



## INVESTMENT GUIDE THAILAND | 2018



**THAILAND**  
**LEGAL, TAX, &**  
**INVESTMENT GUIDE**  
**2018**



Published by  
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Contents are up to date as of January 2018

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# Chapter 1

## Welcome to Thailand 4.0

The fourth stage of the Kingdom of Thailand's economic development journey, which previously saw the Kingdom move from an agriculture-based economic model (Thailand 1.0) to intermediate light and advanced industry models (Thailand 2.0 and 3.0), is now kicking in. Thailand 4.0 is the final step towards making Thailand a first world nation and an ASEAN heavyweight. This twenty-year plan aims to drive Thailand forward to economic prosperity and social well-being without compromising human values and environmental protection.

To achieve these objectives, Thailand 4.0 is relying on new engines of growth such as smart electronics, digital technology, renewable energies and robotics to make the shift from traditional farming and traditional services to smart farming and high-value services. Thailand 4.0 also aims at reducing dependence on foreign technologies by promoting domestic start-ups to develop new made-in Thailand technological innovations.

As the Thai society is evolving, the legal framework is undergoing major changes and wise investors should pay attention to the level of certainty and predictability of the local legal system. This publication has been designed by DFDL as a tool for investors, whether they are newcomers or experienced practitioners, seeking an in-depth understanding of the Thai legal and economic environment. Thailand 4.0 also aims to reflect a geographic dynamic. Initially, at an internal level, with the development of thematic provincial clusters dedicated to activities such as organic fruits agriculture (Eastern Region) or Green Industry (Middle Central Region). At a regional level over a second phase, by reinforcing Thailand's central driving role among its ASEAN neighbors and the global community through the Eastern Economic Corridor and by shifting from a nation-centered approach to an ASEAN-centered perspective, where borders will be gradually perceived as bridges linking economies together rather than walls isolating each country in Southeast Asia.

Leveraging from 20 years pioneering practices in the ASEAN region, DFDL identifies with the geographic vision of Thailand 4.0.

With in-depth knowledge of Thailand and Mekong Region legal environments while providing specialized and personalized advisory services to the international business community, DFDL is the obvious first choice for investors in Thailand 4.0 and across all Southeast Asia.

Welcome to Thailand 4.0!

## Chapter 2

# Introduction: Kingdom of Thailand at a Glance

### 2.1 Country Profile

Land Area	510,890 square kilometers
Total Area	513,120 square kilometers
Population (2017 est.)	68,200,824 (Population est.)
Capital City	Bangkok
Monetary Unit	Baht (THB)
Languages	Thai, English (secondary language), ethnic/regional dialects
Administrative Divisions	76 Provinces 1 Municipality
Ports and Terminals	Bangkok, Laem Chabang, Port of Prachuap, Sri Racha. Most containerized cargo are trans-shipped through Singapore, partly because of the draft limitations at the river port of Bangkok. Laem Chabang Port has begun to receive more traffic in major East-West trade.
Airports	Major international airports include Bangkok Suvarnabhumi, Don Mueang, Chiang Mai, Hat Yai, and Phuket. Total number of airports: 38
Roads	<p>Thailand is widely acknowledged as having the most extensive road transportation network in all of Southeast Asia with more than 390,026 kilometers, of which 384,176, or 98.5%, are concrete or asphalt paved and 66,266 km forming a national highway network throughout the country.</p> <p>Thailand has a five-year development plan for motorways (2012-2016) totaling 707 km for five highway projects throughout the country.</p> <p>New highways throughout the country will eventually become part of the East-West Economic Corridor (EWEC), which will link the South China Sea with the Bay of Bengal, and the North-South Corridor which will link Singapore with Kunming in China.</p> <p>The Greater Mekong area road network already includes a southern economic corridor inclusive of Thailand, Cambodia and Vietnam; the east-west economic corridor linking Myanmar, Thailand, the Lao PDR and Vietnam; the north-south economic corridor which runs from southern China through Lao PDR and Myanmar, and into Thailand; and the southern coastal economic corridor also connecting Thailand, Cambodia and Vietnam. All major cities in Thailand are accessible by land, with all-weather highways and intercity roads linking them to the road network covering the whole country, as well as the Asian Highway and the road networks of neighboring countries at border crossings.</p>

**Railways**

Two international routes to Malaysia are available through Padang Besar and Sungai Kolok. Total railway network: 4,346 kilometers.

*Source: Board of Investment*

*Note: Thailand uses the Buddhist calendar e.g. 2017 = 2560 (543 years difference)*

The Kingdom of Thailand is located on the western side of the Indochinese peninsula. It faces the Andaman Sea and the Republic of the Union of Myanmar to the west, the Lao PDR and the Kingdom of Cambodia to the north and east, and Malaysia to the south.

## 2.2 Political Environment

Thailand is a constitutional monarchy with executive power lying in the hands of a government led by the Prime Minister. Since World War II, Thailand has alternated between periods of democratically elected civilian governments and periods of military rule brought about by coups d'état (most of them peaceful and without bloodshed).

Following the upheavals of 2008-2010, through a national election held in 2011, Yingluck Shinawatra was elected and became Prime Minister. Thailand enjoyed a period of relative stability during the subsequent two years. However, street protests erupted again in November 2013, resulting in the dissolution of parliament and a call for a fresh election. The anti-government protests took place between November 2013 and May 2014, organized by the People's Democratic Reform Committee ("PDRC"). On 20 May 2014, the Thai Army declared martial law throughout the nation and the formation of the National Council for Peace and Order ("NCPO") comprising of the army, navy, air force and the police. Martial law suspended all laws and statutes that were not in compliance with the martial law order and the NCPO assumed power over civil officers in relation to the maintenance of security. Citing security concerns, on 22 May 2014 the leader of the NCPO, General Prayuth Chan-Ocha took control of the executive power, suspended the application of certain parts of the constitution concerning the government, dissolved the Senate and assumed all lawmaking power. Accordingly, Thailand is currently governed by an interim government under the de facto control of the NCPO.

On 7 August 2016, a referendum was held to approve a new constitution drafted by the NCPO. The main points of such constitution include the following:

- The Senate would turn into a fully appointed chamber rather than a partially elected one during the five (5) year "transitional period"; and
- The NCPO would be empowered to appoint the 250 members of this chamber, who have a veto over the lower House of Representatives on amending the constitution, and the Prime Minister may similarly be appointed from outside either chamber.

The 7 August 2016 referendum passed with approximately 61% voting in favor of the new constitution with voter's turnout at around 55%. While there was controversy surrounding campaigning for the referendum, and restrictions placed upon it by the NCPO, the prevailing consensus was that the new constitution would allow the country to return to an apparent stability.

On 13 October 2016 Thailand's deeply revered King Bhumol Adulyadej, also known as Rama IX the Great, passed away after years of illness, plunging the entire nation into mourning. His Majesty's sole male heir, Crown Prince Vajiralongkorn, accepted the throne on 1 December 2016, becoming King Rama X. The new King signed the new constitution into force on 6 April 2017, with certain amendments being finalized post-referendum on 29 March 2016. The Prime Minister announced early October that the long unspecified date for next general elections is now fixed for November 2018.

## 2.3 Economic Environment

### Thailand's GDP Growth

Thanks to a rapid growth in per capita income from the 1970s to the mid-1990s, Thailand has quickly transitioned from a low-income country to a middle-income country. Although real GDP growth has slowed down during the first decade of the new millennium, Thailand's economy exhibited remarkable resilience amidst difficult global economic conditions in 2008 and again, in 2011, during the worst flooding in Thailand's history.

The World Bank now officially lists Thailand as an upper middle-income country as economic growth gradually returns to normal. GDP rebounded after the 2011 floods with a robust growth rate of 6.4 percent in 2012 and this trend continued through 2013; although at a more moderate level of 3.7 percent. Thailand's GDP growth was affected by the political upheaval in 2014 and decreased to 0.9 percent. Since 2014, the GDP growth has risen to 2.9% in 2015 and 3.2% in 2016. It is expected to reach 3.7 percent again in 2017.

### Key Indicators of GDP and the Labor Market

Indicator	2011	2012	2013	2014	2015	2016
GDP Growth (%)	0.84	7.24	2.73	0.91	2.94	3.23
GNP per Capita PPP (USD)	13,535.1	14,714.5	15,293.3	15,646.6	16,222.9	16,916.5
Population (Million)	67,530,130	67,843,979	68,143,065	68,416,772	68,657,600	68,863,514
Unemployment (%)	0.66	0.58	0.77	0.84	0.67	0.63

Sources: Bank of Thailand, CIA World Fact book, National Statistics Office Thailand, The World Bank 2016

### Evolution of Economic Sectors and Productivity

The agricultural sector as a percentage of total GDP has declined in recent decades as Thailand's economy has become increasingly diversified and more heavily reliant on industry and manufacturing.

During the last two decades, Thailand was forced to deal with two major financial crises: the Asian currency crisis in 1997 (known in Thailand as the "Tom Yam Kung" crisis) and the global credit crisis in 2008 (known as the "Hamburger Crisis"). Although Thailand was affected by both crises, especially given its export-oriented economy, a decade-on-decade comparison shows the relative resilience of

the Thailand's economic structure not to mention its ability to rebound quickly to historically stable levels of economic output.

The services industry, driven by a strong tourism sector, has traditionally been the primary engine of Thailand's economy. It is expected that the services sector will become an increasingly important contributor to overall GDP: it surpassed 50 percent for the first time in 2012 and represented an even more substantial portion of the Thai economy in 2017. As the global economy continues to stabilize and returns to growth following the 2008 recession, Thailand is projecting near-record numbers of tourists visiting the Kingdom in 2017, thus contributing further to the revenue generated by the services sector.

### **Percentage Share of GDP by Economic Sector**

Percent in GDP	2011	2012	2013	2014	2015	2016
Agriculture	11.59	11.51	11.32	10.07	8.72	8.34
Industry	38.07	37.43	36.98	36.94	36.39	35.82
Services	50.33	51.06	51.69	52.98	54.89	55.84

Sources: The World Bank

### **Investment**

FDI Inflows	2011	2012	2013	2014	2015	2016
Percent of GDP	0.67	3.24	3.79	1.22	2.26	N/A

Sources: The World Bank

The World Bank's Doing Business Guide ranked Thailand 46th in the world for ease of doing business. While levels of foreign direct investment ("FDI") into Thailand have increased since the lows experienced in 2011, they still fall short of the levels of foreign investment that Thailand experienced during 2006 and 2007. FDI inflows to Thailand exceeded the targets of the Thailand Board of Investment in 2016, bringing a total of USD 10.3 billion into the economy.

Japanese FDI represented just over 22 percent of the overall total in 2016 with the main driver being the automotive industry. The top investors in Thailand are as follows:

Investing Country	2016 % of FDI Inflow
Japan	22.2
The Netherlands	8.0
USA	7.0
Singapore	6.3
Cayman Islands	4.7
Hong Kong	2.4
Malaysia	2.3
Taiwan	2.2
Switzerland	0.9

Sources: Thailand Board of Investment

The key sectors where foreign investment is directed are as follows:

Invested Sectors	2016 % of FDI Inflow
Services	35.9
Paper and chemical goods	21.6
Agricultural products	19.2
Metallurgy and machinery	9.9
Electronic and electric goods	7.9
Minerals and ceramics	3.5
Light industry, textiles	1.6

Sources: Thailand Board of Investment

The agricultural sector saw a 42 percent increase in FDI between 2011 and 2012 due to the new investment incentives instituted by the government, especially in the rubber and palm oil industries. On the back of a growing demand for energy, the refined petroleum products sector increased by more than three-fold, year-on-year, over the same period. However, the most significant increase, and the most positive sign for an economy heavily reliant on tourism, was in the accommodation and food services sectors, which immediately rebounded from 2011, increasing by more than six-fold on par with the highs of 2007.

Additionally, other efforts to attract foreign investors include:

- The Thai government cut the maximum corporate tax rate from 30 percent in 2011 to 20 percent starting in January 2013. Since then, while the reduction was supposed to be temporary, the Thai Revenue Department has not reverted back to the original 30%. The decision to maintain corporate tax rate at 20% allows Thailand to be as competitive as Cambodia, the Lao PDR, Vietnam and Indonesia.
- The Thailand Board of Investment unveiled a revamped plan that provides a series of incentives – both tax and non-tax – to foreign investors in Thailand.
- Approval by Thailand’s cabinet of 36 public infrastructure projects valued at around US \$25 billion, some of which are open to bidding by foreign investors as the Thai Government announces to engage partly in public-private partnerships to fund these projects.
- The introduction of Thailand’s 4.0 economy which is defined as a *“transformed Thailand that maximizes the use of digital technologies in all social-economic activities in order to develop infrastructure, innovation, data, human capital, and other digital resources that will ultimately drive the country towards wealth, stability and sustainability”*. Thailand’s 4.0 economy focuses on investment in:
  - The digital Economy - primarily improving national broadband network with the target for all Thais to have access to broadband connection by 2026;
  - Physical infrastructure including the initiation of the construction of the Thai-China high-speed rail link; and
  - Agricultural reform – namely the “smart farmer” project.

## Trade Balance

The Thai economy is well integrated into the global marketplace. Exports account for nearly two-thirds of the country's GDP, led by a strong industrial sector and a rapidly expanding services sector. Increasingly, most exports consist of manufactured and processed goods that are being sent to other Asian countries while they were in the past primarily destined for the North American and European markets. Thailand is also one of the world's few net food exporters. The vast majority of imports are raw materials and machinery. Due in part to its strategic location providing easy access to larger market of over 600 million people, as well as its pioneering role in the facilitation and liberalization of international trade, Thailand will continue to be a pivotal nation as the region moves further along the path of deepening ASEAN economic integration.

### Exports, Imports, and Trade Balance (2010 - 2017)

Unit: USD billion	2010	2011	2012	2013	2014	2015	2016	2017
Exports	185	203	214	225	224	210	215	236
Imports	177	211	234	219	200	202	178	225
Trade Balance	8	-8	-20	6	24	8	37	11

Sources: Ministry of Commerce; Bank of Thailand and global EDGE

## Monetary and Financial Indicators

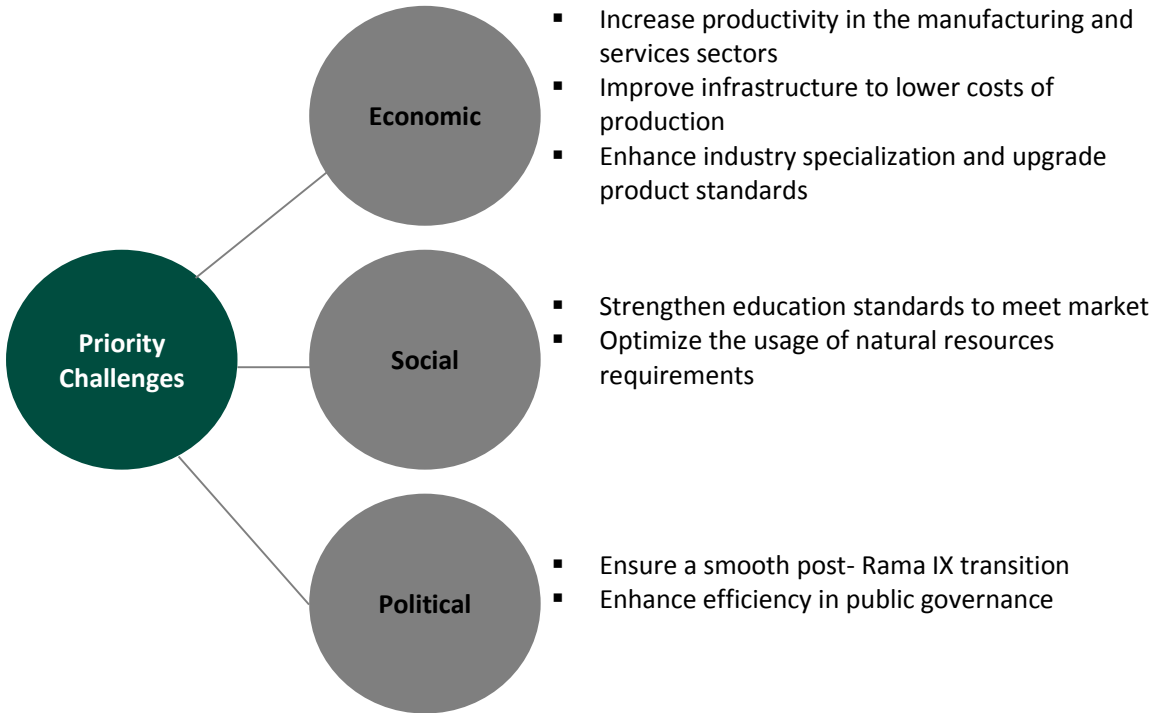
Monetary policy continued to be amenable to growth throughout 2012, buoyed by strong domestic demand and anchored by sound economic foundations. Production constraints were eased and stimulus injections provided a needed boost, resulting in self-sustained economic recovery. The outlook for the years ahead continues to be positive, with the banking system adhering to prudent risk management practices, protecting its solid capital base while keeping inflation at moderate and controlled levels. Additional stimulus measures, including an across the board personal income tax rates cut, should further bolster domestic consumption.

### Some Key Monetary Indicators (2008-2017)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Inflation Rate</b>	<b>5.48</b>	<b>-0.80</b>	<b>3.28</b>	<b>3.80</b>	<b>3.02</b>	<b>2.20</b>	<b>1.90</b>	<b>-0.90</b>	<b>0.20</b>	<b>0.70</b>
<b>Prime Interest Rate</b>										
Minimum	6.25	5.85	5.85	6.63	6.63	6.75	6.75	6.50	6.25	6.03
Maximum	9.50	9.50	8.25	10.25	10.25	7.25	7.13	6.85	6.60	6.60
<b>Fixed Deposit Rate</b>										
Minimum	1.75	0.65	0.65	1.60	2.35	2.15	1.70	1.30	1.30	1.30
Maximum	3.00	1.75	1.70	3.00	2.50	2.35	1.75	1.50	1.50	1.50
<b>Stock Market Index (Dec 1996 = 100)</b>	<b>449.96</b>	<b>734.54</b>	<b>1,019.46</b>	<b>1,025.32</b>	<b>1,391.93</b>	<b>1,416.66</b>	<b>1,224.62</b>	<b>1,497.67</b>	<b>1,228.02</b>	<b>1,542.94</b>

Sources: Thailand's Macro Economic Indicators, Bank of Thailand

## Challenges Ahead





## Chapter 3

# Investing in the Country

Foreign investment in Thailand is generally governed by the Foreign Business Act B.E. 2542 (A.D. 1999) (the “**FBA**”), the Investment Promotion Act B.E. 2520 (A.D. 1977) (the “**BOI ACT**”) as complemented recently by the Seven-Year Investment Promotion Strategy (2015-2021) issued under the Announcement of the Board of Investment (the “**BOI**”) No. 2/2557 Re Policies and Criteria for Investment Promotion (the “**Seven-Year Investment Promotion Strategy**”). Other sources of law in relation to foreign investment are set out in various statutes and regulations such as foreign exchange controls, immigration regulations, import and export regulations and stock exchange regulations.

Under the Seven-Year Investment Promotion Strategy, the BOI has revised some aspects of its policy to further promote investment in Thailand.

The aim of the Seven-Year Investment Promotion Strategy is to encourage:

- Investment that enhances national competitiveness through the encouragement of research and development, innovation and value creation;
- Environmentally-friendly activities;
- The formation of commercial hubs and Special Economic Zones (“**SEZ**”) in lesser developed parts of the country, particularly in the Southern border provinces, to foster increased economic growth commensurate with each region’s potential; and
- Thai investors to invest in other countries.

### 3.1 Key Investment Phases, Procedures and Considerations

The following sections provide an overview of the foreign investment process in Thailand:

#### 3.1.1 Evaluation of Business Potential and Scope of Investment

During this phase, a potential investor will investigate the business climate, meet potential partners and competitors, evaluate micro- and macroeconomic conditions, calculate costs, assess the legal and employment environment, and examine relevant infrastructure to determine whether direct investment into Thailand is a desirable and worthwhile venture.

#### 3.1.2 Decision on Business Structure

After the feasibility study, if an investor decides that Thailand is a viable place for his/her investments, the next step is to consider which business structure to pursue (see “Business Forms”, page 10 of this Investment Guide). Different forms of business entities in Thailand have corresponding advantages and disadvantages with respect to applicable taxes, privileges, incentives, visa and employment processes for expatriate employees.

### 3.1.3 Incorporation of Legal Entity

Subject to the Civil and Commercial Code of Thailand (the “**CCC**”), the FBA and other relevant laws and regulations, business entities engaged in any business in Thailand must be registered with the Ministry of Commerce’s Department of Business Development (the “**MOC**”) in Bangkok or at the relevant Provincial Business Development Office.

The timeline for the incorporation of business entities under Thai law varies depending on the complexity of the applicable process. In the past incorporation was usually a slow process; however, more recently, it now takes about one day to incorporate a business.

### 3.1.4 Other Operating Licenses (Upstream Licenses)

In addition to incorporation and any foreign business licensing as may be required (see section “Obtaining a Foreign Business License” sect. 3.2.2), there are additional general and sector-specific licenses that must be obtained as applicable prior to commencing business operations, including for example:

- **Specific business operating licenses** which can be obtained from the administering authority responsible for the sector in which the company intends to operate in Thailand. Examples include financial institutions, educational institutions, labor recruitment companies and restaurants;
- **Factory licenses** which are granted by the Ministry of Industry (the “**MOI**”) which governs the construction, operation and regulatory obligations of factories in Thailand;
- **Import/export authorization documents** which can be obtained from the MOC and the Customs Department. There are other authorities in charge of import licenses for goods subject to strict controls for national security reasons, as well as public health and safety purposes, such as explosives, toxic and radioactive materials;
- **Exploration, survey, mining, or minerals processing licenses** are granted by the Department of Primary Industries and Mines under the MOI. The license required for upstream oil and gas operations can be obtained from the Department of Mineral Fuels under the Ministry of Energy; and
- **Electricity Business Licenses** which are to must be obtained from the relevant State-owned electricity authorities.

### 3.1.5 Routine “Downstream” Licenses

A number of “downstream” approvals, permits, and licenses must be obtained from the relevant authority. Examples include work permits, value-added tax registration, and social welfare registration.

## 3.2 Forms of Investment Available to Foreigners

As with many other developing jurisdictions, the laws of Thailand provide for certain investment activities and rights that are reserved only for Thai citizens. Foreigners working and investing in the country derive their legal rights primarily from other domestic laws of Thailand. The rights of

foreigners working and investing in the country are restricted to a certain extent by various legislative instruments, such as the Nationality Act, Immigration Act, FBA, Land Code, and Alien Employment Act among others. Other specific restrictions on foreign ownership coexist in specific industries under various statutes, such as commercial transportation, tourism, insurance companies, commercial banks, commercial fishing, and aviation business.

Activities that are enshrined in the FBA are as follows:

- List 1: Strictly prohibited for foreign participation.
- List 2: Prohibited to foreigners unless the Cabinet grants permission.
- List 3: Prohibited to foreigners unless permission is sought and subsequently granted from the Director-General of the Ministry of Commerce.

### 3.2.1 Permitted Forms of Investment

The FBA repealed and replaced the 1972 National Executive Council Announcement No. 281. The Act provides a definition of “alien” and identifies the allowed scope of foreign participation in business in Thailand.

For the purpose of determining which business entities fall under the scope of the FBA, an alien or foreigner is defined as:

- A natural person who is not of Thai nationality;
- A juristic entity that is not registered in Thailand;
- A juristic entity incorporated in Thailand with foreign ownership account for one-half or more of the total number of shares and/or registered capital; and
- A limited partnership or ordinary registered partnership whose managing partner or manager is a foreigner.

Based on the above definition, if more than 50% of the shares in a limited company are held and controlled by Thai citizens, it will be regarded as a Thai company and therefore not be subject to the rules enshrined in the FBA. This means that a foreign investor is generally allowed to hold a maximum of 49 percent of the shares of a company engaged in businesses regulated by the FBA. For any other share structures, specific approval or Foreign Business License (the “FBL”) must be obtained from the MOC.

### 3.2.2 Obtaining a Foreign Business License

Generally, a foreign investor can only engage in a List 2 business with a license issued by the Minister of the MOC (with approval from the Cabinet (Council of Ministers)). For a List 3 business, a license must be issued by the Director-General of the Department of Business Development, MOC or with the specific approval of the MOC’s FBA Committee. The FBA sets out specific timeframes during which the Director-General and the minister of the MOC are required to respond to applications submitted for a foreign business license.

The issuance of a foreign business license is conditional on certain eligibility requirements being satisfied and may be subject to other particular conditions such as the maintenance of a certain

debt-to-equity ratio, minimum employment requirements (of Thai citizens) and a minimum period for maintaining initial capital investment in Thailand. The minimum capital requirement is THB 2 million in general and THB 3 million for businesses participating in a List 2 or List 3 activity, though in practice some offices may require a higher capital requirement.

Generally, the FBA contemplates that a license will be granted for as long as the applicant operates the licensed business; although, the license can be revoked if a promoted/licensed person violates the conditions set out in the FBL or investment certificate.

### **3.2.3 Control in Thai Companies**

#### **Thai Majority Ownership**

A structure involving a Thai majority-owned company under foreign control is often used by foreign investors who wish to form a Thai subsidiary in cooperation with a Thai partner for the purposes of engaging in a restricted business.

For foreign capital ownership structure in which shareholders hold or have invested in less than half of the registered share capital, it is common practice that the management control of the company be vested with the foreign minority shareholder. Subject to the MOC practice applicable as at the time of the relevant legislation, this is usually acceptable provided that the Thai partner is a bona fide investor.

#### **Protection for Minority Shareholder(s)**

Various means can be used to ensure that foreign minority shareholders have effective management and control of a company. Such methods include:

- Creating different classes of shares with different director appointment rights;
- Preference share structures;
- Shareholder agreements (including share-financing arrangements with put and call options);
- Customizing articles of association in order to specify different rights between shareholders i.e. voting rights, dividend rights as well as rights to capital returns;
- Supermajority quorum requirements for board of directors' meetings and shareholders' meetings; and
- Supermajority requirements for approving board of directors' resolutions and shareholders' resolutions.

#### **Nominee Arrangement Prohibition**

Thai companies with foreign participation and control are often set up as majority Thai-owned enterprises to be classified as Thai companies, thereby circumventing the restrictions upon foreign ownership under the FBA.

A business is considered a “foreigner” under Section 4 of the FBA if:

- It is established under foreign law;
- Half or more of its capital is owned by foreigners even if the company is incorporated under Thai law; or
- Foreigners invest half or more of the total value of capital even if Thai nationals own more than half the capital.

The third requirement effectively prohibits the use of a “nominee” or “proxy”. Sections 36 and 37 of the FBA make it illegal for foreigners to circumvent the FBA with the use of a Thai nominee.

Section 36 in particular specifies the penalties attached to Thai nationals acting as nominees for foreigners as seen below:

*“Any Thai national or juristic person that is not a foreigner under this Act, aiding or abetting or taking part in a foreigner business operation (that falls under the Lists attached hereto) by showing that he, she or it is the sole owner of the business or holding shares on behalf of foreigner(s) in any partnership or limited company or juristic person in order for foreigner(s) to operate the business in avoidance of or violation to the provisions of this Act, shall be punished with an imprisonment not exceeding three years or a fine from THB 100,000 to THB 1,000,000 or both; and the Court shall order a stoppage of the aiding or abetting or order a stoppage of the joint business operation or order a stoppage of shareholding or a cessation of the partnership as the case may be. Violators of the Court's order shall be subject to a punishment with a fine of THB 10,000 to THB 50,000 per day throughout the period of violation.”*

### **The Risks for the Nominee and the Business**

As a result, the risks associated for a Thai national acting as a nominee in violation of the FBA are as follows:

- a. Imprisonment of up to three years; or
- b. A fine of between THB 100,000 and THB 1,000,000, or both.

If a nominee structure is in place, the business will also be at risk from the regulations enshrined in the FBA. The court may issue orders as follow:

- a. Stop the Thai national from acting as a nominee;
- b. Discontinue the joint business operations between the foreigner and the foreigner’s nominee; or
- c. Terminate the partnership or business structure.

### **Current Situation and Recommendations**

The last few years have seen an increased amount of scrutiny in this regard, wherein the MOC has been investigating companies to see whether they have been employing the “nominee” structure whilst conducting their business operations. In addition, there have been talks in regard to amending

the FBA to include a definition of what constitutes a “nominee”, meaning employing a nominee structure could result in stricter violations in the future.

We recommend providing an appropriate level of legitimacy for a Thai national in the operations of the business. This will help establish that the Thai national has an active involvement in the business and is not just holding his/her share on behalf of the foreign investor.

### **3.2.4 Restricted, Prohibited and Conditional Investment Sectors**

#### **Restricted and Prohibited Investment Sectors**

As mentioned previously, please refer to Annex 3 for the lists of restricted business activities.

Business activities identified in Lists 1, 2, and 3 of the FBA are subject to foreign shareholding limitations imposed by the FBA.

Foreign investment in businesses identified under List 1 is strictly prohibited. The list includes rice and livestock farming, newspapers, media broadcasting, forestry, fisheries, trading of Thai antiquities and land trading.

Foreign investment in businesses identified under List 2 is prohibited unless permission is granted by the MOC with the approval of the Cabinet (Council of Ministers). List 2 is divided into:

- i. Businesses related to national security (e.g. firearms production);
- ii. Businesses related to arts or culture (e.g. antiques trading or gold ware production); and
- iii. Businesses related to natural resources or the environment (e.g. mining and wool fabrication).

Foreign investment in businesses detailed under List 3 is prohibited unless permission is granted by the Director-General of the Department of Business Development of the Ministry of Commerce with the express approval of the Foreign Business Committee (“FBC”). List 3 is comprised of businesses in which “Thai nationals are not yet ready to compete with foreigners”, such as advertising, tourism and services that would require foreign investors to procure an FBL.

#### **Exemptions and Conditional Investment Sectors**

Thai law permits exemptions for some types of businesses wanting to apply for a FBL; such exemptions are provided for either within the FBA or through an international agreement to which Thailand is a party.

#### **Exemption under the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America 1966 (the “Treaty of Amity”)**

Under the Treaty of Amity signed between the United States of America and the Kingdom of Thailand), the restrictions imposed by the FBA do not apply to US citizens or companies (majority-owned by US citizens) whose business activities fall within the scope of the Treaty of Amity.

The Treaty of Amity was enacted during the Vietnam War (Chiến Tranh Việt Nam). During the interwar years and the years of conflict, the U.S.A and Thailand both benefitted from close relations between the two. After the Second World War, Thai governments enacted numerous legislations

making it increasingly difficult for foreigners to do business in Thailand. As a result, the Treaty of Amity provides a relative advantage to Americans doing business in Thailand. It is, however, important to note that whilst the Treaty of Amity provides significant advantage to American entities and persons, it does not grant rights to immigrate, to own land, to a visa or the right to work.

American entities and persons benefit from the Treaty of Amity in two ways:

- The Treaty of Amity permits American companies to hold a majority of shares or the whole company itself located in Thailand. As previously described, such an arrangement is generally not available to foreigners in Thailand; and
- American companies may engage in business on the same basis as Thai companies and are exempt from most of the restrictions on foreign investment imposed by the FBA.

In order to be eligible for privileges available under the Treaty of Amity, the following requirements must be adhered to:

- A minimum 51 percent of all shares in the Thai entity must be held by American citizens;
- A minimum 50 percent of directors in the entity must be American citizens; and
- The entity must meet certain minimum capital requirements.

Should the type of business not fall under the “restricted” category of the FBA, the minimum capital requirement for a Treaty-protected company is THB 2 million. Conversely, should a business need to obtain an FBL under the FBA, the minimum capital requirement is THB 3 million for each business activity.

The MOC will issue an acknowledgment letter to qualified applicants duly registered under the Treaty of Amity entitling such companies to national treatment for the purpose of exemption from the FBA. In practice, the letter is normally delivered within one or two months.

While the Treaty of Amity provides two significant trade advantages as described above, the US citizen/company is also subject to several restrictions stipulated in the treaty itself. The Treaty of Amity prohibits American investors from engaging in the following “reserved” activities:

- Owning land;
- Conducting business in communication and inland transportation industries;
- Engaging in fiduciary functions;
- Participating in banking involving depository functions;
- Engaging in domestic trade in indigenous agricultural products; and
- Exploiting land or other natural resources.

### **Procedures**

The brief procedures to obtain certification under the Treaty of Amity and subsequently reap the benefits provided by it is set out in the following:

- Step 1 – Document filing

The applicant obtains documents demonstrating that the company has been incorporated and registered in compliance with Thai law.

- Step 2 – Certification

The above-mentioned documents are then submitted to the US Embassy in Bangkok. The US Embassy in Bangkok will then provide certification to the Thai Department of Commercial Registration in the MOC that the applicant business organization is an American owned and managed company and thus entitled to national treatment under the Treaty of Amity provisions.

- Step 3 – Application to the Ministry of Commerce

After certification by the US Embassy in Bangkok, original copies of all required documents, along with completed application forms must be given to the Thai Department of Commercial Registration in the MOC in order to be fully registered under the Treaty.

### **Other Lawful Exemption to the Foreign Business Restriction**

Obtaining a BOI promotion exempts you from obtaining a Foreign Business License. However, obtaining a Foreign Business Certificate is still required.

## **3.3 Investment Guarantees by the Thai Government**

### **Standard Guarantees**

The BOI Act provides the following guarantees to investors:

- The State will not nationalize or unduly appropriate the assets of foreign private enterprises;
- No unfair competition from new State enterprises;
- Protection against monopolies of products similar to those produced by the promoted enterprise will not be permitted;
- Price controls will not be put in place; and
- Tax-exempt imports by government agencies or State enterprises that would unfairly disadvantage foreign enterprises are not allowed.

### **Tax Incentives**

To reduce the tax burden on promoted enterprises during the start-up period, BOI-promoted enterprises (discussed in 3.4 below) may be granted incentives in the form of exemption from the various taxes as detailed under section 3.4 below.

### **Non-Tax Incentives**

The BOI also grants non-tax privileges to a promoted company, including the right to own land for



conducting business, permission to employ foreign experts and technicians to engage in investment feasibility studies or work for the promoted business and permission to remit foreign currency outside of Thailand.

### 3.4 Thailand Board of Investment (Investment Promotion)

The Office of the Board of Investment of Thailand (the “BOI”) administers the BOI Act. The BOI operates under the Prime Minister’s Office and is the principal government agency for encouraging investment in Thailand. The BOI has 14 offices in the following cities: Beijing, China; Frankfurt, Germany; Guangzhou, China; Los Angeles, USA; Mumbai, India; New York, USA; Osaka, Japan; Paris, France; Seoul, Korea; Shanghai, China; Stockholm, Sweden; Sydney, Australia; Taipei, Taiwan; and Tokyo, Japan. The offices also serve as points of contact for Thai investors looking to invest abroad.

#### 3.4.1 Thailand BOI – An Introduction

The BOI on 3 December 2015 launched its new policy under the announcement of the BOI No. 2/2557 with the vision: *“to promote valuable investment, both investment in Thailand and Thai overseas investment, in order to enhance the nation’s competitiveness, to overcome the middle-income trap and to achieve sustainable growth in accordance with the philosophy of sufficiency economy”*.

#### Support and Services Offered to Foreign Investors Looking to Invest in Thailand

The BOI facilitates businesses considering investing in promising investment prospects in Thailand in the following ways:

- Offering an attractive and competitive package of tax incentives;
- Imposing no foreign equity restrictions on manufacturing activities;
- Providing assistance in the provision of visas and work permits to facilitate entry and subsequent operation for a foreign-owned business; and
- Waiving restrictions on land ownership by foreign entities.

#### Support for Thailand Outbound Investments

The BOI also assists Thai companies in their ambitions to invest abroad by offering mentoring and general advice. Such a change in direction has been done for the purposes of improving the industrial competitiveness of Thailand. BOI research has shown that Thailand’s levels of outbound investment fared poorly when compared to other countries in the region such as Malaysia and Singapore. However, recent incentives by the government and a strong performing currency have empowered Thai companies to invest further abroad and the results so far appear to be positive.

The BOI plans to encourage further Thai outbound investment by:

- Exploring new and potentially lucrative investment opportunities in neighboring countries and presenting them to potential investors;
- Providing information, knowledge and support on foreign investment policies; and

- Hosting seminars with Thai investors who have previously invested overseas to share knowledge and encourage more outbound investment.

As the BOI considers Thailand outbound investments a national priority that needs constant monitoring, the BOI has established the Thai Overseas Investment Services Center (the “**TOISC**”) and the Thai Overseas Investment Information Center (the “**TOIIC**”). The TOISC organizes and delivers training modules and seminars to Thai business people before they go abroad. Meanwhile, the TOIIC not only provides market data for investors but also guides Thai business professionals on how best to invest abroad. The TOIIC conducts in-depth studies on investment prospects in Association of Southeast Asian Nation member states (“**ASEAN**”) and arranges seminars on many investment-related issues, like laws and regulations on doing business overseas and identifying opportunities in growth industries.

### 3.4.2 General Criterion for BOI Promotion

The BOI considers applications for BOI promotional privileges based on projects with investment not exceeding THB 500 million.

The requirements are as follows:

- The value added to the project should not be less than 20 percent of sales revenue, except for projects which manufacture electronic products and parts or that process agricultural products and projects granted special approval by the BOI;
- The debt-to-equity ratio should not exceed 3:1 for a newly established project;
- The use of modern production processes and new machinery;
- The application of adequate environmental protection systems;
- Opportunities for technology transfer to Thai companies;
- Training and development of Thai employees; and
- Promoted projects with an investment capital of THB 10 million or more (excluding land and working capital) are required to obtain ISO 9000 certification or similar international certification.

For projects with capital investment of more than THB 500 million (excluding cost of land and working capital), a feasibility study of the project must also be prepared and submitted to the BOI for their consideration.

### 3.4.3 Investment Incentives and Privileges

#### 3.4.3.1 Investment Promotion Zones

In order to alleviate the strain on Bangkok’s infrastructure and to extend the benefits of development to the countryside, the Industrial Estate Authority of Thailand Act B.E. 2522 (A.D. 1979) provides assistance and special incentives for investors operating within industrial estates. There are two categories of industrial estates:

- **Special Economic Zone (“SEZ”)** – An area designated for industrial activities. Any person wishing to operate a business in an industrial estate must obtain a permit from the governor of the Industrial Estate Authority of Thailand (the “IEAT”). Industrial operators are granted certain privileges, including the right to own land in the industrial estate area, to obtain work permits for foreign technicians and experts working for the industrial operator.
- **IEAT Free Zone** – Operators in an IEAT Free Zone are afforded the privilege of exporting products without any restrictions and with the added convenience of being able to import merchandise or raw materials into an IEAT Free Zone. Such supplies are entitled to improved tax and duty privileges, including tax burden relief for products taken out of an IEAT Free Zone for domestic use or consumption.

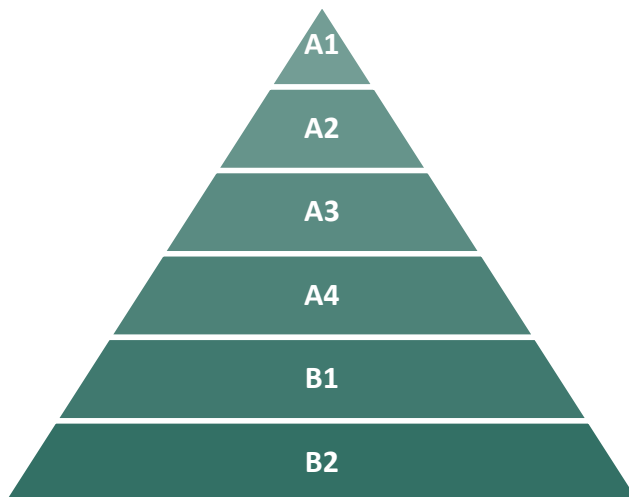
### 3.4.3.2 BOI Incentives

Under the BOI’s Seven-Year Investment Promotion Strategy (2015-2021), there exist two types of incentives being offered to businesses: activities-based and merit-based incentives. Activity-based incentives provide a range of incentives based on the activity being conducted by businesses; while the merit-based incentives are available to all activities (unless specifically excluded by the BOI).

The two classes of incentives are distinguished below:

#### Activity-based Incentives

The incentives are classified into “groups” based upon the priority, as determined by the BOI of the business activities being conducted.



The height of the classification level in the pyramid corresponds to the attractiveness of the incentive package being offered.

Each incentive package is summarized below for your reference.

## **Group A**

Group A represents activities that shall receive CIT incentives, machinery and raw materials import duty incentives and other non-tax incentives.

The group is divided into four subgroups as follows:

- **Group A1** will receive the following incentives:
  - Eight-year CIT exemption without being subject to a CIT exemption cap;
  - Exemption of import duty on machinery;
  - Exemption of import duty on raw or essential materials used in manufacturing export products for one year, which can be extended as deemed appropriate by the Board;
  - Merit-based incentives; and
  - Other non-tax incentives.
- **Group A2** will receive the following incentives:
  - Eight-year CIT exemption, accounting for 100 percent of investment (excluding cost of land and working capital);
  - Exemption of import duty on machinery;
  - Exemption of import duty on raw or essential materials used in manufacturing export products for one year, which can be extended as deemed appropriate by the Board;
  - Merit-based incentives; and
  - Other non-tax incentives.
- **Group A3** will receive the following incentives:
  - Five-year CIT exemption, accounting for 100 percent of investment (excluding cost of land and working capital) unless specified in the list of activities eligible for investment promotion that the activity will be granted CIT exemption without being subject to a CIT exemption cap;
  - Exemption of import duty on machinery;
  - Exemption of import duty on raw or essential materials used in manufacturing export products for one year which can be extended as deemed it appropriate by the Board;
  - Merit-based incentives; and
  - Other non-tax incentives.
- **Group A4** will receive the following incentives:
  - Three-year CIT exemption, accounting for 100 percent of investment (excluding cost of land and working capital);
  - Exemption of import duty on machinery;

- Exemption of import duty on raw or essential materials used in manufacturing export products for one year, which can be extended as deemed appropriate by the Board;
- Merit-based incentives; and
- Other non-tax incentives.

### **Group B**

Group B represents a group of activities that will receive only machinery and raw materials import duty incentives and other non-tax incentives.

The group is divided into two subgroups as follows:

- **Group B1** will receive the following incentives:
  - Exemption of import duty on machinery;
  - Exemption of import duty on raw or essential materials used in manufacturing export products for one-year which can be extended as deemed appropriate by the Board; and
  - Other non-tax incentives.
- **Group B2** will receive the following incentives:
  - Exemption of import duty on raw or essential materials used in manufacturing export products for one year which can be extended as deemed appropriate by the Board; and
  - Other non-tax incentives.

### **Merit-based Incentives**

To attract and stimulate more investment or spending on activities that benefit the country and its industries, the BOI provides additional incentives based on the respective merits of the projects as follows:

#### **Merit for the Competitiveness Enhancement**

In case a project has the following investments or expenditures:

- Research and development (“**R&D**”) in technology and innovation including in-house R&D, outsourcing R&D in Thailand or joint R&D with institutes located overseas;
- Donations to technology and human resources development funds, educational institutes, specialized training centers, research institutes or governmental agencies in the science and technology sectors in Thailand, as approved by the Board;
- IP acquisition/licensing fees for commercializing technology developed in Thailand;
- Advanced technology training;
- Development of local suppliers with at least 51 percent Thai shareholding in advanced technology training and technical assistance; or
- Product and packaging design; either in-house or outsourcing in Thailand, as approved by the Board.

**Additional Incentives**

- One additional year of CIT exemption will be granted if qualified investments or expenditures are not less than one percent of the project's total revenue of the first three years combined, or not less than THB 200 million, whichever is less. However, the total period of CIT exemption will not exceed eight-years.
- Two additional years of CIT exemption will be granted if qualified investments or expenditures are not less than two percent of the project's total revenue of the first three years combined, or not less than THB 400 million, whichever is less. However, the total period of CIT exemption will not exceed eight-years.
- Three additional years of CIT exemption will be granted if qualified investments or expenditures are not less than three percent of the project's total revenue of the first three years combined, or not less than THB 600 million, whichever is less. However, the total period of CIT exemption will not exceed eight-years.

The cap on additional CIT exemption accounts for 200 percent of the investments and expenditures specified in Section 1 above and 100 percent of the investments and expenditures specified in Sections 2-6 above.

**Merit on Decentralization**

In the case of projects that are located in the defined investment promotion zones, these projects may receive additional incentives as follows:

- Three additional years of CIT exemption will be granted. However, the total period of CIT exemption will not exceed eight-years. Projects with activities in Group A1 or A2 that have been granted eight-years CIT exemption will instead receive a 50 percent reduction of CIT on net profits derived from a promoted activity for five-years upon expiration of the CIT exemption period.
- Double deduction for transportation, electricity, and water costs will be granted for a period of ten-years from the date revenue was first derived from the promoted activity.
- Deduction from net profits of 25 percent of the project's infrastructure installation or construction costs will be granted in addition to normal depreciation. Such deductions can be made from the net profit of one year or several years within ten-years of the date of revenue being first derived from the promoted activity.

**Merit on Industrial Area Development**

If projects are located within industrial estates or promoted industrial zones, these projects may be granted one additional year of CIT exemption. However, the total period of CIT exemption will not exceed eight-years. In the event one of the conditions for an activity to be promoted under the BOI is for the projects to be located within industrial estates or promoted industrial zones, this additional incentive will not apply as it is considered a condition of the promotion rather than an additional effort made by the company. The BOI has listed 20 provinces with low average income where investment will be heavily directed:

Kalasin	Yasothon
Chaiyaphum	Roi Et
Nakhon Phanom	Si Sa Ket
Nan	Sakhon Nakhon
Bueng Kan	Sa Kaew
Buri Ram	Sukhothai
Phrae	Surin
Maha Sarakham	Nong Bua Lamphu
Mukdahan	Ubon Ratchatani
Mae Hong Son	Amnat Charoen

#### 3.4.4 Effect of Violations and Non-Compliance

If a promoted project violates or fails to comply with the conditions stipulated by the BOI promotion license, the BOI may withdraw the rights and benefits granted in part or in their entirety.

If the BOI committee believes such violation or failure to comply with the conditions of the license is unintentional, the BOI committee may first instruct the BOI office to serve a written warning that the promoted entity must remedy the failure or otherwise comply with the conditions within a prescribed period.

Should non-compliance still occur after the prescribed period, then the BOI may withdraw the rights and benefits granted in part or in their entirety.

## Chapter 4

# Land and Real Estate

### 4.1 Land Ownership Situation

The Government is in the process of enforcing existing land ownership restrictions under the Land Code B.E. 2497 (A.D. 1954). In particular, there have been several investigations conducted into nominee shareholding structures by the Department of Business Development. Past inspections resulted in few cases filed and no public accusations regarding corporations involved. It is likely that the majority of these cases will be settled out of court with few changes in the behavior of international investors in Thailand. Despite the fact that Thai officials are trying to make the real estate environment more secure, there is still a risk for companies with significant assets engaged in active business in Thailand.

**The Government and local authorities have sought to eradicate land fraud in Thailand. Such fraud, however, is still occurring, especially in Phuket Province and on islands such as Koh Samui. If you are making a land-related investment in Thailand, have your local attorney conduct due diligence before engaging in any kind of transaction.**

### 4.2 Forms of Property Interests

The Ministry of Interior (the “**MOI**”) regulates local land offices throughout the country for recognition and registration of property interests under the Land Code B.E. 2497 (A.D. 1954) and the Thailand Civil and Commercial Code (the “**CCC**”). Various forms of property interests are recognized under Thai real estate law, including a title deed (“**Chanote**”), confirmed certificate of land utilization (“**Nor Sor Saam Gor**”), certificate of land utilization (“**Nor Sor Saam**”) and certificate of possession (“**Sor Kor Neung**”). Generally, the more advanced forms of legally recognized property interest (Chanote and Nor Sor Saam Gor) are suitable for investment and land development purposes, with formal land surveys and reliable land registration procedures.

A Chanote contains all information customarily contained in a title deed, including a cadastral map with marked boundaries, identification of registered owners, transaction history, lessees, mortgages, and other encumbrances. Accordingly, land due diligence procedures can identify all relevant information with respect to the legality of the issuance of a title deed, land ownership, location, and registered encumbrances (if any). A confirmed certificate of use (Nor Sor Saam Gor) is functionally equivalent to a title deed (Chanote) and can easily be upgraded.

**Even though a “Sor Kor Neung” is translated into English as a “certificate of possession”, it does not actually grant any rights of possession over a piece of land. The documents “Nor Sor Saam” and “Nor Sor Saam Gor”, translated as “certificate of utilization” and “certificate of confirmed utilization” actually grant more rights on the land although their translation into English could lead investors to think this is not the case.**



Type of Right	Prerogatives	Corresponding Document	Suitable for Investment Purposes
Occupation and Usage	Can occupy and use land.	Sor Kor Neung	NO
Temporary Occupation and Usage	Can occupy, sell, and use land. Land can also be inherited but is still owned by the Government.	Nor Sor Song	NO
Unconfirmed Possession	Can occupy, sell, use, lease, and mortgage land. The land can also be inherited but is still owned by the Government.	Nor Sor Saam	NO
Confirmed Possession – boundaries defined by aerial survey	Can occupy, sell use, lease, and mortgage land. The land can also be inherited but the land is still owned by the Government.	Nor Sor Saam Gor	YES
Legal Ownership	Can occupy, sell, use, lease, and mortgage land. The land can also be inherited and is not owned by the Government, but by an individual.	Nor Sor Si (Chanote)	YES

### 4.3 Registration of Property Interests

Local land registry offices maintain accurate registration records of most property interests, including land ownership under a title deed (Chanote), long-term land leases, condominium ownership, condominium long-term leases and ownership of structures (e.g. office buildings, hotels, residential villas, etc.). Unless separately registered, a structure is deemed to be owned by the registered owner of the underlying land.

A foreign investor can purchase (or construct) a building on leased land. The ownership of the building, however, cannot be registered directly on a land title deed. Rather, documentary evidence of building ownership may include:

- Construction permit;
- Construction agreement or purchase and sale agreement; or
- Form Tor Aor 13 filed with the local land office.

Under Section 538 of the CCC, a land lease with a term of more than three years must be made in writing and registered with the local land office. Otherwise, the lease term is only enforceable during the first three years. Under Section 540 of the CCC, a land lease may be registered for a maximum

period of 30 years and the lease term may be renewed but the renewal term may not exceed 30 years.

**It is vital that a foreign investor separately registers under his/her own name on a structure built on a piece of land he/she leases. There is a legal presumption in Thai law that a structure is under the ownership of a landowner (lessor) and not a foreign investor (lessee).**

#### 4.4 Land Allocation Licenses

Property developers subdividing a land plot (or contiguous land plots) into ten or more subdivided plots for sale are required to obtain a “land allocation license”, as required under the Land Allocation Act B.E. 2543 (A.D. 2000). Property developers must prepare detailed land allocation license applications to be filed with a local land office. Such applications must include the following documents:

- Land development master plan;
- Land improvement plan;
- Public utilities maintenance plan and bank guarantee in relation thereto;
- List of encumbrances (if any) affecting the subdivided plots;
- Land purchase and sale agreement; and
- Copies of the relevant land title deeds (Chanote) and/or confirmed certificates of land utilization (Nor Sor Saam Gor).

The subdivision of land plots for leasing purposes (as opposed to the sale of subdivided land plots) is not regulated under the Land Allocation Act.

#### 4.5 Foreign Ownership of Land

Under the Land Code and the Foreign Business Act B.E. 2542 (A.D. 1999) (the “FBA”), foreign corporations and foreign citizens are strictly prohibited from owning land in Thailand. Section 36 of the FBA prohibits any Thai national or Thai juristic person from “aiding or abetting or taking part” in any business restricted under the Act, including “land trading”. Nevertheless, foreign investors have often formed Thai corporations to own land in cooperation with Thai majority shareholders.

In recent years, the MOI has adopted a strict enforcement policy and issued a series of regulations to limit the use of Thai land-holding companies by foreign investors. Local land registry offices now require Thai shareholders to provide evidence of the funding source for capitalization of any Thai corporation with foreign shareholders (or foreign directors) engaged in land development. The local land registry office has the power to examine the shareholding of such companies to ensure that control over the company is actually being exercised by the Thai shareholders and requires evidence which proves that the source of funds is from the Thai shareholders if there is foreign shareholding (or if any directors are foreign citizens).

A MOI regulation (Mor Tor 0515/Wor 2227) dated 21 July 2008, confirms that any Thai person who owns land for the beneficial interest of foreigners will be subject to both civil sanctions under the Land Code and criminal sanctions under the Criminal Code.

Based upon the strict enforcement policy of the MOI, foreign investors interested in land development are well advised to hold property rights through registered, long-term leasehold interests (as opposed to freehold land ownership).

#### 4.5.1 Long-Term Land Leasing

As noted above, Section 540 of the CCC provides that a land lease must not exceed 30 years. The lease term may be renewed, but the renewal term must not exceed 30 years. Local land registry offices have been reticent to register a 30-year lease renewal prior to the expiration of the original 30-year term.

Under certain circumstances; however, the Lease of Immovable Property for Commercial or Industrial Purposes Act of B.E. 2542 (A.D. 1999) grants a maximum lease term of 30-50 years if the lease has an industrial or commercial purpose. After this initial term, an extension of not more than 50 years is possible. Similar to an ordinary long-term lease, this extension term can only be registered after the initial term has already expired.

Certain risks may apply to long-term leases granted by Thai citizens (as opposed to long-term leases granted by Thai corporations). A decision of the Supreme Court of Thailand has cast uncertainty as to the enforceability of lease renewal terms against the heirs of individual lessors. Accordingly, lessees are well advised to enter into long-term leases with well-established Thai corporations. In addition, long-term lease agreements should restrict the lessors from transferring land without the consent of the lessee (in order to avoid the possible transfer of the land to an individual lessor).

#### 4.5.2 Exemption to Foreign Land Ownership and Land Lease Restrictions

In general, foreign investors may own land by way of certain exemptions under Thai law. The most elementary way for foreign investors to take advantage of such exemptions is to own land according to the Industrial Estate Authority of Thailand Act B.E. 2543 (A.D. 1979) or the Investment Promotion Act B.E. 2535 (A.D. 1992).

The Industrial Estate Authority of Thailand (the “**IEAT**”) has the authority to approve foreign ownership of land located within designated industrial estates for the purposes of industrial production. In cases where foreign operators dissolve or transfer its business to a third party, the foreign operator is required to dispose of the land approved for foreign ownership and fixtures to the IEAT. The land may also be transferred to a transferee of the business within one year from the date of dissolution of the promoted activity or from the date of transfer of the business. Otherwise the Director-General of the Land Department will have the power to dispose of such land and fixtures in accordance with the Land Code.

With respect to another exemption, the Investment Promotion Act B.E. 2535 (A.D. 1992), the Board of Investment of Thailand (the “**BOI**”) has the authority to approve a foreign investor, as a promoted person under the Investment Promotion Act B.E. 2535 (A.D. 1992), to own any land relating to promoted projects. These include; the land underlying the foreign investor’s facility, residential homes for foreign employees and residential housing for local employees. In order to authorize foreign ownership of land related to BOI-promoted activity, the BOI provides a letter of authorization to be presented to the relevant local land registry office. In case the foreign person (promoted person) under the Land Code dissolves or transfers the promoted activity to a third party,

such a person is required to dispose of the land approved for foreign ownership within one year from the date of dissolution of the activity. This may also be done from the date of transfer of the business to a third party. Otherwise the Director-General of the Land Department will have the power to dispose of such land in accordance with the Land Code.

**Ownership of land is one of the non-tax incentives awarded to a BOI promoted investor. Other non-tax incentives include:**

- **Permission to enter Thailand for the purpose of studying investment opportunities; and**
- **Permission to bring skilled workers and experts in the field of the promoted activity in Thailand.**

## 4.6 Foreign Ownership of Condominiums

### 4.6.1 Leasing Condominiums

A foreign investor is generally permitted to purchase one condominium unit for personal use. Otherwise, if the foreign investor generates income by leasing condominium units, the foreign investor may be deemed as engaging in a leasing business, in violation of the provisions enshrined in the FBA.

If a lessor is a foreign corporation, the leasing income will be subject to Corporate Income Tax (“**CIT**”) at the same rate that applies to Thai corporations (currently 20 percent). The lessor must also obtain the permission of the Bank of Thailand (the “**BOT**”) to repatriate leasing income. Foreign investors leasing property will be subject to Personal Income Tax (“**PIT**”) at progressive rates (from the fiscal year 2015 onward, ranging from zero percent to 35 percent).

If a condominium unit is leased to a Thai corporation as a lessee, the lease payments are subject to Withholding Tax (“**WHT**”) at a rate of five percent. The WHT does not apply to individual lessees.

Personal Income Tax	
Taxable income in THB	Tax rate %
1 – 150,000	Exempt
150,001 – 300,000	5%
300,001 – 500,000	10%
500,001 – 750,000	15%
750,001 – 1,000,000	20%
1,000,001 – 2,000,000	25%
2,000,001 – 5,000,000	30%
5,000,001 and over	35%

#### 4.6.2 Added Protection for Condominium Buyers

The Condominium Act B.E. 2522 (A.D. 1979) allows foreign ownership of individual condominium units, provided that only up to 49 percent of the total livable area in a particular condominium building is owned by foreigners.

Following the substantial improvement in the Thai condominium market, Thai authorities have tried to strengthen regulation through the amended Condominium Act No.4 B.E. 2551 (A.D. 2008). Under this amendment, condominium buyers are protected with respect to claims made in advertisements such as brochures, handbills, or leaflets made by developers. Developers are responsible for condominium units and commons areas which are advertised in such forms of media (condominium units and common areas), which are required to match the claims depicted on such advertisements. The law ensures developers are accountable for claims made in their advertisements and imposes fines of between THB 50,000 to THB 100,000 for violations of incorrect or misleading advertisements.

The law also sets the standard for contracts and clarifies that developers are responsible for the monthly common-area fees for any unsold condominium units. If a unitholder fails to pay the fees, the condominium juristic person can charge a maximum interest rate of 12 percent per year for payment that is one month overdue and up to 20 percent per year for payments that are six months overdue.

### 4.7 Construction and Zoning

Construction of buildings in Thailand is mainly regulated by the Building Control Act B.E. 2522 (A.D. 1979) (the “BCA”) and the Town and City Planning Act B.E. 2518 (A.D. 1975) (the “TCPA”) which provide the permissible uses of land in different zones and under different restrictions. Particularly, the TCPA empowers government authorities to enact the Ministerial Regulations relating to zone restrictions.

The owner of a building is generally required to obtain a construction permit from the competent sub-district administrative organization before commencing construction if the intended area for such construction is subject to the BCA. A construction permit will be generally valid for only one year after the date of issuance and may be renewed yearly for a maximum of three years. Worth noting is that the period of validity and permissible extension of a construction permit may vary on the size of building.

Apart from the BCA, the TCPA is another major piece of legislation on land use and building construction, which empowers the Interior Minister to announce ministerial regulations regarding the permissible land uses and restrictions on building construction in municipalities and provincial areas. Such ministerial regulations will, in general, be effective for five years. These regulations normally apply different zoning designations to the enforceable areas such as: (i) low-density residential zones; (ii) medium-density residential zones; (iii) high-density residential and commercial zones; (iv) industrial and warehousing zones; (v) rural and agricultural zones; (vi) rural and agricultural conservation zones; (vii) recreation and environmental conservation zones; (viii) specific industrial zones; (ix) educational institution zones; (x) religious institution zones, and (xi) governmental and public institution zones.

For example, a rural and agricultural conservation zone is designated for the purpose of natural conservation and rural preservation. Concerning utilization of the land, a building of total area no

larger than the specified size (e.g. 200 square meters per building), government institutions, or public utilities will be permitted.

In addition to the TCPA, the Ministry of Natural Resources and Environment (the “**MNRE**”) has the authority to set restrictions on the use of land throughout Thailand based upon environmental considerations and management of natural resources according to the Environmental Conservation and Protection Act B.E. 2535 (A.D. 1992) (the “**ECPA**”). The ECPA establishes the National Environment Board (under the supervision of the MNRE) to ensure the protection, conservation and promotion of the nation’s natural environment. If the sector requires prior approval of an Environmental Impact Assessment (“**EIA**”) report and the impact of proposed mitigation measures, the project company must conduct a study and assessment and submit an EIA report for approval before embarking on the project work. There exist 35 categories of industries that are required to prepare an EIA report as listed in the notification, which notably includes hotels, residential condominiums and other land developed for residential or commercial purposes.

#### **4.8 Escrow Law**

Another legal measure to safeguard the interests of investors in Thai real estate was implemented through the enactment of the Escrow Act B.E. 2551 (A.D. 2008), which came into effect on 20 May 2008.

While the Escrow Act identifies the specific types of transactions governed by the acts (namely, any reciprocal contract where a contractual party is obligated to transfer or deliver property or documents embodying the obligation and where the other contractual party is obligated to make payment under the contract), the business sector seemingly most affected is real estate.

For example, a buyer in a real estate project, such as a condominium or villa project, must pay a substantial amount to the developer and hope that the developer of the project develops the project on budget and on time. In the Thai real estate market, developers often finance their projects by channeling funds from deposits received from buyers.

Occasionally, these projects stall due to lack of additional funding, leaving buyers with the difficult task of attempting to recoup their payments under the costly and time-consuming court processes in Thailand. Buyers are also disadvantaged in such situations due to the unpredictability of damage awards. Hence, the role of the escrow agent is to eliminate or at least, mitigate these problems.

An escrow agent has a duty to ensure that the contractual parties perform their obligations within the period of time under the conditions set forth in the escrow agreement. The agent may also have a duty to hold funds, property and/or documents embodying the obligation that the contractual parties have placed under its custody. This agent may also deliver funds and arrange for the transfer of ownership or rights in the property subject to the escrow agreement.

An agent that intends to engage in an escrow business is required to obtain a license from the Ministry of Finance, with a recommendation from the Escrow Business Operation Supervision Committee. Furthermore, an agent must be a financial institution or other type of juristic person as prescribed in the ministerial regulations.

Due to the popularity of escrow agents, financial institutions are now bucking the trend and offering escrow services.

An escrow agreement must be made in writing and signed by the contractual parties and the escrow agent (a trilateral contract). It must specify:

- The name of the reciprocal contract prescribed between the contractual parties;
- The period of time or conditions governing the delivery of property or documents embodying the obligation;
- The delivery of money of the contractual parties;
- Rights; and
- Duties and liabilities of the contractual parties and the escrow agent.

An escrow agent must not co-mingle the property of the contractual properties with its own, and it must prepare a list of property of each contractual party separate from its own properties and must also maintain the same according to the requirements prescribed by the Committee.

With regards to the transfer of rights in relation to immovable property, the escrow agent must notify the relevant officer under the land code in writing and the officer records the notice as evidence. Such record-keeping restricts the land office from registering any transfer of rights in such property until the officer is so notified by the escrow agent.

# Chapter 5

## Intellectual Property

### 5.1 Intellectual Property – An Overview

Widespread commercial intellectual property (“IP”) counterfeiting and piracy continue to plague intellectual property rights owners in Thailand. The reason behind this is a lack of enforcement and prosecution of offenders. However, the Thai government is now taking intellectual property offenses more seriously. With World Trade Organization (the “WTO”) membership, Thailand has had to amend its existing laws and enact new legislation in order to meet international standards.

Despite the changes in legislation and practices implemented by Thailand, in 2016 the United States Trade Representative (“USTR”) Special 301 Report included Thailand on the Priority Watch List, the reason being that there had still been considerable violations of intellectual property ever since Thailand’s initial inclusion in the report in 1989. This view held by the USTR has resulted in the Thai government exerting special efforts to enhance the existing legal framework on the protection of intellectual property. The United States has acknowledged recent positive efforts by the Thai government, including amendments to the Copyright Act in 2015 which included the criminal offense of unauthorized camera recording of motion pictures in theaters and copyrighted work on the internet, the amendments also included: (i) the protection of Rights Management Information (“RMI”) and Technological Protection Measures (“TPM”); (ii) the restructuring of the Trade Secret Committee; (iii) the modification of penalty provisions under the Trade Secrets Act 2015; and (iv) the acceleration of patent examination and registration procedures.

Outlined below is the background to the applicable legislative framework in Thailand in connection with intellectual property rights, such as copyrights, patents, trademarks and trade secrets.

**In 2016, Thailand ranked fourth worldwide in fake goods trade according to the Organization for Economic Co-operation and Development (“OECD”), behind China, Turkey and Singapore.**

### 5.2 Copyrights

Thailand became a signatory member of the Berne Convention in 1931. The country has also accepted the standards set by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) under the WTO.

Copyright in Thailand is governed by the Copyright Act B.E. 2537 (A.D. 1994) with amendments added in B.E. 2558 (A.D. 2015). Thailand’s Copyright Act conforms to the standards set by the Berne Convention and TRIPs and provides copyright protection for literary works, artistic works, and performance rights – by making it unlawful to reproduce or publish such works without the author’s permission.

Pursuant to the law, copyright is defined as the exclusive right to execute any act regarding the work created by the author. A copyright is a work that is produced from intellect, knowledge and



assiduousness to innovate the work. It is considered a type of intellectual property that has economic value.

Under the Copyright Act, rights under copyright will be acquired immediately after an innovator developed the work, without having to go through any formal registration process. The owner of copyrighted material or property could therefore protect their work by bringing together relevant evidence that may be used to prove ownership.

**Copyright income is deductible up to 50% of such assessable income (capped at THB 100,000) from your general income when calculating your Personal Income Tax.**

### 5.2.1 Conditions for Filing Record of Creation

A copyright belongs to the author of a work, subject to the following conditions:

- In the case of unpublished work, the author must be of Thai nationality or reside in Thailand, or be a national of or reside in a country which is a member to the Convention on the Protection of Copyright;
- In cases where the author is a juristic person, such a juristic person must be established under Thai law; and
- In the case of published work, the first publication must be made in Thailand or in a country that is a member of the Convention on the Protection of Copyright. Otherwise, the work created must have been published in Thailand or in a country which is a member of the Convention within 30-days from the date of first publication, or the author must have the qualifications as prescribed above at the time of first publication.

In regard to copyright infringement, an author may take legal action against an infringing party on any act done in relation to reproducing, adapting, publishing, or renting a copyrighted work owned by the author. An exemption to this is the use of certain copyrighted work for personal benefits by family members or close relatives, such as research, education and teaching or for the benefit of disabled persons, provided that the works are not used for any commercial purposes.

Under the Copyright Act, the copyright owner is entitled to grant licenses to other persons (either individuals or juristic) to use or exercise rights with respect to the copyrighted work.

### 5.2.2 Duration of Copyright Protection

A copyright in literature, drama, artistry or music is valid throughout the lifetime of the author, and for an additional 50-years thereafter. In the event that the author is a juristic person, the copyright will be valid for a period of 50-years following the creation of the work or the first publication. The copyright for applied artistic work is valid for a period of 25-years following the creation of the work or the date of first publication.

### 5.2.3 Penalties

Pursuant to the Copyright Act, a party who commits copyright infringement by means of reproduction without permission from a copyright owner may be fined THB 20,000 to THB 200,000. If the copyright infringement was committed with the intention to benefit the offender's business,

the offender may face punishment by imprisonment for a term from six months to four years or a fine from THB 100,000 to THB 800,000, or both. If the copyrighted materials are motion pictures, sound, or pictures that were recorded during a cinema performance, such an infringement will result in the offender facing imprisonment for a term from six months to four years and/or a fine from THB 100,000 to THB 800,000.

### 5.3 Patents

A patent is a form of intellectual property that can be assigned, transferred, licensed or used by the owner. Thailand promulgated its first patent law in 1979, the Patent Act B.E. 2522 (A.D. 1979), with significant amendments added in B.E. 2535 (A.D. 1992) and B.E. 2542 (A.D. 1999). The Act protects inventions, product designs and pharmaceuticals. Thailand has numerous bilateral agreements enabling citizens of other countries to file patent applications in Thailand. Thailand has acceded to the Paris Convention for the Protection of Industrial Property on 2 May 2008 and the Patent Cooperation Treaty (the “PCT”) on 24 September 2009.

#### 5.3.1 Permitted Patents

In order to be patented, an invention must have novelty, involve an inventive step and be capable of industrial application. In this regard, the two last qualifications are also applicable to product designs. However, some inventions cannot be patented; such as those in connection with animals, plants and extracted substances from animals or plants, scientific or mathematical rules or theories, computer programs, methods of diagnoses, treatment and care of human and animal diseases, and inventions that are contrary to public order or morality and public health or welfare.

**An alternative in order to protect an invention which has not met the patent requirements is to register under the petty patent model (or utility model). Such an invention, unlike an ordinary patent, will only require the invention to have (i) novelty and (ii) be capable of industrial application.**

#### 5.3.2 Standing to Apply for a Patent

Under the Patent Act, the right to apply for a patent is limited only to a person or a juristic person who holds Thai nationality or a nationality of a country that allows persons of Thai nationality to apply for patents in that country. Patent owners who are domiciled in Thailand or domiciled in a member state of the PCT are eligible to file a PCT application in Thailand. However, an alternative option also exists for foreign patent holders; foreign patent-holders or owners of rights to inventions or designs located in foreign countries may enter into business transactions with parties in Thailand and seek equivalent protection through contractual obligations in the form of a licensing agreement.

Once the patent has been granted, a patent-holder has the exclusive right to produce, use, sell and possess for sale, offer for sale, and import the patented invention or design, and the right to use the words “Thai Patent”, or an abbreviation or translation. Moreover, a patent-holder may also assign the patent to another holder.

**For patent registration, Thailand uses the “first-to-file” system used by many other countries, by granting exclusive rights to the application from the first filing date.**

In the event different inventors file two or more applications for the same inventions at the same date, three options are available:

- a. The inventors agree to use the patent jointly;
- b. One inventor is granted the patent singly; and
- c. If no agreement is reached within the period prescribed by the Director-General, the inventors have 90 days to bring the case to Court, otherwise they will be deemed to have abandoned their application for the patent.

### 5.3.3 Validity of Patent

The validity period of a patent is 20 years for inventions and ten years for designs with both commencing from the date of filing the application. The time during which court proceedings regarding the issuance of the patent are in process may be excluded. A petty patent lasts only six years; however, it may be renewed twice: firstly, for two years, and secondly for a further two years.

### 5.3.4 Penalties

Any person who commits acts that are within the scope of the exclusive rights of a patent holder without the patent holder's authorization may be held criminally liable by imprisonment for up to two years or a fine up to THB 200,000, or both.

## 5.4 Trademarks

The legislation that governs the enforcement of trademark rights is the Trademark Act B.E. 2534 (A.D. 1991), the Penal Code and the Thailand Civil and Commercial Code (the "CCC").

From 28 July 2016 onwards, the Trademark Act B.E. 2534 (A.D. 1991) amended by the Trademark Act (No.2) B.E. 2543 and the Trademark Act (No.3) B.E. 2559 (A.D. 2016) includes the protection of sound marks. The definition of "mark" which can be registered according to Section 4 has been amended to include "sound".

Furthermore, there is also an amendment concerning the process and the period for registration to be more effective. For instance, the period to comply with the order of an official has been reduced from 90 to 60 days. Moreover, the Act specifies the penalties on the misuse of a package with a registered trademark with the intent to lure a customer into believing that such product is an authentic product.

**Under Thai law, the current definition of trademarks eligible for registration includes:**

- Words and names
- Logos and symbols
- Signature
- Shapes or configurations of an object
- Colors
- Sounds

The trademark of "smell" was considered and proposed in a recent amendment as an addition to the current definition of a trademark in order to protect smells. However, this proposition was not adopted due to conflicting opinions.

### 5.4.1 Conditions for Registration

A trademark is defined as “a name or other symbol used by a manufacturer to distinguish his or her products from those of competitors”. The trademark must be “distinctive” and not identical or similar to those registered by others and must not be prohibited by Section 8 of the Trademark Act.

As of February 1992, variations on trademarks are covered under all the provisions of the Act and hence receive the same protection as trademarks under the law. In the case of service marks, all the provisions referring to “goods” in the act’s provisions will mean “services”.

A trademark application must be completed by the proprietor or his/her agent, in Thai, and filed with the Trademark Office of the Department of Intellectual Property using the official forms provided by the authority. In order for a trademark to be registered, the proprietor or his/her agent must have a place of business or registered address in Thailand at which the Trademark Office can contact he/she. Upon receipt of the application, should the Trademark Office allow the trademark to be registered, and provided that no opposition to the trademark arises within 60 days of its publication in the official journal, the Trademark Registrar will grant registration.

In addition, under the Trademark Act (No.3) B.E. 2559 (A.D. 2016), the provisions regarding trademark registration under the Madrid Protocol has also been included in the Act. Therefore, the applicant for a trademark registration may apply for an international application in Thailand so that the applicant may designate other member states for protection or request territorial extensions for protection.

In order to apply, an applicant must have previously applied for trademark registration or possess a registered trademark in Thailand. Otherwise, the applicant must have the following qualifications: (i) being a Thai national or juristic person having principal office in Thailand; (ii) being domiciled in Thailand; and (iii) having an effective industrial or commercial establishment in Thailand.

#### **Validity of Registration**

A trademark is valid for ten years. Owners of trademarks must file an application for renewal at least three months prior to the expiration of their current trademark registration. A renewed trademark will be effective for an additional ten years. A trademark may be registered even if it is not being actively used.

The owner of a registered trademark has the exclusive right to utilize the trademark and may initiate legal action against violators who use the trademark without the registered owner’s consent. Moreover, the owner of a trademark that has been registered in Thailand may enter into a Trademark Licensing Agreement so as to allow other individuals or entities to legally use the trademark. The Trademark Licensing Agreement must be made in writing and must be duly registered at the Department of Intellectual Property in the Ministry of Commerce.

### 5.4.2 Penalties

It is a criminal offense to represent that a trademark is registered when it has not been legally registered with the Department of Intellectual Property. It is a further criminal offense to sell, possess for sale, or bring into the Kingdom objects/goods which represent an unregistered trademark. This offense is punishable by imprisonment of up to one year or a fine of up to THB

20,000, or both. It is also worth noting that presenting false evidence while registering a trademark is liable to a term of imprisonment of up to six months or a fine of up to THB 10,000, or both.

The penalties for a trademark forgery may include, as determined by a court, imprisonment of up to four years or a fine of up to THB 400,000. The penalties for trademark imitation are imprisonment for up to two years or a fine of up to THB 200,000, or both. Anyone who repeats these offenses within a five-year period may be held liable for double punishment.

**In 2013, a Thai coffee shop named “Starbung Coffee” lost a trademark infringement lawsuit against the Starbucks, the American multinational coffee company. The owner of the street shop used a logo parodying the famous green and white logo displaying a twin-tailed mermaid.**

**Even though the small vendor lost the case, it actually gained a lot of exposure from the lawsuit thanks to media coverage of the dispute.**

## 5.5 Trade Secrets

The legislation governing the enforcement of trade secret rights is the Trade Secrets Act B.E. 2545 (A.D. 2002) as amended by the Trade Secrets Act (No.2) B.E. 2558 (A.D. 2015). The Trade Secrets Act provides protection against misappropriation of confidential information such as formulas, methods, programs, processes, patterns, or compilations of information.

We provide below some basic guidelines on how Thai law seeks to protect trade secrets.

### 5.5.1 Protection of Trade Secrets

Although protection granted to trade secrets in Thailand does not require registration, it is important to note that for a company trade secret to be eligible for legal protection in Thailand several conditions must be met:

- The information must not be publicly known or must not be yet accessible by persons who are normally connected with the information;
- The information must possess a commercial value derived from its secrecy; and
- The controller of the information must have taken appropriate measures to maintain the secrecy of the information.

The “appropriate measures” detailed in the third requirement include, for example, non-disclosure and non-use clauses in all agreements governing the use of such trade secrets. Confidentiality provisions must be carefully and precisely drafted so as to accurately describe confidential information to which they relate to. “Appropriate measures” also require steps to be taken to physically protect data (physical measures to protect often includes the implementation of: restricted areas, closed distribution lists for certain type of information, restricted computer access, safes etc.). In case of breaches of confidentiality or misappropriation of trade secrets, the onus is on the trade secret owner to prove that the information was: (i) carefully and clearly classified as confidential; and (ii) that the disclosure was unauthorized or due to misappropriation.

### 5.5.2 Rights of Trade Secrets Owners

Trade secrets owners are exclusively entitled to disclose, deprive of, or use trade secrets, or license someone else to disclose, deprive of, or use trade secrets. Trade secrets owners can also stipulate any terms and conditions for the maintenance of secrecy.

Disclosure, deprivation, or use of a trade secret without the consent of the owner in a manner contrary to honest trade practices is considered an infringement under Thai law.

### 5.5.3 Remedies in Case of Trade Secrets Infringement

Where there is clear evidence that a trade secret infringement has been committed, the affected owner of a trade secret can:

- a. Petition to the court for an interim injunction; or
- b. File an action in the court for a permanent injunction in order to permanently stop the infringement and claim damages from the infringer.

In addition to civil remedies, criminal penalties may also be applied under Thailand's Trade Secret Act with criminal penalties up to one year in prison or a fine of up to THB 200,000, or both. In case a confidentiality agreement/confidentiality exists between a trade secret owner and the discloser, it is also possible to enforce such an agreement to ensure that the information remains confidential.

# Chapter 6

## Natural Resources and Environment

### 6.1 Natural Resources: Types and Regulation

In general, there are two main types of Natural Resources, namely the Oil & Gas, and Mineral. According to Thai legal principles, all-natural resources belong to the State and as such any person wishing to explore or produce natural resources must obtain a concession or license. Any concession granted cannot infringe upon fundamental land ownership rights of third parties. The concessionaire is also required to seek permission from the independent third-party landowner to carry out mineral exploitation activities and compensate him/her for losses (such as loss of use of land or crop damage). However, the government may expropriate private property for use in natural resource exploration and production – for example, for laying oil and gas pipelines. If it is in the public interest, mitigation measures concerning the affected population must be implemented by the government. Such mitigation measures may include relocation, occupational training, and monetary compensation.

#### 6.1.1 Regulation Concerning Oil & Gas

The Petroleum Act B.E. 2514 (A.D.1971) governs the administration and regulation of domestic petroleum operation, with a scope covering exploration, production, storage, transportation, sale and disposal of petroleum. On June 17, 2017, the Petroleum Act (No. 7) B.E. 2560 and the Petroleum Income Tax Act (No. 7) B.E. 2560 were both enacted, amending their predecessor laws in response to changing circumstances and to rectify exploration and production activities (“E&P”) obstacles wherever needed. Both laws entered into force on June 23, 2017. In the past a concession was the only way for international oil companies to participate in petroleum E&P in Thailand. The new law allows for E&P activities to be carried out through a production sharing contract or through a services contract as an alternative to the concession form. Under the new law, the Government through the Petroleum committee will consider the area of work and the proper benefit of the country in order to decide if a concession or PSC is appropriate for each E&P activity.

#### 6.1.2 Regulation Concerning Mineral

In Thailand, major mining rights include exploration rights and mining lease. According to the Minerals Act 2017, which consolidates the Minerals Act B.E.2510 (A.D.1967), as last amended in 2002, and the Mineral Royalty Act B.E.2509 (A.D.1966), as last amended in 1979, into a single statute, a company must apply for a prospecting license in order to engage in mining exploration or apply for mining license if the company wishes to conduct mining activities. However, the mineral rights granted under the Minerals Act are distinct from any rights to use the land. Therefore, it is necessary for a mining license applicant to acquire ownership or land use rights in addition to a mining license. The land use rights over mines vary depending on the types of land of any specific mining site, which can be divided into private land and public land. If the land is privately owned (private land), the

mining license applicant may acquire land ownership or land use right by way of purchase or lease of the land. If the land is government owned (public land), a land use permit or approval issued by the relevant government agency is required.

## 6.2 Royalties on the Extraction of Natural Resources

### 6.2.1 Petroleum Royalties

Petroleum royalties are normally depending on the term of each concession agreement are usually imposed a progressive rate. According to the Petroleum Act B.E. 2560 (2016), the royalty under a product sharing agreement can be calculated on a special percentage basis. In addition to royalties, petroleum concessionaires are also subject to income tax under the Petroleum Income Tax Act, BE 2560 (2016), as amended.

### 6.2.2 Mineral Royalties

The Thai government collects mineral royalties from mining and mineral production. The Minerals Act states that the persons under the Minerals Act, including the mining lease holders and metallurgical operators, must pay a mineral royalty. The mineral royalty rate for each type of mineral is determined by a ministerial regulation issued under the Mineral Act. Royalties are paid based on the value of the particular mineral. Some minerals are subject to progressive rates while other types of minerals are subject to flat rates according to the kind, type and importance of the mineral.

## 6.3 Export of Natural Resources

Thai law permits the imposition of restrictions on the export of natural resources if justified by compelling national security reasons. For example, the energy minister is authorized to prohibit the export of indigenous petroleum as may be necessary to ensure an adequate supply for domestic consumption. Export duties are imposed according to various tariff schedules.

**Thailand follows a policy of embargo regarding natural resource exports to restricted countries as mandated by any UN sanctions.**

## 6.4 Energy Industry Act and Implementing Regulations

The Energy Industry Act B.E. 2550 (2007) (the “**2007 Energy Act**”) was promulgated in as the legal framework to regulate electricity and natural gas businesses. This act established a new regulatory regime for electricity businesses which includes the production, procurement, transmission and distribution of electricity.

Importantly, the 2007 Energy Act establishes the Energy Regulatory Commission (“**ERC**”), comprising one chairman and six other members (appointed by the King of Thailand). The Thai regulator is partially independent, subject to substantial ministerial supervision of the Ministry of Energy. The ERC is responsible for implementing the policy framework set by the National Energy Policy Council (headed by the Prime Minister) (the “**NEPC**”); it is also responsible for overseeing the regulations related to and for the licensing of electricity generation, transmission, distribution businesses and their system operator. The ERC shall announce the type and terms of licenses that corresponds to



each capacity and characteristics of each industry category and may impose conditions on a case-by-case basis.

A number of regulations and notifications have been published to implement the 2007 Energy Act, including notably the Regulation of the Energy Regulatory Commission on Application for license and Permission for Energy Industry Operation B.E. 2551 (2008) (the “**2008 Energy Operation Regulation**”). This regulation has established the framework regarding energy industry operation licenses and relevant application procedures.

## 6.5 Development Plans and Support Programs for Energy Industry

The NEPC approved on 15 May 2015 Thailand's new Power Development Plan (“**2015 PDP**”), which lays out Thailand's energy and investment plans for the period 2015-2036. A new Alternative Energy Development Plan (“**2015 AEDP**”) is also incorporated under this PDP 2015.

### 6.5.1 2015 PDP

The 2015 PDP assumes a GDP growth averaging 3.94%, a rate slightly below the 4.41% GDP growth that was used in the previous PDP from 2010. It is also based on the assumption of improved energy efficiency and increasing energy conservation campaigns. The 2015 PDP aims to install an additional capacity of 57,400 MW by the end of 2036, totaling the country's electricity capacity at 70,410 MW. By 2036, the target is to cut natural gas to a share of 30-40% from current 64%. The proportion of renewable energy is targeted to rise to 15-20% from the current 8%. The transmission system is expected to be further developed and smart grid technologies to be implemented to support increasing shares of renewable energy.

### 6.5.2 2015 AEDP

The AEDP target is to increase the portion of renewable energy generation from 8% in 2014 (approximately 7,279 MW) to 20% (19,635 MW) in 2036. The 2015 AEDP sets the following targets for each type of renewable energy.

Type of Renewable energy	2014 (MW)	2036 Target (MW)
Municipal Waste	65.72	500.00
Industrial Waste	-	50.00
Biomass	2,451.82	5,570.00
Biogas (Waste water/waste)	311.50	600.00
Small Hydro	142.01	376.00
Biogas (Energy crops)	-	680.00
Wind	224.47	3,002.00
Solar	1,298.51	6,000.00
Big Hydro	-	2,906.40

## 6.6 Thailand's Policy on Promoting Renewable Energy

Prepared by a long history of promoting renewable energy and by the small power purchase program first developed and continuously adapted and used since 1991, the turning point for the development of the Thailand's utility renewable energy sector is undoubtedly 2007, with notably the introduction of an adder scheme (differentiated based on the energy source and location) and the increase of the limit of the very small power purchase program to 10MW.

Under the adder scheme, an adder rate is calculated on the top of the base tariff. While the base tariff may vary in different program, the adder rate is generally fixed during a period. However, in the recent years, the policy of NEPC has been to progressively replace the adder payment structure with a FiT scheme, in which a fixed amount per kWhr is paid during the life of a power purchase agreement.

## 6.7 Electricity Business Licenses and Qualifications

Under the 2008 Energy Operation Regulation, the electricity business licenses under the ERC's oversight are as follow:

- a. Electricity Generation License, to be issued to the electricity producer;
- b. Electricity Transmission System License, to be issued to the operator of an electricity transmission system;
- c. Electricity Distribution System License, to be issued to the operator of an electricity distribution system;
- d. Electricity Supply License, to be issued to the operator of an electricity supply business, where electricity is supplied to a user who is not an electricity generation licensee; and
- e. Power System Control License to be issued to the operator of an electricity control center.

In addition to the above-mentioned licenses as to be issued by the ERC, the operation of renewable source electricity generation may require obtaining a factory license from the Department of Industrial Works and a construction permit from the local administrative organization where the project business is located.

## 6.8 Environment Approval Requirements for Electricity Business

In general, the production of electricity from solar source is not required to conduct an Environmental Impact Assessment ("EIA") unless the project would be located in any specific area in which business activities development are subject to EIA requirement. Solar projects with an installed capacity of more than 1,000 kVA are required, to address a Code of Practice ("CoP") report to the ERC as part of the application for an electricity generating license.

In addition, the solar projects with an installed capacity from 5 MW up to 10 MW to submit an Environmental and Safety Assessment Report ("ESA") to the Department of Industrial Works for the purpose of the application for a factory license.

## Chapter 7

# Import, Export and Customs

Thailand has been a member of the World Trade Organization (“WTO”) since 1 January 1995 and a member of General Agreement on Tariffs and Trade (“GATT”) since 20 November 1982. It adopts practices and standards in accordance with the GATT codes in determining customs prices. As an “open economy”, Thailand is continually pushing to adopt more Free Trade Agreements (“FTA”) to ensure its export-driven economy can compete on the world stage. Thailand is a founding member of the Association of Southeast Asian Nations (“ASEAN”) which strives to break down trade barriers between member states and ensure the free movement of trade and goods. The establishment of the ASEAN Economic Community (“AEC”) in 2015 was a major milestone in the regional economic integration agenda, offering opportunities in the form of a huge market of USD 2.6 trillion and over 622 million people. In 2014, the AEC was collectively the third largest economy in Asia and the seventh largest in the world.

As of the date of publication of this guide, Thailand has 13 FTAs in place, signed and in effect, including 6 FTAs signed through ASEAN:

FTAs signed by ASEAN	Bilateral FTAs signed by Thailand
<ul style="list-style-type: none"> <li>▪ ASEAN - Australia and New Zealand Free Trade Agreement (“AANZFTA”)</li> <li>▪ ASEAN - India Comprehensive Economic Cooperation Agreement</li> <li>▪ ASEAN - Japan Comprehensive Economic Partnership</li> <li>▪ ASEAN - People's Republic of China Comprehensive Economic Cooperation Agreement</li> <li>▪ ASEAN - [Republic of] Korea Comprehensive Economic Cooperation Agreement</li> <li>▪ ASEAN - Hong Kong Free Trade Agreement</li> </ul>	<ul style="list-style-type: none"> <li>▪ ASEAN Trade in Goods Agreement</li> <li>▪ Japan - Thailand Economic Partnership Agreement</li> <li>▪ Thailand - India Free Trade Agreement</li> <li>▪ Thailand - Australia Free Trade Agreement</li> <li>▪ Thailand - Chile Free Trade Agreement</li> <li>▪ Thailand - New Zealand Closer Economic Partnership Agreement</li> <li>▪ Thailand - Peru Free Trade Agreement</li> </ul>

Furthermore, Thailand is taking part in bilateral FTA discussions with the Kingdom of Bahrain, India, Pakistan, Turkey, and the USA. Thailand is also engaging in negotiations for an EU-Thailand Free Trade Agreement. The negotiations were launched in March 2014 and include topics such as tariffs and

non-tariff barriers (e.g. – import quotas), services, investment and procurement, intellectual property, regulatory issues, competition, and sustainable development. However, since the military takeover in Thailand in May 2014, negotiations are on hold.

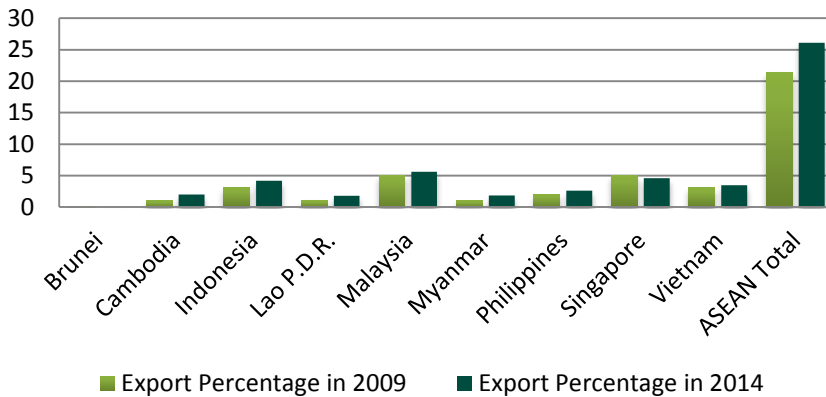
**Tip: If your country does not have a Free-Trade Agreement with Thailand, it might still have one with ASEAN; therefore, exportations from your country to Thailand might still be exempted from import duties.**

## 7.1 Trade and Tariffs – The ASEAN Context

The ASEAN Free Trade Area was launched in 1992 to eliminate tariffs and to promote a single market and production base across the member economies. More than 96% of products are free of tariffs within the ASEAN-6 countries (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) and tariffs were reduced to between 0-5% in December 2015 for all ASEAN members. On 1<sup>st</sup> January 2016, the AEC came into effect, strengthening the economic integration of the region.

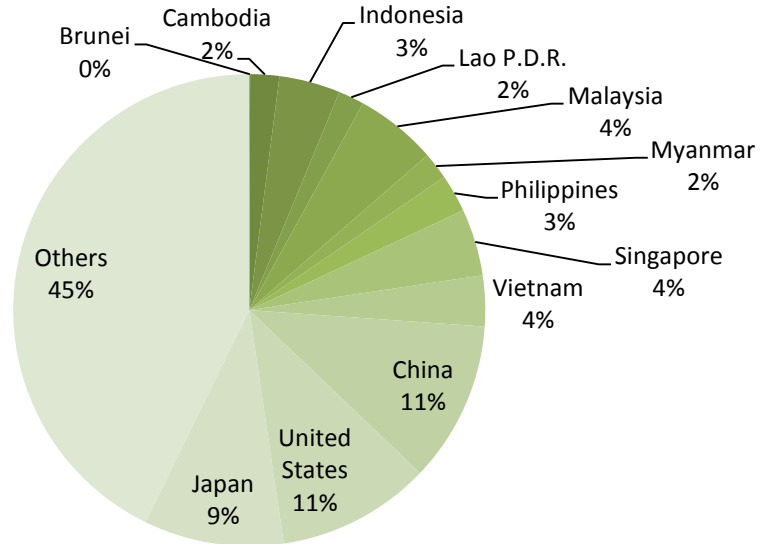
ASEAN is now a key market for Thailand: from USD 32.5 billion in 2009, Thai exports nearly doubled in 2015 to USD 61 billion. ASEAN countries as a whole account for 25.73% of Thai exports, which exceeds the combined export share of China (11.05%) and the United States (11.25%). In terms of imports, ASEAN imports are at USD 41 billion and represent 18% of the total merchandise imported by Thailand in 2014.<sup>1</sup>

### Thailand Export to ASEAN (% of market share)

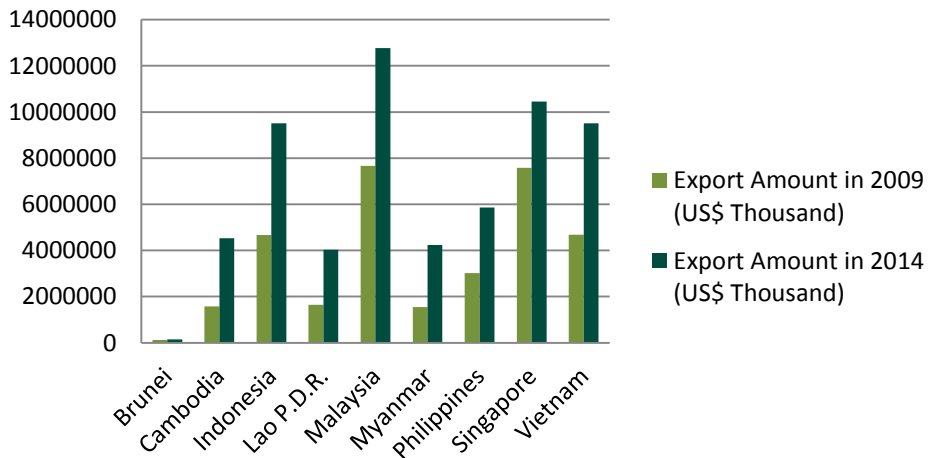


<sup>1</sup> Raw figure from World Bank, <http://wits.worldbank.org/CountryProfile/en/Country/THA/Year/2014/TradeFlow/Export>

## Thai Export Share in 2015



## Thai Exports to ASEAN 2009 vs 2015

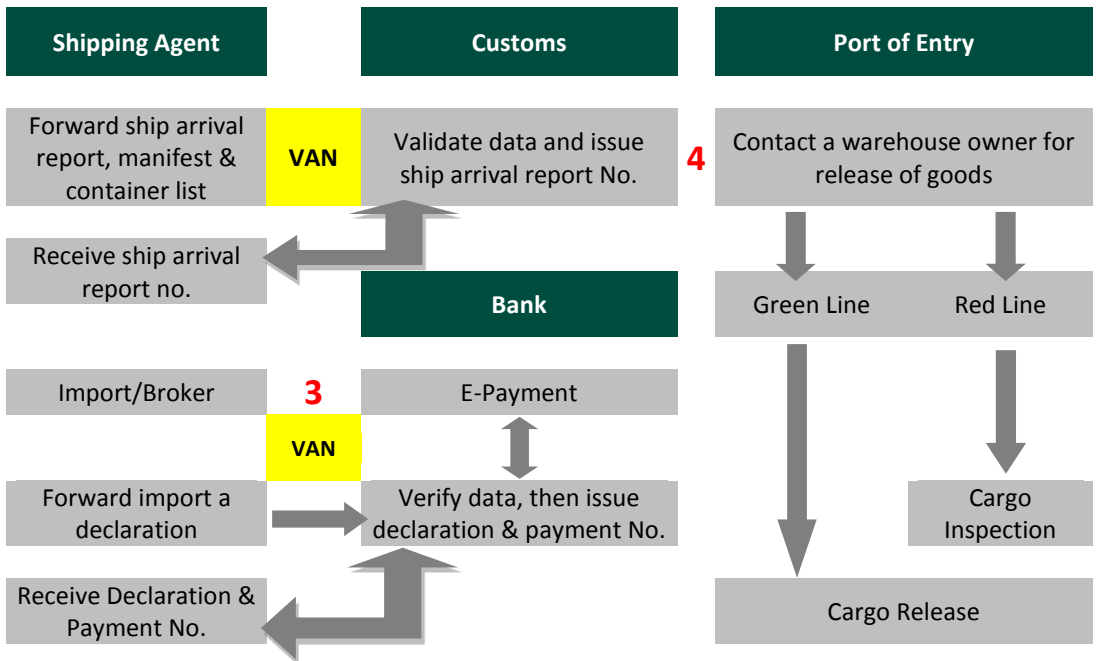


Not only have FTAs provided investors competitive advantages by reducing and eliminating tariffs on imports of raw materials and other components, they have broadened the markets and industries to foreign direct investment (“FDI”). For example, with the Thailand-Australia Free Trade Area, Australian investors are able to be a majority/controlling shareholder in selected industries in Thailand without an approval from the Board of Investment (the “BOI”) (typically in the form of a promotion).

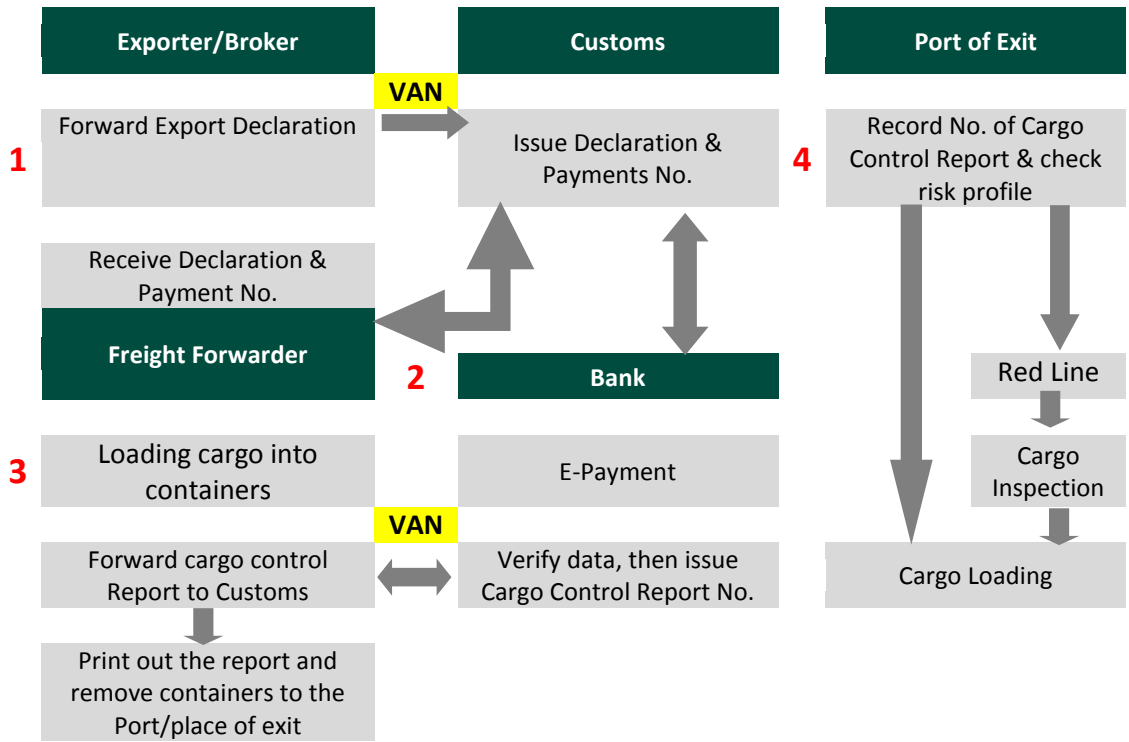
A harmonized customs code and common product certification is also on the agenda. In this regard, on 30 March 2012, ASEAN member states signed the ASEAN Agreement on customs in Phnom Penh, Cambodia. The objectives of this Agreement are to simplify and harmonize customs valuation, tariff nomenclature and customs procedures; to ensure consistency, transparency and fair application of customs laws and regulations, procedures and other administrative guidelines within each ASEAN Member State; to ensure efficient administration and expeditious clearance of goods to facilitate intra-regional trade and investments; and to explore other appropriate intra-ASEAN cooperation arrangements in the field of customs, particularly in the prevention and repression of all forms of smuggling and other customs frauds. So far, 20 priority products and 81 standards for safety have been harmonized across all ASEAN member states. The ASEAN Consultative Committee on Standards and Quality continues identifying new areas for harmonization.

## 7.2 Import and Export Procedures

### 7.2.1 Imports



## 7.2.2 Exports



## 7.3 Customs

### 7.3.1 The Customs Department

The Customs Department of the Ministry of Finance is responsible for the administration of customs duties, including their collection. The department also represents the Revenue Department in collecting VAT on imports as well as the Excise Department in collecting excise taxes on certain items of imports or exports, e.g. petroleum products and beverages.

Thailand's Customs Department has been modernizing its processes through the introduction of an online system. The paperless customs (or e-Customs) system aims to speed up customs procedures, enhance the transparency of these processes, and reduce the transaction costs and time incurred by exporters. Under the e-Import system, there is no need for relevant parties to submit paper documents as all data is transmitted electronically from an importer computer system to the e-Customers System.

### 7.3.2 Export Processing Zones (“EPZs”)

To reduce tax and duty burdens on imported raw materials and products to be exported for manufacturing businesses, the Thai government encourages manufacturers to locate their factories within EPZs. Ten industrial estates contain EPZs which provide privileges to export-oriented manufacturers.

Manufacturers in these EPZs do not have to pay import duties on imported raw materials and do not have to pay export duties when exporting the finished products. In addition to this, exports are subject to zero-rated VAT (government sales tax).

### 7.3.3 Customs Procedures

Import and export customs procedures can be summarized in five steps:

- i. **Declaration** - When a shipment arrives, or leaves Thailand, importers or exporters are required to file a goods declaration form with supporting documents to the Customs Department for cargo clearance.
- ii. **Identification** - A legal person involved in import/export related business is required to apply for appropriate types of “smart” (identification) cards that are categorized into:
  - Gold Card for Importers and Exporters;
  - Licensed Customs Broker Card (Silver);
  - Owner or Manager Card (Yellow);
  - Attorney-in-Fact Card (Green); and
  - Customs Clearance Card (Pink).

In addition, a natural person is required to submit any of the following relevant identification cards to customs during the clearance procedures:

- Identification Card (ID);
  - Government ID Card for Government Officials;
  - State Enterprise ID Card for State Enterprise Officials; or
  - Passport for Non-Thai Residents.
- iii. **Submission of Declaration Forms** - Submission of export/import declaration forms and all supporting documents for examination by customs officials at the port of entry.
  - iv. **Tax Payments** - Payment of applicable taxes and/or depositing guarantee.
  - v. **Inspection and Release** - For cargo to be inspected and finally released from the custody of customs, importers must submit the verified import entry form together with the payment receipt at the appropriate warehouse. Customs inspectors then inspect the imported cargo against the declarations made in the import entry. If the cargo inspected corresponds to the declaration made, the customs inspector will record the inspection result into a computer system and release the cargo to the importer.



## Chapter 8

# Banking and Finance

Considering the dramatic events experienced by this sector, managing the banking system is a sensitive issue in Thailand. However, since the overwhelming 1997 Asian financial crisis (known in Thailand as the “**Tom Yum Goong Crisis**”), which raised fears of a worldwide economic meltdown, the Royal Thai Government has enacted several regulations in order to strengthen and improve the transparency of the financial industry and maintain the stability of the market to ensure Thailand sustains its economic growth.

**On 14 May and 15 May 1997, the Thai Baht was hit by massive speculative attacks. The Thai government refused to devalue the Baht and tried to take measures in order to support the currency. Even though government actions were at first effective, the Bank of Thailand (the “BOT”) soon ran out of foreign currency to continue “rebuying” the Thai Baht resulting in the Thai baht being floated against the US Dollar. This event caused a chain reaction in Asia, eventually culminating into a region-wide crisis.**

### 8.1 Thailand’s Financial System – A Brief Overview

In 2007-2008, two important financial laws were enacted, namely the Financial Institution Business Act B.E. 2551 (A.D. 2008) (the “**FIBA**”) and the Deposit Protection Agency Act B.E. 2551 (A.D. 2008) (the “**DPAA**”). The FIBA and the DPAA are considered the most important acts passed since legislation passed in the wake of the 1997 crisis. These regulations empower the BOT, as an independent authority, responsible for supervising and inspecting the majority of Thailand’s financial institutions with the aim of ensuring the country’s financial systems are stable.

The Bank of Thailand Act B.E. 2485 (A.D. 1942), is the primary legislation governing the BOT’s responsibilities mission, role, and authority, which involves:

- Issue and manage the government’s expectations and banknotes;
- Formulate and implement monetary policies;
- Manage BOT assets;
- Act as a banker and the securities registrar to the government;
- Act as a banker to financial institutions;
- Establish and support the establishment of payment systems;
- Supervise and examine financial institutions;
- Manage and administrate exchange rates under the exchange regime, including management and administration of currency reserve assets, as prescribed in the law on currency;

- Control of foreign exchange as prescribed in the law on foreign exchange control;
- Implement other laws as prescribed to be the authorities of the BOT; and
- Other acts in relation to or in conjunction with management to attain the objectives of the BOT.

In addition, the Bank of Thailand Act stipulates the structure of the BOT's operations and specifies how the governor and the board are appointed and removed. The Act gives the BOT the power to request and obtain information relevant to the monetary policy of the country. Furthermore, the BOT also has the authority to supervise and inspect any financial instrument, which may affect the public or the economy.

## 8.2 The Financial Institution Business Act

The FIBA has replaced the following acts: The Commercial Banking Act B.E. 2505 (A.D. 1962), the Act on the Undertaking of Finance Business, Securities Business, and the Credit Foncier Business B.E. 2522 (A.D. 1979).

The FIBA governs the operations of commercial banks, finance companies, credit finance companies and insurance companies.

The BOT has the legislative authority to issue regulations requiring certain financial institutions established under specific laws to comply with the FIBA. Additionally, the BOT can also use its legislative powers enshrined in the FIBA to impose regulations on non-bank businesses (e.g. personal loan companies or credit card companies) that will come under the control of the BOT.

### 8.2.1 Structure of Financial Institution

The FIBA provides certain structures for financial institutions as follows:

- Thai nationals must hold at least 75 percent of the total amount of issued shares with voting rights. In addition to the preceding requirement, the number of Thai directors must not be less than three-quarters of the total number of directors unless an exemption applies or is otherwise permitted by the BOT;
- Where the BOT deems appropriate, the shareholding ratio of non-Thai nationals can increase up to 49 percent of the total amount of issued shares with voting rights. Further, the BOT may permit a proportion of non-Thai directors of more than one-quarter, but the amount must not reach one-half of the total number of directors;
- Any person holding shares in a financial institution, either directly or indirectly, in an amount of no less than five percent of the total number of shares sold must report the holding of the shares to the BOT; and
- The FIBA introduces a ten percent shareholding limit for a person who holds issued shares of a financial institution, unless otherwise permitted by the BOT.

It should be noted that the above restrictions do not apply to foreign commercial banks branches established in Thailand and foreign commercial banks subsidiaries.

List of Thai Commercial and Retail Banks	
Name	Total Assets in 2016
Bangkok Bank	USD 83.6 billion
Krungthai Bank	USD 81 billion
Siam Commercial Bank	USD 81.4 billion
KASIKORNBANK	USD 70.8 billion
Bank of Ayudhya (Krungsri)	USD 35.2 billion
Thanachart Bank	USD 28.4 billion
TMB Bank	USD 23.8 billion
Kianatkin Bank	USD 18.1 billion
CIMB Thai	USD 8.2 billion
Standard Chartered Bank (Thai)	USD 6.1 billion
United Overseas Bank (Thai)	USD 5.9 billion
Tisco Bank	USD 3.4 billion
ICBC Bank (subsidiary of ICBC of China)	USD 2.1 billion
Mega ICB (subsidiary of Mega ICB of Taiwan)	USD 0.4 billion

Source: Forbes - *"The World's Biggest Public Companies, 2016 Ranking"*

### 8.2.2 Supervision

The following are examples of how financial institutions can be supervised by the FIBA and the BOT:

- The FIBA introduces a new concept regarding “financial business groups” that can only be formed if permitted by the BOT. Companies in a “financial business group” can only engage in “financial businesses allowed by the BOT, and cannot engage in any other business; and
- The BOT has the authority to supervise and control the financial business groups and to specify the capital reserve that a financial business group must maintain in proportion to its assets, liabilities, contingent liabilities and other variables and risks.

### 8.3 Forms of Foreign Bank Permitted

The FIBA authorizes the BOT to relax the restrictions on foreign ownership of shares and on the number of foreign directors in a commercial bank.

In 2013, the BOT issued a set of notifications allowing foreign banks to operate a banking business in Thailand. In this regard, a foreign commercial bank must be formed as a subsidiary of a foreign commercial bank each of which can have a maximum of 20 branches and 20 off-premises ATMs throughout Thailand.

This policy is part of a package of measures drawn up by the Ministry of Finance (the “**MOF**”) and the BOT. A foreign bank branch must maintain a capital adequacy ratio of not less than 12 percent and a non-performing loan ratio not exceeding three and a half percent, have a good rating under the BOT’s rating assessment, and possess an acceptable risk management information system.

### List of Foreign Banks with Bangkok Branches

#### Asia

Bank of China Ltd.

The Bank of Tokyo-Mitsubishi UFJ, Ltd.

Indian Overseas Bank

Mizuho Corporate Bank, Ltd.

Oversea-Chinese Banking Corporation

RHB Bank Berhad

Sumitomo Mitsui Banking Corporation

#### North America

Bank of America N. A

Citibank Thailand

JP Morgan Chase

Scotiabank (Bank of Nova Scotia) - through subsidiary Thanachart Bank

#### Europe

ABN AMRO Bank N. V

BNP Paribas

Deutsche Bank

HSBC

## 8.4 Other Finance Related Laws

The Deposits Protection Law was introduced to ensure the confidence and trust of depositors while maintaining the stability and credibility of financial institutions. It sets out a limited deposit insurance

scheme to be implemented in Thailand, which guarantees a certain level of protection to depositors. Financial institutions that are members of this scheme must pay insurance premiums and report to the Deposit Protection Agency under this law.

The Securities Exchange Law changes the structure of Thailand's capital market supervision as follows:

- It includes the establishment of a capital market supervision board in addition to the Securities and Exchange Commission board (the "SEC") and the SEC office;
- It stipulates the conditions for corporate governance of companies that issue securities to the public, including the accountability of directors, executives, management and shareholders' rights; and
- It also states the requirements for gaining approval for initial public offerings from the SEC.

## 8.5 Foreign Exchange Control

As finance and foreign trade is vital to the economic stability of Thailand, the question of currency regulation has led to several well-publicized debates. After following the International Monetary Fund prescriptions, it appears that Thailand has adopted an intermediate position suitable for the economic trend of the nation.

The legal basis for exchange control in Thailand derives from the Exchange Control Act BE B.E. 2485 (A.D. 1942) and Ministerial Regulation No.13 B.E. 2497 (A.D. 1954) issued under the Exchange Control Act.

All matters relating to foreign currency are regulated by the BOT. No entity other than authorized financial institutions/dealers may buy, sell, lend, exchange or transfer any foreign exchange without obtaining prior permission from the BOT.

### 8.5.1 Operating Environment

The MOF has assigned the responsibility of administering foreign exchange transactions to the BOT. All foreign exchange transactions are to be conducted through authorized financial institutions and non-banks, for which foreign exchange licenses are granted by the MOF.

Authorized moneychangers can buy foreign notes and travelers' cheques and sell foreign currency. Authorized money transfer agents can accept remittance of foreign currencies from abroad and remit foreign currencies abroad for the prescribed purposes.

## 8.5.2 Currency Regulation

### Foreign Currency

There is no limit to the amount of foreign currency that can be brought into Thailand. Any person receiving foreign currencies from abroad is required to sell the foreign currencies to an authorized financial institution or to deposit in a bank. Foreigners temporarily residing in Thailand for less than three months, foreign embassies and international organizations including their employees with diplomatic privileges and immunities, and Thai emigrants who are permanently residing in another country or working abroad are exempt to fulfill such requirement.

**Any person depositing or withdrawing more than USD 20,000 or its equivalent in foreign currency banknotes must declare such to a customs officer.**

### Local Currency

Without the need for authorization, a person traveling to countries bordering Thailand (Cambodia, Lao P.D.R., Malaysia, and Myanmar), including Vietnam and Yunnan Province, China, is allowed to take up to THB 2 million to such countries. This is providing that the banknotes do not exceed THB 450,000. If the banknotes exceed THB 450,000, the holder must inform a customs officer. However, when traveling to other countries, a person can only take up to THB 50,000 or USD 20,000 or equivalent.

## 8.5.3 Bank Deposits

### Foreign Currency Account of Thai Residents

Thai individuals and corporations operating in Thailand are allowed to maintain foreign currency accounts in financial institutions under the following conditions:

- An account is opened with an authorized financial institution in Thailand, and the deposited funds originate from abroad;
- Withdrawal from a foreign currency account is permitted for payment of any obligations of the account holder or its subsidiaries abroad upon submission of supporting evidence, or for conversion into THB by authorized financial institutions, or for deposit into another foreign currency account of the same account holder; and
- The deposit of foreign currency banknotes and coins must not exceed USD 10,000 per person per day.

### Foreign Currency Account of Non-Residents

An account must be credited with funds that originate from abroad, except in the case where a non-resident temporarily working in Thailand converts their income into foreign currency for depositing into their account. Balances on such accounts can be transferred without restriction. There is no limitation on the amount of foreign currency that can be maintained in this type of bank account.

### **Non-Resident THB Account**

Non-resident THB accounts are divided into two types as follows:

- Non-resident THB account (for general use); and
- Non-resident THB account for securities.

These accounts may be debited or credited for investment in securities and other financial instruments such as equity instruments, debt instruments, unit trusts, derivatives transactions traded on the Thailand Futures Exchange and the Agricultural Futures Exchange of Thailand.

The total daily outstanding balances for each type of non-resident THB account must not exceed THB 300 million per non-resident. Transfers between the two types of non-resident THB accounts are not permitted.

#### **8.5.4 Foreign Trade and Exchange**

##### **Imports**

When receiving foreign currency from abroad, it is a requirement that the funds are immediately remitted and sold to an authorized bank or deposited into a foreign currency account with an authorized bank within 360-days from the date of acquisition.

##### **Exports**

Buying or transferring of foreign currency to another country is acceptable, to a limited extent, via an authorized bank upon submission of documents supporting the transfer.

#### **8.5.5 Transactions on Invisibles**

Inward and outward remittance of invisible transactions such as services, income, profits, interests, and dividends are permitted upon submission of supporting evidence to an authorized financial institution.

Remittance to Thai expatriates permanently residing abroad is allowed up to USD 1 million per person per year, if the funds derive from their own personal assets or inheritance. Remittance to relatives permanently residing outside of Thailand is also allowed up to USD 1 million per person per year. Remittance of traveling expenses or educational expenses of residents is also freely permitted upon submission of supporting evidence.

Proceeds from invisibles received by residents must be sold to, or deposited in, a foreign currency account with an authorized financial institution within 360 days from receipt.

## 8.6 Capital Inflows and Outflows

### Foreign Investment

Foreign direct investment (“FDI”) in Thailand is freely permitted upon submission of supporting evidence to an authorized financial institution. Foreign currencies exchanged or sold against THB by non-residents, aimed at investment in stocks listed on the Stock Exchange Thailand (the “SET”), are freely permitted provided that the THB amounts are deposited into a Non-resident Thai Baht account for securities subject to the rules and practices regarding such an account.

Repatriation of investment funds and repayment of overseas loans can be remitted freely upon submission of supporting evidence to an authorized financial institution.

### Capital Transfers by Thai Residents

Residents in Thailand are allowed to invest in, or lend to, affiliated companies abroad without limitation if relevant supporting documents are submitted to an authorized financial institution.

A Thai company is allowed to lend to non-affiliated business entities abroad. Such lending is subject to a cap of USD 50 million per year.

Remittance of funds abroad for purchasing immovable properties is permitted up to USD 10 million per person per year.

### Foreign Currency Transaction Report

Any person purchasing, selling, depositing, or withdrawing foreign currencies with an authorized bank in an amount of USD 50,000 or above is required to report foreign exchange transactions to the authorized bank in the Foreign Exchange Transaction Form as prescribed by the BOT.

**There is no limit to the amount of foreign currency that can be brought into Thailand, but a person traveling to countries bordering Thailand (Cambodia, Lao P.D.R., Malaysia, Myanmar, Vietnam and Yunnan Province, China, is allowed to take up to THB 2 million without any authorization provided that the banknotes do not exceed the amount of THB 450,000. If the banknotes exceed THB 450,000, the holder must inform a customs officer.**



# Chapter 9

## Taxation

The Thai Revenue Code (“TRC”) as supplemented its subordinate laws and regulations is the main tax-related legislation in Thailand. Other special laws also provide certain tax exemptions which business operations may apply for, subject to specific conditions. In Thailand, taxes are imposed at both national and local levels, but the central government is the main taxing authority.

### 9.1 Taxation Overview

The Thailand Revenue Department (“TRD”), under the Ministry of Finance, is responsible for the administration of personal income tax (“PIT”), corporate income tax (“CIT”), petroleum income tax, value-added tax (“VAT”), specific business taxes (“SBT”), stamp duty and inheritance tax.

In general, Thailand’s tax administration follows the concept of “self-assessment”. Taxpayers have a legal duty to declare their income and pay tax to the authorities. Declared income and the taxes paid accordingly are assumed to be correct.

However, as in any country, investigation and imposition of additional tax payable can be conducted by the tax authorities in certain circumstances where it is suspected that a person has failed to file a tax return or has filed a false or inadequate tax return.

### 9.2 Types of Taxes

#### 9.2.1 Personal Income Tax (“PIT”)

##### Residence

An individual who lives in Thailand for a period or periods aggregating of 180 days or more in a calendar year is deemed to be a Thai resident for PIT purposes.

##### Taxable Income and Rates

All individuals who receive assessable income arising in Thailand are liable for PIT, whether resident or not and regardless of where the income is actually paid. Income derived abroad by a resident of Thailand is subject to tax when the income is brought into Thailand. A non-resident is subject to tax only on Thai-sourced income. Taxable income includes employment income, business income and investment income as well as income from a broad range of activities. It includes income in cash or in-kind. Benefits provided by an employer are treated as taxable income, including rent-free housing, cars and drivers provided for personal use or any tax paid by the employer on behalf of the employee. Capital gains of individuals are treated as ordinary income, except that a scale of standard deductions applies to gains from certain types of immovable property transactions.

Assessable income is classified into eight categories:

- i. Personal services rendered to an employer;
- ii. Certain types of employment, positions, commission fees or services rendered;
- iii. Goodwill, copyrights, franchises, annuities, other rights or annual payments derived from a will or court judgment;
- iv. Dividends, interest on deposits with banks in Thailand, shares of profits or other benefits from a company, partnership or mutual funds, payments received as a result of a reduction of capital, bonuses or increased capital holdings, gains from the amalgamation, acquisition or dissolution of companies or partnerships, gains from the transfer of shares or partnership holdings;
- v. Property leasing; under hire or hire purchase contracts;
- vi. Liberal professions (e.g. law, medicine, engineering, architecture, accountancy, etc.);
- vii. Construction and other work contracts; and
- viii. Commerce, agriculture, industry, transport or other activities not specified above.

### **Deductions and Relief**

A personal allowance of THB 60,000 is available to a taxpayer and his/her spouse and a THB 30,000 allowance for each legitimate child. However, if the child is adopted, THB 30,000 allowance for each adopted child will be capped at the maximum of three adopted children. If there are legitimate child and adopted child together, the maximum of three children applies. For wage earners, there also is a deduction of 50% of gross income, up to a maximum of THB 100,000. The same deduction and ceiling applies to income derived from copyright, goodwill, and other intellectual property right. Deductions of between 10% and 30% are available on income from the letting of property depending on the type.

Taxpayers caring for elderly parents are granted a deduction of THB 30,000 per year per parent. They are also allowed an exemption of up to THB 15,000 on health insurance premiums they provide for their parents. Further deductions of up to 10% of income are allowed for donations to registered charities. A deduction of THB 60,000 is also available for every disabled spouse, parent, child or other dependents.

### **Rates**

Individual taxpayers are subject to PIT at progressive rates on net income. Net income is calculated by applying personal deductions based on certain standard rates and specific personal allowances. The personal income tax rates range from 0% to a top marginal rate of 35%. An individual's first THB 150,000 of net income (income after the personal standard deduction and allowances) is currently exempted.

For other types of incomes, such as dividend, tax is normally withheld from payments of dividends to resident and non-resident individuals at a rate of 10%; for non-residents the rate may be reduced under an applicable tax treaty. Tax at 15% is withheld from most payments of interest to individuals

if the payer is a bank or financial institution. Withholding tax (“WHT”) can generally be credited against a resident taxpayer’s final income tax liability. Gains from the sale of a residence are exempt from tax if the proceeds are used to purchase a new home within one year before or after sale of the primary residence. A flat WHT of 15% applies to earnings from the transfer of bonds and other corporate debt instruments, rental fees and income paid to non-residents for the provision of services.

### **Special Expatriate Tax Regime**

A reduction in the progressive income tax rates to a 15% flat rate is applicable to assessable income an expatriate receives through employment by a qualifying Regional Operating Headquarters (“ROH”), International Head Quarters (“IHQ”) or International Trading Center (“ITC”) in Thailand that meets the conditions of each. Expatriates are entitled to these benefits while working in Thailand for a period not exceeding four consecutive years but, in certain cases, up to eight or fifteen years.

#### **9.2.1.1 Tax Rates**

The 2017 progressive rates of PIT are presented in the table below:

<b>Taxable Income</b>	<b>Rate</b>
0 – 150,000	Exempt
150,000 – 300,000	5%
300,001 – 500,000	10%
500,001 – 750,000	15%
750,001 – 1,000,000	20%
1,000,001 – 2,000,000	25%
2,000,001 – 5,000,000	30%
Over 5,000,000	35%

#### **9.2.1.2 Withholding Tax (WHT) on Personal Income**

Certain categories of income – e.g. salary or employment income, capital gains, professional fees, and income from contract-based work – which are paid to an individual taxpayer, are subject to WHT at the rates specified in the Revenue Code. The taxpayer has to file a tax return to compute the annual tax and report the amount of tax withheld during the year to the District Revenue Office no later than 31 March of the following year.

The tax withheld on taxable income during the tax year will be credited against the computation of PIT liability of the taxpayer at the time of filing the annual personal income tax return.

### 9.2.1.3 Penalties

Late filing of the annual PIT return is subject to a surcharge of 1.5% of the tax payable per month. If the taxpayer is charged with tax evasion, a surcharge of 200% of the tax payable applies.

## 9.2.2 Corporate Income Tax (“CIT”)

### 9.2.2.1 Taxable Persons

CIT is a tax levied on juristic entities. For income tax purposes, the term juristic entities include:

- A limited company, a limited partnership or a registered ordinary partnership incorporated under Thai or foreign laws;
- An association or foundation which operates and produces revenue;
- A joint venture;
- A business or profit-seeking activity carried on by a foreign government or its agency or by any other juristic body incorporated under a foreign law; and
- Other types of juristic person specified by the Director-General and announced in the Royal Gazette.

A company registered under the Thai Civil and Commercial Code or a foreign company carrying on business in Thailand through an office, branch or dependent agent is generally subject to Thai CIT. WHT and a branch remittance tax also apply. A company may also be required to register its business for VAT purposes. Specific Business Tax (“SBT”) applies to certain business transactions, such as banking business, interest on loans and sales of immovable assets. Stamp duty is levied on certain contracts or instruments. Other taxes include property tax, signage tax, customs duty and excise tax. Tax exemptions and various incentives are available to all qualified entities, depending on the conditions for granting these incentives.

### Taxable Income and Rates

CIT levied on both Thai and foreign companies. A locally incorporated company is taxed on its worldwide income; a foreign company is taxed only on Thai sourced income. A non-resident company registered in a foreign jurisdiction may be subject to Thai CIT only if it is considered to be carrying on business in Thailand via its agent or go-between or representative.

The CIT rate is 20% of net profits, calculated by deducting all deductible expenses from taxable revenue arising from the business during the fiscal period.

A branch of a foreign company pays income tax at the standard corporate rate but only on Thai sourced profits. A branch is also liable for WHT at 10% levied on profits remitted or booked to the foreign head office (i.e. branch remittance tax). If profits cannot be determined, an assessment may be made based on 5% of gross receipts at the discretion of the Thai tax authorities, i.e. gross receipts-based tax is not an option.

### 9.2.2.2 Status of Residency

A company is resident in Thailand if it is incorporated in Thailand. A branch of a foreign corporation is considered a resident if it is registered with relevant Thai government agency to conduct business in Thailand. Furthermore, the non-resident company will be treated as carrying on business in Thailand and subject to the Thai tax regime if it has agents, employees or go-betweens to generate income or profit in Thailand. A non-resident company is one that is registered in a foreign jurisdiction without any agents and therefore, not considered to be carrying on business in Thailand but earning certain types of income may be subject to CIT through a Thai WHT mechanism.

#### **Taxable Income Defined**

Taxable income includes business profits and passive income (i.e. dividends, interest, royalties, capital gains, etc.) derived from domestic and foreign sources. CIT is computed by taking into account all revenue arising from a business carried on in an accounting period and deducting all allowable expenses.

Subsidies paid by a foreign parent company to its Thai subsidiaries must be included in the CIT base as revenue arising from or as a result of business conducted in Thailand even when there is no requirement for the funds to be repaid. For assessment purposes, there is no distinction between a subsidiary and a branch.

The tax rates on payments made to a firm not engaged in business in Thailand vary depending on the type of fees. A foreign firm is generally taxed on dividends, interest from securities investments and capital gains. Tax must be withheld at source by the Thai payer on behalf of the offshore firm and remitted to the TRD.

#### **CIT Deductions**

Most normal expenses connected with earning income are deductible, including:

- Interest, except interest paid on capital, reserves or nondeductible funds;
- Reasonable and justifiable management fees charged at market value;
- Losses;
- Depreciation;
- Taxes, except for corporate income tax and VAT, paid to the Thai government;
- Bad debts provided there is evidence of reasonable efforts to collect the debt in accordance with the Thai Revenue Code;
- Employer contributions to the social security fund;
- Provident fund contributions;
- Donations up to 2% of net profits;
- Entertainment expenses, up to 0.3% of gross revenue or paid-up capital (whichever is higher), depending on the nature of the business and whether the expense is essential and not exceeding THB 10 million;

- Head office charges or shared costs may be deducted provided the company can demonstrate that the services were actually provided and that they are related to business in Thailand; and
- Net operating losses may be carried forward for up to five accounting periods. If the losses relate to a business promoted by the Board of Investment (“BOI”) during a tax holiday period, the BOI tax losses may be carried over to the five years after expiration of the tax holiday. The carryback of losses is not permitted.

### CIT Exemptions

#### By Categories of Income

- Full CIT exemption on dividends paid by a Thai limited company to another company listed on the Stock Exchange of Thailand (“SET”) where the recipient holds shares in the dividend payer for three months before and after the dividends are paid. In this case, WHT will be exempt even if the dividend recipient does not hold shares in the dividend payer for three months before and after the dividends are paid;
- Full CIT exemption on dividends paid by a Thai limited company to another Thai limited company when the recipient holds at least 25% of the voting right shares of the dividend payer with no cross-shareholding for three months before and after the dividends are paid. In such a case, WHT will also be exempt even if the dividend recipient does not hold shares in the dividend payer for three months before and after the dividends are paid;
- In all other cases of dividend payment by a Thai limited company to another Thai limited company, the recipient is required to include only 50% of dividends received from the payer as taxable income before 10% WHT is imposed;
- Dividends received by a Thai limited company from foreign affiliates are exempted from CIT provided that the dividends have been paid from foreign profits subject to foreign income tax of at least 15%. This is under the condition that the shares have been held by the Thai limited company in such a foreign affiliate with at least 25% of the voting right shares for a period of six months before dividends are paid;
- Income benefitting from tax incentives; and
- An exemption for the share of profits paid by joint ventures to a Thai company or foreign company carrying on business in Thailand.

#### By Categories of Entities

- Companies that are granted tax exemptions under the BOI;
- Foundations and associations registered as charity organizations; and
- Foreign organization authorities under mutual agreements with Thailand for the purposes of economic development and co-operation.

### 9.2.2.3 Capital Gains

There is no specific legislation governing income from capital gains. Capital gains received by Thai juristic companies and limited partnerships are treated as ordinary income and must be included in the calculation of CIT.

Capital gains from the sale of certain investments in Thailand received by foreign companies are subject to a 15% final WHT. However, if neither the buyer nor the seller is a Thai resident and the sale does not take place in Thailand, the capital gains from a sale or transfer cannot be taxed under current laws.

### 9.2.2.4 Tax Rates

The standard CIT rate is 20% of net profits. Special rates also apply to small and medium-sized enterprises (“SMEs”).

### 9.2.2.5 Small and Medium-Sized Enterprises (“SMEs”)

SMEs, companies and limited partnerships with registered capital of no more than THB 5 million and annual turnover of no more than THB 30 million also enjoy the following tax relief on net profit:

Net Profit (THB)	Rate
0 - 300,000	Exempt
300,001 - 3,000,000	15%
From 3,000,001	20%

### 9.2.2.6 WHT on Corporate Income

Certain types of corporate income are subject to WHT. The relevant WHT rates will vary depending on the type of income and on the tax status of the recipient. Generally, the domestic WHT on income from the provision of services is 3% of the entire service fee amount.

### 9.2.2.7 Foreign Tax Credits

Taxes that have been paid in foreign countries may be claimed as credits against Thai CIT both in accordance with the provision of unilateral double tax relief under the Revenue Code and under the provisions of relevant existing Double Tax Agreement (“DTA”). To obtain benefits under a DTA, the Thai payer entity must obtain a tax residence certificate from the beneficiary of the income.

### 9.2.2.8 Thin Capitalization

Currently, there are no provisions governing thin capitalization in the Revenue Code.

### 9.2.2.9 Transfer Pricing

The Revenue Department issued guideline on the determination of Market Price in May 2002. All commercial transactions of related companies, whether domestic or cross-border, are subject to Transfer Pricing Guidelines. The term “related companies” can be defined as two or more companies engaging in or having relationships in terms of equity interest, management or financial control of one over the other. Related company transactions must be made at market value (i.e. at arm’s length).

The TRD provides the definition of market value which is consistent with the arm’s length principle under the OECD’s Transfer Pricing guidelines. Thailand’s Transfer Pricing Guidelines have recognized the OECD’s pricing methods as follows:

- Comparable Uncontrolled Price Method (“CUP”);
- Resale Price Method (“RP”);
- Cost Plus Method (“CP”); and
- Other methods if any of the above methods cannot apply.

Where there is an interrelated transaction, the relevant parties should maintain specific documentation and submit such documentation to the tax authorities upon request. The tax authorities are empowered to adjust transactions deemed not to be at arm’s length.

The Advanced Pricing Agreement (“APA”) is also available for taxpayers. The APA is an agreement between taxpayers and the TRD to determine the pricing method to be used in future transactions between related parties.

On 17 June 2017, the Revenue Department has held a public hearing concerning the draft amendment to the Revenue Code, which aims to introduce and clarify the definition of company or juristic partnership with relating party. In addition, in the proposed draft, it also gives the authority to the Revenue Officer to assess the related party transactions if it is found that the related party transaction is not at arm’s length price.

### 9.2.2.10 Double Taxation Agreements (“DTAs”)

Thailand has currently concluded bilateral double tax agreements with the following 60 countries:

Armenia	Australia	Austria	Bahrain
Bangladesh	Belarus	Belgium	Bulgaria
Canada	Chile	China P. R	Cyprus
Czech Republic	Denmark	Estonia	Finland
France	Germany	Great Britain and Northern Ireland	Hong Kong
Hungary	India	Indonesia	Ireland
Israel	Italy	Japan	Korea
Kuwait	Lao P.D.R.	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
Chinese Taipei	Tajikistan	Turkey	Ukraine
United Arab Emirates	United States of America	Uzbekistan	Vietnam

### 9.2.2.11 CIT Compliance

Recognition of income and expense must be computed on the accrual basis which, with certain exceptions, generally follows standard accounting practice.

For the purpose of CIT computation, the juristic entity will prepare a balance sheet and trading and profit and loss accounts for each accounting period. The juristic person must prepare and file the Annual CIT Return (“**PND.50**”) within 150 days from the closing date of each accounting period along with supporting documents used to compute taxes, all of which have been audited and certified by a qualified person (i.e. audited financial statements). The TRD now has an online system for taxpayers to file the return and an eight-day extension is available from the due date.

The juristic entity is required to prepare and file a Half-Year CIT Return (“**PND.51**”) within two months after the first half-year of the accounting period. This is an estimated profit and loss half-year CIT computation. The pre-paid tax per PND.51 can be used by the juristic entity to credit against the ultimate annual CIT as reported in the PND.50. The filing of a half-year return (“**PND.51**”) is not required for a newly established company or juristic person that had its first accounting period less than 12 months, or a company or juristic person that is in the process of liquidation and had its last accounting period less than 12 months.

The TRD does not grant filing extensions. Late filing will be subject to a maximum fine of THB 2,000 and a surcharge of 1.5% per month on the tax due. However, the maximum surcharge will not exceed the tax due for the PND.50 and the maximum surcharge will not exceed 20% of the tax due for the PND.51. Failure to file the PND 50 after being assessed and summoned by the TRD will result in a penalty of up to 200% of the CIT payable.

### 9.2.3 Value Added Tax (“VAT”)

VAT came into effect on 1 January 1992, replacing business tax. It is an indirect tax collected on consumption and at each stage of the production or distribution of goods or provision of services. Generally, the operator charges VAT on the sale of goods or provision of services to the consumer (“**output tax**”).

The VAT paid by the operator to other operators for the purchase of goods or services (“**input tax**”) is then deducted and the balance remitted to the TRD.

### 9.2.3.1 VAT Payers

Persons liable for VAT under Thai law include:

- Operators or persons selling goods or rendering services in the course of their business or professional activities;
- Importers; and
- Agents selling goods or rendering services in the ordinary course of business for operators residing outside Thailand.

VAT is imposed on the following transactions:

- Sale of goods or provision of services by an operator; and
- The importation of goods.

Under the Revenue Code, “sale” is the disposition, distribution or transfer of goods, whether or not for benefit or consideration, and includes the delivery of goods under specific contracts of hire-purchase or installment sale or the delivery of goods to an agent for sale to a foreign country. “Service” is defined as any activity performed with the view to creating value by means other than the sale of goods. This covers the use by any service supplier of its own services.

The Revenue Code also specifies that the “provision of services in Thailand” will be constituted by any performance of a “service”:

- In Thailand, regardless of whether the use of such service is made locally or overseas; or
- In a foreign country for use in Thailand.

### 9.2.3.2 VAT Exemptions

The Revenue Code provides a certain number of VAT exemption situations, either by virtue of the concerned persons or of the concerned transactions. Those that are exempt from VAT payment liabilities include:

- Small businesses with an annual sales volume of less than THB 1,800,000; and
- Entities exempt by other laws or regulations, such as corporations whose activities come under the Petroleum Income Tax Law.

The sale of certain goods not destined for export (notably agricultural products, animals, fertilizers, fish food and animal feeds, drugs and medical products for animals, newspapers and textbooks) or the provision of services are necessary for the maintenance of life and social welfare, as well as cultural, religious or charitable services are also exempted from VAT.

### 9.2.3.3 VAT Base

The tax base for the calculation of VAT is the total value received or receivable by a supplier for the sale or performance of the services inclusive of excise tax. Such valuation will include any money, property, compensation, consideration for services or any benefit deemed to have monetary value.

The tax base for the calculation of VAT on the imported goods is based on the complete shipping value which includes the cost of the imported goods, freight costs and insurance costs.

#### 9.2.3.4 VAT Rates

The Revenue Code provides the following VAT rates:

- 10% is the standard rate. This VAT rate is currently applied at a reduced rate of 7% for special economic reasons, with a view to stimulating domestic demand until 30 September 2018.
- 0% applies to certain specific business identified under the Revenue Code such as:
  - The export of goods;
  - The provision of services performed in Thailand but used in a foreign country;
  - The provision of international transport services by aircraft or sea-going vessels, organized under Thai or foreign law; and
  - The sale of goods and provision of services to the United Nations and its specialized agencies or to foreign embassies or consulates.

Special rates will apply to the sale of goods and provision of services in Thailand in particular circumstances explicitly determined in the Revenue Code.

**VAT was first introduced in Thailand in 1992 at a rate of 10% but was then reduced to 7%. The Ministry of Finance recently decided to maintain the VAT rate at 7% for the year 2018.**

#### 9.2.3.5 VAT Calculation

VAT is computed monthly by deducting input tax from output tax. If the output tax exceeds the input tax, the operator must remit the excess amount to the TRD. If input tax exceeds output tax, the excess amount may be claimed either as a tax refund from the TRD carried forward as a credit to offset against VAT due in the following months.

VAT arising from input tax is not always deductible from the total output tax. Examples of non-deductible input tax include those:

- Without a valid tax invoice;
- With a tax invoice containing materially inaccurate or incomplete contents;
- Which is not related to the operator's business;
- On entertainment expenses; and
- With a tax invoice issued by a non-authorized person.

If an operator carries on business in both categories (whether subject to or exempt from VAT), then the operator is required to apportion the input tax to each business based on percentages of both income types. Only input tax attributable to the business of the category subject to VAT may be deducted from output tax.

### 9.2.3.6 VAT Registration

A person with an annual turnover more than THB 1,800,000 is required to register as a VAT operator. An operator may also apply for VAT registration before commencing business, regardless of the threshold above. The VAT application must be filed with the local district office where the place of business is located.

Once registered, the operator is required to charge VAT and issue a tax invoice when VAT liability arises in respect of sale of goods or provision of services to claim for a credit or refund on input tax. It is required that documents (such as tax invoices) be recorded and maintained for at least five years to ensure VAT compliance. The tax invoice must contain all the specific details required by law with the original provided for the purchaser and copies kept by the seller.

### 9.2.3.7 Compliance

A registered VAT operator is required to submit its VAT calculation on a monthly basis by the 15<sup>th</sup> of the following month. However, in case there is a provision of service provided by any foreign person, taxpayers are required to perform the self-assessed VAT and pay tax along with Form PP. 36 by 7<sup>th</sup> day of the following month. Filing a late return will result in a tax penalty at 200% of the tax payable and a surcharge of 1.5% on any underpaid tax.

The TRD has issued notifications for compliance rules concerning tax invoices, debit notes, credit notes, and vat records. These rules require the recording of additional details such as the purchaser's taxpayer identification number and the VAT registration Certificates of the purchaser and seller.

## 9.2.4 Specific Business Tax ("SBT")

SBT is imposed on types of businesses that provide services where the added value is difficult to determine. Such businesses are considered to be beyond the scope of the VAT system and therefore not subject to it. The SBT is computed on the basis of monthly gross receipts at the applicable rates as stipulated in the Revenue Code. Unlike the VAT system, operators who are subject to SBT cannot claim VAT payment as a credit for SBT paid and are not entitled to charge SBT to customers.

### 9.2.4.1 Taxpayers subject to SBT

Any individual person or juristic entity conducting transactions subject to SBT in the regular course of business is required to register as an SBT operator.

An operator carrying on business subject to SBT must apply for SBT registration within 30 days from the date of commencement. Businesses relating to the sale of securities and temporary businesses are exempted from SBT registration. Below is a table of relevant types of businesses subject to SBT, relevant tax bases and applicable tax rates.

### 9.2.4.2 Businesses Subject to SBT and Rates

Type Of Business	Tax Base	Tax Rate (as a percentage of gross Receipts)
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<b>Banking or similar business; finance, credit financier; credit foncier and sale of securities in a securities business</b>	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%
	Gross profits before deduction of any expenses from the exchange or sale of currencies, issuance of negotiable instruments, documents of indebtedness or remittance of currencies to a foreign country.	
<b>Life insurance</b>	Interest, fees or service charges.	2.5%
<b>Pawnbroking</b>	Interest, fees.	2.5%
	Money, property, consideration or benefit of value received from sale of forfeited pawned goods.	2.5%
<b>Sale of immovable property in a commercial manner or for profit</b>	Gross receipts before deductions of expenses.	3%

The SBT rates do not include local authority tax. When SBT is paid, an additional 10% of SBT is levied as a local authority tax (municipality tax).

SBT return must be filed monthly within 15 days from the end of the month in which the SBT liability is incurred. Late filing and miscalculation of tax payable is subject to a tax penalty at 200% and a monthly surcharge of 1.5%.

### 9.2.5 Stamp Duty

Stamp duty is levied on 28 classes of instruments specified in the Stamp Duty Schedule of the Revenue Code. The rates/amounts vary according to the nature or content of the instruments.

Examples of instruments subject to stamp duties include the following: land leases, contracts or agreements of hire of work, powers of attorney, letters of credit, loan agreements, checks, bills of lading, memoranda of association for limited companies, articles of association for limited companies and partnership contracts. Please note that the Thai judicial court only recognizes properly stamped instruments.

Stamp duty must be affixed on instruments within 15 days from the date of execution. Unstamped documents are inadmissible as evidence in a civil lawsuit. Failure to comply or duty not fully paid is subject to a penalty as high as 600% of the duty payable.

## 9.2.6 Other Taxes

### 9.2.6.1 Petroleum Income Tax

Companies that have been granted licenses as concessionaire companies under the Petroleum Act B.E. 2514 (A.D. 1971) to explore, produce, and export petroleum (crude oil, natural gas, etc.) are subject to tax under the Petroleum Income Tax Act (“**PITA**”) instead of CIT under the Revenue Code.

The petroleum income tax applies to the relevant companies’ net profits from petroleum operations including the transfer of their concession interests and related activities at the rate of 50%. No further tax is levied on dividends payable to the corporate shareholders or on the profits transferred to the head office by a branch. Net profits for petroleum income tax purposes is computed under the Revenue Code in the same manner as CIT, the difference being that net losses may be carried forward for ten accounting periods. Recently, the Petroleum Act has been amended. It introduced the production sharing agreement (“**PSA**”) scheme to the oil and gas producers/investors. Under such scheme, generally, the production sharing producers will be taxed at 20% of the net profits.

An annual petroleum income tax return must be filed at the TRD within five months of the closing date of each accounting period. Tax penalties and surcharges on offenses are applicable to cases of late filing or failure to file.

### 9.2.6.2 Customs Duties

Customs duties are imposed mainly on imported and selected exported goods, determined by the Law on Customs Tariff Decree B.E. 2530 (A.D. 1987). In general, the invoice price is the basis for the calculation of the duty normally applied to CIF value. Please be aware that the new Customs Act has been published in the Royal Gazette and will be in effect in November this year. The new Customs Act will be modernized and more comprehensive.

### 9.2.6.3 Importation

Customs duties are levied in accordance with the Harmonized Commodity Description and Coding System or Harmonized System. Customs duty rates on most imported goods vary between 0% and 100%. Goods that are obscene, dangerous to health or considered harmful to the national economy may be prohibited from importation.

#### Exemptions from Customs Duties

Exemptions from customs duties on imported goods are available to promoted persons under the Investment Promotion Act and to petroleum concessionaires under the Petroleum Act. Reductions of, or exemptions from, customs duties on imported goods are also granted to members of; ASEAN, the ASEAN Free Trade Area (“**AFTA**”), General Agreement on Tariffs and Trade (“**GATT**”) and the WTO.

Currently, Thailand has 12 FTAs in place, signed and in effect, including five FTAs signed through ASEAN:

**FTAs signed by ASEAN**

**Bilateral FTAs signed by Thailand**

<ul style="list-style-type: none"> <li>▪ ASEAN - Australia and New Zealand Free Trade Agreement (“AANZFTA”)</li> <li>▪ ASEAN - India Comprehensive Economic Cooperation Agreement</li> <li>▪ ASEAN - Japan Comprehensive Economic Partnership</li> <li>▪ ASEAN - People's Republic of China Comprehensive Economic Cooperation Agreement</li> <li>▪ ASEAN - [Republic of] Korea Comprehensive Economic Cooperation Agreement</li> </ul>	<ul style="list-style-type: none"> <li>▪ ASEAN Trade in Goods Agreement</li> <li>▪ Japan - Thailand Economic Partnership Agreement</li> <li>▪ Thailand - India Free Trade Agreement</li> <li>▪ Thailand - Australia Free Trade Agreement</li> <li>▪ Thailand - Chile Free Trade Agreement</li> <li>▪ Thailand - New Zealand Closer Economic Partnership Agreement</li> <li>▪ Thailand - Peru Free Trade Agreement</li> </ul>
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**If your country does not have a Free-Trade Agreement with Thailand, it might still have one with ASEAN; therefore, exportations from your country to Thailand might still be exempted from import duties. In the case of overlapping FTAs, firms and investors can face two sets of applicable rules and pick the most beneficial one.**

#### 9.2.6.4 Export

Export of goods and rates are governed under the export tariff which includes seven items:

- Rice;
- Scrap metal;
- Raw or tanned hides of bovine animals (e.g. Leather);
- Rubber;
- Timber;
- Raw silk and silk yarn; and
- Powdered dried fish.

#### 9.2.6.5 Excise Tax

The excise tax is an indirect selective sales tax which is levied on the consumption of certain goods (mainly luxury goods) such as petroleum products, tobacco, liquor, beer, soft drinks, glass crystal, electrical appliances, motorcycles, yachts, perfume and cosmetic products, vehicles (e.g., passenger cars with ten seats or less), gambling businesses, entertainment businesses, telecommunications concessions and so on. The excise tax is collected by the Excise Department.

Recently, the new Excise Tax Act has just been effective. The new Excise Tax Act replaced many acts used to collect excise tax, such as, Cards Act or Tobacco Act.

Under the new Excise Tax Act revokes the use of the ex-factory price for the base of the calculation of excise tax for the goods. Under the new Excise Tax Act, the base for the calculation of the excise tax will be the suggested retail price (“SRP”).

The SRP will be calculated from the cost of manufacturing, management fee, and the standard of profits. The SRP shall not be lower than the selling price to the end user in the normal market according to the rules and methods specified in the ministerial regulations.

If the SRP is not conformed to the reality, not at market price, or cannot be determined, the Director-General of the Excise Department is authorized to announce the suggested retail price in the ministerial regulations for the calculation of excise tax purposes.

#### **9.2.6.6 Local Development Tax**

This annual tax is based on the value of the land, excluding improvements. Assessments are calculated on the area of the land and on the median value of the land as assessed by the district authority. Taxable property includes land, mountains and water basins. Land used for personal residence by the owner is exempt.

Landowners are required to file tax returns at the district office where the land is located in January of each year and tax is to be paid by the end of April each year or within 30 days of assessment if notified after March. In the case of failure to file a tax return, a surcharge of 10% of the local development tax payable will be imposed.

#### **9.2.6.7 House and Land Tax**

The house and land tax are imposed annually on the owners of a house, building structure with land that is rented or otherwise put to commercial use at a rate of 12.5% of the actual or assessed annual rental value of the property. There are exceptions for owner-occupied residences, buildings owned by state and religious institutions such as public hospitals and so on. A tax return must be paid within February of each year at the municipal or district office of the provincial administrative organization where the land and house or building is located, and tax must be paid within 30 days after notification of the tax assessment. Failure to file a tax return results in a fine of THB 200 and if taxes are paid late, certain penalties will be imposed.

### **9.2.7 Interesting Tax Incentives**

#### **9.2.7.1 International Headquarters (IHQ)**

An international headquarters (“IHQ”) is defined as a company incorporated under Thai law that provides: (a) management or technical services, or (b) supporting services or financial management to its associated enterprises, whether located in Thailand or in a foreign country, as well as being an approved “international trading center” (“ITC”) under the law.

A qualified IHQ receives tax incentives from the TRD for 15 accounting periods. CIT exemptions granted on foreign-sourced income of an IHQ are as follows:

- Income from providing the services above to its foreign affiliates;
- Royalty income from its foreign associated enterprises;
- Dividend income from its foreign associated enterprises;
- Income from the transfer of shares of foreign associated enterprises;



- Income from the sourcing and procurement of goods in a foreign country where the goods are not brought into Thailand; and
- Income received from providing services related to international trading with its foreign associated enterprises.

Additionally, CIT is reduced from 20% to 10% on domestic-sourced income, e.g. income from providing permitted services to its Thai affiliates or royalties received from its Thai affiliates. Payment of dividends and interest by an IHQ to its foreign associated enterprises will not be subject to WHT. Also, full-time expatriates employed by the IHQ are only liable to PIT at 15%.

To qualify as an IHQ, it is required to provide permitted services to its foreign associated enterprises, have paid up capital of not less than THB 10 million, and have operating expenses related to IHQ business paid to recipients in Thailand of not less than THB 15 million per accounting period.

### 9.2.7.2 International Trading Center (ITC)

An ITC is a designation for a company incorporated in Thailand to engage in the procurement and sale of goods, raw materials, and spare parts or to provide services related to international trading with foreign associated enterprises.

An ITC will receive tax incentives from the TRD for 15 accounting periods. The foreign-sourced income of ITC will be exempt from CIT, e.g. income from sourcing and procurement of goods in a foreign country where the goods are not being brought into Thailand or income from providing international trading service to its foreign associated enterprises. Payment of dividends by an ITC to its foreign associated enterprises will be exempt from WHT. Also, full-time expatriates employed by the ITC are only liable to PIT at 15%.

An ITC must have paid up capital of not less than THB 10 million and have operating expenses paid to recipients in Thailand of not less than THB 15 million per accounting period.

### 9.2.7.3 Venture Capital

To be qualified for the tax exemption for venture capital business, the venture capital company must meet the following criteria:

- Is established under the laws of Thailand
- Has paid-up capital on the last day of each fiscal year that is not less than 20 million THB;
- Invests and holds shares in a Targeted Industry Business in Thailand; and
- Submits application to notify the SEC Office within 31 December 2018

Further, the target companies in which the venture capital company holds the shares must operate any of the following business in the industry that implement high technology-based in manufacturing or servicing and are approved by the National Science and Technology Development Agency (“NSTDA”) (“**Promoted Business**”):

- Food and agricultural industry
- Energy-saving, renewable energy or clean energy industry

- Biotechnological industry
- Medical and public health industry
- Tourism, service or creative economic industry
- Advanced materials industry
- Textiles, clothing and accessories industry
- Automobiles industry
- Electronics, computers, software and information services industry
- Research-based, development and innovation-based or new industry

### **Key Tax Benefits for Venture Capital**

Tax Benefits of the venture capital company are as follows:

- Tax exemption of 10 accounting periods from the date of the notification to the SEC Office, on:
  - Dividends from its investment in the investee or target company which operates the Promoted Business; and
  - Capital gain from the sale of shares in the investee or target company, provided that the said investee or target company continuously operates the Promoted Business and generate the revenue of not less than 80% of its total revenue from operating the promoted business.
- The investors/shareholders of the venture capital company will receive tax exemption on:
  - Dividends payable by the venture capital company out of tax exempted income. However, in case the exemption period is expired, the normal 10% withholding tax will apply on any dividend payments. There may be a relief on withholding tax on dividend payment under the relevant double tax agreement (if any).
  - Capital gains from the sale of shares in the venture capital company, provided that:
    - a. In case the venture capital company has no retained earnings, the exemption will be in accordance with the investment ratio of the venture capital company in the investee or target company which continuously operates the Promoted Business and generates the revenue of not less than 80% of its total revenue in the accounting period before the investor/shareholder receives capital gain from the sale of the shares. The investment ratio of the venture capital company shall be in accordance with the Notification of the Revenue Department Commissioner.
    - b. In case the venture capital company has retained earnings from tax-exempted income for not less than 80% of total retained earnings in the accounting period before the investor/shareholder receives capital gain from the sale of the shares, the exemption will be applied to the full amount of capital gain.

However, in case the exemption period is expired, the normal 15% withholding tax will apply on any capital gain payable to foreign investors. There may be a relief on the withholding tax on capital gains under the relevant double tax agreement (if any).

**Note: The retained earnings in (a) and (b) do not include the retained earning which is allocated as reserved capital.**

#### 9.2.7.4 Inheritance and Gift Tax

Thailand recently unveiled its new Inheritance Taxes Act B.E. 2558 (A.D. 2015) and it was published in the Royal Gazette on 5 August 2015, coming into force on 3 February 2016.

The inheritance tax is applied to a recipient of the estate of the deceased for the value of the property exceeding of THB 100,000,000 that he or she aggregately receives from the estate of the deceased.

##### Taxable Persons

- A Thai national;
- An individual who does not have Thai nationality but has a residence in Thailand under immigration laws;
- An individual who does not have Thai nationality receiving an estate situated in Thailand;
- A juristic person registered or incorporated under Thai laws;
- A juristic person having Thai national(s) hold shares more than 50 percent of the paid-up share capital at the time the right to receive the estate has been stipulated; and
- A juristic person having more than 50 percent of managing power as Thai national(s).

##### Taxable Assets

There are five assets when received as an inheritance that are subject to inheritance tax. These assets are as follows:

- Immovable property;
- Securities under the law governing securities and the securities market;
- Money that has been deposited, or other forms of money, where the owner of the inheritance has the right to withdraw it or claim it from the financial institution or person who accepted the deposit;
- A registered vehicle; and
- Other assets as specified by a Royal Decree.

##### Tax Rates

In general, the exceeding value of the property received from the estate is taxed at 10%. However, if the recipient is a descendant or parent of the deceased, the tax rate is reduced to 5%.

**Tax Filing and Payment Requirements**

In the case of heirs who are successors or descendants of the testator, the tax rate is 5% of the legacy value in excess of 100 million baht, the rate for other heirs is 10%.

The tax return must be filed, and the tax paid within 150 days from the date on which the legacy was obtained (if in excess of THB 100 million) or within the deadline as extended by the Director-General at the local branch area revenue office. If the inheritor is deemed incompetent, quasi-incompetent or incapacitated, a curator or guardian will be responsible for the tax payment.

In the case of inaccurate or late tax payment or filing, the assessment officer will assess tax within a one-year period from the day of filing (not exceeding three years) without imposing a penalty or surcharge. In the case of failing to file and not paying the inheritance tax before the due date, the assessment officers are empowered to assess tax within ten years from the day on which the return was due.

**Penalties, Surcharge, Punishment**

- The penalty for failing to file the inheritance tax return within the time limit will be 100% of the tax payable; and
- The penalty for incorrectly calculating the amount of tax due when filing the tax return will be 50% on top of the additional tax payable.

The penalty prescribed in this Act may be waived or reduced in accordance with the rules and conditions prescribed by the approval of the Minister and published in the Royal Gazette.

According to this Act, any person failing to pay tax within the prescribed time will pay a surcharge of 1.5 % per month of tax payable (or for part of a month) excluding the penalty. Where the deadline for tax payment is extended, and the tax is paid within this extension, the 1.5% surcharge will be reduced to 0.75% per month. The calculation of the surcharge begins from the day after the filing deadline until the date of completing the tax payment. However, the surcharge amount will not exceed the amount of tax payable. The taxpayer may also face a fine ranging from THB 20,000 to THB 500,000 depending on the circumstances.

If a taxpayer disagrees with the assessment of the tax authority, an appeal may be made to the Board of Appeal within 30 days from the date of receiving notice. The Board of Appeal will consider the appeal within 180 days from the date of receiving the appeal (this period can be extended by a maximum of 90 days). The decision will be in writing and the appellant notified within 15 days. If the taxpayer does not agree with the ruling, the taxpayer may then appeal to the Tax Court within 180 days from the date of receiving the ruling.

**Gift Tax**

The gift tax is in effect in February 2016. It is applied to any individuals receiving any assets or amount from their parents, descendants, or spouses, or any other persons who are not their parents, descendants or spouses. The tax will be collected based on the value of the assets or amount exceeding the threshold set out below.

### **Tax Exemption**

- Any amount or assets received from parents, descendant, or spouse in the amount or value not exceeding THB 20,000,000 within any tax year\*;
- Any amount received from other persons who are not parents, descendants or spouses in the amount not exceeding THB 10,000,000 within any tax year; and
- Any amount that any person intends to give for the benefits of religion, education or public.

**Note: \*Only the transfer of ownership or possessory right of a real property to a legitimate child is qualified for such exemption. In this case, the parents who transfer the ownership or possessory right of the real property will be liable for the tax.**

### **Tax Rates**

- 5% of the value of the asset exceeding THB 20,000,000 for the assets or money received from parents, descendants or spouse.
- 10% of the value of the asset exceeding THB 10,000,000 for the assets or money received from any person other than parents, descendants or spouse.

# Chapter 10

## Contract Law and Enforcement

Thailand's legal system is a byproduct of its unique history. The legal system of Thailand is a mixture of both common law and civil law; however, the general principles of contract law in Thailand are similar to that of many common law jurisdictions. The main body of law which governs the formation and interpretation of a contract in Thailand is the Thailand Civil and Commercial Code (the "CCC"), in particular the chapters concerning contracts and more specifically, contracts and obligations. The CCC forms the structure of contract law in Thailand from the elements of a contract and the principles of offer, acceptance and the effects of an agreement. The CCC is mute, however, on the substance, subject, or contents of a contract. Nevertheless, there are often specialized areas of legislation that may influence the content of commercial agreements in Thailand.

### 10.1 General Contract Formation

As opposed to the common law, where contracts are generally formed through offer, acceptance, and consideration, Thai law prescribes that a promise becomes an enforceable contract when there is only an offer by one party (offeror) that is accepted by the other party (offeree).

Under Book II of the CCC of Thailand, a contract is defined as follows: *'an agreement between two or multiple parties declaring their intention to accept and conform to an offer made between them in order to enforce the obligations as binding in the contract'*. For a contract to be valid and not at risk of being considered null and void, the following conditions must be met:

- The contracting parties willingly entered into the contract;
- The contracting parties have the legal capacity to enter into the contract;
- The purpose of the contract must be lawful, possible to perform and not pose a contradiction to public order or good morals; and
- The contract must be made in a certain form (written, written and registered with a competent official) as the law specifically requires.

#### Form of Contract

As in common law jurisdictions, it is always advisable to make your agreement in writing and have it signed and documented by all the relevant parties. Certain contracts must take specific forms. In some cases, a contract can be declared void or only partially enforceable if it is not completed in written form and registered with a competent official under the relevant law. Examples include:

- A mortgage or a sale of immovable property (land and buildings) or certain movable properties (ships or vessels of six tons or more) is void if it is not made in writing and registered with a competent official;

- A lease contract of immovable property for the period of more than three years is partially enforceable for the period of only three years if not made in writing and registered with a competent official;
- A lease contract of immovable property for the period of three years or less, is unenforceable if there is no written evidence of the contract signed by the liable party to present to a court;
- A loan agreement of a sum exceeding THB 2,000 is unenforceable if there is no written evidence of the agreement presented to a court; and
- A share transfer agreement by a limited company or individual is void if it is not signed by the party concerned and properly witnessed by a third party.

**If a contract is not expressed in writing it may not necessarily be void; however, it could be unenforceable. This could create issues in the event that a dispute arises between the parties to the contract.**

## 10.2 Interpretation of Contract

When entering into a contract, it is common to find ambiguous terms or terms that can be interpreted in several different ways. The CCC specifies that a contract shall be interpreted according to the general principle of “good faith”, with consideration to the ordinary practice. This merely means that when interpreting the contract, a court will consider the intention of a party or the mutual intention of the parties based on the general principle of “good faith”. The court will also consider traditional practices between the parties or relevant trade practices, too. Furthermore, in interpreting the intention of a party, the court will look for the true intention which was expressed by the parties to the contract rather than a literal meaning of the wording.

In addition, since some types of contracts, such as contracts between a consumer and a business, or professional operators, are normally subject to the provisions under the Unfair Contract Terms Act B.E. 2540 (A.D. 1997). It is worth noting that a standard form contract will be interpreted in favor of the party who does not initiate or has the power over the contract.

## 10.3 Breach of Contract

It is important to note that there are no specific provisions treating a breach of contract under the CCC. Typically, when a breach occurs that has not been rectified by the breaching party, the parties may resolve their disputes through the Thai legal system or, if permitted by the agreement, through alternate dispute resolution mechanisms.

**Please refer to chapter 11 of this guide, on dispute resolution and alternative dispute resolution guide for further information.**

### Modifications and Termination of Contract

A contract can be modified or terminated upon agreement by the concerned parties and a breach of contract can be considered grounds for terminating a contract. Written contracts must also be

amended and terminated in writing. When a contract is terminated, any performance that has already occurred must be compensated (by reciprocal performance), and any performance that has not yet occurred will be considered canceled. Contract termination provisions are broadly written and do not contain any mandatory notice periods. If a party does not perform the obligations imposed by the contract, the other party may set a reasonable period of time and notify the relevant party to perform within the stated period. If the party fails in its duty to uphold its obligations, the other party is entitled to terminate the contract.

#### 10.4 Statute of Limitations

As no specific statute of limitations exists in Thailand, enforcement limitations are contained within the CCC and other relevant acts. Generally, any party to a contract wishing to enforce its rights under the contract or feels that it is being treated unfairly must lodge a complaint with the Court of Justice. Furthermore, the injured party must file the case with the court within a legally prescribed period for staging such a claim or complaint. In most cases, a party suing under contract must file a lawsuit within ten years from the date of when the contract expires. As the time prescription varies depending on the type of contract, it is recommended that a party to a contract seeks legal representation as soon as a situation arises.

#### 10.5 Liabilities and Non-Contractual Obligations

The CCC provides for damages “arising from” a breach of contract. The breaching parties are liable for damages arising from the breach, unless a breach occurs due to a *force majeure* event. While damages for a breach of contract are generally limited to direct damage, the breaching party may also be liable for damages arising from “special circumstances” that are reasonably foreseeable. For a discussion on liquidated damages, please refer to the dispute resolution and alternative dispute resolution chapter of this guide.

When a party breaches a contract, shows non-performance, or performance becomes impossible and the other party has legally terminated the contract, if damages occur, the breached party is entitled to claim for damages. Damages can take the form of the following: (i) damages from expenses on contract performance, or (ii) damages in the form of profits expected to be gained if there was no breach of contract.

Certain non-contractual obligations are governed by Tort Law (Book II, Title 5, CCC of Thailand) under the heading “Wrongful Acts”. While the concept of punitive damages is frequent in common law jurisdictions, the CCC only permits a court to order compensation on direct damage, which resulted directly from a wrongful act.

#### 10.6 Enforcement

The Law of Civil Procedure, through the Legal Execution Department (under the supervision of the Ministry of Justice), gives the executive branch broad powers to issue orders to enforce court judgments, including the seizure of assets.

A specific administrative structure is established for the enforcement of judgments, with some involvement of the courts, the police, and the public prosecutor. The law details the types of court judgments that are enforceable and necessary enforcement procedures.



The Legal Execution Department is entitled to issue orders to confiscate, seize or move property. An owner will be notified that his or her assets have been ordered to be seized. Before being sold at an auction in order to offset a debt or otherwise enforce a damages award, assets will be evaluated by a committee and the evaluation result will be published.

**There are no such thing as punitive damages in Thailand; a court will only award damages to compensate for direct damage.**

# Chapter 11

## Dispute Resolution

### 11.1 Dispute Resolution by Thai Court

#### 11.1.1 General Overview of Thai Court System

As Thailand is a civil law jurisdiction, the principles sources of law are acts, statutes, and regulations as where case precedence is not a binding source of law. In spite of this, Supreme Court judgments can be relied upon as being influential and authoritative, providing a reasonable indication of how a judge may seek to apply the law in certain situations.

Thailand operates a court system of general jurisdiction (or so-called ‘Court of Justice’) and other “specialized” courts. The Court of Justice has broad jurisdiction to try and adjudicate several kinds of cases except the cases subject to the jurisdiction of the ‘specialized courts’ which includes the following: (i) Constitution Court; (ii) Bankruptcy Court; (iii) Labor Court; (iv) Intellectual Property and International Trade Court; (v) Tax Court; (vi) Administrative Court; (vii) Juvenile and Family Court; and (viii) Military Court. It is well acknowledged that the Court of Justice is the largest Court System in Thailand because of its broadest jurisdiction and numbers of courts nationwide. The Courts of Justice comprises of a three-tier court, namely the Court of First Instance, the Appellate Court, and the Supreme Court of Justice of Thailand – which is the highest tier of Thai court.

It is worth noting that court proceedings and trials are normally conducted in the Thai language according to the Civil Procedure Code.

Even though lawsuits filed against the state or state Agencies are heard by the Administrative Court, some of them can be heard by the Court of First Instance, the Court of Appeal and the Supreme Court of Justice if the dispute in question arises from any matter regarding the use of administrative powers by the state or a state agency.

#### 11.1.2 Length of Process

The Civil Procedural Code is the primary legislation covering procedures and trials in Thai courts (except other procedural codes for specialized courts). Litigation in Thai civil courts proceeds relatively slowly when compared to established common law jurisdictions. The length of time largely depends on the workload of the particular court with jurisdiction over the dispute at hand.

Generally, the overall length of time from lodging the initial complaint through to a ruling takes about 12 to 18 months. However, the granting of multiple extensions of time can lead to long delays. Based on our knowledge and experience, it is near certainty that judgments will be delayed due to concurrent extensions.

### 11.1.3 Common Forms of Relief

During the course of proceedings in the Thai legal system, the following types of relief are often granted:

- Temporary attachment orders;
- Restraining orders;
- Damages awards;
- Emergency/Interlocutory injunctions; and
- Specific performance.

Courts have the discretion to make orders for damages in respect of damages incurred, if these damages have been proven to the court's satisfaction.

There is debate amongst legal doctrine as to whether Thai law will uphold a liquidated damages clause. Certain provisions enshrined in the Thailand Civil and Commercial Code (the "CCC") suggests that the amount of liquidated damages stipulated in a contract can be increased or decreased by the courts (in light of the actual and realized amount of damage suffered by the party). However, Section 383 of the CCC states that where a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the court.

The combined effect of these provisions is that liquidated damages clauses under Thai law may not operate effectively in limiting the liability for liquidated damages. Therefore, the court reserves the right, based on the merits of a dispute, to award liquidated damages of an amount at its discretion.

### 11.1.4 Foreign Litigants

Foreign individuals and entities may engage in legal proceedings to resolve any disputes if they have a right of action under the Civil Procedural Code. Court proceedings are always conducted in the Thai language. When a foreign litigant is involved; the use of translators is common practice.

### 11.1.5 Enforcement of Foreign Judgments

Thailand is not a signatory to any reciprocal enforcement treaties of foreign court judgments and Thai courts in practice do not enforce foreign judgments. Should a foreign litigant wish to enforce a judgment against a Thai party through the courts of Thailand, it will have to commence entirely new proceedings on the merits of the judgment that was handed down by a court of another jurisdiction (de novo) in the Thai courts and a full trial will be required. In this respect, a foreign judgment can be relied on as evidence of the obligation and may be recognized as a claim adjudicated abroad.

### 11.1.6 Recent Development

#### Class Actions

In December 2015, Thailand introduced the principle of class actions into the Civil Procedural Code, which were not previously permitted under Thailand's legal regime. Thailand has decided to limit its focus on tortious claims (negligence etc.), breach of contract claims and "claims of legal rights", which are laws generally passed to protect the public. Some examples of these laws include

environmental laws, consumer protection laws, securities and exchange laws, employment laws and trade competition laws.

From a procedural standpoint, the trial portion of class actions is not very different from ordinary civil actions. You can expect the same process of mediation, submission of evidence, hearing of witnesses and finally, a judgment. If the court decides in favor of the class of plaintiffs, then a judgment will include their lawyer's fees along with payment of damages to all class members individually (based on the formula submitted to the court). The result of the class action will bind all member of that particular class.

Class action in Thailand is based on an opt-out rule, which will automatically include other cases having common dispute to all members of the class. A class member who wishes to opt out from the class action must notify the court within 45-days. Any outgoing member cannot rejoin the case or enjoy any benefit from a positive result in the case.

The introduction of class action is likely to result in a number of positive developments in the Thai judicial system. For example, it should increase the efficiency of courts through dealing with actions as a group rather than on an individual basis. It will also provide a degree of certainty to plaintiffs and defendants. Once the court has decided on the class action, the issue will not be heard again. It also provides greater clarity for defendants in individual actions that often result in varying rewards.

**Local residents of a Thai village brought the very first-class action lawsuit against a mining company, allegedly responsible for heavy metal pollution. Environmental law seems to be an area of development for class actions.**

**Another class action lawsuit was recently brought against Ford Motor Company (Thailand) Ltd by over four hundred consumers complaining about substandard condition and performance of Ford Fiesta and Ford Focus vehicles.**

### **E-Filing**

Filing legal documents on Thailand has, until recently, required numerous trips in-person to the applicable courts, which can be both costly and time consuming for ongoing cases. While the Civil Procedure Code was amended to permit electronic filing of legal documents in October 2015, the regulations permitting e-filing from Thailand's Supreme Court Chief Justice have only recently come into effect on 4 May 2017.

Currently, e-filing is accepted by the Civil Court, the Southern Bangkok Civil Court and the Thon Buri Civil Court. In addition, the matters that are eligible for e-filing are sales, hire of property, mortgage, pledge, suretyship, lending, hire-purchase and credit cards.

## **11.2 Alternative Dispute Resolution**

The use of alternative dispute resolution mechanisms has greatly expanded over the last several years in an effort to lessen the number of cases that end up in court, to reduce the expenses that occur during court procedures, and save time in resolving disputes. Moreover, the Court of Justice has a favorable attitude towards this kind of dispute resolution in general, and supports arbitral proceedings conducted in Thailand through various means, such as the enforcing arbitration clauses.

Thailand is a contracting State to the 1923 Geneva Protocol on Arbitration Clauses, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, and the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.

### 11.2.1 Conciliation

Conciliation is a procedure of peaceful settlement of disputes. The matter of dispute is referred to a standing or *ad hoc* commission of conciliation, appointed with the parties' agreement, whose function is to elucidate the facts objectively and impartially and then to issue a report. The issued report is to contain proposals for a settlement, which, however, the parties are under no legal obligation to accept.

Thai culture is often perpetuated as a culture promoting courtesy and conciliation. Traditionally, it was the King who was the foundation of justice. More broadly, in rural areas, village elders, monks, and other leading local figures were, and still are, important catalysts in the judicial process.

### 11.2.2 Arbitration

Arbitration is the determination of a dispute by one or more independent third parties (arbitrators) rather than going through a legal system. An arbitrator is bound to apply the law correctly but may in general adopt what procedure he/she desire; however, arbitrators must conform to the rules of natural justice.

In Thailand, arbitration is regulated by the Arbitration Act B.E. 2545 (A.D. 2002), which adopts the UNCITRAL Model Law.

There are three main domestic arbitration institutes in Thailand: The Alternative Dispute Resolution Office (the "**ADRO**"), also known as the Thai Arbitration Institute (the "**TAI**"), The Thailand Arbitration Centre ("**THAC**") and the Thai Commercial Arbitration Institute of the Board of Trade. Furthermore, most arbitration cases are conducted under the supervision of the International Chamber of Commerce.

The Rules of the Thai Arbitration Institute ("**Rules 2017**") came into force on 31 January 2017. The key changes are as follow:

- The arbitral tribunal can grant interim measures;
- Appointment of a sole arbitrator if there is an absence of agreement;
- Confirmation on the confidentiality of proceedings;
- Service of pleadings and other documents by email is now permitted; and
- New procedure for the consolidation of related arbitrations arising from multiple contracts.

### 11.2.3 Arbitral Procedure

Once a dispute arises, a party who wants to lodge a claim has to file a "statement of claims" with an arbitration institution designated in the arbitration agreement. If the statement of claims passes

preliminary requirements (concerning identification of parties, arbitration clauses and the scope of the claim) a director will issue an order accepting the procedure.

The arbitration institution will then serve a copy of the statement of claims to the other party, the respondent, and ask him/her to submit a statement of defense or counter-claims.

After a sole arbitrator or a three-arbitrator tribunal is appointed, a meeting with the parties will be arranged, so that the tribunal will examine the statement of claims, counter-claims, and identify the disputed issues along with the burden of proof.

The arbitral tribunal takes into account information regarding witnesses and evidence to be offered by the parties which will then determine when and how the hearing will be conducted.

If it is necessary to hold a hearing, the parties wishing to call witnesses are usually required to submit written witness statements in advance. Once all witnesses and evidence have been reviewed, the arbitral tribunal will declare the hearing closed, and the arbitrators will hold a private meeting to decide on a resolution to the dispute.

In limited circumstances, it is possible for foreign arbitrators and foreign lawyers to participate as arbitrators and act as legal advisors in arbitration proceedings. This includes circumstances where the governing law is not Thai law or where it is not necessary to apply for the enforcement of a foreign judgment from a Thai court.

After the hearing, the arbitral tribunal will hold a meeting to discuss all relevant facts and arguments and will then make a decision on the dispute. The outcome of the dispute will be stated in an arbitral award which will become binding once it has been served on the parties concerned.

#### **11.2.4 Enforcement of Arbitral Award**

An arbitral award made in accordance with Thai Arbitration Rules or Thai laws will be recognized as a binding and enforceable award by a Thai court, where the claimant needs to file a request to a Thai court requesting for its enforcement order within three years from the date an award first become enforceable (e.g. 30 days after its issuance date).

A foreign arbitral award will be recognized as a binding and enforceable award by a Thai court if the arbitral award is covered by a treaty or convention such as the New York Convention or the Geneva Protocol to which Thailand is a party. It will only have an effect as far as Thailand has ratified the Convention or the Protocol. A party must file a petition to a Thai court within three years from the date an award first become enforceable (e.g. 30 days after its issuance date). However, Thai courts may refuse the enforcement of the award on certain grounds such as a party lacked legal capacity, the arbitration agreement is not enforceable, the award is beyond the scope of the arbitration agreement, the composition of the arbitration tribunal, due process or the recognition of the award is against public policy.

**Foreign judgments are not enforced by Thai courts, a new procedure will have to be started from the beginning, using the foreign judgment used as evidence.**

# Chapter 12

## Project Finance

### 12.1 Collateral or Security

#### What Types of Collateral or Security are Available?

Thailand's Civil and Commercial Code B.E.2468 (A.D.1925) (the "CCC") regulates the types of collateral available for secured transactions. Under the CCC, only mortgages and pledges can be used as a security to ensure contract performance.

A mortgage is available for security over immovable property such as; land, buildings and certain types of machinery detailed under the Machinery Registration Act B.E. 2514 (A.D. 1971).

A pledge is available for security over movable property such as; shares, stock or inventory in the pledger's company, instruments of investment and unregistered machinery.

In order to make securities more practical, such as the efficiency increase in the enforcement process, and to include a broader range of assets that could be used as a security, Thailand has passed the new Business Collateral Act B.E.2558 (A.D.2015) (the "BCA") which came into effect on July 1 2016. It is now possible to have a business with rights to receive; money in a bank account, accounts receivable, inventory, intellectual property, other intangible assets and other assets prescribed by ministerial regulation, as collateral for which security may be created in the form of a pledge or an assignment.

**Depending on the form and level of your property interests, you may not be able to mortgage your land. Please refer to the table below to see what type of property rights allows you to actually mortgage a land.**

Type of Right	Prerogatives	Corresponding Document	Suitable for Investment Purposes
Occupation and Usage	Can occupy and use land.	Sor Kor Neung	NO
Temporary Occupation and Usage	Can occupy, sell, and use land. Land can also be inherited but is still owned by the Government.	Nor Sor Song	NO
Unconfirmed Possession	Can occupy, sell, use, lease, and mortgage land. The land can also be inherited but is still owned by the government.	Nor Sor Saam	NO

Type of Right	Prerogatives	Corresponding Document	Suitable for Investment Purposes
Confirmed Possession – boundaries defined by aerial survey	Can occupy, sell use, lease, and mortgage land. The land can also be inherited but the land is still owned by the Government.	Nor Sor Saam Gor	YES
Legal Ownership	Can occupy, sell, use, lease, and mortgage land. The land can also be inherited and is not owned by the Government, but by an individual.	Nor Sor Si (Chanote)	YES

## 12.2 Perfection and Priority

The CCC requires the mortgage to be made in writing and registered with the Land Department, for land, buildings, and installations; or the Central Machinery Registration Office of the Ministry of Industry, for machinery. The first mortgage registered will take priority over any mortgages registered at a later date.

Perfection of a pledge under the CCC requires that the property which is the subject matter of the pledge is delivered by the pledger to the pledgee. The pledged items must be kept under the control of the pledgee or security holder. The pledge is automatically extinguished when the secured obligation is extinguished, or the pledged item returned to the possession or the control of the pledger. A pledge of shares will be recorded in the pledger’s share register, as the Ministry of Commerce does not maintain a general registry of security of security interests.

Under the new BCA, unlike pledge, a security provider is entitled to possess, use, exchange, dispose or transfer the collateral. This includes using it in a manufacturing process, provided the security provider cannot pledge the collateral under the BCA any further, otherwise the pledge will be voidable. However, a business collateral contract must be made in writing and registered with a competent officer. A security receiver registered under the BCA will have priority over the assets to unsecured creditors.

**To complete registration of a mortgage with the Land Department, mortgage registration fees of 1% of the mortgage amount, up to a maximum fee of THB 200,000 must be paid. The registration fee for the mortgage of machinery is 1% of the mortgage amount up to a maximum fee of THB 100,000. Stamp duty will be affixed on the mortgage agreement. Stamp duty for guarantees ranges from THB 1 to THB 10.**

## 12.3 Foreign Investment

The primary legislation governing foreign participation in business activities in Thailand is the Foreign Business Act (the “FBA”) which limits the rights of foreigners to engage in certain business activities in the country. The FBA lists three categories of business that foreigners must not be involved in (the



negative list). In addition, a company that is 50% or more owned by a foreign individual or company must have a Foreign Business License (the “FBL”) or be granted a specific exemption.

The Land Code also restricts ownership of land by foreigners. Foreigners may freely lease land, though a lease exceeding three years must be registered with the Land Department; failure to do so will result in the lease being enforceable for three years. A foreign company obtaining incentives under the Investment Promotion Act will be permitted to own land of an area that the Board of Investment (the “BOI”) deems appropriate in order to carry out the promoted activities.

## 12.4 Foreign Exchange Remittance and Control

### Injection of Registered Capital from Foreign Investors in Thailand

When incorporating a private limited company, the CCC requires “*that all issued shares must be subscribed to and that a minimum of 25% of subscribed shares be paid up on the incorporation date*”. For example, if a limited company has a registered capital of THB 1,000,000 for its incorporation, THB 250,000 must be paid for subscribed shares on or before the registration date. As for the remaining amount, contribution will be made at the request of the board of directors.

Generally, the receipt of share payment must be submitted to the Ministry of Commerce (the “MOC”) when registering a company. In case the company has foreign shareholders contributing less than 50% of registered capital/has no foreign shareholders but has a foreign authorized director, a confirmation letter from the bank confirming or stating the financial status in accordance with the contribution of each shareholder for the registered capital of each Thai shareholder must be presented.

### Foreign Sourced Loans

The Ministerial Regulations No. 13 prescribes that a borrower in Thailand who receives a foreign currency loan from abroad must sell the foreign currency to, or deposit it with an authorized bank or authorized company in Thailand within 7 days from the drawdown date. In the event the borrower does not want to bring the drawn down loan into Thailand within 360 days, the borrower must apply for a waiver from the Bank of Thailand (the “BOT”). In remitting the drawdown foreign currency loan to Thailand either by exchanging or depositing with Thai authorized banks, the borrower will be required to report the purpose and details of such a loan to the authorized bank.

### Outflow of Funding (Principal, Interests, and Dividends)

According to the Notification of the Ministry of Finance on Exchange Control, a borrower can outwardly remit foreign currencies to repay the principal to the lender of an amount no higher than the value that the borrower brought into Thailand.

For loan interest and any other bank fees, the borrower is allowed to remit up to the underlying amount shown in the loan agreement and or other supporting documents.

In purchasing or exchanging foreign currency to transfer the money as repayment to the lender i.e. principal and interest, the borrower must submit the requested documents to the authorized bank. In this regard, approval from the BOT will not be required if the authorized bank is satisfied with the complete set of submitted documents.

As for dividends, evidence of a dividend payment such as notice of dividend payment issued by a company is required when remitting the number of dividends outward.

**When several mortgages are registered on a same asset, the first mortgage registered will take priority over any mortgages registered at a later date, even if the contract for the first registered mortgage has actually been entered after another mortgage on a same asset. What matters is the registration date, not the date when the contract was entered into by the parties.**

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# About DFDL

DFDL was established in 1994 and built on a unique vision: to create an integrated legal, tax and investment advisory firm, with in-depth knowledge of the jurisdictions we work in, providing technical excellence across our core areas of expertise.

Over twenty years later, DFDL continues to build on its reputation as the obvious first-choice firm for sophisticated transactions in frontier markets across Asia and beyond.

As these markets continue to expand and thrive, so has DFDL and we are now uniquely positioned to help clients access investment opportunities in the world's most dynamic region.

With a diverse complement of over 140 local and foreign lawyers and advisers working within Asia, we provide versatile tax and legal services in a language that you understand. These services include:

- Banking and Finance
- Corporate, Mergers and Acquisitions
- Employment
- Energy, Mining and Infrastructure
- Real Estate and Construction
- Taxation

Since its foundation, DFDL has acquired an outstanding reputation for providing integrated and solution-oriented legal and tax services to establish, structure and protect our clients' business interests in dynamic and challenging markets. DFDL is also actively involved in developing the legal and regulatory environments of the frontier markets in which we operate.



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