailand" if they:

- + have an employee, agent, representative, or go-between in Thailand; and
- + derive income or gains in Thailand from the activities of such person(s).

Tax credit for income tax paid abroad is granted by a royal decree issued under the Revenue Code and double tax treaties, whereby income tax paid in a foreign country can be used as a credit against Thai income tax payable. However, the amount of tax credit allowed shall not exceed the Thai income tax imposed on the same income.

Tax Calculation

Corporate income tax is calculated by taking into account all revenue arising from or in consequence of a business carried on in an accounting period and deducting all allowable expenses, in accordance with the conditions prescribed in the Revenue Code. The tax year for a corporation is its accounting period, which is normally a duration of 12 months.

In calculating net profits, an accrual basis following generally accepted accounting principles may be applied. Other calculation methods can, however, also be applied for certain types of income, such as income derived from certain businesses including banking, finance, securities,

life insurance, consignment sale, leasing of assets, hire-purchase, installment sale, construction, sale of immovable properties, golf courses, short selling of securities, and buying and selling securities.

In determining taxable income, the all-inclusive concept of income is applied. All realized economic gains are treated as income whether they occur frequently or sporadically. Taxable income includes business or professional income, dividends, interest, royalties, and service fees. Capital gains are treated as ordinary income and are subject to corporate income tax.

Income can be in money or in kind, provided that it is convertible into money or monetary value.

Exemptions

Certain exemptions from corporate income tax are provided under the Revenue Code, royal decrees issued under the Revenue Code, and the Investment Promotion Act. Some examples of such exemptions are given below:

1. A reduction or exemption from tax may be granted to juristic entities in accordance with [tax treaties](#) between Thailand and foreign countries.

For more information on [tax treaties](#), please see the section on [double taxation](#).

2. A corporate income tax exemption for a period of three to eight years may be granted to promoted businesses under the [Investment Promotion Act](#). In addition, dividends, fees for goodwill, copyright, or other rights received from the promoted businesses may also be exempt from income tax in the hands of the recipient.

For more information on [concessions schemes](#), please see the section on [Board of Investment Incentives](#).

3. [Dividends](#) paid by a limited company, registered under Thai law, to another Thai limited company or to a company registered under the law governing the Stock Exchange of Thailand may be exempt from corporate income tax if the holding of the shares in the payer company is in compliance with conditions prescribed in the Revenue Code. A Thai company is entitled to include in its taxable income only 50% of the dividends received from another Thai company, provided that shares have been held for a period of at least three months before and three months after receipt of such dividends (referred to as holding period). A Thai company will be exempt from taxation on all dividends received from another Thai company if the recipient company holds at least 25% of the total shares with voting rights in the paying company and has so held such shares in compliance with the holding period, and the paying company does not hold any shares of the recipient company, either directly or indirectly. Thai companies listed on the Stock Exchange of Thailand are exempt from taxation on all dividends received from other Thai companies if they merely comply with the defined holding period.

Deductible Expenses and Allowance

Generally, expenses incurred exclusively for the purpose of generating income or for the purpose of business, other than certain expenses specified under Section 65 *ter* of the Revenue Code, are tax deductible. However, the deduction of some expenses and allowances must comply with the rules prescribed in the Revenue Code.

- **Depreciation allowance** - Any accounting method of depreciation which is generally accepted can be used, but the depreciation rates cannot exceed the rates specified in the Royal Decree issued under the Revenue Code (No. 145). Accelerated depreciation may be allowed for cash registering machines, and machinery and/or accessories used in research and technological development.
- **Vehicles** - Buses with no more than a 10-seating capacity, or passenger cars, may be depreciated but only for the part of the cost value which does not exceed THB 1 million. The THB 1 million limit is not applicable to vehicles used in the automobile rental business.
- **Reserves** - Reserves set aside from premiums of an insurance business, as well as reserves set aside as provision for bad or doubtful debts from credit extension by banks or finance and securities or credit foncier companies, are allowed as deductions. Other reserves are not allowed.
- **Contribution to funds** - Contribution to a provident fund for employees, established in accordance with Ministerial Regulations, is deductible.
- **Bad debts** - For tax purposes, bad debts may be written off only in accordance with the procedures and conditions prescribed by Ministerial Regulations.
- **Entertainment expenses** - Actual entertainment expenses may be deducted from gross income. However, the total deduction of entertainment expenses in an accounting period shall not exceed 0.3 % of total gross revenue or gross sales, or of the paid-up capital, whichever is greater. In addition, the total entertainment expenses allowed for deduction shall not exceed THB 10 million.
- **Donations** - Donations to public charities of up to 2% of net profits and donations for education or sports of up to 2% of net profits may be deducted.
- **Losses carried forward** - Operating losses may be carried forward for five accounting periods to offset against future profits. Losses for a business promoted by the BOI incurred during a tax holiday period may be carried over for five accounting periods after the expiration of the tax holiday. There is no provision for the carry back of losses to previous accounting periods.

Non-Deductible Expenses

Various of non-deductible expenses are stated under section 65 *ter* of the Revenue Code, including:

- personal expenses and gifts;
- tax penalties, surcharges, and criminal fines under the Revenue Code and other laws concerning taxes and duties;
- any artificial or fictitious expenses;
- consideration for properties owned and used by the juristic entity;
- interest on capital, reserves, or funds of the juristic entity;
- any damage recoverable under an insurance or contract of indemnity;
- any disbursement if the identity of its recipient cannot be proved by the payer; and,
- the portion of the purchase price of properties and the expenses in connection with the purchase or sale of properties which exceed a reasonable amount.

Corporate Tax Rate

The corporate income tax rate is 20%, imposed (with few exceptions) on worldwide net profit received by Thai companies and on Thai source net profit received by foreign companies during the given tax year.

A number of other reduced rates also apply to various enterprises:

- Reduced progressive rates of 15% to 20% are granted to **small and medium-sized enterprises (SMEs)** with an exemption on the first THB 300,000 of net profits.
- A company established as an **International Headquarters (IHQ)** that provides qualifying services to affiliated juristic companies, partnerships, or branches is subject to tax at a reduced rate of 10% or 0% of net profits.

Foreign companies engaged in **international transportation** are subject to tax at the rate of 3% of gross ticket receipts collected in Thailand for passenger transportation, and 3% of gross freight charges collected anywhere for transportation of goods from Thailand, in lieu of tax on net profit. Foundations and associations engaged in business activities are subject to tax at the rate of 2% and 10% of gross business income depending on category of income.

Withholding Taxes

Withholding taxes apply to various categories of income paid to juristic entities. The amount of tax to be withheld depends on the category of income and the tax status of the recipient. The withholding tax rates on some important categories of income are listed below:

- The rate on dividends paid to domestic and foreign corporations is 10%
- Rates on interest:
 - 1% on interest paid by financial institutions (banks, finance or credit foncier companies) to domestic companies that are not financial institutions
 - 10% on interest paid by financial institutions to associations and foundations
 - 15% on interest paid to foreign corporations (final tax payment)
- Rates on royalties:
 - 3% on royalties paid to domestic companies and partnerships (juristic partnerships)
 - 10% on royalties paid to associations and foundations
 - 15% on royalties paid to foreign corporations (final tax payment)
- 15% on capital gains, service fees, professional fees, and rent paid to foreign corporations (final tax payment)
- 3% on service fees and professional fees paid to domestic corporations or permanent branch offices of foreign corporations

The withholding tax rates applied to foreign corporations may be reduced or exempted under tax treaties.

Tax withheld must be remitted to the local district office within seven days from the last date of the month in which the payment is made. The tax withheld will then be credited against the final tax liability of the domestic corporations or branches of foreign corporations.

Filing Tax Returns and Payment of Tax

Juristic entities must file tax returns and pay corporate income tax twice a year: a half-year tax return and an annual income tax return.

A half-year income tax return must be filed within two months from the last day of the first six months of an accounting period. The amount of tax to be paid is computed either on one-half of the estimated net profits for the whole year or on the actual net profits for the first six months of an accounting period. A juristic entity selecting to pay tax on the actual net profits must submit financial statements together with the tax return. The financial statements must be reviewed by an authorized auditor. The tax paid for a half-year is treated as a credit in the computation of the annual income tax liability.

An annual income tax return must be filed and tax must be paid within 150 days from the end of an accounting period. The tax return must also be filed together with an audited balance sheet and profit and loss accounts, or a statement of gross receipts, as the case may be.

In cases involving profit remittance tax, the tax return must be filed and tax must be paid within seven days from the date of remittance.

Consolidated Returns for Affiliated Corporations

The term **market price** means the price of the remuneration, service fee, or interest which each independent party shall set fairly in business practice, in the transfer of assets, provision of services, or extension of loans of the same type as on the date of such transfer of assets, or provision of services, or extension of loans.

There is no consolidated treatment under the Thai Revenue Code whereby corporations within a group may be treated as one tax entity. Each corporation is taxed as a separate legal entity.

In addition, there is no form of group relief or relief by consolidation in respect of losses incurred by an affiliate.

Transfer Pricing Rules

Transfer pricing refers to the transactions between related parties. For tax purposes, a company may be required to show that a transaction with a related party was made at market price. Methods that may be employed for determining market price are the comparable uncontrolled price method, resale price method, cost plus method, or other internationally accepted methods.

The Revenue Department has the power to make assessments regarding the following:

- Transfer of assets without compensation
- Rendering of services without service charge
- Lending of money without interest
- Purchase of properties, or expenses related to purchase of properties, which exceed a normal amount

The following entities are only required to file tax returns once per year:

- ▶ Juristic entities that pay taxes on gross receipts instead of net profits (i.e., foreign corporations engaged in international transportation, associations, and foundations); and
- ▶ juristic entities whose first or last accounting period is less than 12 months

Additionally, the Revenue Department has the power to make an assessment of a transfer of assets, rendering of services or lending of money with compensation, service charge, or interest in an amount considered to be lower than the market value without justification. The Revenue Department also has the power to determine the price of imported goods by comparing them with the price of goods of the same category and type which are delivered to another country.

Corporate Income Tax Violations

An annual corporate income tax return, together with the tax due, must be filed within 150 days of the end of the accounting period, accompanied by audited financial statements. For a juristic entity, failure to file or improper filing of the tax return is subject to the same punishment imposed upon individuals.

A mid-year corporate tax return is also required. It must be filed by the eighth month of the accounting period. Failure to file the mid-year tax return without a reasonable excuse is subject to a surcharge of 20% of the amount of the tax due. In addition, should the underestimation of the net profit of an accounting period exceed 25% of the actual net profit without a reasonable justification, a surcharge of 20% of the deficit tax can also be imposed. Companies listed on the Stock Exchange of Thailand, commercial banks, financial institutions, securities companies, or credit foncier companies, which pay taxes based on actual profit, may also be subject to a surcharge of 20% of the amount of tax due for failure to file the mid-year tax return or filing the mid-year tax return inaccurately without a reasonable excuse.

With regard to criminal liability for tax offenses, sections 35 to 37 *bis* of the Revenue Code provide penal sanctions, primarily against whoever commits a tax offense. A company director can be criminally liable jointly with the company for a tax offense under the Revenue Code.

9.3 Petroleum Income Tax

Companies granted licenses to explore, produce, and export petroleum (crude oil, natural gas, etc.) under the Petroleum Act, and companies purchasing oil for export from a concessions holder, are subject to tax under the Petroleum Income Tax Act instead of corporate income tax under the Revenue Code.

Petroleum Income Tax is chargeable on net profits at the rate of 50%. No further tax is levied on dividends payable to shareholders or on the distribution of profits to the head office by a branch. Net profit for petroleum income tax purposes is computed in the same manner as for corporate income tax, but net losses may be carried forward for ten accounting periods and interest is not a deductible expense.

10. Indirect Taxes

10.1 Value Added Tax

Value Added Tax (VAT) is an indirect tax collected upon consumption (i.e., at each stage of production, distribution of goods, or provision of services).

Generally, the operator charges VAT on the sale of goods or provision of services to the consumer. The VAT paid by the operator to other operators for the purchase of goods or services is then deducted and the balance remitted to the Revenue Department. Thus, tax will accrue at each stage only on the “value added” to the goods or services at that stage. Under the VAT system, the tax will ultimately be borne by the consumer. The operator is therefore regarded as a collector of tax for the Revenue Department.

VAT is imposed on the following:

- a. Sale of goods
- b. Provision of services by an operator
- c. Importation of goods by an importer

Persons Liable to pay VAT

The following persons are liable to pay VAT are:

- a. Operators or persons who sell goods or render services in the course of their business or professional activities. Operators include companies, partnerships, joint ventures, sole proprietors, and government enterprises conducting a business;
- b. Importers;
- c. Agents who sell goods or render services in the ordinary course of business for operators residing outside Thailand;
- d. Transferees of goods or services from certain persons or organizations, i.e. the United Nations, consulates, embassies, etc. Sale of goods or provision of services to such persons or organizations is subject to VAT at a zero-percent rate; and
- e. Operators residing outside Thailand and the persons with the responsibility to carry on business in Thailand, including their employees or representatives residing in Thailand who have direct or indirect authority to manage for such operators, are jointly liable for VAT.

Sale is the disposition, distribution, or transfer of goods, whether or not for a benefit or consideration. It also includes the delivery of goods on hire-purchase or installment sale, the delivery of goods to an agent for sale, or delivery to a foreign country.

Service is any activity performed with a view to benefits, other than sale of goods, and includes making use of the supplier's own service by any means.

Provision of services in Thailand means performing a service in Thailand, regardless of whether the service is used locally or overseas. A service that is performed in a foreign country and made use of in Thailand will be regarded as provided in Thailand.

Exemptions

The following persons are exempted from paying VAT:

- Small businesses with annual sales volume not exceeding THB 1.8 million
- Persons exempted by other laws, such as corporations falling under the Petroleum Income Tax Law

In general, the sale of goods or provision of services that are necessary for the maintenance of life and social welfare will be exempt from VAT. The exempted transactions also include cultural services and religious and charitable services. Examples of exempted transactions are as follows:

- Sale of unprocessed agricultural products
- Provision of educational services
- Provision of health care services
- Provision of domestic transportation services and international transportation by land
- Sale of goods or provision of services exclusively for the benefit of a religion or a public charity in Thailand, provided that the profits are not applied for other purposes

Tax Base

The tax base for sale of goods or provision of services is the total value received or receivable by a supplier from the sale or service inclusive of excise tax. The value of the tax base includes money, property, compensation, consideration for services, or any benefit ascertainable in terms of money. However, the value of the tax base will not include the following:

- Prompt discounts and allowances as clearly stated and deducted from the price of goods or services on the tax invoice
- Rebates, subsidies or compensation prescribed by the Director-General of the Revenue Department, with the approval of the Minister
- Output tax
- Compensation answering to the description and conditions given or prescribed by the Director General, with the approval of the Minister

The tax base for the import of goods is the CIF price of goods plus import duty and excise tax (if any) and surcharges and other taxes and fees.

VAT Rates

VAT is generally imposed at a standard rate of 10%. This rate includes municipal tax, charged at the rate of one-ninth of the VAT rate. All sales of goods, provision of services, and importation of goods are subject to this rate, except the businesses or transactions stated below. A temporary reduction of the VAT rate to 7% is currently in force. The original reduction was due to expire in 2010, but has since been repeatedly extended by successive governments.

A 0% rate applies only to certain businesses specified under the provisions of VAT. A business that makes only zero-rated supplies will not be required to collect any tax on its supplies and can refund all input tax paid. The following are examples of businesses subject to the 0% rate:

- Exporters of goods
- Providers of services performed in Thailand but used in a foreign country
- Providers of international transport services by aircraft or sea-going vessels, organized under Thai or foreign law
- Sellers of goods and providers of services to the United Nations organization or its specialized agencies or to a foreign embassy or consulate

Computation

VAT is computed monthly by deducting the amount of VAT paid on the purchase of goods and services for sale or utilization in the production process during the month ("Input Tax") from VAT due from the sale of goods or provision of services during the same month ("Output Tax"). If Output Tax exceeds Input Tax, the operator must remit the excess amount to the Revenue Department. If Input Tax exceeds Output Tax, the excess amount may either be claimed as a tax refund from the Revenue Department or carried forward to offset against the VAT due in the following months.

VAT arising from the purchase of goods or services ("Input Tax") is not always deductible from the total VAT due ("Output Tax"). Examples of non-deductible input tax are as follows:

- Input tax without a tax invoice

- Input tax with a tax invoice containing materially inaccurate or incomplete contents
- Input tax which is not related to the operator's business
- Input tax on entertainment expense
- Input tax of a tax invoice issued by non-authorized person

If an operator carries on business in both categories subject to and not subject to VAT, then the operator is required to apportion Input Tax to each business. Only the Input Tax that is attributable to the business of the category subject to VAT may be deducted from Output Tax.

VAT Registration

An operator must apply for VAT registration within 30 days of its annual revenue exceeding THB 1.8 million. However, an operator still has the right to apply for VAT registration before commencing business.

An application for VAT registration must be filed with the local district office where the place of business is located.

If the operator has several offices or branches, the application for VAT registration must be filed at the local district office of the Revenue Department which has jurisdiction over the operator's head office.

The registered operator is required to issue a tax invoice when VAT liability arises in respect of sale of goods or provision of services. The tax invoice must contain all the particulars prescribed by law. The original tax invoice must be given to the purchaser and copies of all invoices must be maintained for at least five years.

Filing VAT Returns and Payment of Tax

A registered operator must file a VAT return and pay tax (if any) to the local district office within 15 days of the end of the month in which the VAT is to be accounted for.

For an operator with several places of business, separate VAT returns must be filed (and separate amounts paid) for each place of business (unless otherwise permitted by the director-general of the Revenue Department).

Registered operators who make payments for the following transactions are also required to remit VAT to the Revenue Department within seven days from the end of the month in which the payment is made:

- Payment for goods or services to a supplier residing outside Thailand and temporarily carrying on business in Thailand without being recorded for temporary VAT registration
- Payment for services to a supplier providing services in a foreign country and the use of which is made in Thailand

Value Added Tax Violations

The VAT registrant is generally required to file a VAT return and pay the tax monthly, no later than the fifteenth day of the following month.

Failure to register as a VAT operator, file a VAT return, or issue a tax invoice to a customer, is subject to a penalty of twice the amount of the tax due. A surcharge for failure to pay the VAT is levied at the rate of 1.5% per month of the tax due, such surcharge to be capped at the amount of the tax due. In addition,

noncompliance with VAT regulations is punishable by imprisonment not exceeding seven years and a fine not exceeding THB 200,000. If the offenses have been committed by a juristic person, its managing directors, managers, or representatives may also be subject to the same penalties in certain situations.

Operators residing outside Thailand may be liable for SBT if they carry on business through a place of business, an agent, a representative, or an employee residing in Thailand

10.2 Specific Business Tax

The Specific Business Tax (SBT) is imposed on certain types of businesses that provide services whose “value added” is difficult to define. These businesses are considered to be outside the VAT system and therefore are not subject to VAT. The businesses that are subject to SBT are set out in the table below.

An operator subject to SBT must apply for SBT registration within 30 days from the date of commencing business. Businesses in the sale of securities and temporary businesses are exempt from SBT registration requirements.

SBT is computed on monthly gross receipts at the applicable rate stipulated in the law. SBT returns must be filed monthly within 15 days from the end of the month in which the SBT is to be accounted for.

Where an SBT operator purchases goods or services which are subject to VAT, the SBT operator is characterized as the ultimate consumer in the VAT system.

The types of business, tax base, and tax rates under the SBT are as follows:

Type of Business	Tax Base	Tax Rate (as Percentage of Gross Receipts)
1. Banking or similar business, finance business, credit foncier, and securities business	1.1 Interest, discounts, fees, service charges, or profits before deduction of any expenses from the purchase or sale of negotiable instruments or documents of indebtedness	3.0
	1.2 Gross profits before deduction of any expenses from the exchange or sale of currencies, issuance of negotiable instruments or documents of indebtedness, or remittance of currencies to a foreign country	3.0
2. Life Insurance	Interest, fees, or service charges	2.5
3. Pawnshop	3.1 Interest or fees	2.5
	3.2 Money, property, consideration, or benefit of value received or receivable from sale of forfeited pawned goods	2.5
4. Sale of immovable property in a commercial manner or for profits.	Gross receipts before deduction of any expenses	3.0
5. Sale of securities in SET	Gross receipts before deduction of any expenses (exempt by Royal Decree No. 240)	0.1

The SBT rates do not include municipal tax. An additional amount of 10% of SBT is levied as municipal tax on top of the SBT rate.

In addition to SBT, an operator liable for SBT may also be subject to pay VAT on the following business transactions:

- Business transactions that are not directly related to the specific businesses
- Business transactions which, though directly related to specific businesses, are prescribed by royal decree as business subject to VAT, such as provisions for letting out movable properties on hire, provision of credit card services, and provision of securities underwriting services

If an operator carries on a business that is subject to SBT as well as a business subject to VAT, the operator must allocate its Input Tax between the business subject to SBT and the business subject to VAT. Only Input Tax related to VAT taxable supplies will be credited against the Output Tax.

Specific Business Tax Violations

Failure to register as an SBT operator or file an SBT return is subject to a penalty of twice the amount of the tax due. A surcharge for failure to pay the SBT is levied at the rate of 1.5% per month of the tax due and is capped at the amount of the tax due. In addition, noncompliance with SBT regulations is punishable by imprisonment not exceeding seven years and a fine not exceeding THB 200,000. If the offenses have been committed by a juristic person, its managing directors, managers, or representatives may also be subject to the same penalties in certain situations.

10.3 Customs Duties

Customs duty is mainly imposed on imported and selected export goods specified by the Law on Customs Tariffs. Customs duty is levied in accordance with the Harmonized Commodity Description and Coding System or Harmonized System.

Most tariffs are *ad valorem*, which is a duty laid upon goods at a certain rate of their value. In certain cases, however, both an *ad valorem* rate and a specific rate (e.g., a rate charged on a unit of goods) are given, and the tariff that gives the most revenue will apply. In general, the invoice price is the basis for computation of duty and normally applied to cost, insurance, and freight value for import and free on board for export.

Reduction and Exemption from Customs Duties

Reduction of and exemption from customs duties on certain imported goods is granted to promoted persons under the Investment Promotion Act and to petroleum concessionaires under the Petroleum Act.

Reduction of or exemption from customs duties on imported goods is also granted to members of the ASEAN Free Trade Area (AFTA) and the World Trade Organization (WTO), and to parties of free trade agreements and international agreements to which Thailand is a party.

Thailand is also a member of the General Agreement on Tariffs and Trade (GATT). Thai customs law adopts practices and standards in accordance with GATT codes in determination of customs prices.

10.4 Excise Tax

Excise Tax is levied on selected goods (mainly luxury goods) such as petroleum products, tobacco, liquor, beer, soft drinks, crystal glasses, perfume and cosmetic products, air-conditioners not over 72,000 BTU, and passenger cars with ten seats or less.

Excise Tax is computed *ad valorem* or at a specific rate, whichever is greater. All goods subject to excise tax remain subject to VAT. The excise tax is collected by the Excise Department and is usually imposed at the time of delivery of the goods from factories.

10.5 Stamp Duties

Stamp duty is levied on 28 classes of instruments specified in the Stamp Duty Schedule of the Revenue Code. The rates vary according to the nature or content of the instrument. Examples of instruments subject to stamp duties are powers of attorney, letters of credit, checks, bills of lading, memorandum of association of limited companies, articles of association of limited companies, and partnership contracts.

10.6 Property Tax

Property tax is imposed and collected annually. There are two kinds of property tax in Thailand:

- (1) House and Land Tax; and
- (2) Local Development Tax

House and Land Tax

Under the House and Land Tax Act B.E. 2475 (A.D. 1932), as amended, the tax is imposed on owners of houses, buildings, structures, or land rented or otherwise put to commercial use. Taxable property under house and land tax includes houses not occupied by the owner, industrial and commercial buildings, and land used in connection therewith. The tax rate is 12.5% of actual or assessed annual rental value of the property.

Local Development Tax

Under the Local Development Tax Act B.E. 2508 (A.D. 1965), as amended, the tax is imposed upon the person who either owns or is in possession of the land. Tax rates vary according to the medium value as appraised by the local authorities. Allowances are granted for land utilized as personal dwellings, to raise livestock, and to cultivate crops by the owner. The extent of the allowances differs according to the location of the land.

The Thai government has announced plans to replace the current House and Land Tax, and the current Local Development Tax, with a new Land and Building Tax. The plans indicate that the Land and Building Tax will be based on the use and official appraised value of a property. The new law would be applicable to more categories of property, thus broadening the tax base. Further announcements are expected on enactment and implementation.

10.7 Signboard Tax

Under the Signboard Tax Act B.E. 2510 (A.D. 1967), as amended, a tax is levied on signboards showing names, symbols or marks of business, or advertisements. Rates specified in the Signboard Tax Act are computed on signboard size.

10.8 Inheritance, Estate and Gift Taxes

Inheritance Tax

The Inheritance Tax Act B.E. 2558 (2015) came into effect on February 1, 2016. Any income derived from inheritance prior to the act becoming effective is regarded as exempt income for Thai income tax purposes.

Inheritance tax arises upon distribution of the decedent's estate to an heir/inheritor, and is levied upon the recipient of inherited taxable assets within the scope defined under the act (e.g., immovable property, bank deposits, etc.), but only on value in excess of THB 100 million. A tax rate of 5% applies if the recipient is an ascendant or descendant of the decedent, while a tax rate of 10% is applicable in all other cases.

The act does not apply to: (1) assets inherited from a decedent who has passed away prior to the effective date of the act; or (2) assets inherited by a legal spouse of the decedent.

Gift Tax

While there is no separate gift tax, certain gifts are subject to income tax under the Thai Revenue Code. This development is relatively new, and, in the past, income received from a moral obligation, or gifts made in a ceremony or on occasions in accordance with established customs, were exempt from personal income tax.

However, the Act to Amend the Revenue Code (No. 40) B.E. 2558 (A.D. 2015), which came into effect on February 1, 2016, amended the Revenue Code to provide for the recipient of a gift to be subject to personal income tax on the value of gifts exceeding a specified annual threshold of either THB 10 million or THB 20 million, depending on the status of the recipient. The recipient has the option of either paying the tax at a flat rate of 5% on the non-exempt income (i.e. the amount in excess of THB 10 million or THB 20 million), or including the non-exempt income with their other income, all of which would be subject to personal income tax at normal progressive rates.

11. Double Taxation

Thai tax treaties are mainly concerned with the avoidance of double taxation. The general principle is that the country in which the income arises (source country) has the prior right to tax and the country of residence will grant a relief (tax exemption or tax credit) from paying taxes twice on the same income. In addition, the treaties also provide for cooperation between governments in preventing the evasion of taxes.

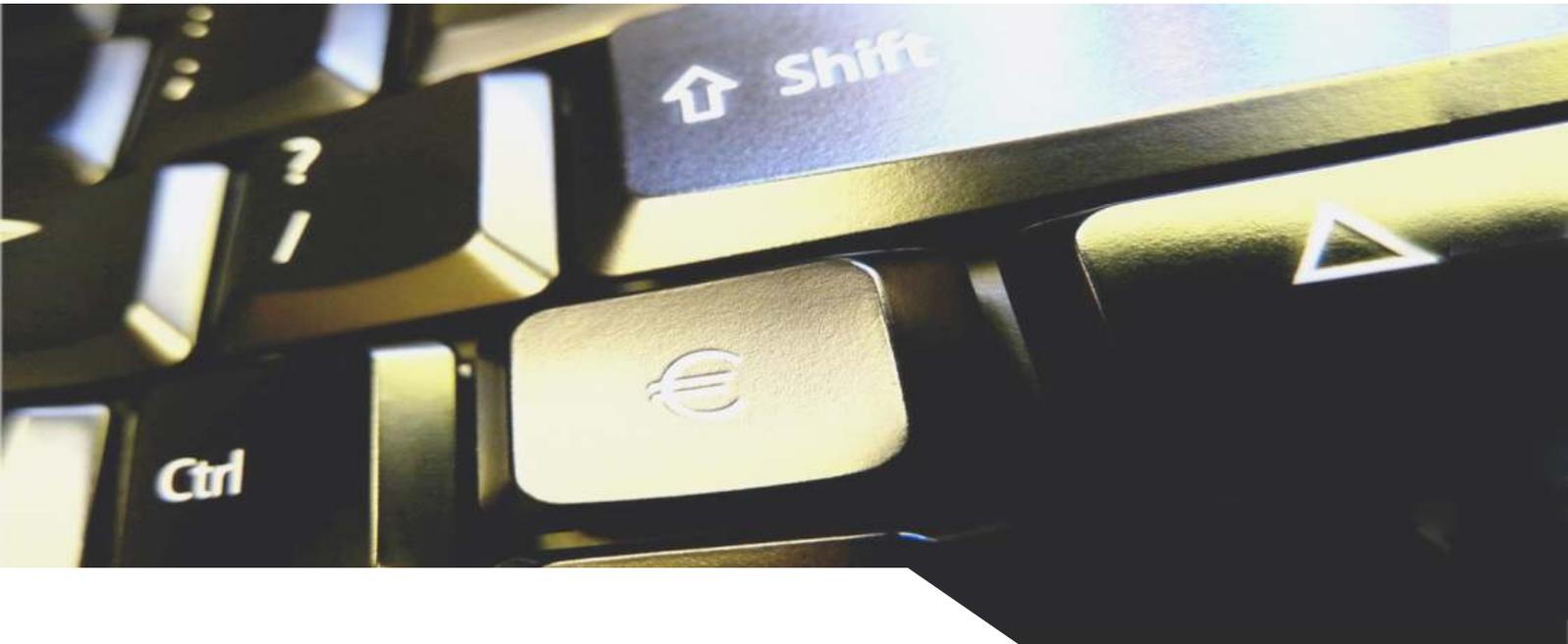
Thailand has entered into a number of treaties for the avoidance of double taxation. The scope of the Thai tax treaties covers taxes on income and on the capital of individual and juristic entities. The provisions of these tax treaties minimize or exempt certain types of income from taxation.

Countries with Double Tax Treaties with Thailand

Armenia, Australia, Austria, Bahrain, Bangladesh, Belarus, Belgium, Bulgaria (Rep.), Canada, Chile, China (People's Republic of China), Chinese Taipei, Cyprus (Rep.), Czech Republic, Denmark, Estonia, Finland, France, Germany, Hong Kong, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Korea (Rep.), Kuwait, Laos, Luxembourg, Malaysia, Mauritius, Myanmar, Nepal, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Poland, Romania, Russia, Seychelles, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States, Uzbekistan, and Vietnam

Countries with Treaties Not Yet In Force

Brunei, Kenya, Lithuania, Morocco, Papua New Guinea, and Zimbabwe



PART 5

Restructuring or Ceasing Operations

This chapter covers changing the structure of an established business and includes an overview of merger and acquisition regulations. This chapter also includes information on bankruptcy, restructuring, and formally ceasing the operations of a business.

Investing in Thailand

Part 5: Restructuring or Ceasing Operations

Tilleke & Gibbins helps clients reach commercial goals, including achieving maximum value from corporate assets, favorable loan terms, equitable distribution of assets and company closure, and business renewal via reorganization or restructuring. We are innovative in our outlook and zealous in our execution.

Our assistance begins at the inception of a deal. Our banking and finance specialists assist clients in properly documenting commercial lending and other financial transactions. Our proactive approach means that our clients can rely on the documentation to solve future lender-borrower disputes.

Our assistance is multifaceted. When we represent a debtor in an insolvency situation, we may negotiate with creditors on the pre-bankruptcy composition of debts, provide advice on employment and labor matters, defend brands and corporate names, explore the client's tax exposure, and obtain protection for directors through contractual arrangements.

12. Mergers and Acquisitions

12.1 Types of Mergers and Acquisitions

Under Thai law, there are three main types of merger and acquisition (M&A) transactions that occur:

1. full merger (amalgamation);
2. share acquisition; and
3. asset acquisition.

A resolution is deemed to be a *special resolution* if passed by general meeting in the following way:

Notice of summoning to a general meeting must be published at least once in a local newspaper, no later than 14 days before the date scheduled for the meeting, and sent by registered mail to all shareholders.

The place, day, time of the meeting, nature of business, and substance of the proposed resolution must be included in the notice for summoning the general meeting.

The resolution must be passed in the meeting by a majority of not less than three-quarters of the total votes of shareholders attending the meeting and eligible to cast the votes.

The full text of the resolution passed in the first meeting must be included in the notice summoning the special meeting.

Amalgamation

Under the CCC, mergers of limited companies are referred to as amalgamations. The CCC sets forth registration and notice requirements for amalgamations.

A limited company may not amalgamate with another limited company, except by special resolution. The special resolution by which an amalgamation is decided must be registered by the company within fourteen days from its date.

Companies must publish a notice of a proposed amalgamation at least once in a local paper. A company must also send a notice of the particulars of the proposed amalgamation to all creditors known to the company, requiring them to present any objections they may have to the notice within 60 days of the date of the notice.

When the amalgamation is complete, it must be registered by each amalgamated company within 14 days. The limited company formed by the amalgamation must be registered as a new company.

The share capital of the new company must be equivalent to the total share capital of the amalgamated companies. The new company is entitled to the rights and subject to the liabilities of the amalgamated companies.

Share Acquisition

For cross-border M&A of public companies, the Securities and Exchange Act B.E. 2535 (A.D. 1992) governs the acquisition of securities for business takeovers. Thailand does not have a specific law on share acquisition of a private limited company. The CCC and the articles of association of the target company will set forth the required procedures for transferring shares in that private limited company.

There is no registration fee for the transfer of a company's shares. However, stamp duties are required to be affixed to the share transfer instruments at the rate of THB 1 for every THB 1,000 or a fraction of the paid-up value of the shares or of the nominal value of the instrument, whichever is greater.

Asset Acquisition

In asset acquisition, the acquirer purchases the assets of the target company. Although Thailand does not have specific laws dealing with asset transfer, the transfer of assets requires the preparation of many documents and can also be financially burdensome if the target company's assets include immovable assets. Registration is also necessary for transfers of land and immovable properties, long-term lease agreements, some intellectual property rights, and machinery. In addition, employees have to be transferred in accordance with Thai labor law. Transfer of assets usually requires numerous notifications and consents from third parties.

If the seller is a juristic person, the transfer of immovable assets (land and buildings) is subject to a registration fee of 2% of the price as appraised by the Land Department. The transfer of immovable assets is further subject to specific business tax at the rate of 3.3% of the selling price, or the price as appraised by the Land Department, whichever is greater. Seller's Corporate Income Tax shall be paid in the form of withholding tax at the rate of 1% of the selling price or official appraisal price, whichever is greater.

12.2 Foreign Investor Limitations in M&A

Foreign investors should be mindful of limitations on foreign ownership when considering cross-border M&A ventures in Thailand. Usual limitations arising under the Foreign Business Act, as discussed in Part 1 of *Investing in Thailand (Commencing a Business in Thailand)*, will apply equally to merger or acquisition of a Thai company. Foreign investment in businesses specified in the FBA is limited to less than 50% of share capital, unless specially permitted or otherwise exempted.

Other incentives may include Board of Investment privileges, tax breaks, customs duty exemptions or reductions, land ownership for foreign companies, and visa and work permit privileges for foreigners.

12.3 Due Diligence

Perhaps the most challenging aspect of M&A in Thailand concerns legal due diligence. Although due diligence plays a vital role in M&A, there are no specific statutory requirements in Thailand for legal due diligence reviews during the course of an M&A deal. Such reviews are essential in order to prevent or mitigate future liability. The review process can unearth determining factors, such as a target's noncompliance or any violation of laws, regulations, restrictions on foreign ownership, or restrictions on share transfers, which may eventually make or break a deal.

Legal due diligence has a variety of definitions, depending upon the context. Generally, due diligence refers to the conduct and judgment that a person would take to carry out their duties. In a corporate context, due diligence is more of an analytical and investigative exercise, typically involving the feasibility of a major transaction.

Before any intended merger or acquisition is completed, financial due diligence on the target is required in order for the acquirer to decide whether or not the acquisition of the target is commercially and financially viable. Legal due diligence on the target is also an important task to identify any legal discrepancies or liability on various matters, which the legal team may discover during their legal due diligence on the target. The acquirer should not complete the deal without their legal team conducting due diligence on the target.

A legal team can also confirm the legitimacy of issued shares; whether there are any encumbrances on major assets; whether the target is legally authorized to conduct business with the proper or requisite licenses; potential breaches of terms and obligations of material commercial contracts or employment agreements; and most importantly, whether or not there is any pending litigation by or against the target, or any bankruptcy or reorganization filings.

There are, however, limitations on the performance of legal due diligence review in Thailand. First, Thailand does not have a centralized recording system of pending nationwide court suits on which to conduct litigation searches. Independent litigation searches have to be conducted at each major court in Bangkok—the Central Bankruptcy Court and the Business Reorganization Office, Civil Court, Southern Bangkok Civil Court, Intellectual Property and International Trade Court, Central Labor Court, Criminal Court, and Central Tax Court. If the target is located outside Bangkok, litigation searches at the relevant provincial court must be arranged.

Thailand also does not have a centralized asset registry. Real property searches must be undertaken at the appropriate Land Office where the target's real property is situated. Copies of land title deeds may serve to facilitate the conduct of these property searches.

Lastly, any encumbrances on shares can only be verified by vetting the register of shareholders, which is maintained solely by the target and is not in publicly available records.

Key Points on Mergers and Acquisitions:

- Share acquisition would generally be advantageous where:
 - the company has substantial intellectual property rights, contracts, licenses and permits, and other intangible assets that cannot be transferred;
 - the company's assets cannot be transferred or are transferrable, but such would be very costly due to transfer fees, taxes, and other costs;
 - the company's losses could be carried over to subsequent accounting years; and
 - the company's employees are a material component of the existence of its business.
- Asset acquisition would generally be favored where risks are foreseen in the hidden liabilities of the target company and where such risks outweigh the advantages of lesser transfer fees, taxes, and other transaction costs.
- Due diligence reviews are now widely seen as an essential step when moving forward with a transaction. All companies involved in significant transactions should carry out legal due diligence review, whether limited or in full, prior to entering into any M&A deal in order to prevent or mitigate future liability.

For further information on mergers and acquisitions or assistance with the implementation of strategic growth transactions or conducting due diligence, please contact the Tilleke & Gibbins M&A team on +66 2056 5555.

13. Restructuring

The Bankruptcy Act 1940, as amended, sets forth the process of maintaining the viability of a distressed company by setting up a legal structure to maintain the debtors' assets and to rehabilitate its business on the one hand, while protecting the interests of the creditors, old and new alike, on the other.

Two distinct means for pursuing restructuring exist: out-of-court restructuring and court-supervised restructuring.

13.1 Out-of-Court Restructuring

Under informal restructuring schemes, lenders and borrowers with non-productive loans create their own plans to reformulate loan repayment. This is usually based on bilateral contracts between lenders and borrowers. The only guidelines to informal restructuring are the creditor's individual policies.

13.2 Court-Supervised Restructuring

A petition for restructuring can be filed by:

- a debtor;
- a relevant government authority; and
- creditors who are owed not less than THB 10 million.

Once the court approves the petition, it declares a stay on legal proceedings, which restricts the ability of creditors to take action against the company to recover sums owed to them. This stay prevents parties from commencing or continuing lawsuits against the company and prevents creditors from filing dissolution or bankruptcy petitions.

Next, the creditors select a planner to draft a rehabilitation plan and to effectively take over the debtor's business. Within one month of the court's approval of the planner, all creditors must submit their claims. Claims that are not submitted within that period will be forfeited. The planner then drafts the plan and submits it to the creditors within three months (with a maximum of two one-month extensions). The law divides creditors into the following four groups (in order of repayment priority):

1. Major secured creditors
2. Minor secured creditors
3. Unsecured creditors
4. Subordinate creditors

The creditors must approve the plan by special resolution, which takes place when creditors representing at least 75% of the total indebtedness approve the plan, or upon approval by those representing 75% of the indebtedness of a single group of lenders, so long as those representing at least 50% of the total indebtedness approve the plan. When a special resolution has been passed, the plan is submitted to the court for final approval.

A secured creditor is a creditor which holds rights over the assets of the debtor in a mortgage, pledge, or a right of retention, or a creditor with a preferential right.

Any creditor who does not fall within the definition of a secured creditor is deemed to be an unsecured creditor.

The court must approve all plans that meet certain criteria. From the time the court accepts a plan, it becomes binding on all creditors. The court-supervised plan administrator then manages the business and its assets, attempting to implement the plan within a five-year time frame (with a maximum of two one-year extensions). Within this time frame, if the court deems the plan unsuccessful, it may order its termination and/or put the company under absolute receivership, leading to bankruptcy proceedings.

It is possible to file an appeal against any interlocutory order or court order giving a decision regarding business reorganization.

Recent Amendments for Small and Medium Sized Enterprise

Recent amendments open the rehabilitation process to natural persons, juristic bodies, and partnerships, while also lowering the minimum threshold of debt that debtors, who are not in a position to make repayment, must meet to be eligible for protection. The minimum thresholds vary depending on the type of debtor. For a debtor which is a private limited company, the amount of debt must not be less than THB 3 million and not more than THB 10 million.

In order to apply for rehabilitation, a debtor or a creditor of the debtor must file a petition to rehabilitate, along with an approved rehabilitation plan for at least two-thirds of the total amount of debt, to the Central Bankruptcy Court and comply with other procedural requirements.

The court then considers whether or not to accept the petition. If accepted, an automatic stay goes into effect. This stops the creditor(s) from claiming or seizing the debtor's assets, and it stops the ongoing seizure process and the auctioning off of the debtor's assets.

Termination/Absolute Receivership

If the court does not approve the restructuring plan, or terminates the reorganization and orders absolute receivership, the debtor undergoes bankruptcy procedures. Should this occur, creditors can apply for repayment with the court receiver within two months after the court publishes the absolute receivership order. This deadline is extended to four months for foreign creditors.

Should the court terminate the restructuring plan rather than place the debtor under receivership, the company is restored to its former state. In such circumstances, the stay is lifted, reinstating all rights and liabilities of the former shareholders and directors. Secured creditors may then decide to foreclose on the debtor's assets. The timeframe for the whole procedure, from the date of filing the application to actual realization of assets, if not appealed, is approximately 44 weeks.

14. Cessation or Termination of Business

When formally ceasing a business, the general nature of tasks that must be undertaken are the settling of affairs of the company, paying its debts, distributing the assets, and most importantly, settling its tax liability with the Revenue Department

There are six ways in which a limited company can be legally terminated in accordance with the Civil and Commercial Code (CCC):

1. In the circumstances, if any, provided by the company's regulations
2. If formed for a specified period of time, by the expiration of that period
3. If formed for a single undertaking, by the termination of that undertaking

4. By a special resolution to dissolve
5. By becoming bankrupt
6. By a court's order

14.1 Liquidation

A company can commence the cessation process by passing a special resolution to dissolve. Following a special resolution, the liquidation process will commence.

Upon dissolution of a partnership or company for any other cause than bankruptcy, the managing partners or directors become liquidators unless otherwise provided by the contract of partnership or by the regulations of the company.

The liquidators must register the dissolution of the partnership or company, and the names of the liquidators, with the Business Development Department within 14 days of the date of dissolution.

The liquidators must, as soon as possible, make a balance sheet and have it examined and certified by the auditors, and must summon a general meeting to:

- confirm the directors or managing partners as liquidators, or appoint other liquidators in their stead; and
- adopt the balance sheet.

The general meeting may direct the liquidators to make an inventory or to do whatever the meeting may deem advisable for the settlement of the affairs of the partnership or company.

Once the affairs of the partnership or company are fully liquidated, the liquidators shall make up an account of the liquidation showing how the liquidation has been conducted and the property of the partnership or company has been disposed of. The liquidators must call a general meeting for the purpose of laying the account before it and giving any necessary explanation.

After the account is approved, the liquidators must register the proceedings of the meeting with the Business Development Department within 14 days. Such registration is taken as being the end of the liquidation.

After the liquidation, the books, accounts, and documents of the liquidated partnership or company must be deposited at the Registrar's Office within 14 days, where they shall be kept for ten years after the end of the liquidation. All such books, accounts, and documents shall be freely open for inspection by any interested person.

Obligations Toward Creditors, Employees, and Others

Within 14 days of dissolution, the liquidators must notify the public of the dissolution of the company by newspaper advertisement and send a similar notice by registered mail to each creditor. The employer must give notice of termination to employees in advance and make severance payment in accordance with the Labor Protection Act. Employees have preferential rights on par with claims of taxing authorities.

For further information on obligations toward employees,
please see the chapter on **Working in Thailand**.

Tax Consequences of Liquidation

There are special provisions of the Revenue Code dealing with liquidations. A voluntary winding-up of business is generally subject to a tax audit on the company's income tax and VAT by the Revenue Department.

This creates an important responsibility for both the liquidator and auditor to closely monitor and resolve any tax issues with the revenue inspector. The investigation could include a review of up to five years of financial transactions. If any irregularity or extra tax burden is found, the Revenue Department may request that the Department of Business Development hold off on completing the liquidation.

Costs and Timeframe for Liquidation

Costs involved in termination include government fees, advertisement fees, announcements to shareholders, lawyers' fees, auditors' fees, severance pay to employees, bankruptcy court fees (if applicable), and other incidental costs.

The time required to terminate a business depends on how complicated it is to settle the affairs of the company, pay its debts, distribute the assets, and most importantly, settle its tax liability with the Revenue Department. Some cases may take only a month, while others could take up to ten years—the maximum prescription period for civil claims.

14.2 Bankruptcy

Following the 1997 Asian financial crisis, Thailand's bankruptcy laws were substantially amended. A specialist Bankruptcy Court was created, which also has the power to consider bankruptcy cases which involve criminal matters.

Bankruptcy proceedings may be commenced in relation to companies or individuals (the debtor). Proceedings can only be commenced by creditors and cannot be voluntarily commenced by the debtor.

For bankruptcy proceedings to be commenced, the debtor must:

- be insolvent, with insolvency being assumable if:
 - the debtor's assets are seized or attached under a writ of execution;
 - there is no asset of any kind capable of seizure or attachment for payment of the debts; or
 - the debtor receives notices from a creditor at least twice, thirty days apart, and the debtor does not pay the debt under those notices;
- have a domicile or operate a business in Thailand; and
- have a minimum amount of debt of not less than THB 1 million for an individual or THB 2 million for a juristic person.

If the court grants the petition, the liquidation process commences. A court-appointed official receiver takes control of the property of the debtor and distributes it amongst the creditors in accordance with priority rules. The rules of priority are largely similar to those used in restructuring.

If the debtor is a government official, a teacher, or an employee in some state-owned organizations, upon a court order making the person bankrupt, they will be disqualified from their jobs.

Rules on Bankruptcy Cases

The Rules on Bankruptcy Cases B.E. 2549 (A.D. 2006) establishes procedural rules that focus on accelerating Bankruptcy Court proceedings and hearings. The rules encourage the use of electronic equipment and express mail in communications between courts and require provincial courts that receive bankruptcy petitions, including bankruptcy petitions involving criminal matters, to deliver such petitions to the Bankruptcy Court as soon as possible. The provincial courts have the power to issue search warrants and arrest warrants, and to imprison or release a defendant.

Discharge from Bankruptcy

There are two ways in which a bankrupt may be discharged from bankruptcy:

1. A court ordered discharge: a court will discharge a bankrupt from bankruptcy when the court finds that at least 50% of the debtor's assets have been distributed to creditors and the court does not find the bankrupt to be dishonest.
2. Automatic discharge after the lapse of the bankruptcy period: a discharge will take effect three years from the date of adjudication, barring several disqualifying criteria.

The effect of discharge from bankruptcy is that the bankrupt is released from debts that arose before the court ordered the bankruptcy. This applies to all debts except for tax debts and debts which were a result of dishonest or fraudulent conduct of the bankrupt.

14.3 Dissolution by the Court

A limited company may also be dissolved by the court on the following grounds:

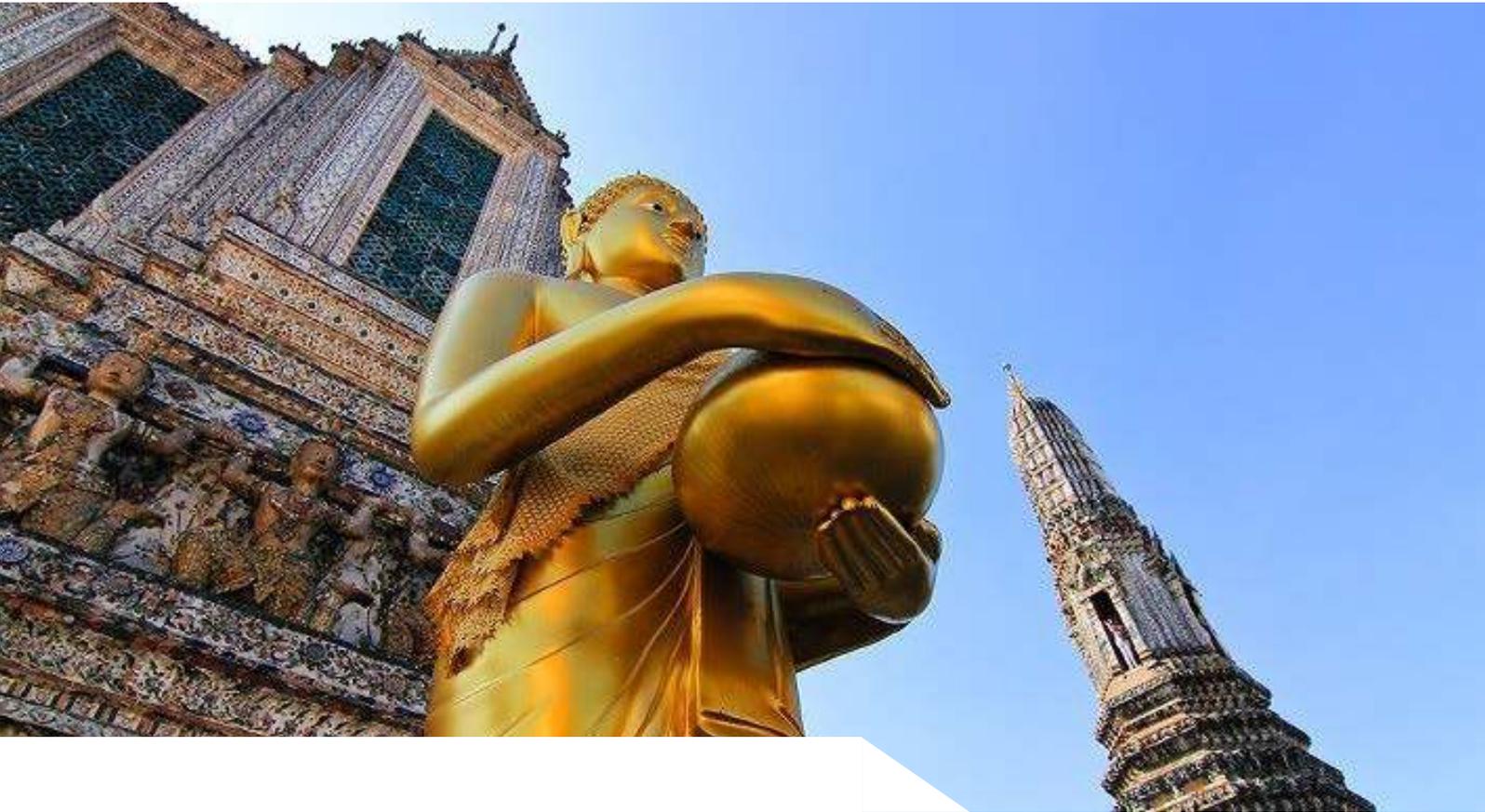
1. Failure to file a statutory report or hold a statutory meeting. In this case, however, the court may, instead of dissolving the company, direct that the statutory report be filed or the statutory meeting be held as it may think fit.
2. The company does not commence business within a year from the date of registration or suspends its business for a whole year.
3. The business of the company can only be carried on at a loss and there is no prospect of its fortunes being retrieved.
4. The number of shareholders is reduced to less than three.

Key Points on Bankruptcy and Restructuring:

- The minimum amount of debt to commence bankruptcy proceedings is THB 1 million for an individual and THB 2 million for a juristic person.
- Debtors cannot voluntarily commence bankruptcy proceedings for themselves.
- Once the court has ordered the debtor into absolute receivership, a creditor may ask for repayment of its debt within two months of the court's order. If the creditor resides outside of Thailand, the receiver may extend this period by not more than another two months.
- Debtor and creditors who are owed not less than THB 10 million can file a petition for restructuring.
- The creditor must submit their claims within one month after the court approves the plan.
- In general cases, the implementation period of the plan must not exceed five years.

For further information on bankruptcy and restructuring or assistance with commencing bankruptcy or restructuring proceedings, please contact the Tilleke & Gibbins Bankruptcy and Restructuring Practice on +66 2056 5555.

Living in Thailand



A GUIDE FOR VISITORS AND RESIDENTS

This chapter provides information on laws impacting persons visiting or living in Thailand. The chapter covers visa and immigration requirements, property ownership, and insurance issues.

Living in Thailand

A Guide for Visitors and Residents

This chapter provides information on laws affecting persons living in Thailand. The topics that are covered include immigration and visa requirements, property ownership, and insurance issues.

This chapter also delves into matters related to personal conduct. Most personal conduct laws in Thailand are largely similar to the laws of the United States and/or the United Kingdom and are not covered in *Thailand Legal Basics*. The exception is defamation law, which differs substantially from international concepts. Foreigners visiting or residing in Thailand should be aware of Thailand's strict defamation laws, which include criminal defamation and lèse-majesté.

Laws affecting a person's ability to work in Thailand are covered in the chapter "*Working in Thailand*".

15. Immigration and Visas

15.1 Immigration Requirements

To visit, live, or work in Thailand, immigration requirements must be met. Immigration into Thailand is governed by the Immigration Act B.E. 2522 (A.D. 1979), as amended, and is administered by the Immigration Bureau of the Royal Thai Police.

Any foreigner wishing to enter Thailand, unless otherwise exempt, must obtain a proper visa from a Royal Thai Embassy or Royal Thai Consulate prior to his or her arrival in Thailand. There are three exemptions to this general rule, which are enumerated below.

- Foreigners in transit and tourists from the following countries are permitted to obtain an entry visa on their arrival (a “visa-on-arrival”) at designated entry points in Thailand. A visa-on-arrival allows a stay of 15 days.
 - Bhutan, China (including Taiwan), Cyprus, Ethiopia, India, Kazakhstan, Latvia, Lithuania, Maldives, Mauritius, Papua New Guinea, Andorra, Bulgaria, Fiji, Malta, San Mario, Romania, Saudi Arabia, Ukraine, and Uzbekistan.
- Foreigners in transit and tourists from the following countries are exempt from complying with visa requirements. They are permitted to enter and stay in Thailand for 30 days without an entry visa. These individuals, however, must obtain an entry stamp on their passports at the immigration checkpoint of entry.
 - Australia, Austria, Bahrain, Belgium, Brazil, Brunei, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, South Korea, Kuwait, Luxembourg, Liechtenstein, Laos, Macau, Malaysia, Monaco, Mongolia, Netherlands, New Zealand, Norway, Oman, Peru, Philippines, Portugal, Poland, Qatar, Russia, Singapore, Slovak, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, and Vietnam.

Foreigners in transit and tourists who are exempt from complying with the visa requirements above, and who arrive in Thailand by any means except by airplane, are only permitted to stay for 15 days each time. There is an exception for Malaysian nationals who arrive from Malaysia and nationals from the G7 countries: USA, UK, Canada, France, Germany, Italy, and Japan, who are allowed to stay for a period not exceeding 30 days each time.

- Nationals of Argentina, Brazil, Chile, the Republic of Korea, and Peru are currently permitted to stay for up to 90 days after obtaining an entry stamp at the immigration checkpoint of entry.

In order to stay longer than the initial length permitted, foreigners must have a valid visa which can be obtained from a Royal Thai Embassy or Consulate prior to entry into Thailand.

The countries listed above change periodically. The Immigration Bureau adds and removes countries as circumstances dictate. It is recommended to check the lists of countries with a Royal Thai Embassy or consulate prior to traveling. Foreigners from all other countries that do not have agreements with Thailand must obtain visas before coming to the country.

15.2 Visas

A visa authorizes entry into Thailand for a specific length of time, which varies depending on the type of visa. The passport or travel document will show the date of authorized entry and the permissible duration of stay.

In Thailand, there are numerous visa categories. The Immigration Act prescribes eight main visa categories. Each category is restricted to the purpose for which the visa has been issued and foreigners are advised to strictly adhere to the rules governing each visa category. Any change of address should be relayed to local police within 24 hours, and those who have a foreigner stay in their residence are subject to the same reporting requirement.

- **Transit Visa (TS).** Applicable to foreigners entering Thailand with the intention to travel on to another country.
- **Tourist Visa (TR).** Applicable to foreigners visiting Thailand for sightseeing purposes only.
- **Non-Immigrant Visa.** Applicable to foreigners entering Thailand on a temporary basis for a particular purpose. This is divided into several sub-categories:
 - “B” for business purposes
 - “B-A” for business or investment
 - “IB” for investment purposes or other affairs connected with an investment under the law governing investment promotion. Issuance of IB visas is controlled by the Board of Investment.
 - “IM” for investment purposes, as approved by the appropriate ministries or departments concerned
 - “ED” for purposes of study or observation
 - “RS” for purposes of scientific research or teaching in a research or educational institution in Thailand with approval from the ministry or department concerned
 - “M” for performance of duties connected with the mass media
 - “R” for missionary work with approval from the ministry or department concerned
 - “EX” for performance of skilled or expert work
 - “O” for other purposes, as prescribed in the ministerial regulations (such as for family reunions, medical treatment, or legal proceedings)
 - “O-A” (Long Stay) visas may be issued to applicants aged 50 years or over who wish to spend their retirement in Thailand. Employment of any kind is strictly prohibited. Upon arrival, the holder of this type of visa will be permitted to stay in Thailand for one year from the date of first entry. The accompanying spouse will be eligible to be considered for temporary stay under a non-immigrant “O” visa, for which a marriage certificate must be provided.
- **Diplomatic Visa (D).** Applicable to foreigners who enter Thailand on a diplomatic or consular mission or for the performance of duties with international organizations.
- **Official Visa (F).** For performance of official duties involving the Thai government.
- **Non-Quota Immigrant Visa.** Applicable to permanent residents wishing to leave Thailand and return within the year.

- **Courtesy Visa.** Applicable to diplomatic and/or official passport holders who enter Thailand for purposes other than official duties and to those ordinary passport holders who enter Thailand in response to an official Thai request.

Foreigners with non-immigrant one-year visas who have resided in Thailand consecutively for at least three years are eligible to apply for permanent residence (PR) permits in Thailand.

Length of Stay

The permitted length of stay in Thailand varies depending on the type of visa.

Type of Visa	Permitted Length of Stay
Transit Visa	Not exceeding 30 days
Tourist Visa	Not exceeding 30 or 60 days
Non-Immigrant Visa	Not exceeding 90 days
Diplomatic, Official, and Courtesy Visa	As necessary

Extension of Stay

A tourist visa may be extended for a maximum of 30 days, depending on an applicant's nationality. Extension applications for tourist and transit visas are processed for a government fee of THB 1,900. The following documents are needed to process an extension application:

- Passport or travel document.
- One photograph (2 ½ inches square).
- Statement of reasons for requesting an extension.

Non-immigrant "B" visas are usually extended for a period not exceeding one year per time from the date of arrival. Exceptions to this standard rule exist under the investment law, which allows for longer periods of up to two years, depending on the recommendation of the authorities in charge and the size of the investment. Extensions for non-immigrant visas are processed for a government fee of THB 1,900. Numerous supporting corporate documents are needed.

Overstaying

The allowable period of stay is always stamped or written in the passport upon arrival in Thailand. Every foreigner is responsible for checking his or her passport for the authorized length of stay.

Passport and visa control is a rigorous process in Thailand and is not to be dismissed lightly. Any foreigner who overstays in Thailand is subject to a fine of THB 500 for each day after the expiration date of the permitted length of stay, up to a maximum of THB 20,000. This fine may be paid at the Immigration Division or at the airport upon departure. If a foreigner is unable to pay the fine for overstaying a visa, he or she is subject to detention at the Immigration Detention Center under section 30 of the Penal Code.

Change of Visa

For foreigners who did not apply for a non-immigrant visa prior to arriving in Thailand, the Thai government provides the opportunity to change visa status if additional time in Thailand is required. This procedure may be done within the country. An eligible foreigner may have entered Thailand with a tourist

or transit visa granted by a Thai embassy or consulate abroad, or even entered the country under a 30-day visa exemption. The foreigner must apply to change the type of visa at least 21 days in advance of the expiry date of his or her period of stay. Certain documents are required, which vary depending on the purpose of the application for a non-immigrant visa. Foreigners who have already received permission to stay in Thailand under a non-immigrant visa and would like to change the purpose of staying in Thailand will be considered on a case-by-case basis, and will have to fulfill the requirements under the new category applied for.

Re-entry Permit

If a foreigner holds any kind of visa for staying in Thailand and wishes to leave and return to the country by the expiry date of his or her period of stay without having to apply for a new visa, they must apply for a re-entry permit prior to departure. A re-entry permit allows the foreigner to re-enter Thailand and use the time remaining on his or her period of stay. If a re-entry permit is not applied for, the visa will be automatically canceled, even though it has not expired.

To facilitate the travel schedules of foreigners, aside from the immigration offices throughout Thailand, a re-entry permit may be obtained at Suvarnabhumi and Don Muang (Bangkok), Chiang Mai, Phuket, and Hat Yai, international airports, as well as other designated immigration checkpoints throughout the country. Suvarnabhumi (Bangkok) International Airport operates 24 hours, 7 days a week, while other checkpoints generally operate during normal office hours or some variation thereon. Applicants should check the opening hours in advance, as they may vary with little notice. The fee for a single re-entry is THB 1,000 (plus administration costs), while that for multiple re-entries is THB 3,800. It is recommended to request a multiple re-entry permit if one expects to be frequently traveling out of Thailand. This allows the permit holder more than one entry into Thailand during his or her travels. If the visa holder leaves Thailand before the expiration of his or her period of stay and wants to return, but does not have a re-entry permit, he or she must apply for a new visa from a Thai embassy or consulate abroad.

Exits may only be legally made at designated immigration control points. Crossing any border is an exit for immigration purposes, whether or not the exit point is controlled. Thus, forays into neighboring countries are deemed to be exits, legal or otherwise, and returning to Thailand from such trips is a new entry requiring proper visas or re-entry permits.

90-day Notification

A foreigner who stays in Thailand for a period of 90 consecutive days has a duty to report their current address to the Immigration Office. Upon failing to comply with this requirement, they will be subject to a fine of THB 2,000, which will increase if they are arrested. If they leave Thailand any time during the 90-day period the count of 90 days will restart upon their reentry into Thailand.

For information on **work permits**, see chapter on **Working in Thailand**.

For further information on visas and immigration or assistance with obtaining permits, please contact Tilleke & Gibbins

16. Property Ownership

Ownership of real property can be separated into three categories:

1. Ownership of land
2. Ownership of condominiums
3. Ownership of buildings on land that is owned by others

Different legal requirements apply to each type of ownership. Foreigners are subject to strict ownership requirements under Thai law and those who choose to purchase real property usually choose to own condominiums. As an alternative to ownership, foreigners may wish to lease land or property.

16.1 Land Ownership

Land ownership in Thailand may be individual or shared. Thai nationals may purchase land in Thailand, while foreigners (individuals or companies) are generally not allowed to buy or hold land unless they obtain permission from the concerned governmental authorities; this permission will not be granted unless the foreigners obtain promotion from the Board of Investment of Thailand or the Industrial Estates Authority of Thailand, or permission under other specific laws. Special considerations apply to foreigners with a Thai spouse or a Thai minor born of a foreign parent.

Land issues are governed primarily by the following laws:

- Land Code B.E. 2497 (A.D. 1954)
- Land Reform for Agriculture Act B.E. 2518 (A.D. 1975)
- Land Development Act B.E. 2543 (A.D. 2000)
- City Planning Act B.E. 2518 (A.D. 1975)
- Condominium Act B.E. 2522 (A.D. 1979), as amended
- Rules Relating to Land Allocation B.E. 2535 (A.D. 1992)

Documentation for Ownership

The land office in the province where the land is located is the proper registration location for land transactions. For land located in the Bangkok area, registration must be made at the appropriate district land office. All land transactions should be recorded in a written document, have documentation of ownership or possession, and be registered.

It is critical to research and trace the true ownership of land prior to any agreement. The process to determine ownership can become complicated; especially in rural areas.

Land Documents Providing Evidence of Land Ownership or Possession Rights

- **Land title deed** (*Chanote*)—A land title deed is the purest form of land ownership. It ensures easy transfer and is issued mainly in urban areas. One original set is kept at the district land office where the registration of land transfer takes place and the other original set is given to the owner of the land.
- **Confirmed certificate of use** (*Nor Sor Saam Gor*)—This document certifies the right to use land and is often issued pending the issuance of the land title deed, under which rights of possession

of particular land may be registered or the owner may lease the land. Transfer of a confirmed certificate of use is mainly completed at the district land office or branch district level, as the case may be.

- **Certificate of use** (*Nor Sor Saam*)—This is similar to the confirmed certificate of use, but lacks completion of formalities such as provision of an aerial photo of the land. To transfer a certificate of use, the intent to do so must be posted at each of the following places:
 - Provincial land office or branch land office
 - District land office or branch district office
 - House of the village headman
 - Location of the land
 - Municipal office, if the land is in a municipality

There is a 30-day waiting period before the transfer is registered by the chief district officer or Assistant district officer, as the case may be.

- **Certificate of possession** (*Sor Kor Neung*)—A certificate of possession only recognizes possession and does not imply ownership rights. A certificate of possession is nontransferable, but a person in possession may transfer physical possession. This certificate is required before a certificate of use or land title deed can be issued, and is most common in rural areas.
- **Tax receipt**—A tax receipt is evidence of possession, but does not confer ownership rights with possession. It is useful when applying for a certificate of possession.

Residential Land for Foreigners

The provisions governing the acquisition of land by foreigners, by virtue of a treaty under the Land Code Amendment Act, do not apply to foreigners who have brought in an amount of money for investment fixed in ministerial regulations. At present, the money must be over THB 40 million, the land must be less than one *rai*, and permission must be obtained from the relevant minister.

The acquisition of land by foreigners shall be per the bases, procedures, and conditions prescribed by ministerial regulations. The Ministerial Regulations Governing the Bases, Procedures, and Conditions for Foreign Acquisition of Land for Use as Residence B.E. 2545 (A.D. 2002) rules that foreigners can purchase land of not more than one *rai* in Thailand for residential purposes, so long as they comply with the following rules and conditions:

- They bring at least THB 40 million into Thailand for investment and maintain such investment for a period of not less than five years.
- Permission must be obtained from the Minister of Interior.
- Money brought into Thailand must be invested in one of the following businesses or activities:
 - Purchasing bonds of the Thai government, Thai National Bank, Thai state enterprises, or which the Ministry of Finance secures capital or interest.
 - Investment in immovable property mutual funds, immovable property mutual funds, or mutual funds for resolving financial institution problems established under the law governing securities and exchange.
 - Investment in share capital of a juristic person, which is granted permission to invest under the law on investment promotion.

- Investment in an activity declared by the Board of Investment to be eligible for investment promotion under the law on promotion of investment.
- The area which a foreigner is permitted to acquire must be within Bangkok, Pattaya City, or municipalities or areas designated as residential zones under the law governing city planning, and must not be located in a military safety zone according to the law governing military safety zones.
- A foreigner who is granted permission must only utilize the land only for residential purposes for him/herself and family, and the usage must not be against the morals, customs, or way of life of the local community.

Special Consideration for Thais with a Foreign Spouse

The Interior Ministry has set up guidelines to be followed by the competent land authorities. Those guidelines, in summary, provide the following:

- If a Thai with a lawful foreign spouse (by registered marriage) wishes to make land purchases or accept land transfers in a like manner during marriage, the competent authorities shall register the legal rights in land for the applicant if the official inquiry reveals that the applicant, along with the foreign spouse, have jointly affirmed in writing that the money used to buy the land is derived wholly from separate property owned by the applicant and not from shared property.
 - If the foreign spouse fails to make such an affirmation, or affirms in writing that all or part of the money so used is out of the communal property, the matter shall be submitted for a decision to the minister in charge through the Royal Land Department after the inquiry has been made. This is in accordance with section 74, paragraph 2 of the Land Act.
- If a Thai with an unregistered foreign spouse (a common spouse) wishes to make land purchases or accept land transfers in a like manner while living with the spouse as husband and wife, the competent authorities shall proceed with the registration of legal rights in land for the applicant if the official inquiry reveals that the applicant, along with the foreign spouse, have jointly affirmed in writing that the money used to buy the land is derived wholly from personal property owned by the applicant and not from property jointly owned by the applicant and the common foreign spouse.
 - If the foreign spouse fails to make such an affirmation, or affirms in writing that all or part of the money so used is out of the money jointly earned by the applicant and the foreign spouse, after the inquiry has been made the matter shall be submitted for decision to the minister in charge through the Royal Land Department. This is in accordance with section 74 paragraph 2 of the Land Act.
- If a Thai with a foreign spouse, whether their marriage is registered or not, wishes to accept land as a gift during the marriage while living with the spouse, the competent authorities shall proceed with the registration of legal rights in land for the applicant if the official inquiry reveals that the gift has been accepted as separate property, or as personal property only, and that the foreign spouse has no ownership interest in land.
 - If the gift has been accepted as shared property, and if the foreign spouse has ownership interest in land, after the inquiry has been made the matter shall be submitted for decision to the minister in charge through the Royal Land Department. This is in accordance with section 74 paragraph 2 of the Land Act.

- If a Thai who once had a foreign spouse but has now divorced or deserted said spouse wishes to register land acquisitions, the competent authorities shall only register such legal rights if the official inquiry reveals that there are no circumstances in which the law has been evaded.

The Royal Land Department also requires the foreign spouse to give spousal consent in the matter in person and in writing. If the foreign spouse is unable to make a trip to Thailand to give the required consent, the foreign spouse may make an affidavit before a notary public. The affidavit is then suitably attested by a Thai Consulate located in the country concerned, and then submitted to the Royal Land Department.

Special Considerations for Thai Minors Born of a Foreign Parent

The Interior Ministry has set up guidelines to be followed by the competent land authorities. Those guidelines, in summary, provide the following:

- If a Thai minor born of a foreign parent wishes to make land acquisitions and registrations, the competent authorities shall proceed with the registration of legal rights in land for the applicant if the official inquiry reveals that there are no circumstances where evasion of the law has been committed.
- If a person wishes to give a piece of land as a gift to a Thai minor born of a foreign parent, the competent authority shall inquire into his or her intention of giving the gift to the minor and into his or her legal relations with the minor. If the property to be given as a gift is acquired by purchase, it must be determined whose money was used to make the acquisition and that there are no circumstances in which the law has been evaded.
- No such inquiries will be required for a foreign born Thai who has reached the age of 20.

16.2 Condominium Ownership

The Condominium Act B.E. 2522 (A.D. 1979), as amended, allows certain groups of foreigners (both individuals and juristic persons) to acquire condominium units in Thailand, provided that the foreign ownership in a condominium project does not exceed, in the aggregate, 49% of the total area of all condominium units in the condominium building. The foreigners must be able to present correct and complete documentation and evidence as required by the Land Department.

The following foreign individuals are eligible to own condominium units:

- Foreigners who are permitted to have residence in Thailand under the Immigration Act. The documents required are a passport, residence permit and house registration, or foreigner book.
- Foreigners who are permitted to enter Thailand under the Investment Promotion Act. The documents required are a passport plus a letter from the Board of Investment of Thailand certifying permission to live in Thailand under the Investment Promotion Act.
- Foreigners who bring foreign currency into Thailand to pay for the purchase of condominium units, or withdraw money from a nonresident's bank account, or withdraw money from a foreign currency account. The documents required are evidence of bringing foreign currency into Thailand or evidence of withdrawal of money from a nonresident's Thai Baht account or withdrawal of money from a foreign currency account in an amount not less than the price of the unit to be bought.

Evidence of ownership of a condominium unit is in the form of a condominium unit title deed (*Nangsue Kammasit Hong-Chut*). One original set is kept at the land office where the ownership is registered and the other original set is given to the owner of the condominium.

16.3 Building Ownership

There is no law prohibiting foreigners from owning a building. Therefore, foreign companies and foreign individuals may own buildings, even though they do not own the land on which the building is constructed. To construct or own a building in such circumstances, the foreign company or individual would need to lease the land, or have permission from the landowner to occupy the land, or otherwise have evidence of the consent of the landowner to the foreigner's building occupying the land.

16.4 Lease of Property

Laws regarding lease of property or buildings fall under the Hire of Property General provisions of the Civil and Commercial Code.

Periods of Leases

A lease contract of any immovable property for three years or less is not enforceable unless made in writing and signed. Leases of more than three years need to be registered with the land office. Otherwise, they will be enforceable for only three years.

Land, houses, condominium units, and other buildings may be leased to foreigners for up to 30 years, with possible renewal for another 30 years. However, it should be noted that the renewal option, agreed by the parties in a lease agreement, will be treated as a private agreement between the parties and might not be enforceable against someone who purchases the property from the lessor or any transferee of the leased property during the first 30-year lease period.

Extending or Ending the Lease

The lease is extinguished at the end of the agreed period without notice. At the end of an agreed lease period, however, if the tenant retains possession of the property and the landlord does not object, the lease is deemed to be extended for an infinite period whereby either party may terminate the lease contract by providing the other party notice of at least one rental period of not more than two months.

Extinguishing the Lease

There are a number of resource options available to an innocent party if a lease is extinguished before the end of the agreed lease period. A contract can be terminated by a lessor in the case of nonpayment of rent or the lessee breaches the agreement.

If the lease is cancelled by the lessee, he or she is responsible for damages incurred until an appropriate replacement is found or a reasonable time period has expired. If taken to court, the verdict can vary depending on the specifics of the case and the actual damage the plaintiff is able to prove to the court.

Transfer of Lease Rights

Unless otherwise provided in the lease agreement, a lessee cannot transfer his or her rights to a third person or sublet the whole or part of the leased property without the consent of the lessor.

For information about land and building ownership by corporate entities, see chapter **Investing in Thailand**.

Key Points on Property Ownership and Leases:

- Foreigners (individuals or companies) are generally not allowed to buy or hold land unless they obtain permission from the concerned governmental authorities.
- Foreigners, who bring in money of not less than THB 40 million may own land for residential purposes of up to one *rai*, subject to obtaining permission from the relevant minister.
- Qualified foreigners can own condominium units in Thailand of up to 49% of the total area of all condominium units in the condominium building.
- Foreigners may own buildings even though they do not own the land on which the building is constructed.
- Foreigners can lease immovable property for the maximum period of 30 years with an option to renew for another 30 years.

For further information on, or assistance with, property ownership or leasing, please contact Tilleke & Gibbins on +66 2056 5555.

17. Defamation

Thai law has both civil and criminal remedies to deter defamation and allow for recovery of damages. The elements of each type of action differ. Criminal defamation is particularly common in Thailand because the law permits the victim of a crime to prosecute the crime on their own, without recourse to a public prosecutor. It is common for criminal charges to accompany a civil suit. Interestingly, a defamatory statement that is true is not actionable as a civil claim, but is only prosecutable as a crime.

17.1 Criminal Defamation

Defamation is a crime in Thailand under section 326 of the Penal Code, which states:

“Whoever falsely accuses another person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to hatred or contempt, is said to commit defamation, and shall be punished with imprisonment not exceeding one year or a fine not exceeding THB 20,000, or both.”

Defamatory statements against deceased persons are also punishable under the Penal Code if they impair the reputation of the deceased persons or their parents, spouses, or children. The offense of criminal defamation is compoundable, which means that the deadline (prescription period or statute of limitations) for filing a charge for criminal defamation with the police or directly in the courts is three months from the date that the defamatory statement and the offender became known to the victim.

The elements of an action for criminal defamation under the Penal Code include the following:

1. **An accusation.** An accusation is the communication of a statement concerning another person or entity by any means (including speech, writing, photography, recording, broadcast, etc.). The statement must be capable of being understood by the recipient. For example, if a defendant verbally made an otherwise defamatory remark to a deaf person, the defendant would only be

guilty of attempted defamation. In addition, the accusation must contain verifiable information which can be proven to be true or false.

Example:

The statements: “*he accepted bribes,*” “*he often comes to work late,*” and “*he caused the problem for the group*” are all considered defamatory. Statements of prediction or statements that cannot be literally true generally are not actionable, such as “*he will grow up to be a thief*” or “*he is an animal.*”

- 2. Concerning another identifiable person.** There must be an “injured person” in a defamation action, which can be either a specific individual or a legal entity.

Example:

The untrue statement “*some doctors at ABC Hospital routinely commit malpractice*” would be defamatory against ABC Hospital, but would probably not be considered defamatory against the doctors because it fails to identify which of them routinely commit malpractice. On the other hand, “*all doctors at ABC Hospital routinely commit malpractice*” would be defamatory against both the hospital and the doctors, because it refers to all the doctors and the reader can easily identify who they are.

- 3. Received by a third party.** The defamatory statement must have been conveyed to a third party that can understand the statement. Moreover, the term “third party” does not include a co-offender, a person’s spouse, or a snooper.

Example:

If X sends a letter to Y accusing Y of wrongdoing, X might be guilty of insulting Y (see “Insult” below), but Y is not a third party and therefore there is no defamation.

If Z is a snooper who opens and reads the letter addressed to Y, the law would not regard Z as a third party and X would not be guilty of defamation, because the letter was not intended for Z to open and read. However, if X sends the accusation to Y by postcard, thus allowing anyone to easily read it, then it could be concluded that X intentionally sent the accusatory postcard to a third party and X could be convicted of defamation.

- 4. Potential damage to the victim.** Proof of actual damage is not required. All that is necessary to show defamation is the likelihood that the accusation will cause damage to the victim, including contempt, hatred, or damage to the victim’s reputation. The law does not require proof that the third party who received the defamatory accusation actually felt contempt or hatred for the victim as a result of hearing the accusation.
- 5. Intent.** Criminal defamation requires proof that the defendant intentionally delivered the accusation to a third party or knew that a third party would receive it. A conviction does not require proof that the defendant acted with malice. If the defendant was not aware that the third party would overhear or otherwise receive the accusation (or could likely receive the accusation, as with a postcard), the defendant should not be held liable for criminal defamation under Thai law.

All of the above elements must be established in order to convict someone of criminal defamation in Thailand.

Defenses to Criminal Defamation

A defendant will be acquitted of criminal defamation in Thailand if any one of the following defenses can be established:

1. **True statement.** An accusation is generally not defamatory if it is true, unless it concerns the victim's personal matters and is not of benefit to the general public.

Example:

Y mentioned in his blog that X Hospital cheats by marking up the medicine prices 300%. If this fact is true, Y can be acquitted. On the other hand, if A informs a third party that B is having an affair with C, A can be convicted of criminal defamation against B even if the accusation is true, because this is a personal matter and it is not of any benefit to the public.

2. **Good faith statements.** An accusation does not amount to criminal defamation if it was an opinion or statement that the defendant expressed in good faith and believed was true, and fits one of the following criteria:
 - **Self-defense.** The opinion or statement was issued in good faith to protect the defendant's legitimate interest.
 - **Exercise of official government functions.** The opinion or statement was issued by an official in good faith within the scope of his or her responsibility.
 - **Public figure doctrine.** The opinion or statement was issued in good faith and amounted to a fair comment on a person ordinarily subjected to public criticism, such as a politician.
 - **Report of court proceedings or meetings.** The opinion or statement is a fair report regarding the open proceedings of any court or any open meeting.
3. **Court proceedings.** An accusation does not amount to criminal defamation if it is an opinion or statement expressed during court proceedings by the parties involved, their lawyers, or their witnesses.

Punishment for Criminal Defamation

Criminal defamation is punishable with up to one year of imprisonment and/or a fine of up to THB 20,000. If the defamation is committed by means of a publication (an article, photograph, painting, film, recording, etc.), the maximum sentence increases to two years of imprisonment and/or a fine of THB 200,000. In addition, the court also may order the destruction of defamatory materials, and may order publication of all or a portion of the court judgment in one or more newspapers at the expense of the guilty party.

For further information about criminal offenses and court processes in Thailand, see chapter on **Litigating in Thailand**.

17.2 Civil Defamation

Defamation can be criminal under Thai law, but it is also a tort or “wrongful act,” which allows a victim to pursue civil damages for his or her actual loss by filing a separate civil complaint. Section 423 of the Civil & Commercial Code states:

“A person who, contrary to the truth, asserts or circulates as a fact that is injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it.

A person who makes a communication the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a rightful interest in it.”

The elements of an action for civil defamation include the following:

1. **Saying or telling.** Conveying a statement by any means of communication.
2. **To a third party.** The defamatory statement must have been conveyed to a third party who was able to understand the statement. The term “third party” does not include a co-offender, spouse, or snooper.
3. **An untrue fact.** The message must include a statement of fact that is false.
4. **Causing damage to the plaintiff.** The plaintiff must prove that the defamatory statement has affected his or her reputation, credit, earnings, or prosperity in some manner. The damages must be actual and must have already occurred in order to hold a defendant liable.
5. **Defendant’s knowledge of the falseness.** The defendant knew or ought to have known that the statement was false. Civil defamation does not require intent to defame, and case law indicates that the courts will conclude that a defendant ought to have known that a statement is false if its subject matter is not of the defendant’s legitimate interest and is not beneficial to the public—in other words, if a statement involves someone’s personal life and there is no public benefit to circulating the statement.

Defenses to Civil Defamation

The defenses to civil defamation include the following:

Rightful interest. A person who communicates an erroneous statement in good faith to a third party is not liable for civil defamation if that person or the recipient had a rightful interest in the information, even if the information is false.

Case Study:

In *Dika* (Supreme) Court Case 938/2519, the Thai Bankers Association circulated a notice to its members warning them that the action of a group of persons which erroneously included the plaintiff might be damaging to the members’ business. The court concluded that the action of the Thai Bankers Association was a valid protection of a legitimate interest, and the association was not liable for civil defamation.

Absolute privilege under the constitution. A defamation action cannot be brought based upon statements made by members of the Senate or the House of Representatives of the National Assembly when stating facts or opinions or in casting votes. No charge or other manner of action can be brought against such legislative members. This privilege extends to printers and publishers of the legislative minutes and to persons permitted by the presiding member to give statements of fact or opinion at such sittings.

Absolute privileges under the Penal Code. These privileges include expressions made in good faith, and expressions of opinion or statement issued during court proceedings. These defenses are discussed above under the section on defenses to criminal defamation.

Damages for Civil Defamation

For most civil claims, Thai courts will only award the plaintiff the amount of actual provable damages. It is normally quite difficult to prove actual damages in a civil defamation case, unless the plaintiff can prove that various third parties cancelled specific contracts or took other quantifiable actions as an adverse result of the defamatory incident. Lacking this specific evidence, the Thai courts will award monetary damages in civil defamation cases based on an estimate of the harm, but those awards are usually much more conservative than they might be in North America or Europe.

In addition to (or in lieu of) monetary damages, the court is authorized to order other proper measures to rehabilitate the injured party's reputation.

Time Bar for Civil Defamation Action

With some exceptions, civil claims for damages arising from defamation are barred by prescription (statute of limitations) one year after the date the defamatory act and the responsible person became known to the injured person, or a maximum of ten years from the day when the wrongful act was committed.

For further information about civil matters and court processes in Thailand, see chapter on [Litigating in Thailand](#).

17.3 Lèse-Majesté

Thailand's Penal Code states that "Whoever defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years." The defenses that are available to ordinary defamation under the Penal Code are not available to persons charged with lèse-majesté. In addition, repeating a lèse-majesté comment originally made by someone else is considered to be the same offense as the original lèse-majesté comment.

If lèse-majesté comments are published in the press, the editor-in-chief of the publication is deemed a principal offender in addition to the actual author, whether or not the editor actually knew about or participated in the offense.

Persons who issue lèse-majesté comments from abroad can face trial and punishment if they visit Thailand. A lèse-majesté comment that is issued or published outside Thailand is deemed to be committed when and where a third person receives the message in Thailand.

There have been several lèse-majesté cases where the messages were issued or published abroad.

In those cases, the media was banned and blocked in Thailand. Media reports suggest that the lèse-majesté creators may have been blacklisted from entering Thailand.

17.4 Other Laws Relevant to Defamation

Other laws relevant to defamation include the Penal Code, Printing Registration Act, Broadcasting Act, Immigration Act, and Extradition Act.

Penal Code

The Penal Code includes provisions on the following issues:

- Making a false report (section 172)
- Filing a false charge with the authority (section 173)
- Filing a false charge with the court (section 175)
- Perjury (section 177)
- Fabrication of false evidence (section 179)
- Presenting false evidence (section 180)

Depending on the circumstances of each offense, punishment may range from two to seven years' imprisonment and a fine of THB 4,000 to THB 14,000.

- Insult (Section 393)

Punishment for insult is up to one month imprisonment, a fine of up to THB 1,000, or both.

Printing Registration Act B.E. 2550 (A.D. 2007)

Under section 10 of the Printing Registration Act, the police can prohibit the import of any printed matter into Thailand if it is considered to be defamatory, insulting, or threatening against the King, the Queen, the Heir-apparent, or the Regent, or which might affect the security of Thailand, the peace and order, or the good morals of the public. The police are empowered to seize and destroy any such printed materials.

Broadcasting Act B.E. 2551 (A.D. 2008)

Section 37 of the Broadcasting Act prohibits broadcasting a program "with contents instigating overthrow of the democratic regime of government with the King as Head of the State or affecting the national security, public order, or good morals." The punishment for violation of this statute includes a fine from THB 50,000 to THB 500,000, and/or suspension or revocation of broadcasting license.

Immigration Act B.E. 2522 (A.D. 1979)

The Immigration Act provides authorities with the right to deny entry to a foreigner "having exhibited behavior which would indicate possible danger to the public or likelihood of being a nuisance or constituting any violence to the peace of safety of the public or to the security of the public or to the security of the nation..."

If the Thai authorities believe a foreign journalist's activities in Thailand may affect national security, the journalist could be denied entry to Thailand. The foreigner, however, may file a petition with the Administrative Court to revoke the decision.

Key Points on Defamation:

- Lèse-majesté (defaming, insulting, or threatening the King, the Queen, the Heir-apparent, or the Regent) is a very serious crime in Thailand, and is punishable by imprisonment for 3 to 15 years. Never say anything disparaging about the royal family, even if you are only joking.
- Foreigners should be careful before publicizing their disputes in Thailand to third parties, due to the risk of prosecution for criminal defamation. Keep in mind that the aggrieved party can prosecute a criminal action against you without going through the public prosecutor.
- "Truth" is not always a defense to criminal defamation.

For further information on, or assistance with, defamation matters,
please contact Tilleke & Gibbins on +66 2056 5555.

18. Political Parties and Elections

Since the establishment of the National Council for Peace and Order (NCPO) to govern Thailand in May 2014, the NCPO has issued several announcements on various laws in the nation. NCPO Announcement No. 57/2557, issued in June 2014, affirms that the Organic Act on Political Parties B.E. 2550 (A.D. 2007) remains valid, and as such, this law continues to prohibit foreign persons from funding political parties or their members for the purpose of carrying out party activities. The term "foreign persons" includes the following classes of legal person:

- Persons who do not hold Thai nationality
- Juristic persons under foreign law engaged in business or having a branch office registered in Thailand or abroad
- Juristic persons registered in Thailand with more than 50% of their capital or shares belonging to persons who do not hold Thai nationality. In the case of a public limited company which is listed on the Stock Exchange of Thailand, the consideration under this clause shall be done on a date prior to the date on which the funding is made, based on the shareholder book kept at the Stock Exchange of Thailand
- Organizations or juristic persons receiving funds from foreign countries whose objective is to carry on business for the benefit of non-Thai nationals, or having non-Thai managers or directors
- Persons, organizations, or juristic persons accepting money, property, or any other benefits for the operation of a political party or political activities from persons, organizations, or juristic persons under any of the foregoing categories

A foreign person who contributes such funding may be liable to imprisonment for a term not exceeding ten years or a fine not exceeding THB 200,000, or both. Moreover, the foreign person is subject to deportation by order of the Interior Minister due to having exhibited behavior indicating a possible danger to the security of the nation or having been punished with imprisonment by judgment according to the Immigration Act B.E. 2522 (A.D. 1979).

Correspondingly, a party leader, a member of the executive committee of a political party, a member of the branch office of a political party, or a member of a political party who arranges for his or her party to

accept such funding may be subject to imprisonment for a term of two to ten years or a fine of THB 40,000 to THB 200,000, or both, and suspension of electoral rights for a period of five years.

The act also prohibits a person who is not a Thai citizen from becoming a member of or participating in the activities of any political party. A person who violates this law may be subject to imprisonment for a term not exceeding two years or a fine not exceeding THB 40,000, or both. The violator is also subject to deportation by order of the Interior Minister due to having exhibited behavior indicating a possible danger to the security of the nation or having been punished with imprisonment by judgment according to the Immigration Act B.E. 2522 (A.D. 1979).

If the violator happens to have Thai nationality by naturalization and not by birth, his or her Thai nationality may also be withdrawn according to the Nationality Act B.E. 2508 (A.D. 1965). Again, a member of the executive committee of a political party or member of the branch office of a political party who arranges for his or her political party to accept such a person may be liable to imprisonment for a term not exceeding two years or a fine not exceeding THB 40,000, or both, and suspension of electoral rights for a period of five years.

19. Insurance

19.1 Compulsory Insurance

Third-Party Motor Insurance

Third-party motor insurance is compulsory for all private vehicle owners. The law sets out minimum standards for such limited coverage for passengers and third-party liability, as well as deadlines for filing and payment of claims.

Those injured are able to claim an initial payment of THB 80,000 for medical coverage, and THB 200,000 to THB 300,000 for any instance of the following:

- blindness, deafness, dumbness, or the loss of ability to speak or loss of the tongue;
- loss of a reproductive organ;
- loss of an arm or any other organ;
- physical or psychological deformity; or
- permanent incapacitation.

The initial payment must come from either the insurance company or the Third Party Insurance Compensation Fund within seven days of filing the application for obtaining the initial payment. In addition, the application must be filed with the insurance company or the Third Party Insurance Compensation Fund, as the case may be, within 180 days from the day on which the damage occurred. The fund, supported by the government and the insurance industry, will provide protection for injury/death caused by those otherwise uninsured (e.g., stolen vehicles, drivers without third-party insurance, and accidents for which insurance firms refuse to pay).

Other Compulsory Insurance

Other compulsory insurance is provided for in the Workmen's Compensation Fund and Social Security Fund. Coverage by these funds is the responsibility of employers to their employees. Further information on these funds can be found in the chapter on Working in Thailand.

19.2 Options

Numerous life and non-life insurance companies are active in Thailand. Shopping around can often produce some interesting options, depending upon the criteria for selection. Most investors prefer to appoint a broker, rather than an agent, who can play a supportive role almost as if a brokerage company were in fact the insurance department of their company.

As in any country, the prudent foreign investor should investigate the requirements and skills of a good broker and secure the services of a competent professional to meet his or her needs.

19.3 Claims

An insurance contract is defined as an agreement between the insurer and insured, whereby the insurer agrees to make compensation or pay a sum of money in case of contingent loss or any other future event specified in the contract, and the insured agrees to pay the premium.

An insurance contract is voidable if, at the time of its making, the insured, or in case of life insurance, the party upon whose death payment depends, knowingly omits facts that would have induced the insurer to raise premiums or refuse to enter into the contract, or knowingly makes false statements in regard to such facts. In addition, an insurance contract is not enforceable by action unless written evidence exists and is signed by the liable party. Pursuant to the amendments to the Casualty Insurance Act B.E. 2535 (A.D. 1992) and Life Insurance Act B.E. 2535 (A.D. 1992), however, all advertising images or solicitation documents shall be regarded as parts of the insurance policy; if the meaning of any advertised wording or image is contrary to that written in the policy, such meaning shall be interpreted in favor of the insured or the beneficiary.

Any right to claim compensation for loss is time-barred if judicial proceedings are not instituted within two years of the date of loss. The prescription period for compensation claims under life insurance is ten years.

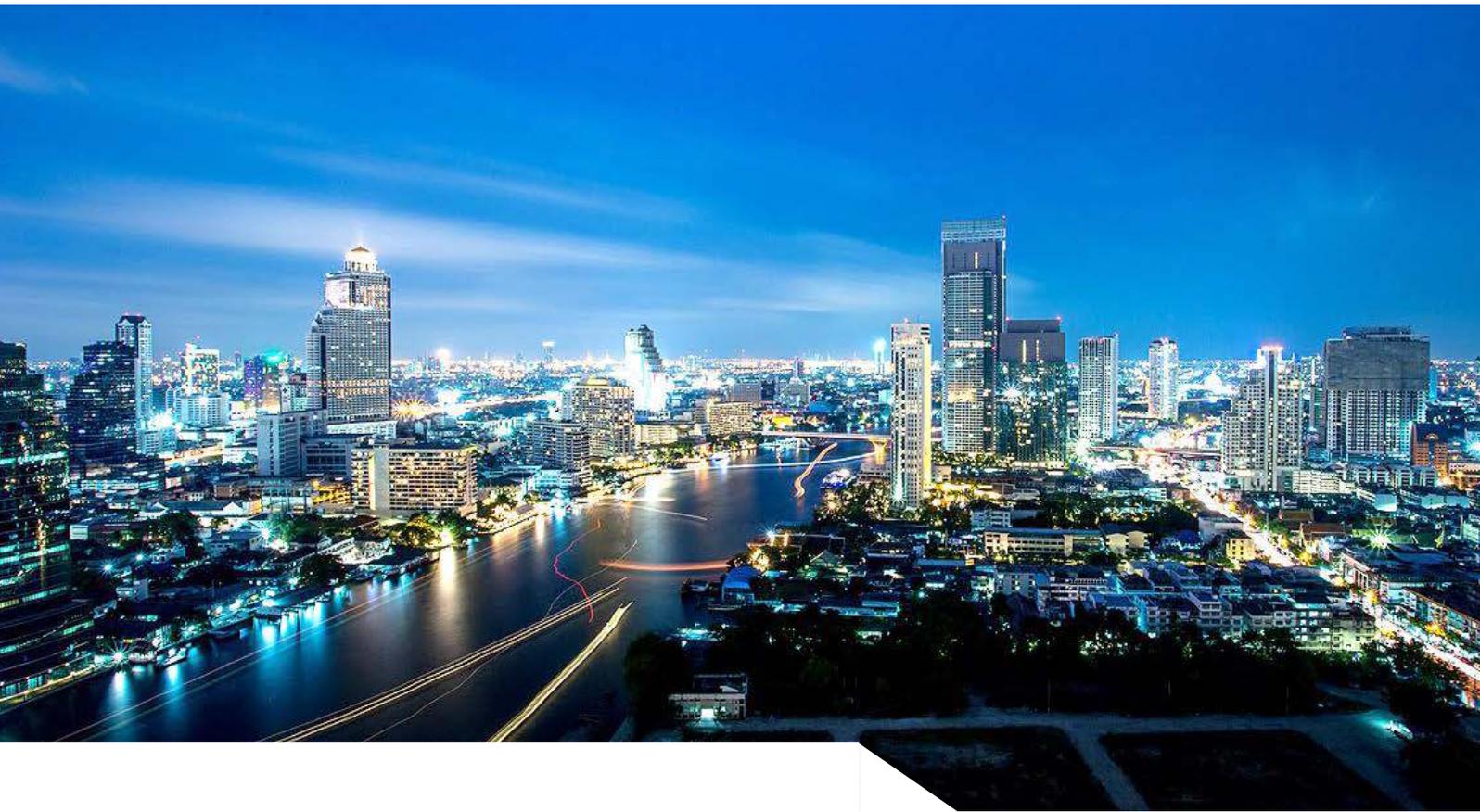
For further information about civil claims and court processes in Thailand,
see chapter on **Litigating in Thailand**.

Key points on Insurance:

- All vehicle owners are required to obtain insurance for injuries or death caused by their vehicles.
- All advertising images or solicitation documents shall be regarded as parts of the insurance policy.
- Any right to claim compensation for loss is time-barred if judicial proceedings are not instituted within a two-year period from the date of loss. The prescription period for compensation claims under life insurance is ten years.

For further information on, or assistance with, insurance matters,
please contact Tilleke & Gibbins on +66 2056 5555.

Working in Thailand



A GUIDE FOR EMPLOYERS AND EMPLOYEES

This chapter covers the fundamentals of Thai labor law, including conditions, benefits, and termination or dismissal. This section also provides information on the additional requirements for foreigners working in Thailand.

Working in Thailand

A Guide for Employers and Employees

Business conditions, labor sentiment, and new opportunities evolve swiftly in the growing economies of Southeast Asia. Tilleke & Gibbins helps employers navigate these shifting legal landscapes by providing advice on labor law and employment matters that is timely and time-tested, innovative, and practical.

Our first goal is to help employers formulate long-term, yet flexible, strategies on conditions of employment, staff restructuring, labor-management relations, and other critical employment issues. By helping employers create a positive work environment, we help companies save recruitment and litigation costs, react to changing labor conditions, and attract and keep talented employees.

In this chapter of *Thailand Legal Basics*, you will find information on:

- ▶ Standard conditions of employment
- ▶ Work rules and regulations
- ▶ Working hours
- ▶ Employing females or children
- ▶ Remuneration
- ▶ Leave entitlements
- ▶ Employee benefits
- ▶ Termination of employment

20. Thai Labor Law

Labor matters are generally governed by the Labor Protection Act B.E. 2541 (A.D. 1998), as amended, and sections 575 to 586 of the Civil and Commercial Code on hire of services. Other laws include:

- Labor Relations Act B.E. 2518 (A.D. 1975), as amended
- Act Establishing the Labor Court and Labor Court Procedure B.E. 2522 (A.D. 1979), as amended
- Provident Fund Act B.E. 2530 (A.D. 1987), as amended
- Social Security Act B.E. 2533 (A.D. 1900), as amended
- Workmen's Compensation Act B.E. 2537 (A.D. 1994)
- Foreign Employment Act B.E. 2551 (A.D. 2008)
- Home-Based Worker Protection Act B.E. 2554 (A.D. 2011)
- Occupational Safety and Health Act B.E. 2554 (A.D. 2011)

An *employee*

is a person who agrees to work for an employer in return for a wage, regardless of title

20.1 Standard Conditions of Employment

An employer must provide the minimum standard conditions of employment. Employers cannot stipulate employment conditions which do not comply with the minimum standards set by the Labor Protection Act.

20.2 Work Rules and Regulations

Any employer that has ten or more employees is required to prepare written work rules and regulations (in Thai) and have them submitted to the district labor office that governs the region in which the employer's office is located. These work rules must be submitted within seven days from the date they are effective. One copy must also be posted at the place of work. The work rules and regulations must contain at least the following information:

- Working days, regular working hours, and rest periods
- Holidays and rules for taking holidays
- Rules on overtime and working on holidays
- Date and place of paying wages, overtime pay, holiday pay, and holiday overtime pay
- Leave and rules for taking leave
- Discipline and disciplinary actions
- Submission of grievances
- Termination of employment, severance pay, and special severance pay

In addition, an employer who regularly employs ten or more employees has to maintain at the place of work:

- a register of employees (in Thai) containing, for example, names, addresses, dates of employment, wage rates, etc.; and

- documents concerning the calculation of wages (in Thai), for example, working days, working hours, and wages.

20.3 Working Hours

Maximum working hours are fixed depending on the type of work that is conducted. In general, normal working hours may not exceed 8 hours per day or 48 hours per week. Work which may be detrimental to an employee's health or body, as prescribed in ministerial regulations, cannot exceed 7 hours per day or 42 hours per week.

If any day has less than 8 working hours, the employer and the employee may agree to include the remaining working hours with the working hours of any normal working day. The total number of working hours, however, must not exceed 9 hours per day and 48 hours per week. The employer must pay remuneration at 1.5 times the hourly wage rate of a working day for the number of hours worked in excess of 8 hours to a daily or hourly employee, or at 1.5 times the rate for each work unit performed on a working day to a piecework employee.

On a typical workday, employees shall be entitled to a rest period of one hour after five consecutive working hours. The employer and the employee, however, may agree in advance to a rest period shorter than one hour, but the total rest periods during a working day may not be less than one hour per day.

20.4 Child and Female Employees

The minimum age of employment is 15, and no children under the age of 18 may be employed without first informing the Labor Inspector.

Male and female employees shall be treated equally, unless the nature of the working conditions does not allow for such equal treatment.

Employees under the age of 18 and pregnant employees are not allowed to work between the hours of 10 p.m. and 6 a.m., work overtime, work on holidays, or do other work as prescribed by law. Employers are not allowed to terminate female employees for reason of pregnancy.



The minimum wage is set periodically by notification of the Ministry of Labor and Social Welfare.

It is advisable to check the current Notification of the Ministry of Labor and Social Welfare Regarding Prescribing Minimum Wages

20.5 Remuneration

The employer can provide a remuneration package, which may include a range of benefits. Basic remuneration, however, must meet salary scales based on minimum wage.

Wages must be paid in Thai currency, unless otherwise agreed between an employer and an employee.

20.6 Employee Welfare

A business entity with 50 employees or more must have a popularly elected welfare committee, whose role is to look after and make recommendations regarding employee welfare.

20.7 Holidays and Leave

An employee is entitled to at least a one-day holiday per week. This is usually taken on Sunday. In addition, a minimum of 13 public holidays per year, including National Labor Day, must be granted. After one year of service, employees are entitled to a paid annual vacation of not less than six working days. Below are the commonly adopted public holidays.

Commercial Holidays	
New Year's Day	January 1
Chinese New Year	January-February (changes annually)
Makha Bucha Day	February-March (changes annually)
Chakri Day	April 6
Songkran Day	April 13
National Labor Day	May 1
Visakha Bucha Day	May (changes annually)
Asarnha Bucha Day	July (changes annually)
H.M. King Maha Vajiralongkorn's Birthday	July 28
H.M. the Queen's Birthday	August 12
Anniversary of the Passing of King Bhumibol	October 13
Chulalongkorn Day	October 23
King Bhumibol's Birthday / National Father's Day	December 5
Constitution Day	December 10
New Year's Eve	December 31

Government Holidays

New Year's Day	January 1
Makha Bucha Day	February-March (changes annually)
Chakri Day	April 6
Songkran Day	April 13–15
Royal Ploughing Day	May (changes annually)
Visakha Bucha Day	May (changes annually)
Asarnha Bucha Day	July (changes annually)
Buddhist Lent Day	July (changes annually)
H.M. King Maha Vajiralongkorn's Birthday	July 28
H.M. the Queen's Birthday	August 12
Anniversary of the Passing of King Bhumibol	October 13
Chulalongkorn Day	October 23
King Bhumibol's Birthday / National Father's Day	December 5
Constitution Day	December 10
New Year's Eve	December 31

Bank Holidays

New Year's Day	January 1
Makha Bucha Day	February-March (changes annually)
Chakri Day	April 6
Songkran Day	April 13
National Labor Day	May 1
Visakha Bucha Day	May (changes annually)
Half-Year Holiday	July 1
Asarnha Bucha Day	July (changes annually)
H.M. King Maha Vajiralongkorn's Birthday	July 28

H.M. the Queen's Birthday	August 12
Anniversary of the Passing of King Bhumibol	October 13
Chulalongkorn Day	October 23
King Bhumibol's Birthday / National Father's Day	December 5
Constitution Day	December 10
New Year's Eve	December 31

Sick Leave

Employees are entitled to sick leave when they are sick, and are entitled to be paid for 30 working days per year.

Maternity Leave

A pregnant employee is entitled to 90 days of maternity leave for each pregnancy, including holidays. The employer must pay 45 days of full wages during the leave period, with the remaining 45 days being paid by the social security fund.

21. Benefits and Social Security

21.1 Employee Welfare Fund

Under the Labor Protection Act, the employees of a business operation with ten or more employees must be members of the Employee Welfare Fund. The objective of the Employee Welfare Fund is to provide financial security for the employees (in the case of resignation or retirement) or for beneficiaries (in the case of death).

The Employee Welfare Fund is to be established and managed by the Employee Welfare Fund Committee upon enactment of an enabling royal decree. However, no such decree has been issued—therefore, the Employee Welfare Fund is not in effect at present and employers are not required to use this fund.

Once established, the Employee Welfare Fund will be mandatory, subject to certain exceptions. If the employer has a registered provident fund (see section below) or provides welfare for employees in case of their resignation or death in accordance with the rules and procedures prescribed in ministerial regulations, it is not legally required to take part in the Employee Welfare Fund.

The contributions of the employer and employee will be in accordance with the rates prescribed in the ministerial regulations, but must not exceed 5% of the employee's wage.

21.2 Social Security

An employer with one or more employees must register with and contribute to the Social Security Fund. Upon registration, employees will become "insured persons," entitled to benefits provided under the Social Security Act.

The Social Security Act requires that the government, employers, and employees contribute to the Social Security Fund at the rates prescribed by law. At present, both employers and employees each make monthly contributions at the rate of 5% of the employees' wages, while the government contributes at a rate of 2.75%. The maximum salary used as a basis for calculation of contribution is THB 15,000. Thus, the maximum monthly contribution paid by an employer and an employee is THB 750 each.

The Social Security Act does not cover government officials; employees of foreign governments and international organizations; employees working in foreign countries for Thai firms; teachers at private schools; students who work for schools, universities, and hospitals; and other types of employees according to royal decree.

The act provides compensation and benefits for:

- injury or illness not related to work (work-related injury or illness is covered by the Workmen's Compensation Fund);
- maternity;
- disability not related to work (work-related disability is covered by the Workmen's Compensation Fund);
- funerals for death not related to work (work-related death is covered by the Workmen's Compensation Fund);
- child welfare
- old age; and,
- unemployment.

Self-inflicted injuries and suicide are excluded from coverage under the act.

21.3 Provident Fund

A provident fund is a type of superannuation fund that employers and employees jointly establish and register according to the Provident Fund Act B.E. 2530 (A.D. 1987), as amended. Although provident funds are not mandatory, if one is established it must be registered.

Provident funds consist of monetary contributions made by employees and their employer, including money and interest on money or other property donated to the fund. They are managed by independent securities firms that are approved by the Ministry of Finance. A provident fund provides security for an employee in case of death, retirement, or termination or resignation from employment.

The employee's contribution may not be less than 2% and not more than 15% of his or her wages. The employer's contribution must not be less than the employee's contribution.

21.4 Worker's Compensation

An employee who sustains injury or sickness, or the estate of an employee who disappears or dies, during performance of his or her work-related duties is entitled to receive workmen's compensation. An employer who has one or more employees must register for and contribute to the compensation fund once a year, unless the employer is exempt under:

- the Workmen’s Compensation Act B.E. 2537 (A.D. 1994); or
- the Notification of the Ministry of Labor and Social Welfare Re Types, Sizes of Businesses, and Localities where Employers are Required to Make Contribution (No. 2) B.E. 2545 (A.D. 2002).

The rate of contribution is assessed at 0.2% to 1.0% of employees’ annual earnings, depending on the risk classification of the employer.

An employee who suffers injury or illness during performance of his work-related duty is entitled to reimbursement for the cost of medical treatment, funeral expenses, and compensation.

22. Termination and Dismissal

Termination of employment and the ensuing consequences are governed by general stipulations in the Civil and Commercial Code and in labor law.

22.1 Termination with Cause

Under the Labor Protection Act B.E. 2541 (A.D. 1998), an employee may be dismissed without notice or severance payment under any of the following circumstances:

- Dishonestly performing his or her duty or intentionally committing a criminal offense against the employer.
- Intentionally causing damage to the employer.
- Negligently causing gross or serious damage to the employer.
- Violating work regulations, rules, or lawful orders of the employer after written warning has been given by the employer other than in serious cases when the employer is not required to give any warning.
- Neglecting duty for three consecutive working days without justifiable reason.
- Being imprisoned by a final judgment of imprisonment. If it is an offense committed through negligence or a petty offense, it must be a case which has caused damage to the employer.

22.2 Termination without Cause

When there is termination without cause, it is compulsory that the employer give a written notice and make severance payment to the employee. Calculation of the severance pay is based on the length of unbroken service, as per the table below.

Period of Service	Days
<i>(Inclusive of holidays, leave days, and days on which work stoppage is ordered by the employer)</i>	
120 days but less than 1 year	30
1 year but less than 3 years	90
3 years but less than 6 years	180
6 years but less than 10 years	240
10 years or more	300

The employer can terminate the services of an employee immediately by making payment in lieu of notice.

An employee can bring an action against his or her employer in the Labor Court if the employee thinks the employment was terminated by unfair practices.

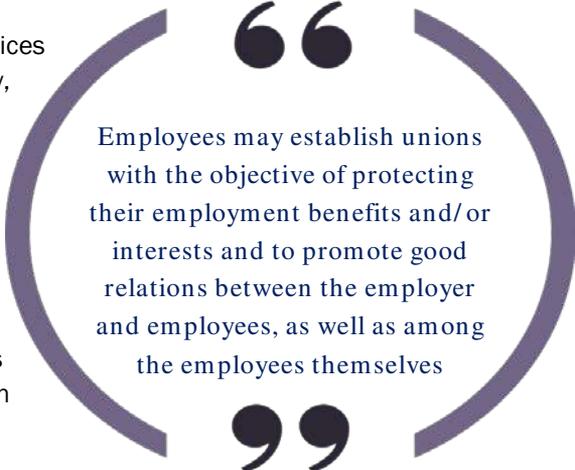
23. Labor Disputes

The Labor Relations Act B.E. 2518 (A.D. 1975), as amended, establishes procedures for:

- labor negotiations;
- resolution of demands between employers and employees; and
- mediation by the Department of Labor Protection and Welfare officials, or arbitration by the Labor Relations Committee.

If there is a labor dispute concerning the conditions of employment, the complaining party must serve a written notice on the other party. The first stage of settlement is direct negotiation between employer and employee through their duly authorized representatives. If no settlement is reached, the dispute is referred to the Conciliation Officer, who will mediate the dispute. If mediation fails, both parties may refer the matter to arbitration by one or more arbitrators. The employer can choose to effect a lockout or the employees can go on strike, but this is subject to restrictions on some businesses, as provided by the Labor Relations Act.

For labor disputes occurring in certain essential services which affect the general public or the national economy, such as railways, telephone or telecommunications, and waterworks, the Conciliation Officer will refer the dispute to the Labor Relations Committee if mutual negotiations and mediation fail. The committee's decision can be appealed to the Minister of the Interior within seven days of receipt of the decision. The minister will issue a decision on the appeal and notify both parties within ten days of receipt. A Labor Relations Committee decision is final if not appealed within seven days, as is the minister's decision regarding the appeal.



Employees may establish unions with the objective of protecting their employment benefits and/or interests and to promote good relations between the employer and employees, as well as among the employees themselves

23.1 Labor Unions

The Labor Relations Act provides that employees within the same company (except state enterprises) or employees doing similar work, regardless of the number of employers, may form labor unions.

Labor unions must be registered with the registrar of the Department of Labor Protection and Welfare. They can operate only upon the issuance of a license. A license is issued only after an investigation is made by the registrar to confirm that the regulations of the union are not contrary to law and public order and that they do not constitute a threat to national security or the economy.

“

Entitlement to form a labor union is restricted to Thai nationals employed by the same employer, or engaged in the same type of activity in the same province, of at least 20 years of age. A labor union must have at least ten promoters.

”

Entitlement to form a labor union is restricted to Thai nationals employed by the same employer, or engaged in the same type of activity in the same province, of at least 20 years of age. A labor union must have at least ten promoters. Supervisory employees with responsibility for recruitment, promotion, sanctions, and termination of employment cannot become members of a labor union established by other employees or in which other employees are members. Furthermore, such other employees cannot become members of a labor union established by supervisory employees or in which supervisory employees are members. Labor unions registered under the law can submit demands for better conditions of employment and carry out other activities for the benefit of their members.

24. Employment of Foreigners

A foreigner may work in Thailand if he or she:

1. has a valid visa and a work permit; and
2. is able to perform work that does not violate the Foreign Employment Act.

The term “work” is defined very broadly and covers both physical and mental activities (whether or not for wages or other remuneration).

Theoretically, even volunteer or charity work requires a work permit. It is common practice for volunteer teachers and other official charity workers to be required to obtain work permits

24.1 Occupations Closed to Foreigners

Most foreigners who intend to work in Thailand are subject to the Foreign Employment Act B.E. 2551 (A.D. 2008). A foreigner cannot perform any act of work or service unless a work permit has been issued by the Department of Employment, Ministry of Labor, or unless the individual or the work performed falls within an exception to the act.

The schedule annexed to the Royal Decree Stipulating Work in Occupations and Professions Prohibited to Foreigners B.E. 2522 (A.D. 1979) lists occupations that are closed to foreigners and reserved for Thais. The current list contains the following occupations:

- Labor work, except labor work in fishing boats under the next category below
- Agriculture, animal husbandry, forestry or fishery, except work requiring specialized knowledge, farm supervision, or labor work in fishing boats, particularly marine fishery
- Bricklaying, carpentry, or other construction work
- Wood carving
- Driving motor vehicles or vehicles which do not use machinery or mechanical devices, except piloting aircraft internationally
- Shop attendance
- Auction sale work
- Supervising, auditing, or giving service in accountancy, except occasional internal auditing
- Cutting or polishing precious or semiprecious stones
- Haircutting, hairdressing, or beautification
- Cloth weaving by hand
- Mat weaving or making utensils from reed, rattan, jute, hay, or bamboo
- Making rice paper by hand
- Lacquer work
- Making Thai musical instruments
- Niello work
- Goldsmith, silversmith, or gold-and-copper alloy smith work
- Stone work
- Making Thai dolls
- Making mattresses or quilts
- Making alms bowls
- Making silk products by hand
- Making silk products by hand
- Making Buddha images
- Knife making
- Making paper or cloth umbrellas
- Making shoes
- Making hats
- Brokerage or agency, except in international trading
- Professional civil engineering concerning design and calculation, systemization, analysis, planning, testing, construction supervision, or consulting services, excluding work requiring specialized techniques
- Professional architectural work concerning design, drawing-making, cost estimation, or consulting services
- Garment making
- Pottery or ceramic ware making
- Cigarette making by hand
- Tour guiding or conducting
- Street vending
- Type-setting of Thai characters by hand
- Unwinding and twisting silk by hand
- Clerical or secretarial work
- Providing legal services or engaging in legal work, except arbitration work, and work relating to defense of cases at arbitration level, provided the law governing the dispute under consideration by the arbitrators is not Thai law, or it is a case where there is no need to apply for the enforcement of such arbitration award in Thailand

24.2 Applications for Work Permits

Criteria for Granting Work Permits

The criteria for consideration of whether to grant work permits vary according to the type of employer or work. For instance, every company established under Thai law is generally given a quota of one work permit for every THB 2 million of its capital. In addition, when reviewing a work permit application, officials also consider other qualifications of the applicant, such as age, job title, job description, educational background, and work experience. Most royal decrees, ministerial regulations, notifications, resolutions, and orders issued under the previous act continue to be enforceable insofar as they do not contradict the new act.

Application Process

An applicant for a work permit must have either a non-immigrant visa or a permanent resident permit. Generally, a non-immigrant visa must be obtained before entering Thailand. A permanent resident permit can be applied for only after a foreigner has resided in Thailand for at least three consecutive years under a non-immigrant visa. An employer or potential employer may file an application for advance permission for an employee to work before the foreigner enters the country. The work permit itself, however, will not be issued until the individual enters Thailand on a valid non-immigrant visa.

If the job being applied for is not in Bangkok, the application is filed at the relevant provincial department of the Employment Office. Supporting documents usually must be translated into Thai with appropriate certification.

In order to work with a limited company in Thailand, applicants for work permits must supply the following documents:

- Application form (Tor. Thor. 2) and three photographs, front view, and 3x4 cm in size (taken within the previous six months)
- Letter from employer certifying employment and reasons for not employing a Thai national
- Copy of the company's affidavit certified by the Department of Business Development (made within the previous six months)
- Copy of the list of shareholders certified by the Department of Business Development (made within the previous six months)
- Copy of certificate of incorporation
- Copy of VAT certificate, or Phor. Por. 01 and 09
- Copy of latest audited financial statements
- Copy of Phor. Ngor. Dor. 50 (Corporate Income Tax Return) and receipt
- Organizational chart
- List of all expatriate(s) in the company indicating position and work permit number(s)
- Copies of educational certificates and letters of recommendation from previous employment
- Copies of all pages of passport showing the valid non-immigrant visa ("B" or "O")
- Copies of all pages of the work permit of the authorized director showing the valid date (if the authorized director is a foreigner)
- A medical certificate certifying that the applicant is free from prohibited diseases (issued within the previous one month)
- Power of Attorney affixed with THB 10 duty stamp
- Map of the company's location
- Official form for notification of commencement of work (Tor. Thor. 10)
- Any other relevant document(s)

Other Requirements:

- All photocopies of documents must be certified as true copies by the authorized director(s) and affixed with the company seal.

- If the application is filed by another person, a valid power of attorney in the prescribed form must be attached with a THB 10 duty stamp affixed.
- On the application form, the job description entry must be completed with a detailed description of the job to be performed, how it is related to other employees, and what materials will be used in the work.
- If the job applied for is subject to a license under a particular law in addition to the Foreign Employment Act, a photocopy of that license (e.g., a teacher's license, physician's license, press card from the Public Relations Department, certificate of missionary status from the Religious Affairs Department, etc.) must be attached.
- If the applicant is married to a Thai national, the marriage certificate must be presented along with the spouse's identity card, birth certificates of children, household registration certificate, and a photocopy of every page of the applicant's passport.
- If the applicant is applying for a position previously held by a foreigner, a photocopy of the predecessor's work permit, together with his or her notice of resignation from the company or a letter confirming his or her intended date of departure, must be presented.

For more information on visas, please see the chapter on [Living in Thailand](#).

24.3 Length and Validity of Work Permits

According to the current Foreign Employment Act B.E. 2551 (A.D. 2008), a work permit can be granted for up to two years (renewable), regardless of the duration of stay which is stamped on a foreigner's passport.

A work permit is valid only for the particular job for which it was issued and within the geographic limitations specified in the work permit. Working in a position or at a location other than that specifically approved is grounds for termination of a work permit. Foreigners may hold more than one position with one or more employers, but must obtain permission for each position and for each employer. Generally, the permission for each position is entered into the original work permit record.

Exceptions to the Foreign Employment Act permit foreigners to perform work deemed necessary and urgent which can be completed within 15 days. The Department of Employment must, however, be informed before work begins.

24.4 Exemptions from Work Permits

Certain foreigners are exempt from work permit requirements. There are seven categories:

- Members of the diplomatic corps
- Members of a consular mission
- Representatives and officials of the United Nations and its specialized agencies
- Personal servants from abroad employed by any of the above
- People who perform duties or missions under an agreement between the government of Thailand and another foreign government or international organization
- People who perform duties or missions for the benefit of education, culture, arts, sports, or other activities as may be sanctioned by royal decree

- People with special permission from the government of Thailand to enter and perform duties or missions in the Kingdom

24.5 Penalties for Work Permit Violations

Working without a valid work permit, even for one day, is a criminal offense. Penalties for working without a work permit include imprisonment of not exceeding five years or a fine from THB 2,000 to THB 100,000, or both. If such a foreigner admits the crime committed and agrees to travel out of Thailand within the period of time prescribed by the interrogating officer (which must not be later than 30 days), the interrogating officer may impose a fine and make arrangements for the foreigner to travel out of Thailand without trial. A company or employer that hires a foreigner without a valid work permit is subject to a fine from THB 10,000 to THB 100,000 for each foreign worker/employee. At the time of writing, legislation has been enacted to substantially increase the punishment for both employers and employees who violate the law on work permits. However, that legislation was subsequently suspended by executive order, rendering it temporarily unenforceable. For more information on the current state of the penalty schedules, please contact Tilleke & Gibbins.

A work permit holder must have the work permit booklet with him/her at all times while working in Thailand.

24.6 One-Stop Service Center

The One-Stop Service Center facilitates the processing of work permits and extensions of stay for qualified foreign investors, experts, and correspondents. Through the center, the Immigration Bureau and the Department of Employment can issue work permits and extensions of stay within three hours. In general, processing an extension of stay is handled by the Immigration Bureau, while processing work permits is handled by the Department of Employment, which normally takes about 10 to 14 working days to complete. The following investors, executives, or experts, including their family members, are qualified to submit applications through the center:

- Executives or experts who have been granted privileges under the Investment Promotion Act B.E. 2520 (A.D. 1977), the Petroleum Act B.E. 2514 (A.D. 1971), or the Industrial Estate Authority of Thailand Act B.E. 2522 (A.D. 1979)
- Individual investors who bring in money from abroad of not less than THB 2 million for the purchase of shares in a private company
- Executives or experts working with a company whose total current asset value is not less than THB 30 million
- Foreigners who come to work for the foreign press
- Foreign officers of branch offices of overseas banks, foreign banking offices of overseas banks in Bangkok, provincial foreign banking offices of overseas banks, and representative offices of foreign banks
- Foreigners who come to work for branch, representative, or regional offices of overseas enterprises

For further information on visas and immigration or assistance with obtaining permits, please contact Tilleke & Gibbins at +66 2056 5555.

Protecting Intellectual Property in Thailand

A Guide for IP Owners and Licensees

Thailand is in the midst of rapid development, making the transition from an agricultural society to an industrialized society. The country is increasingly adopting the use of new technologies that stimulate economic growth. The value of advanced technology has become widely realized in Thailand, and it has come to play an integral role in the industrialization process.

This increased technology transfer to Thailand raises important issues relating to intellectual property rights and their protection. Infringements and imitations of intellectual property are inevitable in a developing country like Thailand, and while this may be viewed as a positive point by local businesses, this view is not shared by foreign intellectual property owners or their home governments.

From a business perspective, intellectual property is regarded as one of the most important and valuable assets of a business. The value of marks and names is based on the goodwill and reputation accumulated through the owner's use of them in his or her business until they become known and accepted by the general public to represent or be associated with quality goods and/or services.

The value of a patent lies in the owner's monopoly and exclusive right to its use for a certain period of time without competition from other traders, thus allowing the owner to derive commercial benefit from it.

Owners benefit from well-managed and well-protected intellectual property in two forms—direct commercial profit through their own use and royalties and other fees through others' use with owners' permission, or both. More and more companies with valuable intellectual property (e.g., high technology and/or well-known international marks and names), however, are increasingly inclined toward royalties. Technological cooperation, licenses, franchises, and other similar arrangements are gaining popularity among high technology or well-known companies as ways to maximize business profit with minimal risk, especially in alien business environments. For example, Thailand's income from royalties is quite substantial and increasing every year.

25. Introduction to Intellectual Property

For practical purposes, intellectual property is generally classified into marks, patents, and copyrights.

- Marks (trademarks, service marks, certification marks, and collective marks) are used as a way to identify a unique product, service, or certification.
- Patents for inventions and product designs grant the patent holder an exclusive right to use an invention or method.
- Copyrights apply to literary works, artistic works, dramatic works, musical works, audio-visual works, cinematographic works, sound and video broadcasting works, and computer software.

In view of recent economic growth and escalating problems of infringement and counterfeiting in Thailand, intellectual property owners should seek protection of their IP rights through both active use and legal protection. Protection of intellectual property is based on the following legislation:

- Trademark Act B.E. 2534 (A.D. 1991)
- Trademark Act (No. 2) B.E. 2543 (A.D. 2000), as amended by Trademark Act (No. 3) B.E. 2559 (A.D. 2016)
- Patent Act B.E. 2522 (A.D. 1979)
- Patent Act (No. 2) B.E. 2535 (A.D. 1992)
- Patent Act (No. 3) B.E. 2542 (A.D. 1999)
- Copyright Act B.E. 2521 (A.D. 1978)
- Copyright Act B.E. 2537 (A.D. 1994), as amended by Copyright Act B.E. 2558 (A.D. 2015)
- Civil and Commercial Code
- Penal Code
- Consumer Protection Act

Trademarks and patents are legally protected by a system of registration, while copyright protection is automatic and does not require registration. The Department of Intellectual Property maintains comprehensive records of copyright.

The Department of Intellectual Property, Ministry of Commerce, is responsible for all matters relating to intellectual property (trademarks, service marks, or patent registrations; copyright recordation; etc.), as well as the enforcement of intellectual property rights laws.

26. Trademarks

Marks (including trademarks, service marks, certification marks, and collective marks) are used as a way to identify a unique product, service, or certification. When a trademark is registered, the proprietor of the trademark shall have the exclusive right to its use with the goods and/or services for which the registration was granted.

Thailand has followed the international standardized classification known as the Nice System since its adoption of the 10th edition of the Nice Agreement Concerning the International Classification of Goods

and Services for the Purposes of the Registration of Marks in 2013. The Thai Trademark Act (No. 3) B.E. 2559 (A.D. 2016) provides for legal protection and registration of the following:

- Trademarks
- Service Marks
- Certification Marks
- Collective Marks
- Trademark/Service Mark License

In addition to legal protection for trademarks registered in Thailand, the act also provides protection for well-known trademarks.

While it was possible in the past to record a well-known trademark by filing an application with the Department of Intellectual Property, the recordation system for well-known marks was abolished in 2015. Despite this change, if a trademark was recorded as a well-known trademark under the previous regulations, a trademark registrar can still consider this recordation when examining new trademark applications.

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A *mark* includes a photograph, drawing, invented picture, brand, name, word, text, letter, numeral, signature, group of colors, shape, or three-dimensional object, sound, or any combination of these items.
”

Accession to the Madrid Protocol

Thailand acceded to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) on August 7, 2017, and the system is due to come into effect on November 7, 2017. This will enable trademark owners in Thailand to file a single international application designating other member states to the protocol. Similarly, trademark owners in other member states will be able to designate Thailand in international applications to seek protection in the country. The decision as to whether or not a mark in such an international application is registrable in Thailand will still be based on the amended Thai Trademark Act.

26.1 Acquisition of Rights

According to the Trademark Act (No. 3) B.E. 2559 (A.D. 2016), a trademark may be registered if:

- it is distinctive;
- it is not forbidden under the Act; and
- it is not identical or similar to a trademark registered by another person.

Distinctiveness Requirement

A distinctive trademark is one that enables the public or users of the goods or services under said trademark to recognize and understand that such goods or services are different from other goods or services. A distinctive trademark shall possess or consist of at least one of the following essential particulars:

- A personal name, a surname of a natural person which is not according to its ordinary signification a surname.
- The full name of a legal entity under relevant law, or a trade name, which is stylized in either case and not directly descriptive of the nature or characteristics of the goods.

- A word or text that is not directly descriptive of the nature or characteristics of the goods and is not a geographical name designated by the Minister by notification.
- A newly-invented word.
- A stylized letter or numeral.
- A combination of colors represented in a stylized manner.
- The signature of the applicant or the previous owner of the applicant's business, or the signature of another person, with his/her permission.
- A representation of the applicant, or of another person, with his/her permission, or, if such person is a deceased person, with permission of his/her ascendant(s), descendant(s), and spouse, if any.
- A device.
- An image that is not directly descriptive of the characteristics of the goods or services, and does not represent a map or a geographical location designated by the relevant minister by notification.
- A figure or shape that is not an inherent feature of the goods or services, is not necessary for the technical operation of the goods or services, or does not add value to the goods or services.
- A sound that is not directly descriptive of the nature or characteristics of the goods or services, is not an inherent sound of the goods or services, or is not the sound that the goods or services make when they are used.
- A trademark which does not contain any of the above elements can be deemed distinctive if it is used as a trademark on goods or services which are widely sold, distributed, or advertised under the rules and regulations prescribed by the Minister of Commerce and there is proof that the rules and regulations have been complied with.

A trademark which possesses or consists of any of the following particulars shall not be registrable:

- Royal or official arms or crests, royal seals, official seals, the Royal Chakri seal, emblems and insignia of royal orders and decorations, position seals, emblems of ministries, bureaus, departments, or emblems of provinces.
- Flags of Thailand, royal standards, or official flags.
- Royal names, royal signatures, royal monograms, or royal dynasties.
- Photographs or portraits of the King, Queen, or heirs.
- Names, words, text, or emblems which represent the King, Queen, royal descendants, or heirs.
- National flags or national emblems of foreign countries, flags and emblems of international organizations, seals of heads of foreign countries, official emblems and marks of quality assurance on goods of foreign countries or international organizations, or names and initials or acronyms of foreign countries or international organizations, unless authorized by the person in charge of foreign affairs of such foreign countries or international organizations.
- Official emblems, emblems of the Red Cross, or the appellation "Red Cross" or "Geneva Cross."
- A trademark which is similar to any of the seven categories listed above.
- A mark identical or similar to the representation of a medal, diploma, or certificate or any other mark awarded at an exhibition or competition held by the Thai government or a Thai government agency or Thai state enterprise, a foreign government, or an international organization, unless such medal, diploma, certificate, or mark has actually been awarded to the applicant for goods

bearing its representation, and it is used as a part of his or her trademark, and provided that the calendar year of award is indicated.

- A mark which is contrary to public order, morality, or public policy.
- A mark which, according to criteria prescribed by the Minister, is identical or so very similar to a well-known trademark that it confuses or deceives the public as to the proprietor or the origin of the goods bearing the mark, regardless of whether or not the trademark has been registered.
- A geographical indication which is protected under related laws.
- Other trademarks prescribed by the relevant minister.

Application for Trademark Registration

A trademark (service mark, certification mark, and collective mark) application must:

- be completed on an official form in the Thai language, with specimens of the mark attached;
- include the class of goods/services intended to be protected;
- be filed along with a priority claim form (if priority is to be claimed);
- be filed by the proprietor or his or her agent under a power of attorney, who must have a fixed place of business in Thailand or a contact address at which they can be contacted by the Trademark Registrar; and
- be filed with the Department of Intellectual Property.

All documents and trademarks that are not in the Thai language must be translated into Thai. Word marks can be registered, but the meaning and pronunciation in Thai shall be stated in the application. A single notarized power of attorney is sufficient for all applications having the same owner.

Under the current practice, both single-class and multiple-class applications may be filed.

While it is possible to file a trademark application through the online system of the Department of Intellectual Property, documents and payment must be submitted in person at the Department of Intellectual Property within one day following the submission of the electronic filing. As a result, the online system is not commonly used in Thailand.

If the Trademark Registrar finds that the proposed trademark:

- is distinctive;
- is not prohibited;
- is not identical or similar to another trademark already registered by another proprietor;
- does not confuse or deceive the public as to the proprietorship or origin of the goods or services; and
- meets criteria for registration;

the registrar will advertise the mark and the details of the application in the *Trademark Gazette*, which is published in Thai. If there is no objection within 60 days of publication, the mark will be registered (subject to payment of the registration fee).

Competing Applications – Priority Right

In the event that several persons have applied for registration of identical or closely resembling marks for goods of the same or different classes, but which are, in the registrar's opinion, of the same character so as to confuse the public, the first applicant has the priority right.

An applicant or challenger not satisfied with the registrar's decision can, in certain circumstances, file an appeal with the Board of Trademarks. The appeal must be filed within 60 days from the date of receipt of the registrar's notice. If the applicant or challenger in either an appeal petition or opposition case is not satisfied with the Board of Trademarks' decision, the applicant or challenger can file a lawsuit with the Intellectual Property and International Trade Court (IP&IT Court) within 90 days from the date of receipt of the board's decision. Furthermore, the losing party at the IP&IT Court can bring the case to the Supreme Court, which is the final procedure available.

The act also grants a priority right to trademark applications filed in Thailand within six months from the date of the first application in a foreign country if the applicant is a national (or is domiciled or has an actual operating industrial or commercial enterprise) in a country:

- which is a member country of an international convention or treaty for the protection of trademarks of which Thailand is also a member; or
- where a reciprocal gesture is made for Thai nationals.

Under the Trademark Act, a court action to cancel the registration of any mark on the grounds of a better right must be brought within five years from the date of registration.

26.2 Trademark Rights

When a trademark is registered, the proprietor of the trademark shall have the exclusive right to its use with the goods or services for which registration was granted.

When a trademark is registered, the date on which the application was filed or deemed to be filed shall be its date of registration. The registration of a trademark is valid for a period of ten years from the filing date of the application. The validity term does not include the period of time involved in legal proceedings. Application for renewal can be made within three months before the registration expires.

A renewal application may be filed within a six-month period from the expiry date by paying a 20% surcharge of the government fee.

Rights to trademark applications or registered trademarks are transferable and inheritable.

Any interested person or the registrar may request that the Board of Trademarks or the IP&IT Court, depending on the circumstances, cancel the registration of a trademark on various grounds (e.g., nondistinctiveness, contrary to public policy or good morals, nonuse, and better right).

License Agreements

The owner of a registered trademark may grant a license to other persons for any or all of the goods or services for which it is registered. A trademark license agreement must be in writing and registered with the Department of Intellectual Property.

Applications for registration of a trademark license agreement must be in accordance with the rules and procedures of Ministerial Regulation No. 1, which prescribes the required documents and lays out the

process for filing applications. Under current Thai law, a trademark license agreement must be undertaken in writing, and must at least identify:

1. the conditions and terms of the agreement between a trademark proprietor and a person applying to be an authorized licensee, which enables the former to control the quality of the goods or services;
2. the goods or services for which the licensed trademark is to be used; and
3. a provision specifying that only an authorized licensee has the right to use the trademark, or that such proprietor shall authorize any person, in addition to the authorized licensee, to use it.

According to the current law, a license agreement will not be extinguished as a result of a transfer or inheritance of the licensed trademark, unless agreed otherwise in the license agreement.

For information on trademark licensing in Franchise agreements, please see the chapter on **Investing in Thailand**.

Key Points on Trademarks:

- Marks (including trademarks, service marks, certification marks, and collective marks) are used as a way to identify a unique product, service, or certification.
- When a trademark is registered, the owner has the exclusive right to use the mark with the goods and/or services for which the registration was granted.
- A trademark may be registered if it is distinctive, not forbidden under the Trademark Act, and not identical/similar to other registered trademarks.

For further information on trademark registration, please contact the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

26.3 Infringement of Marks

The Trademark Act provides the penalties for counterfeiting and also stipulates that the proprietor of a trademark, service mark, certification mark, or collective mark whose rights are infringed may petition for a court injunction instructing the infringer to cease and desist. In practice, a petition for injunction is filed after an action against mark infringement has been initiated.

Criminal Action – Infringement of Trademarks

The legal framework for the protection of marks in Thailand is set out in the Trademark Act B.E. 2534 (A.D. 1991), as amended by the Trademark Act (No. 2) B.E. 2543 (A.D. 2000) and (No. 3) B.E. 2559 (A.D. 2016), the Penal Code, and the Civil and Commercial Code. The prohibitions on activity under the Trademark Act are directed at those who forge, imitate, import, sell, or offer for sale any counterfeit goods, refill infringing products in genuine packaging, or grant any service using, without permission, any registered trademark, service mark, collective mark, or certification mark.

A criminal action is initiated when the owner of a mark or his or her duly authorized agent files a complaint with the police, followed by a police raid. After a court action on trademark infringement has

been initiated, a trademark proprietor can file a petition directly with the court requesting an injunction against forgeries or imitations of his or her mark.

The most common offenses for infringement of trademarks are forgery of a trademark and imitation of a mark:

- Penalties for **forgery of a trademark** registered in Thailand or refilling infringing products in the genuine packaging can include fines of up to THB 400,000 and prison sentences of up to four years (usually reduced or suspended for first-time offenders). A trademark owner may bring criminal charges against an infringer by either submitting a complaint directly to the court, or more commonly, lodging a complaint with police authorities.
- Penalties for **imitation of a mark** registered in Thailand can include fines of up to THB 200,000 and prison sentences of up to two years. Infringement of foreign-registered marks can also lead to criminal sanctions, but the fines are dramatically less and provide little deterrent effect.

Generally, a trademark owner must be prepared to commit significant resources for any truly effective sustained campaign. Costs will include special agents' or investigators' fees for conducting raids, legal incentives and rewards given and accepted by the police and/or other officials (authorized under Thai law Title 38, Incentives and Rewards, Chapter 1, General Principles Concerning Payments and Rewards, and is contained in the regulations of the Police Internal Manual), rewards for informers, and legal fees.

Directors or managers of a juristic person (a company, registered ordinary partnership, association, foundation, or limited partnership) are regarded as having jointly committed the offense with the juristic person, unless it can be proven that the offense was committed without their knowledge or consent.

Foreign trademarks not registered in Thailand but already registered outside of Thailand are protected under sections 273–275 of the Penal Code. Currently, the maximum penalties imposed are a fine of THB 6,000 or imprisonment of three years or both for forging a trademark, or a fine of THB 2,000 or imprisonment of one year or both for imitating a trademark.

Civil Action – Marks Violation

The owner of a registered trademark which has been infringed may file an action claiming compensation from the infringer under sections 420 and 421 of the Civil and Commercial Code (CCC).

The owner of a trademark not yet registered in Thailand but registered somewhere else can also receive protection under the Trademark Act B.E. 2534 (A.D. 1991), section 46, under “passing off.” For monetary recovery, proof of damages is required.

Unregistered Trademarks

The owner of an unregistered trademark is not entitled to institute any legal proceedings in court to prevent use or to recover damages for infringement. Certain protection for the owner of an unregistered trademark is afforded by the Penal Code, which imposes penalties on use of name, figure, artificial mark, or wording in carrying on the trade of another person or causing the same to appear on merchandise, packing, covering, advertisements, price lists, commercial letters, or the like, in order to make the public believe that it is the merchandise or trade of such person.

Under the Civil and Commercial Code (CCC), the owner of an unregistered trademark has the right to institute a case in the IP&IT Court against any person for passing off goods as those of the true proprietor.

For further information on commencing a civil or criminal case, please see the chapter on **Litigating in Thailand**.

Key Points on Trademark Enforcement:

- It is recommended that the mark should be registered in Thailand in order to have the full range of protection provided for in the Trademark Act.
- The owner of a mark whose rights are infringed may petition for a court injunction instructing the infringer to cease and desist.
- In practice, a petition for injunction is filed after an action against mark infringement has been initiated.
- A criminal action is initiated when a mark owner or his or her duly authorized agent files a complaint with the police, followed by a police raid.
- A civil action is initiated by an owner of an infringed registered trademark by filing an action claiming compensation from the infringer under the Civil and Commercial Code.
- Owners of trademarks not yet registered in Thailand but registered elsewhere can receive protection under "passing off" of the Trademark Act. Proof of damages is required for monetary recovery.

For further information on trademark enforcement, please contact the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

27. Patents

A patent provides the exclusive right to exploit a particular design or invention. Under the Patent Act B.E. 2522 (A.D. 1979), as amended, applicants may file for patent protection for inventions and designs. For patent filing purposes, Thailand has its own patentability criteria and procedures for filing patent applications.

Pharmaceutical products are currently patentable if they meet the criteria, but naturally occurring microorganisms and their components, animals, plants, and/or their extracts are not patentable. To date, Thailand has not granted patents for business methods. Computer programs *per se* are not regarded as patentable subject matter.

27.1 Acquisition of Patent Rights

Patent rights can be acquired through several different registration processes. The foremost procedure is registration under the Patent Cooperation Treaty (which provides some international recognition). Patents can also be registered by filing a national application with the Department of Intellectual Property.

Patent Cooperation Treaty

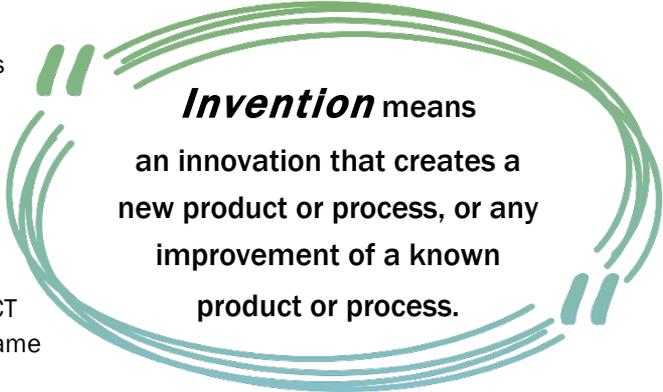
Thailand is a contracting state of the Patent Cooperation Treaty (PCT). The PCT has established an international procedure for filing patent applications for all countries that are members of the treaty. An international PCT application does not offer universal or worldwide protection for a claimed invention. The application must be filed in Thailand for the patent to have domestic recognition.

The PCT entered into force for Thailand on December 24, 2009. PCT applications with a filing date of December 24, 2009, and beyond, are eligible for registration in Thailand.

PCT National Phase Application in Thailand

The required information and documents for an application in Thailand are:

1. The details of the PCT application.
2. A copy of the English PCT specification as originally filed.
3. The specifications, including claims, abstract and drawings (in both English and Thai). As the Thai translation of the English-language specification must be filed on the same date that the PCT International Application enters into the Thai national phase, the applicant must provide the English-language specification at least two months prior to the national phase filing.
4. Notarized power of attorney.
5. If the applicant in the national phase is different from the applicant in the international phase, then a deed of assignment must be submitted. However, the Thai Patent Office does not require the deed of assignment to be submitted if the applicant(s) and inventor(s) in the PCT International Application and the PCT National Phase Application are the same person.
6. PCT Request (PCT/RO/101)
7. PCT/IB/301
8. PCT/IB/304
9. PCT/RO/105, ISA/210



Invention means
an innovation that creates a
new product or process, or any
improvement of a known
product or process.

After the national phase PCT application has been filed in Thailand, the Thai Examiner will conduct an examination of the application under the procedures provided under the Thai Patent Act B.E. 2522 (A.D. 1979), as amended by the Patent Act (No. 3) B.E. 2542.

Non-PCT Application/Conventional Patent Protection

Patents are protected under the Thai Patent Act B.E. 2522 (A.D. 1979). The act covers inventions and designs.

Inventions

To be patentable, an *invention* must be:

- new;
- non-obviously inventive; and
- industrially applicable.

An invention is “new” if it does not form part of the state of the art. State of the art includes the following inventions:

- An invention which was widely known or used by others in the country prior to the date of the patent application.
- An invention with subject matter that was described in a document or printed publication, displayed, or otherwise disclosed to the public in Thailand or a foreign country prior to the date of the patent application.
 - A disclosure, however, which was made due to or in consequence of the subject matter having been obtained unlawfully, or a disclosure by an inventor, including display of the invention at an international or official exhibition, if done within 12 months before the patent application was filed, shall not be deemed to be a disclosure.
- An invention already patented or petty patented in Thailand or a foreign country before the date of the patent application.
- An invention for which a patent or a petty patent has already been filed in a foreign country more than 18 months before the date of the application, and for which a patent or petty patent has not yet been granted.
- An invention for which a patent or a petty patent application has already been filed within or outside Thailand and the application has been published before the date of filing the application in Thailand.

PRODUCT DESIGN

means any form or composition of lines or colors which gives a special appearance to a product.

A patent may be granted under the Thai Patent Act for new **product designs** that are capable of industrial production, including handicrafts. Absolute novelty is required for a design to be patentable (i.e., it must not be disclosed anywhere prior to the date of filing a patent application in Thailand).

Designs that are contrary to public policy or good morals or that are prescribed by royal decree are not patentable.

The right to apply for a patent or petty patent and design protection extends to:

- Thai nationals or juristic persons whose principal office is located in Thailand;
- nationals of countries that have reciprocal patent agreements with Thailand;
- nationals of a country that allows Thai nationals or juristic persons with a principal office in Thailand to apply for patents;

- nationals of countries that are parties to international treaties or conventions for patent protection to which Thailand is also a party; and,
- foreign applicants who are domiciled or have an ongoing functioning industrial or commercial enterprise in either Thailand or a country that is a member of any international treaties or conventions for patent protection to which Thailand is a party.

Application Process for an Invention

Once an application is submitted for either an invention patent or a product design patent, it will be assessed for compliance with the abovementioned requirements. Patent applications are then published under an early publication system (although it is possible to defer publication upon request). Any interested party may object to the granting of the patent within 90 days of the date of publication.

A substantive examination of the patent application will then be carried out to assess the novelty and obviousness of the invention. This examination is not automatic, but must be requested within five years from the publication date.

Following the successful passing of a substantive examination, a patent will be granted and registered. The patent holder will then have legally protected exclusive use of the invention.

Petty Patents

An invention that is new and is capable of industrial application but lacks an inventive step may be protected under a petty patent. Petty patent holders receive the same exclusive right to exploit an invention, as well as the right to grant licenses to others, as ordinary patent holders.

Applicants may not apply for both a patent and a petty patent for the same invention. Applicants in either case can, however, change the type of right applied for (i.e., from petty patent to patent and vice versa) prior to registration of the invention and issuance of the petty patent, or before publication of the patent application, whichever the case may be.

No substantive examination is required for petty patents. An interested person may, however, request a substantive examination within one year from the registration date.

The following inventions do not qualify for patents or petty patents:

- Naturally occurring microorganisms and their components, animals or plants, or extracts from animals or plants
- Scientific or mathematical rules or theories
- Computer programs
- Methods for diagnosis, cure, or treatment of human or animal diseases

Patents under the Paris Convention

Thailand is also a member of the Paris Convention for the Protection of Industrial Property, the World Trade Organization (WTO), and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Priority Rights

A priority right, which is provided under the Paris Convention or the PCT, is a time-limited right starting from the filing of a patent application in another country. The priority right allows the applicant to file subsequent applications in other member countries for the same invention, design, or trademark, effective as of the date of filing the first application.

Under both the Paris Convention and the PCT, a priority right can be claimed in relation to an **invention** if the application is filed in Thailand within **12 months** from the first filing date in a foreign country.

Under the Paris Convention, a priority right can be claimed in relation to a **design** if the application is filed in Thailand within **6 months** from the first filing date in a foreign country.

27.2 Extent of Patent Rights

The term of a patent invention is 20 years from the filing date for conventional applications or from the filing date of PCT applications for the PCT National Phase in Thailand. It is not renewable. The term of protection for a petty patent is six years from the application date, which can be extended twice for two years for each extension.

Termination of Protection

The Director General may ask the Board of Patents to revoke a patent if:

1. two years after issuance of a compulsory license, the patentee or licensee has not manufactured the product or applied process under the patent in the Kingdom, or the product is not being sold or imported for sale for the time being, or is being sold but at an unreasonable price; or
2. the patentee has licensed other persons to exercise the rights in the patent without conforming to prescribed procedures.

Patent Licensing Agreements

The patent holder may authorize any other person by granting a license to exercise his rights or may assign his patent to any other person. In granting a license, however, the patent holder shall not:

- impose upon the licensee any condition, restriction, or royalty term that tends to unfairly limit competition; or
- require the licensee to pay a royalty for use of a patented invention after the patent has expired.

Conditions, restrictions, or royalty terms that are contrary to the above are considered null and void. The patent license contract and the assignment of a patent must be in writing and registered in compliance with the requirements and procedures prescribed by ministerial regulations.

Compulsory Licenses

A compulsory license can be issued by the government authority allowing a person other than the patent holder to utilize the patented invention without the patent holder's consent. Article 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) authorizes the use of the compulsory licensing "in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use."

An application for a compulsory license may be made under the following circumstances:

1. If the patentee or petty patentee has not enforced his or her lawful rights after three years from granting of the patent or petty patent or four years from the date of application, whichever is later.
2. If the exercise of the patent rights of one party (the junior patentee) infringes another patentee (the senior patentee), provided that:
 - a) the junior patentee's invention is a substantial technological advancement that is beneficial to the economy, compared to the invention under the patent for which the license is being sought;
 - b) the senior patentee receives a cross-license to exploit the junior patentee's patent rights; and
 - c) the junior patentee shall not assign a legal license to anyone, unless it is an assignment together with his or her own patent.
3. A government ministry or department may exploit an exclusive right by itself or by designating another person in a patent for the benefit of public utilities or national defense; the preservation or acquisition of natural resources or the environment; the prevention of severe shortages of food or medicine or other necessities for living; or other public interests.

Key Points on Patent Rights:

- Patents provide the exclusive right to exploit a particular design method or invention, including selling products or possessing products for the purpose of selling.
- The term of a patent invention is 20 years from the filing date for conventional applications or from the filing date of PCT applications for the PCT National Phase in Thailand. The term is not renewable.
- The term of protection for a petty patent is six years from the application date, which can be extended twice for two years for each extension.
- The Director General may ask the Board of Patents to revoke a patent if, two years after issuance of the license, the patentee or licensee has not manufactured the product or applied process under the patent in the Kingdom, the product is not being sold or imported for sale, or the product is being sold at an unreasonable price.
- Patent licensing agreements must not limit competition or require the licensee to pay a royalty for use of a patented invention after the patent has expired.
- A person can receive a right to a patent without consent in the form of a compulsory license, authorized only "in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use."

For further information on patent registration, please contact
the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

27.3 Infringement of Patent Rights

The patentee or petty patentee of an invention is granted an exclusive right to engage in the production or utilization of processes which have been patented or petty patented during the period of validity. The exclusive rights of the patentee or petty patentee of an invention include selling, offering for sale, possessing for the purpose of selling, and importing the patented or petty patented product or product produced under the patented or petty patented process.

The following acts are not considered to be infringement of a patent or a petty patent for inventions:

- Any act for the purpose of study, research, experimentation or analysis, provided that it does not unreasonably conflict with a normal exploitation of the patent or petty patent and does not unreasonably prejudice the legitimate interests of the patent or petty patent owner.
- Production of the patented or petty patented product or use of the patented or petty patented process, provided that the producer or user, has engaged in the production or acquired production equipment prior to the date of filing of the patent or petty patent application in Thailand in good faith and without knowing or having no reasonable cause to know about the patent or petty patent application.
- Preparation of a drug specifically to fill a doctor's prescription by a professional pharmacist or medical practitioner, including any act done to such pharmaceutical product.
- Any act concerning an application for drug registration, with the applicant intending to produce, distribute or import the patented or petty patented pharmaceutical product after the expiration of the patent or petty patent term.
- Use of a device forming the subject of a patent or petty patent in the body or other accessories of a maritime vessel of a country that is party to an international convention or agreement on patent protection to which Thailand is also a party, when such a vessel temporarily or accidentally enters the waters of Thailand, provided that such a device is used exclusively for the needs of the vessel.
- Use of a device forming the subject of a patent or petty patent in the construction or other accessories of an aircraft or a land vehicle of a country that is party to an international convention or agreement on patent protection to which Thailand is also a party, when such aircraft or land vehicle temporarily or accidentally enters Thailand.
- Use, sale, possessing for sale, offering for sale, or importation of a patented or petty patented product when it has been produced or sold with the authorization or consent of the patentee or petty patentee.

No other person except the patentee will have the right to use the patented design in manufacturing, selling, possessing for sale, offering for sale, or importing a product, which embodies the patented design, except in the use of the design for the purpose of study or research.

Infringement of exclusivity may be enforced through either civil or criminal action.

Any act conducted before a patent or petty patent is granted is not considered an infringement, unless the act was:

- a) against an invention or design under a pending patent application that has been published in the official *Patent Gazette*; and
- b) the person so acting knew of the patent or petty patent application, or had been informed in writing thereof.

A complaint for related damages may be filed only after the patent or petty patent is granted.

Patent Injunction and Patent Infringement Proceedings

Both civil and criminal action may be taken against infringers of a Thai -registered patent or petty patent.

Criminal action is initiated with the filing of a criminal complaint with the police, followed by a police raid (based on a lawful search warrant), arrest of the infringer, and seizure of the infringing goods.

Alternatively, the patentee may elect to initiate a private criminal action against the infringing by filing a complaint directly with the court. In this regard, the court will hold a pretrial hearing to determine whether the complaint has grounds before accepting it for further prosecution. Potential penalties are imprisonment not exceeding two years, or a fine not exceeding THB 400,000, or both, in the case of invention or design patents, and imprisonment not exceeding one year, or a fine not exceeding THB 200,000, or both, in the case of petty patents.

If an infringer violates the rights of a patentee or petty patentee, the patentee or petty patentee may file a petition with the court to immediately stop the infringement. In practice, this may be done after a court action against patent or petty patent infringement has been initiated.

In a civil process patent or petty patent infringement case, the burden of proof is on the defendant provided that the patentee or petty patentee can prove that the defendant's product is identical or similar to the product derived from the process under the patent or petty patent. In addition, the court has the power to order the infringer to make compensation for actual damages, loss of profit, and necessary expenses incurred in enforcing the right of the patentee or petty patentee, and to confiscate or destroy all infringing goods possessed by the infringer to prevent resale.

For further information on commencing a civil or criminal case,
please see the chapter on **Litigating in Thailand**.

Key Points on Patent Enforcement:

- A patentee has the exclusive right to engage in the production or utilization of processes that have been patented during the patent's period of validity.
- Infringement of exclusivity can be enforced through civil or criminal actions.
- Criminal action is initiated with the filing of a criminal complaint with the police, followed by a police raid, arrest of the infringer, and seizure of the infringing goods.
- Patent holders may file a petition with the court to immediately stop infringement if an infringer violates a patent holder's right.
- In a civil process patent infringement case, the burden of proof is on the defendant. The court has the power to order the infringer to pay compensation for actual damages, loss of profit, and necessary expenses incurred in enforcing the patent holder's rights, and to confiscate or destroy all infringing goods possessed by the infringer to prevent resale.

For further information on patent enforcement, please contact
the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

28. Copyrights

Copyright provides an associated bundle of exclusive rights to the creator of a copyright work. Copyright is governed by: the Copyright Act B.E. 2537 (A.D. 1994), as amended by the Copyright Act (No. 2) B.E. 2558 (A.D. 2015), which came into force on August 4, 2015, and the Copyright Act (No. 3) B.E. 2558 (A.D. 2015), which came into force on April 6, 2015; Ministerial Regulations B.E. 2540 (A.D. 1997); and the Notification of the Ministry of Commerce Re: List of Member Countries to the Convention Governing Protection of Copyrights or the Convention Governing Protection of Performers' Rights.

28.1 Acquisition of Rights

Copyright protection arises automatically upon creation of a qualifying work. For added protection, authors may undertake voluntary recordal of their copyright with the Department of Intellectual Property. A record of copyright does not conclusively prove ownership or priority, but it may be used as evidence in court. It is also recommended to attach a copyright notice to the copyright work, but this is not required in order to obtain the protections of copyright.

To record a copyright with the Department of Intellectual Property, applicants should submit an application form; a current, duly notarized power of attorney; and one original or copy of the copyrighted work. All documents must be completed in the Thai language.

Types of Works

Only original works are protected by copyright. There are eight categories of original works that may be protected:

1. Literary works (defined to include computer programs)
2. Artistic works
3. Dramatic works
4. Musical works
5. Audio-visual works
6. Cinematographic works
7. Sound and video broadcasting works
8. Any other works of a literary, scientific, or artistic nature

Note that copyright protection does not extend to ideas, steps, processes or systems, methods of use or operation, concepts, principles, discoveries, or scientific or mathematical theories. No copyright can be claimed for daily news, constitutions, regulations, by-laws, judgments, orders, or government decisions based on the public's underlying right to receive information.

A copyright is inherent in every original work if:

- At the time of creating a yet-unpublished work, or else when it first became published, the author was either a Thai citizen or a resident of Thailand, or a national or resident of a member country of the Berne Convention or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and

- The work was first published within Thailand or a member country of the Berne Convention or TRIPS, or else a nonmember country of the Berne Convention or TRIPS, and subsequently published in Thailand or a member country of the Berne Convention or TRIPS within 30 days of first publication.

Thailand is not a signatory to the Rome Convention of 1961 or the Universal Copyright Convention. Therefore, only persons with unpublished works who are nationals, subjects, or residents of a country party to the Berne Convention, and those whose works were first published in such a member country, may claim copyright protection in Thailand, provided certain conditions are met.

28.2 Rights of Copyright Owners

A copyright owner has the exclusive right to reproduce, adapt, communicate to the public, rent, or assign the copyright work.

The author of the work is the inherent owner of the copyright, although certain exceptions exist in the context of employment and other commissioning relationships. When the work is created by an officer or employee under hire of service, the officer/employee is entitled to the copyright unless otherwise agreed in writing. When a work is created by a contractor for a commission, the employer is entitled to the copyright unless otherwise agreed between the parties. The author will generally possess an exclusive right to take action against unauthorized users of the work, including unauthorized reproduction, adaptation, or public dissemination.

The 2015 Amendment of the Copyright Act formally acknowledged the first-sale doctrine's applicability to copyright works, such that an owner's rights are exhausted once there has been a legitimate sale of the work.

Duration of Copyright

In general, copyright will exist for the life of the author plus an additional period of 50 years after his or her death. If the author is a juristic person, the copyright exists for a period of 50 years after the work is first published or, if unpublished, after its creation. Works of "applied art," which are a type of adaptation of a protected work, may be protected for 25 years.

Assignment of Copyright

Copyright is transferable (assignable). The owner may grant a license to another person for reproduction, adaptation, public dissemination of its copyright work, or renting an original or copy of a computer program, audio-visual work, cinematographic work, and sound recording with or without conditions. A license may not contain conditions which restrict fair competition, as provided for in Ministerial Regulations B.E. 2540 (A.D. 1997) issued under the Copyright Act B.E. 2537 (A.D. 1994).

Performers' Rights

A performer holds exclusive rights to the sound and video broadcasting or the public dissemination of his or her live performance. Performers also have the exclusive right to authorize the making of a recording of their performance and the right to control the reproduction of a performance recording made without permission, or made for purposes other than those for which the performers gave their permission, or of that which falls under the exemptions to infringement of performer's rights. The performer shall be entitled to compensation, provided that he or she is a resident or citizen of Thailand, or a substantial portion of the performance occurred in Thailand or a member country of the International Convention on Protection of Performers' Rights, of which Thailand is also a member. Performers' rights

are protected for a term of 50 years from the last day of the calendar year of the performance or recording thereof.

The 2015 Amendment of the Copyright Act recognized that a performer also has moral rights to identify himself/herself as the performer of his/her performances and to prevent a transferee, or any other person, from any modification of the performances that would cause damage to the performer's reputation or honor. This right continues after death and may be exercised by a performer's heirs for the term of protection.

Any assignment of performers' rights must be in writing and can be made either wholly or in part, except when through inheritance. If there is no period of time specified in the assignment contract, it shall be deemed that the assignment is for a period of three years.

Fair Use Guidelines Issued by Department of Intellectual Property

In recent years, the Department of Intellectual Property (DIP) initiated a significant move to develop a knowledge-based system with intellectual property laws. As a result, three fair use guidelines were drafted to strike a balance between the copyright owners' interests and the interests of the public. The three guidelines cover fair use in the areas of software, news reporting, and education. Despite the DIP's endorsement, these guidelines are not law and they have no binding effect. They can, however, be viewed as clarifying sections 32–35 of the Thai Copyright Act, providing the general public with guidance on the extent of "use" which qualifies as "fair use."

According to the guidelines (and as provided for in the Copyright Act), three general elements must be met in order for "use" to qualify as "fair use":

1. The use must not conflict with the normal exploitation of the copyright work.
2. The use does not unreasonably prejudice the legal rights of the owner.
3. The use must not be commercial in nature.

In addition to these basic elements, for educational use, the DIP proposed in the guidelines that the following factors should be taken into consideration:

1. the purpose of the use and whether the use is appropriate;
2. the nature of the copyright work;
3. the amount used—in general, the guideline suggests that using less than 10 percent of the copyright work is allowed; and
4. the economic impact or effect on the value of the copyright work.

With respect to news reporting, the DIP proposed the following considerations:

1. whether the use is within the general course of news reporting through the mass media and contains an acknowledgment of copyright ownership;
2. the nature of the copyright work;
3. the amount used—in general, using less than 10 percent of the copyright work is permissible; and
4. the effect of the use on the potential market for or the value of the copyright work.

As for software, the guidelines suggest that applying the considerations above to the nature of the copyright work and the amount of the copyright work used would be inappropriate. Therefore, the DIP recommended an analysis which focuses on the purpose and economic impact of the use and the terms of the licensing agreement in connection with the computer program. The DIP also suggested that different types of software should be analyzed differently. Commercial software should be treated strictly because most of the conditions would depend on the terms indicated in the licensing agreement. For shareware, trialware, and freeware, the DIP has provided guidelines to users as to what extent use should be deemed fair or unfair. For instance, the DIP suggested that multiple downloads of trialware after its expiration to avoid purchasing the software would be considered unfair. On the other hand, open source software is open to reverse engineering or development without prior consent or a licensing agreement. The DIP has proposed new draft guidelines to address these issues.

Key Points on Copyright:

- Copyright protects an owner's creation or works from infringement by actions such as unauthorized reproduction or public dissemination.
- Copyright does not have to be registered in order for protection to exist.
- Only original works under the following eight categories can be protected by copyright: literary works, artistic works, dramatic works, musical works, audio-visual works, cinematographic works, sound and video broadcasting works, and any other works of a literary, scientific, or artistic nature.
- A copyright owner has the exclusive right to reproduce, adapt, communicate to the public, rent, or assign the copyright work.

For further information on copyrights, please contact
the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

28.3 Infringement of Copyright

Copyright infringement arises from a deliberate act of reproduction made with respect to all or part of a copyright work of another without permission, either **directly** or **indirectly**.

Any unauthorized direct act of replication with regard to audio-visual materials, cinematography, or sound recordings without permission, regardless of whether it pertains to sound and/or pictures, is also regarded as an infringement.

The Thai Copyright Act was amended in 2015 to create additional liability (with exceptions) for any person who deletes or modifies the rights management information (RMI) of a copyright work with the knowledge that such deletion or modification would induce, cause, or facilitate infringement of a performer's right. Additional liability (with exceptions) is also created for any person who communicates to the public or imports any copyright work for distribution in Thailand with the knowledge that the RMI of such work has been deleted or modified.

The amended act establishes that any person who circumvents the Technological Prevention Measures (TPM) of software or provides the service of circumvention may be held liable for infringement (with exceptions) if the circumvention was performed with the knowledge that such circumvention would induce or cause infringement of a copyright work or a performer's rights. The amendments also create

liability for recording the video and/or sound (camcording) of movies in a film theater without authorization.

In cases of online infringement, the amended Copyright Act provides copyright owners with a procedure to obtain a preliminary injunction against the internet service provider (ISP) which is hosting the infringing content. To obtain an injunction, the copyright owner must provide sufficient details to the court to demonstrate that it is the owner of the work, the work is being infringed on in the system of the ISP, and the preliminary injunction is necessary to prevent further harm. The copyright owner must follow up the request for injunction with legal action against the infringer within the time period specified by the court.

Use of copyright material protected by copyright for any of the following purposes is not considered infringement, provided that such act neither conflicts with the normal exploitation of the work nor unreasonably prejudices the lawful rights of the owners:

- Use for research, study, teaching, examination, or for personal or family benefit; for comment or for reporting current events through mass media with acknowledgment of the copyright owner of the work; or for proceedings or consideration of government officials.
- Reasonable use (i.e., reasonable recitation of, copying, or reference to any part of a copyright work) with acknowledgment as to the ownership of such work. Reasonable copying for use in a library or for the purpose of research or study and not for profit-making purposes.
- Use of a computer program for research, study, or for the benefit of the owner of the reproduction of the computer program; for comment or for reporting current events through mass media with acknowledgment of the copyright owner of the computer program; for proceedings or consideration of government officials; for adaptation of the computer program when necessary for its use; or for making backup copies for reference or for public research and not for profit-making purposes.
- Reasonable dissemination to the public of dramatic or musical works by associations, foundations, or charitable organizations when not done for profit.
- Reproducing a copyright work in conducting government affairs by a government official with authority under the law or as directed by government officials, if such work is under official possession.

Additionally, the following uses shall not be considered copyright infringement:

- Use for drawing, painting, constructing, engraving, sculpting, carving, lithographing, photographing, filming, video broadcasting, or any similar acts with regard to any artistic work displayed in a public place (excluding architectural work).
- Use for acts as described immediately above (except construction work) carried out in relation to a work of architecture.
- Restoration of a building which is an architectural copyright work to its previous form.

The amended Copyright Act provides an exception to infringement for any reproduction of a copyright work that is required in order to allow a computer system to function normally.

Infringement Proceedings

Criminal action may be taken against infringements of copyright works under the penalty provisions of the Copyright Act. Penalties include imprisonment not exceeding four years, a fine not exceeding THB

800,000, or both. Double penalties may be imposed upon any person who commits another copyright offense within five years of being released from punishment for a previous offense of copyright infringement, or when there is clear evidence that an infringement is committed deliberately or is intended to make a work widely accessible to the public.

In addition, infringement of RMI or TPM may result in a fine of up to THB 100,000. If the above infringements are committed in the course of trade, the offender may be liable for imprisonment not exceeding three months to two years, or a fine of THB 50,000 to THB 400,000, or both.

The Copyright Act also provides for confiscation of infringing goods and permits the copyright owner to seek to permanently enjoin an infringer from repeating the offense. The Copyright Act also provides that 50 percent of the fines levied by the court against the infringer will be payable to the copyright owner.

Previously, directors or managers of a juristic person (a company, registered ordinary partnership, association, foundation, or limited partnership) were regarded as having jointly committed any copyright infringement offenses with the juristic person, unless it could be proven that the offense was committed without their knowledge or consent (section 74). However, this provision was repealed by the Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560 (A.D. 2017) when it came into effect on February 11, 2017.

For further information on commencing a civil or criminal case,
please see the chapter on **Litigating in Thailand**.

Key Points on Copyright Enforcement:

- Copyright infringement arises from a deliberate act of reproduction made with respect to all or part of a copyright work of another without permission, either directly or indirectly.
- Direct infringement consists of copying, modifying, reproducing, adapting, publicly disseminating, renting out an original or a copy (audio-visual, cinematographic, sound recording, computer program), or publishing by a person who is not the copyright owner or licensee.
- Indirect infringement occurs from selling, possessing for sale, offering for sale, offering for rent, public dissemination, distribution in any manner prejudicial to the copyright owner's rights, or importing or making an order for import into Thailand by any person who is aware, or should have been aware, that the particular work infringes a copyright work.
- The Copyright Act provides for confiscation of infringing goods and permits the copyright owner to seek to permanently enjoin an infringer from repeating the offense. The Copyright Act also provides that 50 percent of the fines levied by the court against the infringer will be payable to the copyright owner.

For further information on copyright enforcement, please contact
the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

29. Trade Secrets

Trade secrets are protected under the Trade Secret Act B.E. 2545 (A.D. 2002) (TSA). The TSA provides broad trade secret protection, including protection for pharmaceutical formulas, food formulas, cosmetic formulas, advertisements, and marketing strategies.

29.1 Acquisition of Rights

Registration of trade secrets is not required, with the understanding that revealing details of the secret to a third party would deprive the owner of the benefit of monopolizing that secret. Not all of a company's secrets are considered to be trade secrets by the TSA. In order for a company secret to be eligible for legal protection in Thailand as a trade secret, the following three criteria must be satisfied:

1. The information must not be publicly known or not yet accessible by persons who are normally connected with the information.
2. The information must be economically valuable because of its secrecy.
3. The controller of the information must have taken appropriate measures to maintain the secrecy.

The actions that constitute “appropriate measures” depend on the nature of the secret, although merely “not telling anyone” is generally not sufficient to meet the third prerequisite. Use of nondisclosure agreements and confidentiality clauses in employment contracts and other agreements is generally the level of caution at which the company must operate.

Examples of Appropriate Measures to Maintain the Secrecy Include:

- ❑ restricting access to information to those who require it in order to complete their tasks (i.e., control the reference/access group);
- ❑ physically protecting the information by keeping it in locked cabinets or on password-protected separate network drives;
- ❑ clearly distinguishing confidential information from other information, and marking all relevant documents as “confidential” so that there can be no confusion;
- ❑ conducting regular and thorough training for employees on how to handle secret information;
- ❑ having a clear exit process for departing employees;
- ❑ providing training completion certificates when employees are trained in using your confidential information (in order to successfully show access to your trade secrets later if necessary); and
- ❑ tracking the flow of confidential information, including restricting the use of flash disks, portable hard drives, and laptops.

29.2 Rights of Trade Secret Owners

The owner of a trade secret has the right to disclose, take, or use his or her trade secret, or permit others to use his or her right without any necessary condition to maintain its secrecy. Trade secrets shall have protection for as long as they are deemed secret.

Ownership of Trade Secrets

The TSA does not explicitly vest ownership of a trade secret in a single owner. This can prove especially problematic where both an employer and an employee claim ownership of a trade secret.

The TSA identifies the owner of a trade secret by specifying the actions that qualify an entity to claim ownership. An owner of a trade secret is:

1. someone who discovers, invents, compiles, or creates the trade information;
2. someone who has a legitimate interest in test results or trade information that is a trade secret; and
3. transferees.

Ownership in a trade secret can therefore theoretically be vested in multiple entities.

For example, an employer would own the trade secret by virtue of having a legitimate interest in the trade information. An employee would also own the trade secret because the employee created the trade information.

Where multiple persons qualifying as owners under provisions (1) and (2) above claim ownership in a trade secret, the TSA appears to be silent on which owner would have superior rights. While parties (and courts) may look to the intellectual property landscape and the various rationales underlying the same to craft their arguments on who should have superior rights, it is clear that trade secret ownership should not be determined in the context of a dispute or litigation. Instead, employers should enter into a valid written agreement between the employer and the employee to conclusively identify which party is the only legitimate owner of the trade secret.

29.3 Infringement of Trade Secret

Infringement of a trade secret includes an act of disclosing, taking, or using a trade secret without the lawful consent of the trade secret owner in a manner that violates fair commercial practice. In this regard, the infringer must know, or have appropriate reason to know, that his or her action is contrary to fair commercial practice.

Actions that are contrary to fair commercial practice include breach of contract, breach of confidence or persuasion to breach confidence, bribery, intimidation, fraud, theft, receipt of stolen property, or espionage by electronic surveillance or any other means.

The following actions shall not be considered infringement of a trade secret:

- Disclosure or use of a trade secret by a person who obtained such a secret through a juristic act without awareness, or without any reason to be aware that the other party acquired such trade secret by violating another person's trade secret rights.
- Disclosure or use of a trade secret by a government agency in charge of preserving such trade secrets in the circumstances where:
 - it is necessary to protect public health and security;

- it is necessary for other public interests, not for commercial purposes. In this regard, a particular agency that is charged with the keeping and maintaining of the trade secret, or a state agency or any concerned person that obtained such trade secret, shall take regular measures to protect such trade secret from unfair commercial use;
- independent discovery as a result of the expertise of the person making the discovery; and
- reverse engineering.
 - The exception under reverse engineering cannot be applied if the person who carries out such reverse engineering has entered into an agreement with the trade secret owner or with the product seller that states otherwise. Therefore, prudence dictates an express prohibition against reverse engineering when contracting for or licensing any technology or product where a trade secret is at risk of exposure.

Infringement Proceedings

The causes of action which are available in trade secret cases include:

- breach of an employment agreement by an employee;
- misappropriation of trade secrets and confidential information; and
- tortious interference with business relations with the ex-employee and/or between the former employer and its customers or suppliers.

The penalties under the TSA are primarily criminal penalties consisting of fines, imprisonment, or both. The fines range from THB 2,000 up to THB 200,000, and imprisonment from one month up to two years, depending upon the offender and the offense.

In the event of an offense committed by a juristic person resulting from an order, action, or lack of an order or action which must be performed in the course of duty by the director, manager, or any person responsible for the operations of such juristic person, that juristic person shall be subject to punishment pursuant to the relevant provisions pertaining to the offense.

For further information about breach of employment and grounds for termination of employment, please see the chapter on **Working in Thailand**.

For further information on commencing a civil or criminal case, please see the chapter on **Litigating in Thailand**.

Key Points on Trade Secrets:

- Each company should develop its own policy on trade secrets, with clear guidelines and strategy.
- Employers should enter into a valid written agreement between the employer and the employee to conclusively identify the party who is the only legitimate owner of the trade secret.
- Infringement of a trade secret includes an act of disclosing, taking, or using a trade secret without the lawful consent of the trade secret owner in a manner that violates fair commercial practice.
- Actions that are contrary to fair commercial practice include breach of contract, breach of confidence or persuasion to breach of confidence, bribery, intimidation, fraud, theft, receipt of stolen property, or espionage by electronic surveillance or any other means.
- Causes of action available in trade secret cases include breach of an employment agreement by an employee; misappropriation of trade secrets and confidential information; and tortious interference with business relations with the ex-employee and/or between the former employer and its customers or suppliers.

For further information on trade secret rights, please contact the Tilleke & Gibbins Intellectual Property team on +66 2056 5555.

Litigating in Thailand



A Guide for Plaintiffs and Defendants

This chapter provides information on bringing or defending a civil or criminal matter in Thailand. It contains an overview of litigation procedures and the relevant considerations before bringing a claim. This section also provides an overview of Thailand's legal system.

Litigating in Thailand

A Guide for Plaintiffs and Defendants

This chapter aims to shed light on Thailand's civil law system—a system that may be unfamiliar to investors from common law countries.

Beginning with an overview of Thailand's court system, the chapter moves on to provide an in-depth examination of civil proceedings—instigated by a civil action, brought by a party against another party for the purpose of seeking compensation for damages or some other form of restitution for damages caused—covering all aspects relevant to both preparing and conducting litigation, as well as making appeals and pursuing alternative means of dispute resolution.

The chapter then delves into criminal proceedings—usually initiated by the government, but sometimes, by private parties—exploring search and arrest warrants, criminal charges, punishment, and appeals.

A look is then taken at foreign proceedings, governing laws, the intricacies of Thailand's more significant courts, the legal profession, and the judiciary.

30. Introduction to Civil and Criminal Matters

30.1 Civil, Criminal, or Both?

If considering initiating legal action or responding to an action commenced by another party, one of the first fundamental considerations is whether the matter is civil or criminal. This will have important implications for both the conduct of the proceedings and the range of possible outcomes.

A criminal matter is usually brought by the government (the Public Prosecutor's Office), but in Thailand, private parties may also initiate a criminal claim. The principal aim of bringing a criminal matter to court is to punish the offender. In contrast, a civil action is brought by a party against another party for the purpose of seeking compensation for damages or some other form of restitution for damage caused.

Certain actions can give rise to grounds for both civil and criminal actions. For example, defamation may be prosecuted as a criminal offense to seek criminal punishment, as well as by a civil action to seek a public retraction and/or compensation for damage to the victim's reputation.

There are two main differences between civil and criminal proceedings: the standard of proof and the remedies.

- The **burden of proof** in civil trials is by a preponderance of the evidence, and will be assigned by the court based upon the issues raised in the complaint and answer. On the date of the settlement of issues, the court will assign the burden of proof on each disputed issue to one of the parties. In contrast, in a criminal proceeding, the prosecuting body must prove the allegations beyond a reasonable doubt.
- **Punishment** in criminal matters is generally in the form of fines or imprisonment. Civil proceedings have a broader range of remedies. As the aim of civil proceedings is redress, not punishment, the end result is usually an award of money or, in some cases, an order that the defendant performs or does not perform some action. Preliminary injunctions are also available in some civil actions to protect the plaintiff's position or stem the plaintiff's losses pending trial.

Remedies and punishments are further discussed under the sections below
on **Civil Proceedings** and **Criminal Proceedings**.

30.2 Court Jurisdiction

The Constitution of the Kingdom of Thailand (Interim) B.E. 2550 (A.D. 2007), as amended in 2017, recognizes four court systems:

1. The Constitutional Court;
2. The Administrative Court;
3. The Courts of Justice; and
4. The Military Court.

Each of these courts has jurisdiction over different types of matters. The table below provides a basic overview of the courts and the types of matters they have jurisdiction over.

*This is a simplification and is subject to a number of exceptions.
Further information on each court can be found at the end of this chapter.*

Court	Dispute type
Juvenile Court	Any criminal case involving children (7-14 years of age) and juveniles (15-18). Any civil action involving minors (less than 20 years of age).
Central Bankruptcy Court	Bankruptcies and restructuring.
Central Intellectual Property and International Trade Court	Trademarks, copyrights, or patents (civil and criminal). Agreements on technology transfers or licensing (civil). International sale, exchange of goods or financial instruments, services, carriage, insurance, and other related legal actions (civil). Letters of credit issued in connection with the above civil actions, inward and outward remittance of funds, trust receipts, and provision of guarantees in connection therewith (civil). Ship arrests, dumping and subsidization of goods, and services from abroad (civil). Disputes over layout designs of integrated circuits, scientific discoveries, trade names, geographical indicators, trade secrets, and plant varieties (civil and criminal). Offenses relating to trade under sections 271 to 275 of the Criminal Code (civil and criminal).
Labor Court	Employment disputes.
Tax and Duty Court	Tax issues and customs duty matters.
Municipal Courts	Any civil claim not exceeding THB 300,000. Any criminal case where the maximum sentence does not exceed three years imprisonment or a fine of THB 60,000.
Civil and Criminal Courts	General disputes not falling within the jurisdiction of any of the specialized courts.
Appeals Courts	Appeals from civil and criminal courts.
Administrative Court	Legality of decisions made by government entities or officials.
Dika (Supreme) Court	Appeals from the Courts of Appeal and certain specialized courts.
Constitutional Court	Constitutional review of laws or royal decrees, resolutions of political parties, and appointment and removal of public officials.
Military Court	Anything related to official military duty.

30.3 Court Process Fundamentals

All courts use the continuous hearing system, whereby all hearings are conducted continuously until the case is finished.

Unlike most court systems, trials are presided over by multiple judges. The number of judges required to hear a matter varies between courts. Several courts also require one or more lay judges to adjudicate matters.

The Thai judicial system is largely an adversarial system. Judges take a proactive role in case management and make all procedural decisions during the trial. Judges have discretion to ensure that the matter is adequately addressed by the parties and may also directly question witnesses during trial hearings to elicit facts necessary to adjudicate the dispute. Thai law does not provide for trial by jury.

Proceedings are conducted in the Thai language. Translators are permitted for persons who do not speak Thai, but must be provided by the party concerned. Judges take an active role in the examination of witnesses, with due regard to impartiality, and in settlement negotiations between the parties in court.

Most court proceedings are open to the public. On the petition of a party however, the court may close all or part of the proceedings or prohibit their disclosure, if it is of the view that doing so “is proper to protect the injured person (e.g., a juvenile or rape victim, etc.) or to safeguard the public interest.” In practice, this rarely occurs, but there have been situations where, for example, the court closed hearings to protect the identity of a particular witness or to protect evidence and testimony that may constitute a trade secret. Despite such an order, every judgment is read in open court. Court documents such as pleadings, witness statements, and court orders (except for Supreme Court judgments) are not generally available to the public.

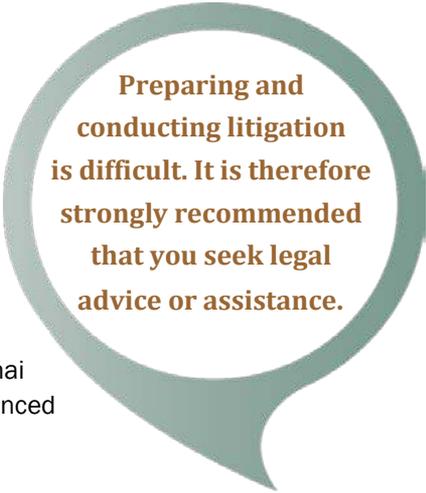
Foreigners, whether resident or nonresident, individual or corporate, are not discriminated against in Thai courts, and can expect a fair hearing by the judiciary.

Further information on the jurisdiction and procedures of specific courts can be found later in this chapter under the section on **Establishment of Courts**.

31. Civil Proceedings

31.1 Prior to Commencing Proceedings

Litigation is usually the last resort in the process of resolving disputes. In fact, many parties to a dispute try to avoid the litigation process altogether, fearing that seeking recourse from the courts will lead to a disruption in commercial relationships, result in unnecessary legal expenses, and will generally lengthen the period in which the dispute remains unresolved. While some of these fears may indeed be legitimate, sometimes litigation is the most effective means for a party to obtain relief. For parties contemplating such recourse, it is reassuring to know that the Thai court system is generally accessible, unbiased, and remains a balanced vehicle for the resolution of disputes.



Preparing and conducting litigation is difficult. It is therefore strongly recommended that you seek legal advice or assistance.

Time Limitations for Commencing Court Proceedings

The Civil and Commercial Code prescribes periods within which claims must be commenced. The periods vary from one month to ten years, depending on the type of claim.

- **Torts:** Claims for wrongful acts (torts) must be filed within one year from the date on which the wrongful act and the person bound to make compensation became known to the injured person (or within three years if the wrongful act claim is filed under the Consumer Case Procedure Act), but no later than ten years from the date on which the wrongful act was committed. The prescription period may, however, be longer than one year if the wrongful act is also a criminal offense (e.g., vehicular homicide).
- **Contracts:** Generally, the prescription period for most commercial disputes runs for two to five years from the first date in which the claim could have been enforced. However, there are different prescription periods for different types of contract. Since prescription can be a difficult and imprecise area of the law in Thailand, those who believe that they may have a claim against a defendant in Thailand are advised to retain counsel sooner rather than later, even if only for the limited purpose of evaluating this issue.
- **Other:** The prescription period for claims for which no specific period is prescribed by statute is ten years.

The prescription period cannot be extended or reduced by agreement, but it may be interrupted if the debtor acknowledges the claim in writing, gives security, or does some other unequivocal act acknowledging the claim. A fresh period of prescription commences when the interruption ceases.

Other Statutory Preconditions before Commencing Proceedings

There are no formal pre-action steps required prior to commencing most civil proceedings, but typically, a plaintiff will send one or more demand letters prior to commencing a civil action. In some instances, the purpose of the demand letter is partly to prove the date of commencement of the prescription period.

There are also certain requirements relating to specific claims that must be met before a claim can be filed:

- **Mortgage:** The mortgagee must send a notice to the debtor requiring it to perform its obligation within a reasonable time period fixed in the notice. A claim can only be filed after the expiry of this time period.
- **Rescission of contract:** A party must give notice to the other party to a contract to perform its obligation within a reasonable time period fixed in the notice before the contract can be rescinded, unless the contract already provides for performance at a fixed time or within a fixed period.
- **Hire of property:** A hirer must notify the lessor to make good any defects before the hire contract can be terminated. A lessor must notify the hirer to comply with the terms of the contract or to take care of the property before the contract may be terminated. A claim may only be brought after the notification and subsequent termination.

Power of Attorney

A client may execute a power of attorney (POA), specifically authorizing an agent to file a lawsuit, and/or a deed of appointment, specifically authorizing an attorney to represent the client in court. Before initiating or responding to a lawsuit in Thailand, the lawyer acting on behalf of a client must present to the court the POA or the deed of appointment. Clients must take care to execute such documents in the

manner instructed by their attorneys, especially if the documents are executed outside of Thailand. A Thai lawyer representing a client in court generally has absolute authority to conduct the case in any lawful manner he or she sees fit, unless limited in writing.

Location of Assets

Before initiating litigation, it may be advisable to investigate the nature and extent of the defendant's assets in Thailand and abroad. A money judgment is of limited value if the defendant has little or no recoverable assets.



In civil cases when a plaintiff is a nonresident, the defendant is entitled to seek security, which will be remitted to the court in order to cover the defendant's costs and legal fees in the event the defendant wins the case. A security bond deposited by the plaintiff may be held until all appeals are exhausted by the defendant.

31.2 Commencing Proceedings

Civil proceedings are commenced by filing a complaint in the prescribed form to the court and paying the court fee.

The complaint must contain the name of the court and the names of the parties, together with details of the facts and allegations forming the basis of the claim. The complaint may be pleaded generally and there is no need to give full particulars of the claim in the complaint, provided that all grounds on which the plaintiff wishes to rely in later trial hearings are included. Finally, the complaint must be dated and include the names of those on whom the complaint is to be served.

After the complaint is filed and the court has accepted it, the plaintiff must file a request to the court for

COURT FEES

To cover the initial court costs in civil cases (except consumer and labor cases), the court requires, at the time of filing the original suit and each further appeal, a payment by the applicant of 2% of the claim (maximum of THB 200,000) for claims under THB 50 million, and an additional 0.1% of the claim for claims exceeding THB 50 million.

Court fees may be waived if the court is satisfied that the applicant is a pauper or in certain other cases.

a summons and pay a fee to have the summons and a copy of the complaint served on the defendant. A court officer will then serve the summons and complaint on the defendant. Depending on the means of service (personal, by posting, or by mail), the defendant has 15 to 30 days from the date of service to file its answer to the complaint, as well as a counterclaim (if any). If the defendant files a counterclaim in time, a court officer will serve it on the plaintiff, and the plaintiff will also have 15 to 30 days to file an answer. Extensions are routinely granted.

Thereafter, the court schedules a hearing at which the issues in dispute are settled. The court encourages the parties to mediate the dispute and one or more mediation hearings may be scheduled. The court will also schedule the trial hearings. The mediation hearings are likely to be scheduled within

a few months of the settlement of issues hearing, but the trial hearings may be scheduled 6 to 10

months later. The average length of time from filing a complaint through to the lower court judgment is approximately 12 months or so.

The burden of proof in civil trials will be assigned by the court and is based upon the issues raised in the complaint and answer. On the date of the settlement of issues, the court will assign the burden of proof on each disputed issue to one of the parties.

There is no formal disclosure or discovery procedure. Parties are required to file a list of witnesses and documents on which they will rely, together with copies of the documents, seven days before the commencement of the first trial hearing. It is possible to apply to the court for a subpoena of known documents from the other party or from third parties.

Emergency Orders and Temporary Injunctions

It is possible to obtain an emergency order or temporary injunction at any time before judgment is entered. In practice, however, the Thai courts will not grant this type of relief unless it is satisfied that the complaint is well-grounded and that there are sufficient extenuating circumstances to uphold the granting of such an order.

Generally speaking, the court will only issue such an order in emergency cases. In addition, the court may require the plaintiff to put up a security deposit as indemnification for a wrongfully ordered injunction.

Emergency orders and temporary injunctions generally remain in force until judgment is rendered. The defendant may, however, petition the court at any time to withdraw the order or its enforcement.

Similarly, pre-judgment attachment is rare and difficult to obtain. The plaintiff must convince the court that there is a high chance that the defendant is about to abscond or transfer/waste assets before the court issues its judgment.

31.3 Early Disposal of a Case

There are two ways in which a case can be disposed of before reaching a hearing:

- A plaintiff fails to appear or file the required documents within the prescribed time limit.
- An out-of-court settlement is reached.

Default Orders

Either party may be declared in default by the court upon motion by the other party for failure to answer or to appear within the prescribed time period.

If the defendant fails to answer, the plaintiff may apply for a default order. After it is served on the defendant, he or she may appear to explain his or her default. If the failure to answer was involuntary or otherwise justified, the court will ordinarily grant the defendant a reasonable time to answer. If the default was unjustified, the court will order the action to proceed without permitting the defendant to file an answer or present its own witnesses (although a defaulting defendant can still cross-examine the plaintiff's witnesses). If the plaintiff fails to file for a default order within 15 days

Temporary orders may, for example, include an order that a defendant not dispose of certain property before a final judgment is rendered.

An *injunction* would temporarily prevent a defendant from undertaking a certain action.

after expiration of the time period prescribed for the defendant to answer, the court will strike the case from its docket.

If both parties are in default of appearance, the action will be stricken from the court docket without prejudice to reinstating the suit. If the plaintiff fails to appear, the court will strike the action, unless the defendant requests that the action proceed, in which case it will be adjudicated *ex parte*, as it is the same as if the defendant fails to appear.

Offers of Compromise or Settlement

It is important to note that in Thailand, there is no such thing as an “offer without prejudice.” Anything which is put in writing can be used against the offering party. It is therefore advised that compromises, settlements, and offers to compromise or to settle should not be made without first consulting with legal counsel. A party at trial or anticipating litigation should be careful in all communications with the opposing party.

31.4 Hearing and Judgment

Witnesses and Evidence

Each party submits a list of witnesses to the court prior to the hearing. At the hearing, each party may select any or all of the witnesses on the list to give evidence. It is possible to call evidence from a person who is not on the witness list, but only with the court’s approval.

All evidence given by a witness must be in Thai, or translated into Thai. Translators must be provided by the party who called the witness. In certain circumstances, evidence may be given via videoconference.

If documentary evidence is to be relied upon, it must be authenticated by a witness (i.e., a witness must present the document and be available for cross-examination by the other party). Documents are required to be originals, unless the court allows otherwise. Any document in a language other than Thai must be accompanied by a certified Thai translation.

Burden of Proof and Final Arguments

After all of the evidence has been heard, both parties are entitled to present final oral and/or written arguments supporting their contentions, citing pertinent evidence and legal precedents. Each party’s final argument will summarize the evidence, address the burden of proof (as discussed above), and make a convincing argument for why the court should rule in that party’s favor.

Judgments

Judgments are given in writing and are read in court. Judgments generally set forth each party’s presentation of the facts and statement of arguments, followed by the court’s decision.

31.5 Remedies

The court can award monetary damages and order specific performance and permanent injunctions prohibiting certain actions or conduct. While the courts are sometimes authorized by law to award punitive damages, they rarely do so. Judgments provide for simple interest to run up to the date of payment, and the rate of interest currently prescribed by law is 7.5% unless the parties agree on a different interest rate.

A court of first instance generally has the power to issue writs of execution to enforce its judgments and decide matters relating thereto. When a court issues an execution order, it can also issue an order instructing the judgment debtor to:

- pay the judgment;
- deliver property; and
- perform a certain act. Compensation can be claimed for all damages arising from nonperformance and special circumstances that the defaulting party foresaw or ought to have foreseen.

Payment

Judgments calling for payment can be rendered in foreign currencies if that is the currency specified in the pleadings and was the intent of the parties. Monetary awards carry a statutory rate of interest and are generally calculated either from the date of filing suit or from the date of judgment.

Property

If the debtor does not comply with a monetary judgment, the creditor may apply for a writ of execution. Upon receiving the writ, an executing officer normally accompanies a creditor or an agent of the creditor to the property location, and either seizes the property or leaves the property in place under seal. Notice of attachment is then sent to the judgment debtor and a public auction is advertised. Both parties and any others concerned are notified. These procedures are more complex and time-consuming than the above simple explanation might imply, as identifying, tracing, and locating assets can be extremely difficult. In certain rare circumstances, at the request of the creditor, the court may order the debtor to disclose his or her assets.

Secured creditors are entitled to collect sums due and owing only from the encumbered property, unless the security agreement provides otherwise. Unsecured creditors are entitled to collect their debts out of the whole of the debtor's property, including any money or other property due to the debtor from third parties, subject to the priority claims of secured creditors.

Performance

The existence of an obligation may entitle the creditor to demand performance from the debtor. Performance must be tendered in the manner in which it is owed, and may be tendered by a third person to the creditor or his or her authorized representative. The creditor cannot be compelled to receive any performance other than that to which he or she is entitled, unless he or she accepts such substitute performance. Courts may compel performance by imposing terms of imprisonment, subject to performance by the debtor.

31.6 Costs

The court has discretion in making awards of costs to the prevailing party. Large legal fee awards, however, are not common in Thailand, and it is more likely that only a small fraction of actual legal fees will be recoverable. The court calculates the amount of costs to be awarded based on a statutory schedule. The statutory level of fees serves as a minimum and maximum guideline for the courts in assigning lawyer remuneration in cases of need.

The minimum and maximum guidelines for lawyers' fees depend on the amount of claim, much like court fees. In fixing the amount of lawyers' fees, the court must have due regard to how complicated or simple the case is, the time devoted, and the amount of work done by the lawyer in conducting the case.

The amount is usually nominal and parties to litigation should not expect to recover a meaningful portion of their legal costs.

The defendant can apply to the court for an order requiring the plaintiff to deposit money or security with the court for costs and expenses if either:

- the plaintiff is not domiciled or does not have a business office situated in Thailand and does not have assets in Thailand; or
- there is a strong reason to believe the plaintiff will evade payment of costs and expenses if it is unsuccessful.

The Thai courts routinely grant orders for security or a deposit in relation to foreign plaintiffs.

31.7 Appeals

All appeals to the Court of Appeals and the Dika (Supreme) Court must be filed within one month after the judgment or order being appealed is handed down to the parties, provided the party wishing to appeal is entitled to do so. Extensions are often granted. Filing an appeal does not in itself stay execution of a judgment or an order of the court of first instance. A separate motion for a stay must be filed with or after the appeal.

31.8 Alternative Dispute Resolution

As court litigation is often lengthy and protracted, potential litigants should consider alternative means of resolving disputes. Deciding on whether to litigate or seek resolution of conflicts through alternative dispute resolution (ADR) is commonly an anticipatory decision made by the parties to a contract, before a dispute exists, where the parties either specifically elect mediation or arbitration uniquely tailored to their needs or simply leave the matter of dispute resolution to the responsible court.

The pros and cons of ADR in Thailand are not unlike elsewhere, but potential litigants should be aware of the following local factors:

- **Speed.** The ADR process will not necessarily be faster from start to enforcement of the award or judgment. This is because while ADR does have the advantage of giving the parties more control of the pace of the proceedings, a final court judgment can be enforced immediately through the Legal Execution Office. In contrast, enforcement of arbitral awards often requires an additional set of lower court and upper court proceedings, which may take several more years.
- **Costs.** Traditionally, arbitration has often been considered cheaper than litigation, primarily because arbitration proceedings are more flexible and limit some more costly aspects of litigation (such as pre-trial discovery). In Thailand however, litigation can be cheaper than arbitration, because:

“It is generally accepted and recognized that criminal, family, labor, and certain types of IP disputes cannot be submitted to arbitration on account of being contrary to public policy. In 2015, the Cabinet passed a resolution that relaxed the previous general rule prohibiting the use of arbitration clause in all types of public sector contracts unless Cabinet approval was obtained. However, Cabinet approval is still needed in public-private partnerships, concession agreements, and other large-scale projects.”

- a) court filing fees in many cases are limited to 2% of the claim amount or THB 200,000, whichever is less;
 - b) only limited pretrial discovery is allowed;
 - c) no payments are necessary to an arbitration institute and/or panel, which are often quite expensive;
 - d) many Thai courts have implemented user-friendly and cost-saving measures, such as affidavits in lieu of direct examination and video testimony for overseas witnesses; and
 - e) a final court judgment can be enforced without further recourse to the courts, which is generally not the case when trying to enforce an arbitration award.
- **Expertise of the Panel.** One of the most frequently cited benefits of arbitration is the parties' ability to select a panel of arbitrators with the proper expertise for understanding and resolving the dispute. This benefit applies in Thailand as well. For the sake of completeness, however, it should be noted that for cases filed in the IP&IT Court, the courts offer a panel of judges with at least one lay judge with special expertise in the field underlying the dispute (for example, international finance or intellectual property). Their presence has helped bridge the expertise gap between litigation and arbitration in Thailand, and is helping make the outcomes of complex commercial litigation far more predictable. In addition, Thai civil procedure permits the parties to a court case to appoint arbitrators to decide specific issues in dispute, upon which the court will adopt those findings of fact in rendering its judgment.

Lastly, it should be remembered that one reason for choosing arbitration over court litigation is flexibility and the ability to custom tailor how a party's dispute would be resolved by choosing the arbitration rules and institute, the venue, the language of the proceedings, and the number and qualification of arbitrators. For example, the parties may choose local arbitration institutes over international arbitration institutes such as the International Chamber of Commerce (ICC). The administrative costs and arbitrator fees are quite reasonable at local institutes and are one way to decrease the overall cost of arbitration in Thailand.

Arbitration Law and Usage

Thailand is a signatory to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol).

Arbitration as an alternative to court trials is recognized in Thailand under the Arbitration Act B.E. 2545 (A.D. 2002), which generally follows the UNCITRAL (United Nations Commission on International Trade Law) model act. Under the Arbitration Act, domestic arbitration usually occurs under the rules of the Thai Arbitration Institute administered by the Office of the Judiciary or the rules of the Board of Trade. In 2017, the rules of the Thai Arbitration Institute (TAI) were updated and modelled after the International Chamber of Commerce (ICC) rules. Among other novelties, the 2017 TAI rules now include the provisions of the terms of reference under the ICC model. Consequently, in general terms, the 2017 TAI rules provide stricter time limits and are intended to make the overall process more efficient.

Arbitration clauses are increasingly common in commercial contracts, particularly for international transactions and construction contracts. In order to be binding upon the parties, the agreement to arbitrate must be evidenced by a written document or stated in written correspondence between the parties. A court claim under a contract containing an arbitration clause may be dismissed if a party to the contract raises the issue of arbitration prior to the deadline to file an answer. If neither party raises the issue, the case will be litigated.

Arbitration Institutes

There are three main domestic arbitration institutes in Thailand:

1. Thai Arbitration Institute of the Alternative Dispute Resolution Office, Office of the Judiciary, established in 1990;
2. Thai Commercial Arbitration Institute of the Board of Trade, also established in 1990; and
3. The Thailand Arbitration Centre, established in 2014 and mostly focused on mediation

These institutes are well-respected and administered, supervised by a diverse advisory board, have standard arbitration rules, and maintain a list of qualified available arbitrators.

In addition, arbitration services are provided by the International Chamber of Commerce (ICC) Thailand, which follows rules established by the ICC in Paris. In contracts designating foreign arbitration institutes, the ones most commonly utilized are the ICC, Singapore, Hong Kong, and London institutes.

Arbitrators

Under the Royal Decree Stipulating Occupations and Professions Forbidden to Foreigners (No. 3) B.E. 2543 (A.D. 2000), foreign citizens may act as arbitrators in any arbitration, and may act as legal advisors in cases where the governing law is not Thai law or where there is no need to apply for enforcement of the arbitral award in Thailand. Prior to participating in the arbitration, foreign arbitrators may be required to apply for and obtain a work permit in Thailand. As the need to comply with the work permit requirement changes frequently, it is advisable to seek counsel on the matter sooner rather than later.

Enforcement of Arbitral Awards

There is no distinction between enforcement of arbitration awards rendered in Thailand and those rendered in foreign countries, so long as an award rendered in a foreign country is governed by a treaty, convention, or international agreement to which Thailand is a party. Foreign arbitral awards rendered in member countries of the New York Convention and the Geneva Protocol are recognized and enforced in Thailand, which is a member of both conventions. Arbitral awards are generally enforced whereas foreign judgments are not.

- **Revocation/Set Aside.** A petition to revoke an arbitration award must be filed with the court within 90 days from the date of receipt of the award. Under UNCITRAL, an arbitral award may only be revoked in the country in which it was issued. The effect of revocation of an arbitral award is that the award is no longer enforceable worldwide.
- **Enforcement.** If either party refuses to comply with an arbitration award in Thailand, such award may be enforced only after a Thai court judgment is obtained ordering enforcement. A petition for enforcement of an award must be filed with the court within three years from the date when the award could first be enforced. The effect of a non-enforcement order is that the award is not enforceable in Thailand (only).
- **Grounds.** The grounds for revocation or non-enforcement of an arbitral award are similar. Sections 40 and 43 of the Arbitration Act provide that a court may revoke or refuse enforcement of an arbitral award, where the party contesting the arbitral award or its enforcement proves one of the following factors:
 - A party to the arbitration agreement was under some incapacity under the law applicable to that party.

- The arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under the law of the country where the award was issued.
 - The party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings.
 - The award deals with a dispute not falling within the scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope thereof can be separated from the part that is within the scope of arbitration agreement, the court may set aside or enforce only the part that is beyond the scope of the arbitration agreement or clause.
 - The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, in accordance with the law of the country where the award was issued.
 - The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this type of case as it thinks fit. If requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security.
- The court may also set aside or refuse to enforce an arbitral award if it finds that: (1) the award involves a dispute not capable of settlement by arbitration under the law, or (2) the recognition or enforcement of the award would be contrary to public policy.

Key Points on Alternative Dispute Resolution:

- Arbitration is often preferable to litigation when special technical expertise is required to understand the dispute. Construction and software design disputes are typical examples of disputes that are better resolved by arbitrators with special expertise in those fields.
- Arbitration is also preferable when some or all of the opposing party's assets are located outside of Thailand, since arbitral awards are enforceable in most countries, whereas a Thai court judgment is normally only enforceable against assets located in Thailand.
- Litigation in Thailand is usually less expensive than arbitration because arbitrators and arbitration institutes normally charge the parties far more than a typical court filing fee. Arbitration can also take longer than litigation if the plan is to enforce the award in Thailand, because the party attempting to enforce the award will need to proceed through a lower court proceeding followed by one or two upper court appeals.

For more information on alternative dispute resolution, please contact the Tilleke & Gibbins Dispute Resolution team on +66 2056 5555.

32. Criminal Proceedings

32.1 Search and Arrest Warrants

The state enjoys the general power to gather information and to issue notices requesting documents and witness statements. If the recipient of such a notice does not comply, the state authority must seek a search warrant from the court.

A search warrant may be issued in the following circumstances:

- To discover and seize any article that may be used as evidence in the course of an inquiry, preliminary examination, or trial.
- To discover and seize any article, where:
 - the possession of the article is an offense;
 - the article has been unlawfully obtained; or
 - the article is reasonably suspected to have been used or intended to be used in the commission of an offense.
- To discover and rescue any person who is wrongfully restrained or confined.
- To locate any person against whom a warrant of arrest has been issued.
- To discover and seize any article according to the judgment or order of a court, where such discovery or seizure cannot be otherwise secured.

A search warrant for the purpose of finding and arresting a person must be issued concurrently with an arrest warrant for that person. The person to execute the search warrant must possess both the search warrant and the arrest warrant.

A government official or a police officer may search a private place without a search warrant in various cases of emergency and imminent danger and in other specified circumstances. An officer may also search a person who is placed under arrest and may seize any and all articles in the possession of the detained person. The search of a person must be conducted with due propriety and a woman must be searched by a female officer.

An illegal search does not preclude the evidence from being admissible in a court of law. The trial judge may determine whether to admit or preclude the evidence. An illegal search may, however, result in penalties for the officer conducting the search, including a fine and/or imprisonment.

32.2 Criminal Charges

In Thailand, there are two options available to a party seeking to initiate criminal actions.

- The victim may file criminal charges directly with the court without going through the police and Public Prosecutor's Office. In that event, the court will schedule a preliminary hearing to determine whether the facts support trying the case. If the court agrees that there are reasonable grounds to proceed, it will schedule a trial just as if the Public Prosecutor was bringing the charges.

- The victim (or in some cases a witness) may submit charges directly to the police and allow the police and the public prosecutor to handle the matter. The police will question the petitioner and summons the defendant to appear for similar questioning. After completion of an investigation, the investigating officer will issue an opinion to the public prosecutor, making a recommendation for or against prosecution. If the prosecutor ultimately decides to prosecute, the matter will go to trial. Normally, the court will not conduct a preliminary hearing in this instance.

Filing a criminal action is serious and could subject the filer to criminal charges of defamation or asserting false information in order to lodge a criminal complaint.

Compoundable Offenses

The Thai legal system recognizes two types of criminal offenses: compoundable and noncompoundable. In general terms, crimes against the state or crimes affecting morality and public policy are noncompoundable (e.g., murder and theft), whereas certain crimes between persons are compoundable (e.g., fraud, defamation, and bouncing cheques).

A compoundable offense may be settled and withdrawn by the victim at any time before its final judgment, and the public prosecutor cannot then prosecute the case.

A noncompoundable offense may also be settled and withdrawn by the victim at any time prior to the lower court's judgment, but the public prosecutor retains the authority to prosecute the offense on behalf of the State. The courts generally do not allow a public prosecutor to withdraw or settle a lawsuit based on a noncompoundable offense, absent of exceptional circumstances.

Prosecution

In Bangkok, the criminal caseload is shared among different courts of first instance. Alleged offenders may appear in the Criminal Court, the South Bangkok Criminal Court, the Thon Buri Criminal Court, or Min Buri Provincial Court. The proper court will depend on the place of arrest, the alleged offender's residency, or the origin of inquiry. In other provinces, criminal matters can be adjudicated in Provincial (Jang-Wad) Courts.

- Municipal (district/*kwaeng*) courts have the power to adjudicate criminal cases where the maximum punishment by law does not exceed three years' imprisonment and/or a THB 60,000 fine.
- Provincial (*changwat*) courts may adjudicate all criminal matters within the jurisdiction of the court.
- The Intellectual Property and International Trade Court is a specialized court with exclusive jurisdiction to adjudicate criminal matters involving intellectual property.

If the defendant has no counsel, a lawyer will be appointed by the court prior to the start of the trial in cases where the charge carries a maximum sentence of death or by request where the accused is 18 or under. Attorney fees paid by the court are very low and are determined by the judge according to the complexity of the case.

The prosecutor has the burden of proving all elements of the crime beyond a reasonable doubt.

32.3 Punishment

Thailand does not have any mandatory sentencing guidelines, and the court is authorized to exercise its discretion in criminal cases by taking into account the circumstances and gravity of the offense. The court can fix any amount of punishment within the legislative framework for the offenses involved. There are five types of sentences in Thailand:

1. Death
2. Imprisonment
3. Confinement
4. Fines
5. Forfeiture of property

The usual penalty for a criminal conviction is a fine or imprisonment or both. Maximum amounts are fixed for each offense by statute. Fines in Thailand depend on the circumstances, but are relatively low compared to the fines imposed in many other countries.

32.4 Appeals

An appeal can generally be made on both the facts and the law in regard to a guilty judgment, though the Thai Criminal Procedure Code (CPC) does not allow appeals in all cases where the defendant is sentenced to a short term of imprisonment. Both parties can appeal questions of law.

As of December 11, 2016, an amendment to the CPC provides that a defendant that intends to appeal a judgment to the Court of Appeals or the Supreme Court, must appear before court officials. Absent defendants lose their right to appeal to higher courts and are barred from designating lawyers to act on their behalf before the Court of Appeal or the Supreme Court.

The amendment applies only to absent defendants whose judgment includes an order for imprisonment or greater punishment. Lesser punishments (e.g., a fine, confinement, forfeiture, etc.), including suspended sentences of imprisonment, are not affected by the amendment, and such defendants can therefore apply for an extension the deadline to appear before court officials.

33. Foreign Proceedings

33.1 Enforcement of Foreign Judgments

Foreign judgments are not enforceable in Thailand. Thailand is not a party to any unilateral or multilateral treaties or conventions on the enforcement of foreign judgments. Foreign decrees are sometimes acceptable as evidence in Thai courts, and can be persuasive evidence, provided they are not default judgments, are not offensive to Thai public policy, and are translated into the Thai language.

33.2 Depositions

Thailand is not a party to the Hague Convention on Taking Evidence Abroad. Thailand has, however, entered into a number of bilateral agreements on mutual assistance in criminal matters. These agreements provide for cooperation in taking evidence and obtaining statements.

For countries without a bilateral agreement with Thailand, testimony can be taken for a foreign court through the use of letters rogatory, which normally take at least six months or longer. The procedure begins when a foreign court produces written questions that are sent to Thailand through diplomatic channels. Once the questions reach the Thai Civil Court, the assigned judge can compel the deponent's attendance to respond to the questions. Thai and/or foreign attorneys from both sides are allowed to be present during examination by the judge, and may ask the judge to further probe areas worthy of additional inquiry. The judge normally summarizes (not repeats) the deponent's replies into a tape recorder, and they are transcribed and returned to the foreign court through the same diplomatic channels.

33.3 Foreign Writs

Foreign writs may be served on persons in Thailand with affidavits of service being made at the concerned embassy, provided this method of service complies with the laws of the foreign jurisdiction. This procedure is neither affirmed nor prohibited by Thai law.

33.4 Extradition

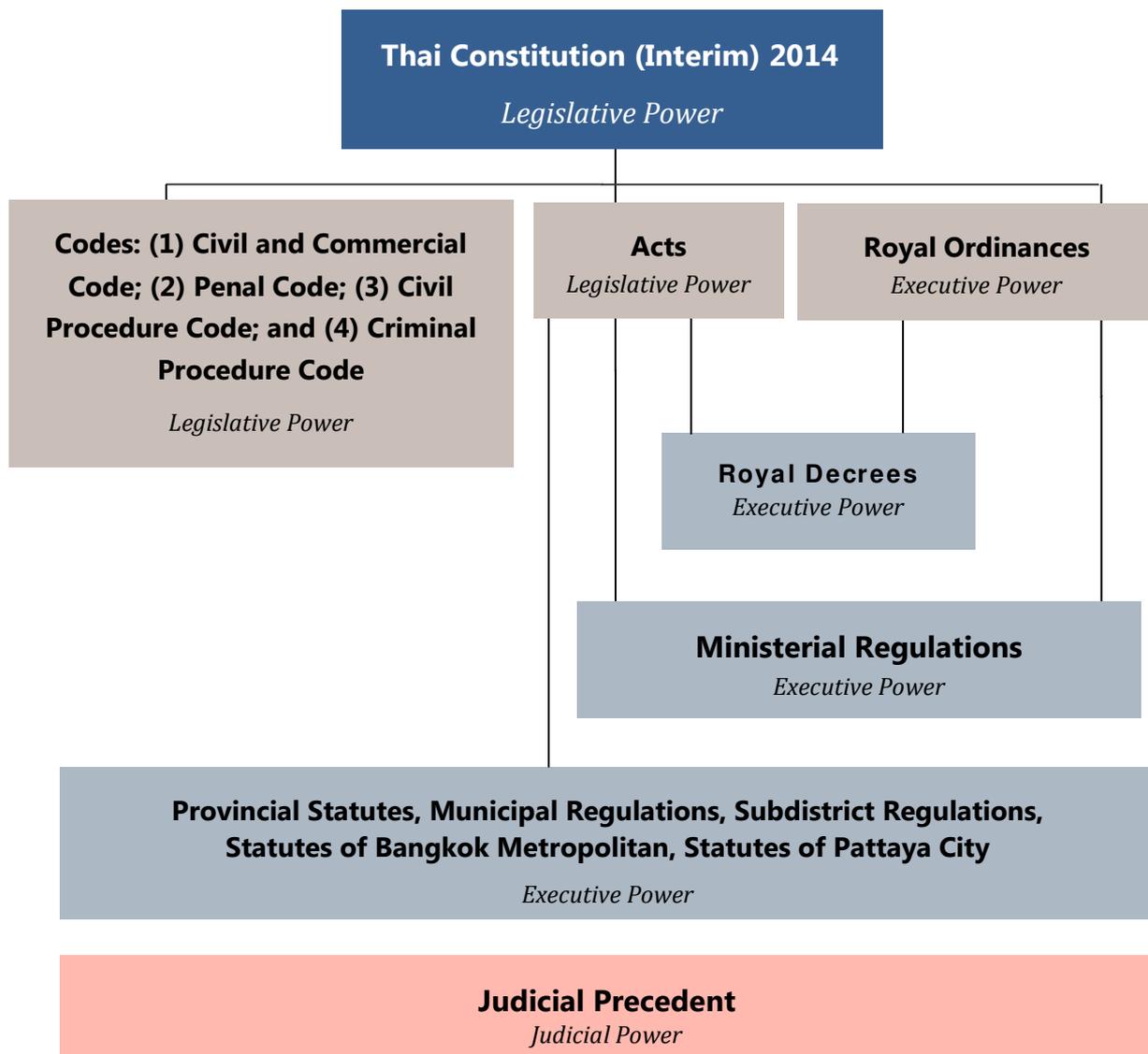
Extradition is governed by the Extradition Act B.E. 2551 (A.D. 2008), together with extradition treaties. The following countries have extradition treaties with Thailand: Australia, Bangladesh, Belgium, Cambodia, Canada, China, Fiji, India, Indonesia, Laos, Malaysia, the Philippines, South Korea, the United Kingdom, and the United States of America.

Extradition generally requires the offense to be criminal under the laws of the requesting country and the laws of Thailand, and the offense must be punishable in both countries by imprisonment of at least one year, or death.

34. Further Information on Thailand's Legal System

34.1 Governing Laws

The sovereign power of Thailand is vested in the legislature, the executive, and the judiciary. The hierarchy of legal authority in Thailand can be generally described as follows:



Source: Associate Professor Police Colonel Naiyana Kerdwichai, "Introduction to Laws," 2005. (Revised by Tilleke & Gibbins in 2011)

Legislative Power

Legislative power is vested in the parliament, which is comprised of the House of Representatives and the Senate.

The Constitution

The Constitution of the Kingdom of Thailand is the supreme law concerning the administration of the country. In order to meet the ever-changing needs of the country, there have been several constitutional amendments and promulgations of new constitutions throughout Thailand's history. The most recent promulgation is the 2014 Constitution, which was drafted by legal academics and then enacted by the National Council for Peace and Order.

The 2014 Constitution maintains the key principles of its predecessors by instituting a democratic regime of government. The King is the head of state but exercises no political responsibility. Sovereignty rests with the Thai people through the National Legislative Assembly, the cabinet, courts (including constitutional organs), and state agencies in accordance with the provisions of the constitution.

Codes and Acts

The elemental codes are as follows:

1. Civil and Commercial Code
2. Penal Code
3. Civil Procedure Code
4. Criminal Procedure Code

The country functions under a series of special legislative enactments called acts, of which there are hundreds. Acts concern many aspects of the day-to-day life and activities of people in business, industry, agriculture, military, and government.

Executive Power

Executive power is vested in the government of Thailand, which is led by the prime minister and the cabinet (composed of the prime minister and not more than 35 ministers nominated by the prime minister and appointed by the King). The prime minister must be a member of the National Legislative Assembly and shall be qualified, and not disqualified, in accordance with the requirements provided in the constitution. The King has the power to remove ministers from office as advised by the prime minister.

Only The King can promulgate royal ordinances and royal decrees. The government may issue Ministerial Regulations and local acts.

Judicial Power

Judicial power to adjudicate cases is vested in the courts. The judiciary is independent from executive control. Judges independently try cases in accordance with the Constitution and the law and in the name of the King.

Judicial precedent as a source of law has a unique Thai definition. A previous Thai Dika (Supreme) Court decision will influence a current case only to the extent of the judge's impression of the merits of the earlier case; the judge retains the discretion to apply the precedent opinion to the current case. In practice, however, the Dika (Supreme) Court endeavors to follow its earlier decisions. In certain unique circumstances, the Dika (Supreme) Court may call a meeting of Dika (Supreme) Court judges to debate a certain point of law and, if a consensus is reached, to change previous precedent.

All reported Dika (Supreme) Court decisions (dated after 1986) are searchable online. Since lower and intermediate courts of appeal decisions are not reported, they have virtually no influence outside their jurisdictional areas

34.2 Establishment of Courts

Courts of First Instance

The courts of first instance comprise general civil courts and courts of special jurisdiction. The general civil courts are divided into district courts, which have jurisdiction to hear small claims with a maximum

value of THB 300,000, and provincial courts, which have jurisdiction to hear all claims above THB 300,000. Unless the judgment has been declared final by statute, appeals from the general civil courts may be made to the Appeals Court, and a further appeal can be made to the Supreme Court.

The courts of first instance are the lower courts—the first level in the court system where trials actually take place.

There are only two tiers of courts for the courts of special jurisdiction, with the exception of the Juvenile and Family Court, and appeals from the courts of special jurisdiction are heard directly by the Supreme Court. The Supreme Administrative Court hears appeals from the Administrative Court.

Juvenile and Family Court

The Juvenile and Family Court has jurisdiction in any criminal case involving children (a person who is not over the age of 15) and juveniles (15 to 18) and any civil action under the Civil and Commercial Code involving proceedings concerning any minor (under 20). This court also governs family matters such as divorce, maintenance, and custody, and any proceedings in which the court must pass judgment or issue orders affecting children or youths. Children below the age of 10 are not punishable under Thai law and reduced or no imprisonment is imposed upon children under 15.

A trial in the Juvenile and Family Court is adjudicated by two professional judges and two lay judges, with the requirement that at least one of the lay judges must be female.

Central Bankruptcy Court

The Central Bankruptcy Court has jurisdiction over bankruptcies filed in all provinces. The Central Bankruptcy Court is charged with administering the Bankruptcy Act B.E. 2483 (A.D. 1940), as amended by the Bankruptcy Act (No. 7) B.E. 2547 (A.D. 2004), and bankruptcy proceedings involving liquidation or reorganization.

Central Intellectual Property and International Trade Court

The Central Intellectual Property and International Trade (IP&IT) Court is a court of first instance that considers international trade and intellectual property disputes.

The IP&IT Court has jurisdiction over the following civil and criminal actions, and civil cases related to arbitration on the same topics:

- Trademarks, copyrights, or patents (civil and criminal);
- Agreements on technology transfers or licensing (civil);
- International sale, exchange of goods or financial instruments, services, carriage, insurance, and other related legal actions (civil);
- Letters of credit issued in connection with the above civil actions, inward and outward remittance of funds, trust receipts, and provision of guarantees in connection therewith (civil);
- Ship arrests, dumping, and subsidization of goods or services from abroad (civil);
- Disputes over layout designs of integrated circuits, scientific discoveries, trade names, geographical indicators, trade secrets, and plant varieties (civil and criminal); and
- Offenses relating to trade under Sections 271 to 275 of the Criminal Code (civil and criminal).

Career judges in the IP&IT Court are judicial officials with special training in intellectual property or international trade. The court also utilizes lay judges with specific expertise in particular areas of intellectual property or international trade. An IP&IT Court trial is adjudicated by at least two career judges and one lay judge.

The IP&IT Court is the only court to allow interlocutory injunctions or attachments before filing suit. This court is also unique in that it allows pre-trial conferences.

Hearings are usually held without adjournment until judgment is rendered. This allows for a trial to be completed within 12 to 18 months, plus another 3 years or sometime longer if appealing to the Dika (Supreme) Court.

Labor Court

Labor courts are established by the Act on Establishment of Labor Courts and Labor Court Procedure B.E. 2522 (A.D. 1979). The Act also specifies procedures that must be followed by these courts. Labor Court trials are heard by a quorum of one career judge, one lay judge selected by employer federations, and one lay judge selected by labor federations.

Tax and Duty Court

The Tax and Duty Court hears tax and customs duty disputes. It requires a quorum of two judges, one lay and one career, to hear cases.

Constitutional Court

The Constitutional Court has the jurisdiction to determine the constitutionality of laws. Persons whose rights or liberties (as recognized by the Constitution) are violated may file a motion to the Constitutional Court for a decision that the law or a provision thereof is unconstitutional. Access to the Constitutional Court is only allowed where all other means for redress have been exhausted.

The Constitutional Court has jurisdiction to review the following:

- The constitutionality of parliamentary acts
- The constitutionality of royal decrees
- The authorities of constitutional mechanisms
- The appointment and removal of public officials
- Political party issues
- The constitutionality of draft legislation

34.3 Legal Profession and Judiciary

The first Lawyers Act was passed in the year 1914 during the reign of King Rama VI and has witnessed many changes since, with the Lawyers Act B.E. 2528 (A.D. 1985) being the present governing law. Section 4 of the Lawyers Act describes a lawyer as a person who has been registered as a lawyer and who possesses a license that has been issued to him or her by the Lawyers Council of Thailand. A lawyer must observe the Regulation of the Lawyers Council of Thailand on Lawyer's Ethics B.E. 2529 (A.D. 1986), which is managed by the Committee on Professional Ethics.

The Lawyers Council of Thailand is given power under the Lawyers Act to issue rules regulating the professional practice and conduct of lawyers, the breach of which constitutes professional misconduct.

When a complaint of professional misconduct is filed against a particular practicing lawyer, the Lawyers Council of Thailand appoints a committee consisting of three members to investigate the complaint. If they decide that the complaint is valid, the case is sent before the Disciplinary Committee.

The legal profession in Thailand is limited to Thai nationals. However, foreign attorneys who obtained lifetime work permits when the first Alien Working Act was passed in 1972 are allowed to continue giving legal advice.

Qualifications and Legal Education

Prince Rabi's Law School was the nation's preeminent law school for 36 years before merging with Chulalongkorn University in 1933. Teaching of law was transferred to a new school, Thammasat University, the next year. Chulalongkorn started teaching law again in the 1950s. The 1970s saw the start of open universities, including Ramkhamhaeng and Sukhothai-Thammathiraj, teaching law.

In addition to the prerequisite LLB degree from the undergraduate law faculty of a Thai university (or an Associate Degree in Law or a Certificate in Law equivalent to a Bachelor's or Associate Degree from an educational institution accredited by the Lawyers Council of Thailand), law graduates are now required to pass a seven- to eight-month training course provided by the Lawyers Council of Thailand, which consists of one month of training in theory and six to seven months of practical training. Alternatively, law graduates may serve as law trainees for one year in a law office and then pass the Lawyers Council of Thailand examination before applying to the Lawyers Council of Thailand for permission to practice law.

The above requirements entitle a national to a license, which is valid for two years from the date of issuance and which can again be renewed within 60 days prior to its expiration. Life memberships are also available, the licenses of which are valid until the death of the holder.

Those who wish to do so may pursue a barrister-at-law degree, a further course lasting one year or more, offered by the Bar Institute. A barrister-at-law is entitled to take further examinations in order to be qualified to act as a judge or a public prosecutor.

Judiciary

The judiciary is currently made up of over 4,000 professional and trainee judges sitting on courts of first instance (excluding the Constitutional Court, the Administrative Court, and Military Courts), plus Courts of Appeal and one Dika (Supreme) Court. Judges are also attached to the Office of the Court of Justice for administrative duties in support of the courts and for filling in when needed in courts throughout the nation.

Generally, a judgeship is a career profession. A judge in the Courts of Justice shall be retired at the age of 60. After that, he or she may become a senior judge and remain in office until the age of 70, subject to a performance evaluation process.

General candidates for judgeships are recruited through an open competitive examination. Candidates must be of Thai nationality, be at least 25 years of age, and possess an LLB degree from a Thai law school and a barrister-at-law degree from the Bar Institute. They must also have two years of experience as a court clerk, assistant court clerk, probation officer, execution officer, official receiver, public prosecutor, litigator, judge advocate's general officer, or other government legal officer.

Candidates with special qualifications or expertise must still qualify via an open competitive selection process, but may elect to take alternative examinations to assess their knowledge and expertise. Two groups of candidates are eligible for such preferential treatment. The first group includes candidates

with a barrister-at-law degree from the Bar Institute and additional special qualifications, for example, a foreign law degree or a Thai bachelors, masters, or doctorate degree with expertise or experience in legal or other fields corresponding to the degree or as specified by the Court of Justice Judicial Committee. The second group includes candidates with a Barrister-at-Law degree from the Bar Institute with expertise or experience in branches of law specified by the Court of Justice Judicial Committee, together with current or past service as (1) a professor or associate professor in a government university or (2) a law instructor in a government university for at least five years or (3) a director in a government agency or (4) a litigator for five years.

Appointments, promotions, transfers, and removal of judges are made by H.M. the King upon recommendation of the Court of Justice Judicial Commission. The judiciary and its functions are virtually independent of both the legislative and executive branches. Judges are governed by the Judicial Service Act and may be dismissed from service only for proven misconduct, incapacity, or infirmity.

Public Prosecutors

The government is represented in both criminal and civil matters by public prosecutors stationed throughout the country. The Office of the Attorney General is currently an independent public agency. Both judges and public prosecutors are governed by their own service commissions in order to be free of outside influence and control. Like judges, public prosecutors are career professionals. Public prosecutors are governed by the Prosecution Office and Prosecutors Act B.E. 2551 (A.D. 2008).

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