DOING BUSINESS IN THAILAND

SECOND EDITION

CHANDLER MHM

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Second Edition

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PREFACE

Chandler MHM Limited (Chandler MHM) has a history of representing clients as an independent law firm in Thailand since 1974, and it is one of the few local firms with qualified Thai, US and Japanese lawyers. The firm has more than 40 years' experience in Thailand and across Southeast Asia, with clients also benefiting from Mori Hamada & Matsumoto's (MHM's) strong presence in Japan, China, Singapore, Myanmar, Vietnam and Indonesia and its global network with top independent law firms.

Chandler MHM advises leading Thai and international clients on a wide range of projects, with principle practice areas including: banking and project financing, corporate and mergers & acquisitions, energy and natural resources, major investment projects, real estate, REITs/capital markets, regulatory, dispute resolution, litigation, restructuring and insolvency, labor and employment law, government contracts and technology, media and telecommunications law (TMT). The firm's lawyers draw on integrated practice expertise to deliver legal solutions that are practical, innovative and consistently responsive to clients' needs.

Chandler MHM ensures clients of international reach and an international standard of practice. The firm currently has over 80 lawyers, with language capabilities including, Thai, English, Japanese, Chinese, and French.

Chandler MHM consistently receives top tier recognition from international commentators including: *The Legal 500 Asia Pacific 2020*, as a Top Tier Firm (Projects and Energy); *IFLR1000 2020*, as a Top Tier Firm (Banking & Finance and Project Development); *Chambers and Partners Asia Pacific 2020*, as a Leading Law Firm; *ASIAN-mena COUNSEL In-House Community 2019*, as Thailand Firm of the Year, and Most Responsive Domestic Law Firm (Thailand); *Asialaw Profiles 2020*, as an Outstanding Law Firm (Banking & Finance, Corporate and M&A and Energy); and *Asian Legal Business 2019* as Tier 1 for M&A.

A foreign investor interested in starting a project or transaction in Thailand for the first time will find a legal framework and administrative practices that satisfactorily govern most private sector business concerns. The roles of the law, lawyers and judiciary in Thailand are well established. It is a system within which most foreign and local investors can operate comfortably with a high degree of confidence in consistent interpretation and enforcement of the law.

The modern Thai legal system dates from the reign of King Chulalongkorn in 1868. The Ministry of Justice was established in 1892. The Thai Bar Association was established in 1914. As of December 2019, there were approximately 79,000lawyers, judges and prosecutors. Legal and accounting professions are regulated under professional licensing systems, which encourage high standards of service.

There is an independent judiciary which provides a forum for the fair settlement of disputes. Thailand has several arbitration institutes. The most recent, the Thai Arbitration Center, was established in 2007 (in operation since 2015) and the Thai Arbitration Center is encouraging usage for international disputes. High status is attached to being a judge, and the examinations to enter the judiciary are comprehensive and difficult. The judiciary zealously guards its independence. Government agencies may be sued in the courts and cannot raise a defense of sovereign immunity. However, state property is not subject to execution.

There is a Thai civil service which administers laws and regulations with a high degree of consistency, and is largely free from political interference. Few, if any, decisions in a normal business transaction or investment project require going above the civil service for a political decision.

Although Thai is the language of the courts and government agencies, most contracts between private parties may be executed in English or other foreign languages, and may be governed by foreign law. Such contracts may also specify a foreign jurisdiction, or foreign or domestic arbitration as the dispute settlement mechanism. Foreign and domestic arbitration awards are enforceable. However, foreign court judgments are not enforced by Thai courts.

The Thai court system operates with a high degree of predictability. However, some foreigners may be surprised by the absence of juries, no US-style discovery for documents prior to trial, no contingent legal fees, and no right to full recovery of legal fees. In the most recent World Bank's Ease of Doing Business Ranking Report 2020, Thailand is ranked 21st, up from 48th in 2017, among 190 economies. Thailand made improvements in four areas: starting a business, getting electricity, paying taxes, and trading across borders. Thailand is actively taking steps to improve its score.

This book provides an overview of Thai laws and practices for doing business in the private sector. It is not a complete summary and should be used only as a guide for preliminary planning purposes. Due to the continually changing legislative in Thailand, professional advice should always be sought in identifying and interpreting the laws and regulations applicable to particular projects and transactions before implementation. Chandler MHM provides legal services on matters discussed in this publication.

CHANDLER MHM LIMITED
March 2020

INTRODUCTION
THE THAI LEGAL SYSTEM

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(1) History of Thai Law

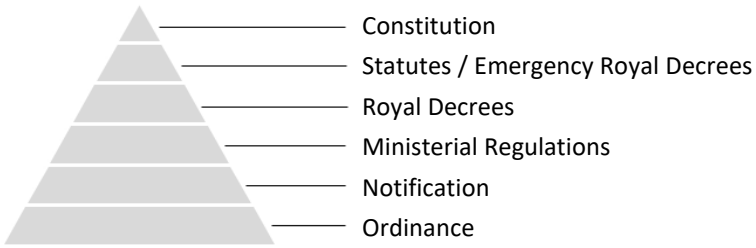
The modernization of Thai law began during the reign of King Rama V (King Chulalongkorn; reign: 1868 – 1910). Thailand1 had concluded a number of one-sided treaties in favor of Western nations in the 19th century that included consular jurisdiction and a waiver of tariff autonomy, among other terms. These unfair treaties, among other factors, were major factors in the modernization and Westernization of Thailand's legal system. During the process of updating the Thai legal system, and because Thailand was one of the few countries in Southeast Asia that had not been under colonial control, Western legal experts (from France, England, Belgium and other nations) were invited to Thailand as legal advisors. These experts played major roles in establishing fundamental laws, including the Criminal Code and the Civil and Commercial Code. Development of this new legal system with the input and influence of these Western advisors resulted in a Thai legal system that is fundamentally categorized as a civil law system, with some common law features.

Currently, there are four basic codes: (i) Thai Civil and Commercial Code, (ii) Criminal Code, (iii) Civil Procedure Code, and (iv) Criminal Procedure Code. In addition, there are the Land Code, the Revenue Code, and special laws and regulations governing most areas of commercial activities; many drafted and implemented with the assistance of international legal advisers. Decisions and rulings of the judiciary and civil service are not binding, but have considerable force as precedents.

(2) Sources of Thai Law

The Constitution is the supreme law in the Thai legal system. Secondary sources of law under the Constitution are statutes, emergency royal decrees and royal decrees. ministerial regulations, notifications, and ordinances are commonly adopted pursuant to enabling statutes. In addition, apart from these elements of the ordinary legal system, there are proclamations of the revolutionary government which were enacted by the provisional regime following the coup and ouster of the government in 2014. These proclamations may take precedence over any other source of law, depending on the subject matter and content. An overview of each of these elements is displayed in the figure below.

[Introduction Figure 1] Thailand's Legal Structure



(i) The Constitution

Thailand's first constitution was promulgated in 1932. Since then, there have been a total of 20 constitutions which have been enacted. Constitutions have been repeatedly discarded as a

[1] At that time, the country was officially known as "Siam".

consequence of the military coups, with numerous interim constitutions, followed by promulgation of new permanent constitutions. The most recent permanent Constitution came into effect in April 2017, following a national referendum held on 7 August 2016 that approved the adoption of the proposed draft Constitution.

(ii) Statutes

After the national general election in March 2019 and the Cabinet has been officially formed in July 2019, all statutes (acts) are currently enacted by the Thai National Assembly. In principle, statutes come into effect following publication in the government gazette, though the effective date may be delayed if prescribed in the text of the statute.

(iii) Emergency Royal Decrees

Emergency royal decrees are enacted by the government in the name of the King in cases where urgency is required to maintain national security, public safety, national economic security, to avert a public calamity, or in the case where urgency is needed to enact a law that requires rapid and confidential deliberation related to taxation or currency. An emergency royal decree has the same force as a statute. An example of an emergency royal decree is the Emergency Decree on Civil Aviation of Thailand, B.E. 2558 (2015), which was enacted in 2015 to establish and stipulate the authority of the Civil Aviation Authority of Thailand.

(iv) Royal Decrees

Royal decrees are enacted by the government in the name of the King in order to enforce the Constitution, statutes, or emergency royal decrees to the extent not contrary to the law. A specific example of a royal decree is the Royal Decree Prescribing Works Related to Occupations and Professions that an Alien is Prohibited to Engage In, B.E. 2522 (1979)2, which prohibits foreign nationals from working or engaging in 39 specific occupations.

(v) Ministerial Regulations

Ministerial regulations are adopted by the ministers of each ministry pursuant to statutes or emergency royal decrees in order to enforce those statutes or emergency royal decrees. Promulgation of ministerial regulations requires the signature of the relevant minister. Specific examples of ministerial regulations are two Ministerial Regulations Relating to Specified Service Businesses not Requiring Foreign Business Operation Licenses issued in 2013 and 2016, respectively3, which were enacted by the Ministry of Commerce specifying service businesses that are exempted from the category of "other service businesses" under List 3 of the Foreign Business Operations Act, B.E. 2542 (1999), and no longer require a foreign business operation license.

(vi) Notifications

Ministries or their constituent departments may adopt notifications in order to prescribe specific rules related to a particular subject. Typically, the director-general of a particular department will be empowered by virtue of a Ministerial Regulation to issue notifications in order to prescribe detailed rules and regulations.

[2] Enacted in 1979

[3] Enacted in March 2013 and July 2016

(vii) Ordinances

Local governmental bodies in Thailand are granted the authority to enact ordinances pursuant to the law. The system of local government in Thailand is complex, but the main local governmental units are provinces, districts (in Thai, "*amphur*"), and sub-districts (in Thai, "*tambol*"). Each local governmental unit has ordinances, enacted by assemblies that apply only to that local governmental unit.4

(viii) Proclamations by the Revolutionary Government

Following the successful coup and suspension of the Constitution in 2014, at the time, there was no legislative body, and consequently, proclamations by the revolutionary government take the form of laws issued in order to govern. The content of such proclamations is varied and includes revision and repeal of the Constitution and various statutes. The National Council for Peace and Order ("**NCPO**") was established in May 2014 and had issued 456 such proclamations . Examples include the Order of the NCPO No. 2/2560, which concerns development of the Eastern Economic Corridor, and the Order of the NCPO No. 41/2559, which grants to the National Broadcasting and Telecommunications Commission the authority to suspend broadcasts that violate regulations enacted by the NCPO. After the national general election in 2019, the NCPO has dissolved upon the formation of the Cabinet. 312 proclamations issued by the NCPO has already been revoked or invalid. However, the remaining 144 proclamations are still in effect.

(3) Law Reform Initiatives

The current government has invested significant resources into improving the process of lawmaking in Thailand, as well as conducting a review of unnecessary and / or outdated laws and regulations. Under the auspices of the Council of State, a body that is charged with proposing new laws to the Council of Ministers, the government has taken a number of specific initiatives to this end. As an example, the so-called "guillotine unit" within the Council of State is presently reviewing regulations and mandatory licenses with the aim of reducing unnecessary licenses. The review is also intended to improve the lawmaking process, clarifying the manner in which Ministries can adopt regulations and issue notifications. The Council of State has been working closely with the Stock Exchange of Thailand, the Thailand Development Research Institute, as well as the Thai Chamber of Commerce and numerous foreign chambers of commerce in this regard. Thailand has shown dramatic improvement in its ease of doing business, ranking 21st in the World Bank's 2020 report.

4 Bangkok is divided into districts (in Thai, "*khet*") and sub-districts (in Thai, "*kwaeng*").

CHAPTER 1

ESTABLISHMENT OF COMPANIES IN THAILAND AND RESTRICTIONS ON FOREIGN INVESTMENT

CHAPTER 1 | ESTABLISHMENT OF COMPANIES IN THAILAND AND RESTRICTIONS ON FOREIGN INVESTMENT

This Chapter discusses options available for establishing a business in Thailand and how to establish a limited company, which is the most common business entity, and also restrictions on foreign investment in Thailand.

(1) Establishment of Business Entities

The Thai Civil and Commercial Code (the "**CCC**") is the primary law governing partnerships and limited companies in Thailand (Sections 1012 – 1273/4). The Public Limited Company Act, B.E. 2535 (1992) (the "**PLCA**") is the primary law governing public limited companies. Establishment of the following types of partnerships and companies are recognized and regulated under these laws:

A. Thai Partnerships and Limited Companies

(i) Partnerships

The CCC governs both ordinary partnerships and limited partnerships. In the case of an ordinary partnership, all of the partners together bear joint and several liabilities for the partnership's obligations (Section 1025 of the CCC).

Limited partnerships have both limited liability partners who bear indirect limited liability to the extent of their equity investments, and general liability partners who are jointly and severally liable for all of the partnership's obligations (Section 1077 of the CCC).

Both ordinary partnerships and limited partnerships acquire a juristic personality when they are registered (Section 1015 of the CCC). Whereas registration of an ordinary partnership is voluntary (Section 1064 of the CCC), registration of a limited partnership is mandatory (Section 1078 of the CCC). Note that the use of partnerships is not common in Thailand.

(ii) Limited Companies

The CCC (Sections 1096 – 1273/4) governs limited companies, while the PLCA governs public limited companies. Both types of company are composed only of shareholders who bear indirect and limited liability.

B. Branch Offices or Representative Office of a Foreign Entity

The following are alternative forms of Thai juristic entities in which foreign companies may elect to engage in.

(i) Branch Offices

It is not uncommon for foreign companies to choose to establish a branch office in Thailand. A branch office is regarded as having the same legal status as a foreign company (e.g. the foreign head office). As a result, the liability related to contract execution or unlawful conduct by the branch office in Thailand is imputed to the head office of the foreign company. Therefore, branch offices may only engage in business activities to the extent of the foreign company's stated business purpose.

(ii) Representative Offices

Foreign companies can also establish representative offices in Thailand whose primary functions are to provide local information and support to their respective head offices. However, the scopes of activities permitted for a representative office are extremely limited and the offices cannot engage in profit-generating activities.

In the past, under the policy of the Department of Business Development, Ministry of Commerce (the "**DBD**"), the authority in charge of the Foreign Business Operations Act, B.E. 2542 (1999) (the "**FBOA**"), a representative office was categorized as an "other service business," which was subject to restrictions on investment by foreign companies, and a foreign business operation license was required in order to conduct business activities. However, effective as of 9 June 2017, an extension of exemptions was made by Ministerial Regulation (No. 3) issued under the FBOA resulting the activities of a representative office no longer being listed as restricted businesses (i.e. it is not necessary for a representative office to apply for a foreign business operation license). However, a representative office shall notify of the place storing the accounts and the supporting documents needed for making accounting entries in order to obtain its juristic person registration number under the Notification of the DBD on Directions Pursuing Accounting Law to be Applied with a Juristic Person Established under Foreign Law but Operating Business in Thailand Prescribed as the Person Charged with the Accounting Duty, B.E. 2559 (2016).

C. The Establishment of a Limited Company

A limited company is the most common form of juristic entity utilized by investors in Thailand. The following provides a brief overview of incorporation procedures and timelines for incorporation.[1]

(i) Promoters and Share Capital

a. Promoters

When establishing a limited company, it is necessary to first select promoters who will perform the corporate establishment procedures with the DBD. The main requirements related to promoters for limited companies are set forth in Figure 1-1.

[Figure 1-1] Major Requirements Related to Promoters of Limited Companies

	Requirements
Minimum number of promoters	three promoters (Section 1097 of the CCC)
Requirements for promoters to become founding shareholders	Promoters must hold a minimum of one share as shareholders at the time of establishment of the limited company (Section 1100 of the CCC) (however, subsequent transfer is in principle unrestricted).
Thai residency requirement	None

b. Capital

There is no "minimum capital" requirement but the value of each share shall not be less than five Baht (Section 1117 of the CCC). However, in cases where the business is conducted by a "foreigner" under the FBOA, registered capital must satisfy the minimum registered capital requirements (Section 14 of the FBOA).

[1] In addition to establishing a juristic personality through the formation of a new company; another option is to acquire an existing company through a merger and acquisition. See *Chapter 3 (Mergers and Acquisitions)* for information on establishing businesses through M&As.

(ii) Procedures for Establishing a Limited Company

The following is a brief outline of steps required to establish a limited company in Thailand.

Step 1: Reservation of a Name (1 – 3 days)

The first step in establishing a limited company is to file an application online and register the company's name with the Registrar of the Partnerships and Companies Registration Office, the DBD (the "**Registrar**"). Registrar will advise the business as to whether the proposed name is available within a few days of receiving the application. If the name is approved, the applicant will have 30 days from the date of approval to file the Memorandum of Association (the "**MOA**") to the Registrar.

Step 2: Filing of MOA (1 – 3 days)

The MOA is a relatively simple document which must contain the following information:

- the name of the company;
- the company's registered office location (at this stage only the province (in Thai "*Changwat*") needs to be specified);
- a list of the company's business objectives;
- a declaration that the liability of the company shareholders shall be limited;
- the total amount of the registered share capital, the numbers of shares, and the par value thereof (which must be at least five Baht per share); and
- the names, addresses, occupations and signatures of three promoters, and the number of shares subscribed to each of them.

A registration fee of 500 Baht is required and payable in connection with the filing of the MOA.

Step 3: Holding of Statutory Meeting (7 days' notice)

After the Registrar has accepted the registration of the company's MOA, the promoters must hold a statutory meeting. Prior to holding the statutory meeting, all of the shares in the company must be subscribed to. The shares may not be issued at a price lower than the par value per share.

The first payment for shares must be at least 25% of their par value.

As early as seven days after the MOA has been approved by the Registrar (seven days' notice of the statutory meeting is required), the statutory meeting of the share subscribers may be held.

At the statutory meeting, the following business must be transacted:

1. The adoption of the Articles of Association (the "**AOA**") of the company (unless agreed not to adopt the AOA, the provisions in the CCC apply);
2. The ratification of any contracts entered into and any expenses incurred by the promoters in organizing the company;
3. The fixing of the amount, if any, to be paid to the promoters for their services in organizing the company;
4. The fixing of the number of preference shares, if any, to be issued, and the nature and extent of the preferential rights of such shares;
5. The fixing of the number of ordinary shares or preference shares to be allotted as fully or partly paid-up other than in money if any, and the amount up to which they shall be considered as paid-up;
6. The appointment of the first directors of the company and fixing their powers; and
7. The appointment of the first auditors of the company.

After the statutory meeting has been held, the promoters must hand over the company businesses to the new directors. Promptly after holding the statutory meeting, the directors must require the promoters and share subscribers to pay the amount due on each share (not less than 25%, except for the exceptions described above). After the promoters and share subscribers have made payment on their shares, the directors may then apply for the registration of the company. The director(s) must register the incorporation of the company within three months after the date of the statutory meeting, otherwise the registration of the company cannot be made, and all the money received from the promoters and subscribers must be returned without deduction.

Step 4: Registration of the Company (1 – 3 days)

In order to register the incorporation of the company, the directors must submit various standard forms and other information to the Registrar. This includes copies of the AOA as well as the minutes of the statutory meeting, all in Thai language. The Registrar will examine the documents filed and if in proper order will approve the registration of incorporation of the company. At such time a second registration fee is payable in an amount 5,000 Baht. Upon payment of the registration fee, the company becomes officially incorporated as a limited company and may commence doing businesses. A certificate of registration will be issued after the payment of the registration fee.

Note that the procedure above reflects the written law and regulations. In actual practice, details and documents for registration of companies can be expedited by combining steps 2, 3, and 4 (after confirmation of the company's name, and with all proper documentation and details available). Payment of fees under steps 2 and 4 can also be made at the same time, under the expedited approach.

General Notes

1. Payment of Share Capital

The rules related to the payment of share capital have changed in recent years. A recent notification related to the application for registering companies and partnerships, as well as for registering changes in registered capital was issued on 24 March 2015, and came into effect on 1 April 2015. Under this notification, when a registration application for the establishment of a company with registered capital in excess of five million Baht is made, additional documents must be submitted. Guidelines related to this notification were announced on 31 March 2015, and certain exceptions were established with regard to payment in cash, as discussed below:

- In the Case of Payment in Cash

At the time of application for registering the establishment, the applicant must submit evidentiary documentation issued by a bank verifying receipt of payment. This documentation must show that the money has been received in an amount equal to the registered capital by a person with signing authority for the established company. However, according to the guidelines, if the applicant, who has the person with signatory authority is a foreigner or an investment promotion license has been received from the Board of Investment of Thailand (the "**BOI**") or the Industrial Estate Authority of Thailand (the "**IEAT**"), cannot submit such evidentiary documents to the Registrar, the applicant has to submit the letter informing those reasons to the Registrar.

Within 15 days from the receipt of the application for the registration of establishment of the company, the applicant must submit evidentiary documentation issued by a company's bank verifying the receipt of payment of money of the company equal to the registered capital by the established company.

- In the Case of Payment in Kind

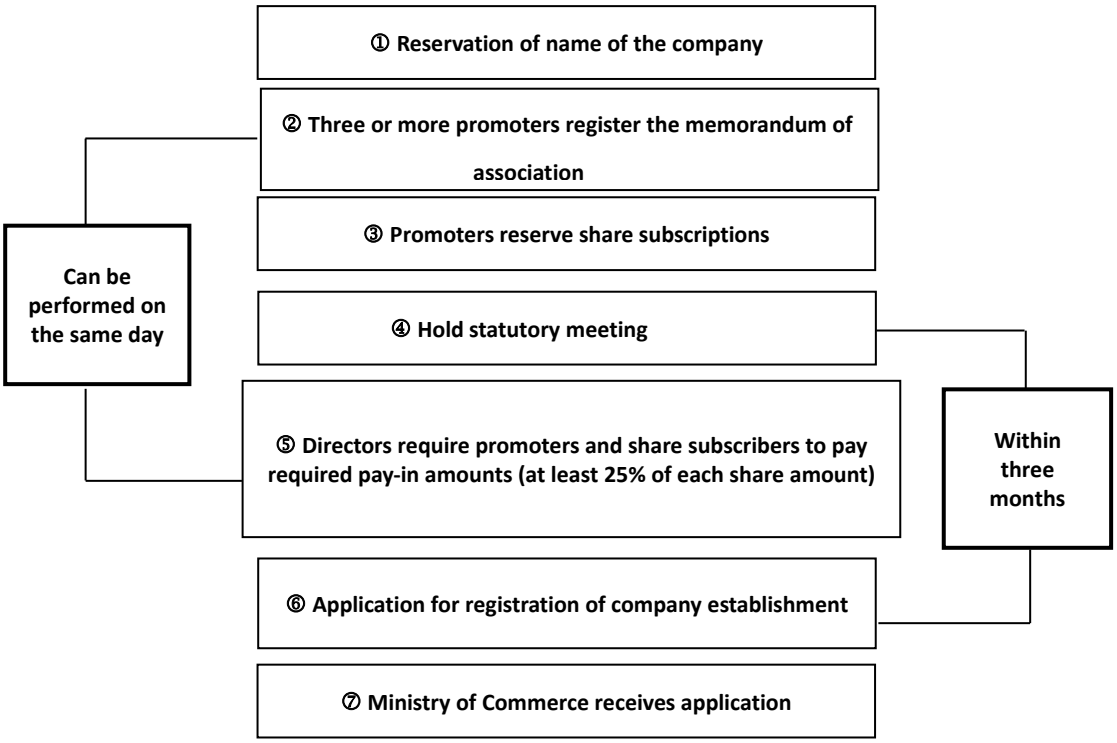
At the time of the application for registration of establishment: a letter of confirmation must be submitted by the owner of the property verifying that ownership of the contributed property was transferred to the established company; and

Within 90 days from receipt of the application for the registration of establishment, the following documents must be provided: (i) in the case of real property or assets that must be registered, evidentiary documentation verifying that the company is the owner; and / or (ii) in the case of assets other than those falling under (i), a list setting forth the details of the contributed property and the amounts.

2. Summary (timeline)

A summary of company establishment procedures as discussed above is shown in Figure 1-2 below (also see the DBD's website). The entire process generally takes at a minimum three weeks from the start of preparation of documents to the completion of the registration.

[Figure 1-2] Procedures for Establishment of a Private Limited Company (Model)



(2) Restrictions on Foreign Investment

A. Overview

In Thailand, a license is required for "foreigners" to engage in certain restricted businesses. There are approximately 17 laws and policies restricting foreign ownership of a business. As a result, it is necessary to have a general understanding of restrictions on foreign investment when considering setting up or acquiring a business in Thailand.

B. The Foreign Business Operations Act, B.E. 2542 (1999) (the "FBOA")

(i) The Definition of "Foreigner" and Restrictions

The primary law restricting direct foreign investment in Thailand is the FBOA. Restrictions under the FBOA apply to all "foreigners." A foreigner is defined as a person who falls under any one of the following (Section 4 of the FBOA):

a. a natural person not of Thai nationality;
b. a juristic person not registered in Thailand;
c. a juristic person registered in Thailand with 50% or more of its shares held by a person specified in item a. or b.;
d. a limited partnership or registered ordinary partnership whose managing partner or manager is a person specified in item a.; or
e. a juristic person registered in Thailand with 50% or more of its shares held by a person specified in item c. or d.

When a foreign company establishes a juristic entity or invests in Thailand, items c. and e. are usually the key provisions. With regard to item c., note that the percentage of foreign capital is determined according to the ratio of capital and not to voting rights, and that the criteria is ownership of "50% or more" of shares, not a majority of shares.

(ii) Businesses Subject to Restrictions

In principle, foreigners may not engage in the businesses specified in Lists 1 to 3 of the FBOA (Section 8 of the FBOA), unless they acquire a foreign business operation license (described below). The lists of businesses subject to restriction are as shown in Figure 1-3 below.

[Figure 1-3] Foreign Businesses Subject to Restriction

Category	Type of business subject to restriction
List 1 Businesses in which foreigners may not engage	1. Newspaper publication or radio and television broadcasting business 2. Agriculture and orchard business 3. Animal husbandry 4. Forestry and wood fabrication (natural wood) 5. Fishing business (in Thai territorial waters and economic zones) 6. Extraction of Thai herbs 7. Antiques (trading or auction) 8. Manufacture or casting of Buddhist images and mendicant priest bowls 9. Land trading
List 2 Businesses in which foreigners may not, in principle, engage as they are related to national security, the protection and nurturing of traditional arts and culture, or the protection of natural resources and the environment	1. Manufacture, sale, or repair of firearms, etc. 2. Domestic land, maritime, or air transportation or domestic airline business 3. Sale of Thai antiques and handicrafts 4. Production of woodcarvings 5. Silkworm farming, production of Thai silk yarn, Thai silk weaving, or Thai silk pattern printing 6. Manufacture of Thai musical instruments 7. Production of goldware, silverware, nielloware, bronzeware, or lacquerware 8. Production of crockery of Thai culture and art 9. Production of sugar from sugarcane 10. Production of salt from salt farms or underground salt 11. Production of salt from rock salt 12. Mining including rock blasting and crushing 13. Wood fabrication for furniture and utensils
List 3 Businesses in which foreigners may not, in principle, engage as domestic Thai industry is not yet	1. Rice milling and flour production 2. Fishery business (aquaculture) 3. Forestry business 4. Manufacture of veneer board, chipboard, and hardboard 5. Manufacture of lime 6. Accounting services

Category	Type of business subject to restriction
sufficiently competitive	7. Legal services 8. Architectural design services 9. Engineering services 10. Construction (excluding construction involving foreign investment of 500 million Baht or more and requiring special expertise) 11. Broker and agency businesses (excluding broker and agency business related to futures trading of securities and agricultural commodities, financial instrument sale services, financial transactions necessary for production within the same business group, international trade brokering with foreign investment of 100 million Baht or more, and other broker and agency businesses designated by ministerial regulation) 12. Auctioning (excluding international auctions for goods other than antiques and works of art and other auctions designated by ministerial regulation) 13. Domestic trade of traditional domestic produce and produce not prohibited by law (excluding futures trading of agricultural commodities) 14. Retailing with a total minimum capital of less than 100 million Baht or minimum capital of each shop of less than 20 million Baht 15. Wholesaling with minimum capital of each shop of less than 100 million Baht 16. Advertising business 17. Hotel business (excluding management) 18. Tourism business 19. Sale of food and beverages 20. Plant cultivation and enhancement of varieties; and 21. **Other service businesses** (except those specified by ministerial regulation)

a. *Businesses in List 1*: Businesses in which foreigners may not engage.

- List 1 of the FBOA specifies nine types of business in which foreigners may not engage. It is particularly noteworthy that land trading is included.

b. *Businesses in List 2:* Businesses in which foreigners may not, in principle, engage as they are related to national security, the protection and nurturing of traditional arts and culture, or the protection of natural resources and the environment.

- List 2 specifies 13 types of business in which foreigners may not, in principle, engage in for purposes of national security, the protection and nurturing of traditional arts and culture, and or the protection of natural resources and the environment. Note that domestic transportation (land, maritime, and air transportation and domestic airline business) is included.

- In the case of the businesses specified in List 2, a "foreigner" may by exception engage in these businesses if a foreign business operation license is obtained from the Ministry of Commerce pursuant to the approval from the Cabinet. In this case, at least 40% of the shares of the "foreigner" must be owned by a Thai person (non-foreigner), and at least two-fifths of the directors must hold Thai nationality (however, the Ministry of Commerce may reduce the percentage of shares to 25% pursuant to the approval from the Cabinet) (Section 15 of the FBOA).

c. *Businesses in List 3*: Businesses in which foreigners may not, in principle, engage as domestic Thai industry is not yet sufficiently competitive.

- In the case of the businesses specified in List 3, a "foreigner" may by exception engage in these businesses if a foreign business operation license is obtained from the Director-General of the DBD pursuant to the approval from the Foreign Business Operation Committee.

d. *"Other Service Businesses" Specified in List 3, item 21*

- Businesses specified by ministerial regulation are exempt from "other service businesses." came into effect in 11 March 2013, 11 February 2016, 26 May 2017 and 13 June 2019, respectively. The exempted businesses are as follows:

  a) securities business pursuant to the law on securities and exchange;
  b) derivatives business pursuant to the law on derivatives;
  c) trust business pursuant to the law on trust for transactions in capital markets;
  d) life insurance business pursuant to the law on life insurance;
  e) casualty insurance business pursuant to the law on casualty insurance;
  f) financial institution business, businesses relating to or necessary for financial

institution business operations, other businesses of financial institutions and businesses of companies in a financial business groups under the law governing financial institution business:

- commercial banking business;
- service business as a bank's representative office;
- Shariah financial service;
- acting as an agent of a financial institution;
- provision of service of acceptance of money deposits with a condition for withdrawing money from the account according to the order of customer, and escrow agent business;
- private repurchase transaction business;
- acting as agent to accept applications and collect insurance premiums or fees for export insurance service or credit insurance for customers;
- undertaking the service relating to financial business for financial institutions, companies in financial business group, Bank of Thailand and government agencies;
- provision of lease of immovable properties;
- purchase or take of the transfer of loan account receivables;
- cash management service;
- service related to preparation of documents relating to customers' businesses;
- service agent for settlement of debts or acceptance of applications; and
- provision of hire purchase and leasing;

g) asset management business under the law on asset management corporation;

h) service business as a representative office of foreign juristic person in international trading business under the regulations of the Office of Prime Minister governing establishment of visa and work permit service center;

i) service business as a regional office of foreign juristic person in international trading business under the regulations of the Office of Prime Minister governing establishment of visa and work permit service center;

j) service business having a government authority under the law governing budgetary procedure as a contractual party;

k) service business having a state enterprise under the law governing budgetary procedure as a contractual party;

l) service business of granting loan in the country, service of renting out of office building spaces with utilities, service of giving consultation and advice only on management, marketing, human resources and information technology between juristic persons which are related in one of the following manners:

- more than half of the shareholders or partners in one juristic person constitute

more than half of the shareholders or partners in another juristic person; or

- the shareholders or partners holding at least 25% of the value of the entire capital of one juristic person are also shareholders or partners holding at least 25% of the value of the entire capital of another juristic person; or
- one juristic person is a shareholder or partner holding at least 25% of the value of the entire capital of another juristic person; or
- more than half of the directors or partners with management authority in one juristic person are directors or partners with management authority in another juristic person.

Even though the businesses are exempt from the lists of businesses subject to restrictions, there are instances in which separate restrictions on foreign investment are imposed by the 16 laws related to specific businesses.

C. Special Treaty/Bilateral Agreements

There are a certain variety of permissions used for foreigners to conduct restricted business in Thailand, one being the Treaty of Amity and Economic Relation between Thailand and the U.S.A., The Thailand–Australia Free Trade Agreement and The Japan-Thailand Economic Partnership Agreement.

(i) The Treaty of Amity and Economic Relations between Thailand and the U.S.A., B.E. 2512 (1969) (the "**US Treaty**")

American nationals and entities who form a local company or register a branch office may avoid restrictions of the FBOA under the US Treaty, except for the activities reserved under Article 4 of the US Treaty such as communications, transport, fiduciary functions, banking, land and other natural resource exploitation, and domestic trade in indigenous agricultural products. All of the directors and officers who are authorized to bind the corporation alone must be American and / or Thai nationals. If the principal shareholder is another corporation, the same ownership and control requirements apply. This is also required of any corporate shareholder in that corporation to be American and / or Thai nationals.

(ii) The Japan-Thailand Economic Partnership Agreement (the "**JTEPA**") effective as of 1 November 2007

This JTEPA eases the restrictions on the percentage of foreign investment in certain businesses in Thailand in a manner that is favorable to Japanese businesses. Pursuant to the JTEPA, the loosened restrictions take precedence over the provisions of the FBOA. A summary of the loosened restrictions specified in Annex 5 to the JTEPA is provided in Figure 1-4.

[Figure 1-4] Overview of Eased Restrictions through the Japan-Thailand Economic Partnership Agreement

Industries	Details of preferential treatment for Japanese individuals and businesses (easing of restrictions)
General management consulting services (excluding legal and audit consulting services)	Ownership up to 100% is permitted
Logistics consulting business (excluding all transportation business)	Ownership up to 51% is permitted
Household electrical appliance maintenance and repair services (wholesale goods sold under the same brand by a Thai company or group company as its own products or goods manufactured by a Japanese group company)	Ownership up to 60% is permitted (conditioned on capital of at least 100 million Baht and other requirements)
Wholesale business (products of the same brand manufactured by a Japanese company or by its group companies in Thailand (excluding distilled liquor) or automobiles manufactured in Japan by its group companies)	Ownership up to 75% is permitted
Retail business (products of the same brand manufactured by a Japanese company or by its group companies in Thailand (excluding distilled liquor) or automobiles manufactured in Japan by its group companies)	Ownership up to 75% is permitted
Hotel and restaurant services (including catering)	Ownership up to 60% is permitted

Industries	Details of preferential treatment for Japanese individuals and businesses (easing of restrictions)
	(conditioned on paid-in capital of at least 800 million Baht and other requirements)
Restaurant business	Ownership up to 60% is permitted (conditioned on paid-in capital of at least 50 million Baht and other requirements)

(iii) The Thailand–Australia Free Trade Agreement (the "**TAFTA**") effective as of 1 January 2005

There are 18 businesses under TAFTA. The Registrar will consider the types of businesses and number of shares that Australian people can hold under this agreement. There are 12 businesses that must request for certificate and there are six businesses that do not have to request for certificate. A summary of the restrictions is provided in Figure 1-5.

[Figure 1-5] Overview of Eased Restrictions through the Thailand–Australia Free Trade Agreement

(1) Businesses that must request for certificate can be classified into 12 types according to List 2 and List 3 of the FBOA. The Australian investor can hold the shares more than 50% of all shares.

No.	Category	Businesses	Condition	Australian must hold the shares of less than
1.	List 2: Mining	land and marine mining	1. Must be approved by Ministry of Industry 2. Must have two-fifth of directors that are Thai	60 %
2.	List 3(10): Construction	Public Utilities Construction /	1. Must be Public Utilities Construction/Transportation	100 %

No.	Category	Businesses	Condition	Australian must hold the shares of less than
		Transportation Construction that uses special equipment, machinery, technology or expertise	Construction that uses special equipment, machinery, technology or expertise 2. Have paid-up capital of at least 1,000 million Baht	
3.	List 3(17): Hotel business	Luxurious hotel and resort service	1. Only for the investment with the paid-up capital of at least 800 million Bath 2. At least 100 hotel rooms	60 %
4.	List 3(19): Restaurant	Full range of restaurant	1. Must have the total area of at least 450 square meters 2. Have paid-up capital of at least 50 million Bath	60 %
5.	List 3(21): Other Service Business	General Consulting Service for Regional Operating Headquarters (ROH) / branch or ROH's subsidiaries	Must be service for ROH / branch or ROH's subsidiaries	100 %
6.	List 3(21): Other Service Business	Meeting Hall	1. Must have the total area of at least 4,000 square meters 2. The area within the biggest 3. Meeting hall must be at least 3,000 square meters	60 %
7.	List 3(21): Other Service Business	International Product Exhibition Center	1. Must have the total area of	60 %

No.	Category	Businesses	Condition	Australian must hold the shares of less than
			at least 50 Rais[2] 2. Must have area within the building of at least 25,000 square meters	
8.	List 3(21): Other Service Business	Wholesale and Retail service relevant to the sale and installation of the products manufactured by the Australian juristic person established in Thailand	1. Wholesale and Retail with installation service 2. The products is manufactured in Thailand by such juristic person (sale and installation agent)	100 %
9.	List 3(21): Other Service Business	Education / Educational Institutes with science and technology expertise such as life sciences, bio-technology and Nano technology	1. Expertise in science and technology such as life sciences, bio-technology and Nano technology 2. Located outside Bangkok and metropolitan areas 3. At least 50% of the University council directors	60 %

[2] The units of land measurement in Thailand are Wah, Ngan, and Rai. Conversion factors between Thai and other measurements are:

Thai Measurements		Other measurements	
1	Wah	2	Meters
1	Square Wah	4	Square Meters
1 100	Ngan Square Wah	400	Square Meters
1 4 400	Rai Ngan Square Wah	1,600	Square Meters
≈ 2.50	Rai	1	Acre
≈ 6.25	Rai	1	Hectare

No.	Category	Businesses	Condition	Australian must hold the shares of less than
			are Thai	
10.	List 3(21): Other Service Business	Fun Park and zoo service	1. Only for the investment with the paid-up capital of at least 1,000 million Bath 2. At least 200 Rais of total areas	60 %
11.	List 3(21): Other Service Business	Aquatic animal park service	1. Only for the investment with the paid-up capital of at least 200 million Bath 2. At least 10 Rais of total areas	60 %
12.	List 3(21): Other Service Business	Pier and Anchor service for tourism ships	Only in the case of having ship lifting equipment, pier and maintenance service center	60 %

(2) Businesses that do not need to request for foreign business operation certificate upon considering the number of shares due to the Australian investor can hold the shares less than 50% of all shares or the certificate receiver must be Thai juristic person. There are six types of businesses as follows:

No.	Category	Businesses	Condition	Australian must hold the shares of less than
1.	List 3(14): Retail	Sale of Telecommunication Equipment	-	50 %

No.	Category	Businesses	Condition	Australian must hold the shares of less than
2.	List 3(15): Wholesale	Sale of Telecommunication Equipment	-	50 %
3.	List 3(21): Other categories of Service Business	Telecommunication Consulting Service	-	50 %
4.	List 3(21): Other Service Business	Leasing service of Telecommunication Station Equipment	-	50 %
5.	List 3(21): Other Service Business	Database Access Services	Only for the service by using the public telecommunication network under the supervision of the National Telecommunication Commission of Thailand	25 %
6.	List 3(21): Other Service Business	Domestic Very Small Aperture Terminal (VSAT)	Only for the service by using the public telecommunication network under the supervision of the National Telecommunication Commission of Thailand and service that performs according to built-transferred-operated identified by National Telecommunication Commission of Thailand	40 %

D. Restrictions Imposed by Individual Laws Regulating Businesses

In addition to the FBOA, there are also 16 individual laws and policies related to business that directly or indirectly impose restrictions on foreign investment. Direct restrictions on foreign investment include cases where the limit on foreign ownership is set lower than 50% as specified in the FBOA. Indirect restrictions include, for example, requirements that a certain percentage of directors have Thai nationality or be Thai residents.

Typical examples are the restrictions imposed by specific laws related to insurance companies, banks, and other financial institutions.

(i) Insurance

When a foreigner engages in the life insurance business and casualty insurance business, it is necessary to comply with the restrictions of the Life Insurance Act, B.E. 2535 (1992) and the Loss Insurance Act, B.E. 2535 (1992) (the "**Thai Insurance Acts**"). The Thai Insurance Acts were amended in March 2015, and some of the restrictive conditions were subsequently loosened (Section 10 of the Life Insurance Act and Section 9 of the Loss Insurance Act). Details are shown in the Figure 1-6.

[Figure 1-6] Restrictions on Foreign Businesses under Thai Insurance Acts

	Foreign ownership limit	Requirement for directors to be Thai nationals*
Principle	No more than 25% (less than 25% prior to amendment)	At least three-quarters of directors must be Thai nationals
Exception 1	May be increased to no more than 49% with special approval from the Insurance Commission	May be reduced to a majority with special approval from the Insurance Commission
Exception 2	In certain circumstances, may be raised further by the Minister of Finance	In certain circumstances, may be reduced further by the Minister of Finance

** With regard to the nationality requirement concerning directors, before the amendment, there were few insurance companies that satisfied the strict "Thai national" standard, and the definition of "Thai national" was repealed, and the definition of "foreigner" was amended to correspond to that in the FBOA.*

a. Exception 1

In cases where the Insurance Commission determines that there are "appropriate grounds,"[3] the foreign ownership limit may be increased to 49% and the percentage of directors who are Thai nationals may be reduced to a majority with approval from the Insurance Commission.

b. Exception 2

Furthermore, in the exceptional circumstances specified below, the Minister of Finance may raise the foreign ownership limit beyond the rate specified in exception 1 and may reduce the percentage of directors who are Thai nationals below the rate specified in exception 1. Raising the limits of foreign ownership and foreign director ceilings are subject to the Minister of Finance's determination of the following:

1. In cases in which the company is in a situation that results in harm to the insured or to the public or in which the company is operating in such a way as to result in such harm;
2. In cases in which it is necessary for the stabilization and the reinforcement of the insurance company; and
3. In cases in which it is necessary for the stabilization and the reinforcement of the insurance industry.

Prior to the March 2015 amendments to the Thai Insurance Acts, only the circumstances specified in item 1 were recognized, but as a result of the amendments, items 2 and 3 were added and the scope of special approval was expanded.

[3] An Insurance Commission Notice that came into effect on 5 February 2016, listed the following two circumstances as circumstances where there are "appropriate grounds" for loosening the restrictions on foreign investment: (i) the case where the capital adequacy ratio will or may fall below the ratio specified by the Insurance Commission Notice (set at 100% under the current notice) and (ii) in the case where an improvement plan is established to raise business competitiveness.

Column: Removal of ban on online sales of insurance products

Until recently, Thailand did not have any regulations concerning the sale of life insurance and casualty insurance online (the "**Insurance Products**"), and the sale of online Insurance Products were not permitted. However, on 29 November 2016, the Office of Insurance Commission approved a notice specifying standards, procedures, and conditions for the online sale of Insurance Products. As a result, it is possible for insurance companies, insurance brokers, and banks to sell Insurance Products online if they satisfy the standards, procedures, and conditions specified in the proposed notice. According to reports, the notice has come into force in 2017, following consultations with insurance companies and other related persons in the market. The main provisions of the notice are set forth below.

- The text of insurance certificates related to all Insurance Products sold online must be approved by the Office of Insurance Commission in advance.
- Insurance brokers may sell online only those Insurance Products approved in advance by insurance companies.
- When insurance is sold online, the insurance company must confirm the particulars of the insurance policy with the policy holder by telephone within seven days from issuance of the insurance certificate and must record and preserve the details of such confirmation.
- Insurance companies bear a duty to ensure that insurance brokers comply with the conditions set forth in the notice, and if an insurance broker violates the notice, approval to sell Insurance Products granted to that broker must be cancelled.
- In order to prevent data breaches when selling Insurance Products online, insurance companies must create electronic trading systems that comply with systems specified in the Electronic Transactions Act and regulations related to that act.

Recently, adoption of new regulations and review of existing regulations, primarily in the direction of relaxing requirements, have been frequently considered and carried out with regard to life insurance and casualty insurance businesses, including the adoption of regulations that exclude these businesses from the restrictions on foreign investment under the FBOA and the issuance of notices by the Insurance Commission related to the acquisition of approval. As a result, there has been a relaxation of restrictions on foreign investment under the Thai Insurance Acts.

(ii) Banks and Other Financial Institutions

The Financial Institutions Business Act, B.E. 2551 (2008) (the "**Financial Institutions Business Act**") applies to banks and other financial institutions and, similar to the Thai Insurance Acts, imposes restrictions regarding maximum foreign ownership rates and minimum director percentages

(Section 16 of the Financial Institutions Business Act). A summary of the restrictions is set forth in Figure 1-7. Certain exceptions are recognized and can be obtained from the Bank of Thailand and the Minister of Finance, but in actuality, circumstances of approval to loosen restrictions are limited.

[Figure 1-7] Restrictions on Foreign Businesses under the Financial Institutions Business Act

	Foreign ownership limit	Requirement for directors to be Thai nationals
Principle	No more than 25%	At least 75% of directors must be Thai nationals
Exception 1	May be increased to no more than 49% with special approval from the Bank of Thailand	May be reduced to a "majority" with special approval from the Bank of Thailand
Exception 2	In certain circumstances, may be raised further by the Minister of Finance	In certain circumstances, may be reduced further by the Minister of Finance

a. Exception 1

The Bank of Thailand may, pursuant to an application from a subject person, raise the foreign ownership limit and reduce the percentage of directors who must be Thai nationals.

b. Exception 2

In the exceptional circumstances specified below, the Minister of Finance may raise the foreign ownership limit beyond the rate specified in exception 1 and may reduce the percentage of directors who are Thai nationals below the rate specified in exception 1:

- In the case where it is necessary in order to improve the business position of a financial institution;
- In the case where it is necessary to create stability of a financial institution; and
- In the case where it is necessary for the stability of the financial institution system.

(iii) Other Restrictions on Entry to Financial Businesses

The Financial Institutions Business Act (Section 9 of the Financial Institutions Business Act)

provides that only public companies that have received approval from a Minister pursuant to a recommendation from the Bank of Thailand may engage in commercial banking business, finance business, and so on. In addition, there are other restrictions concerning business formats and its directors such as opening and relocating financial institution head offices and branches and closing a branch, which requires approval from the Bank of Thailand (Section 13 of the Financial Institutions Business Act). The directors of financial institutions also cannot in principle concurrently serve as a director, manager, employee, or other person with managerial authority of another financial institution (Section 24 of the Financial Institutions Business Act).

E. Restrictions on Foreign Investment Related to Land Ownership

In addition to the restrictions on foreign investment discussed above, under the Land Code, foreigners generally cannot own land unless specific laws and regulations would allow otherwise under certain conditions, e.g. obtaining approval from the BOI, the IEAT or becoming a concessionaire under the Petroleum Act. Otherwise, the land would be disposed of within one year.

Laws concerning real estate including land ownership are explained further in Chapter 9.

F. Responses to Restrictions on Foreign Investment

(i) Acquisition of a Foreign Business Operation License

When a business is under consideration and is subject to restrictions under the FBOA, the first possible method to move forward is the acquisition of a foreign business operation license.

To acquire a foreign business operation license, it is necessary to submit documents stating, in Thai, the particulars of the expected business, projected income and expenditures, employment, transfers of technology, and so on. If requested by the relevant authorities, additional information must also be submitted. The application review period is in principle no more than 60 days, but the period may be extended for additional 60 days (Section 17 of the FBOA), and there are instances in which it takes a considerable time to acquire a foreign business operation license.

(ii) Acquisition of the BOI Investment Incentives

There are cases in which a company may seek a foreign business operation certificate via the BOI (Section 12 of the FBOA), after obtaining business promotion certificate, to conduct restricted business activities in Thailand. The BOI is a governmental investment promotion organization

which engages in investment promotion by granting preferences to domestic and foreign enterprises pursuant to the Investment Promotion Act, B.E. 2520 (1977). If the conditions, as required by the BOI, are satisfied certain preferences are permitted but in principle new investment is required. Specifically, the promotion incentive granted by the BOI for a business that is subject to promotion permits a foreigner to hold all or some shares in excess of the restrictions under the FBOA. Ownership of land is also permitted in some cases (see Section G. below with regard to other tax incentives, such as exemptions from corporate taxes and non-tax incentives).
The BOI released the details of a New Investment Promotion Strategy (the "**New Strategy**") in December 2014. The implementation period of the New Strategy is a seven-year period from 2015 to 2021, and it applies to investment applications received on or after 1 January 2015. Projects that had already received incentives and applications before 1 January 2015 are subject to the application of the former investment incentive program (the "**Former Program**").

The BOI's Investment Promotion Incentives primarily include the following:

- **Tax incentives**: with a focus on import duty reduction or exemption affecting machinery and raw materials, and on corporate income tax holidays up to eight years; an additional fifty percent reductions for five years.
- **Non-tax incentives**: with a focus on 100% ownership in manufacturing and diverse service sectors, permission to own land, and permission to bring in foreign expats and technicians.
- **Additional Incentives**: additional Incentives are further classified into two categories: (i) Merit-based Incentives, and (ii) Area-based Incentives. In addition, Merit-based Incentives are granted for activities regarding research & development (R&D), advances in technology training, local supplies development, and product and packaging design. The Area-based Incentives are granted for projects located in provinces with the lowest per capital income, special economic zones, Southern border provinces, or industrial estates/promoted industrial zones.

(iii) Eligible Businesses

Businesses that are eligible to receive investment incentives under the New Strategy are the businesses under the following categories:

Category 1: agriculture and agricultural products;
Category 2: mining, ceramics and basic metals;
Category 3: light industry;
Category 4: metal products, machinery and transport equipment;
Category 5: electronic industry and electric appliances;

Category 6: chemicals, paper and plastics;
Category 7: services and public utilities; and
Category 8: technology and innovation development.

G. Investment Incentives and Benefits other than the Relaxation of the Restrictions on Foreign Investment

(i) Benefits from BOI Investment Incentives

Benefits afforded to businesses eligible for investment incentives under the New Strategy (other than the relaxation of the restrictions on foreign investment and permission to own land) are divided into two categories according to type: fundamental incentives and merit-based incentives.[4] The New Strategy abolishes the zone system[5] established under the Former Program and in principle, the new incentives are granted to individual businesses regardless of their location.

a. Fundamental Incentives

Fundamental incentives are divided into tax incentives, including exemption from income taxes, and non-tax incentives, including the relaxation of restrictions on foreign investment and permission to own land, as discussed above. Fundamental incentives are broadly further categorized into:

1. **Group A** (further divided into subgroups A1 to A4 according to industry) and Category 8 (Technology and innovation development), which are eligible for exemption from the corporate income tax; and
2. **Group B**, which is not eligible for exemption from the corporate income tax (further divided into subgroups B1 and B2 according to industry).

b. Merit-Based Incentives

Merit-based incentives[6] are incentives granted in addition to the fundamental incentives described above in order to enhance Thailand's competitiveness, promote decentralization, and / or promote investment that contributes to the development of industrial areas.

[4] The BOI website explains the specific content of the benefits in detail, and this book made reference to the content on the BOI website.
[5] A program that had divided the country into three zones and provided greater benefits according to the distance from the Bangkok Metropolitan area.
[6] See the BOI website.

c. Merit-Based Incentives for Enhancing Competitiveness

The duration of the exemption from the corporate income tax can be extended up to a maximum of three years depending on the expenditures or investment necessary for certain businesses listed in Figures 1-7 as a percentage of sales in the first three years or the amount of such expenditures or investment (see Figure 1-8 and Figure 1-9)[7].

[Figure 1-8] Business Activities Eligible for Merit-based Incentives for Enhancing Competitiveness

Business activities eligible for merit-based incentives for enhancing competitiveness	Additional maximum amount (percentage of expenditures or investment)
1. Research and Technology development and innovation (in-house, outsourced in Thailand, or joint R&D with overseas institutes)	300%
2. Donations to Technology and Human Resource Development Funds, educational institutes, specialized training centers, or R&D institutes or governmental agencies in the science and technology (S&T) field in Thailand, as approved by the BOI	100%
3. Intellectual property acquisition and licensing fees for commercializing technology developed in Thailand	200%
4. Advanced technology training	
5. Development of local suppliers (companies with at least 51% Thai equity) in advance technology training and technical assistance	
6. Product and packaging design outsourcing (including both internal and outsourcing in Thailand, as approved by the BOI)	

[Figure 1-9] Extension of Period of Corporate Income Tax Exemption

Expenditures or investment necessary for the eligible business as a percentage of sales for the first three years or the amount of such expenditures or investment	Additional exemption from corporate income taxes
1% or 200 million Baht or more	1 year
2% or 400 million Baht or more	2 years
3% or 600 million Baht or more	3 years

[7] See the BOI website.

d. Merit-Based Incentives for Decentralization

Incentives under the general zone system have been discontinued, but in cases in which a company establishes a business in certain low-income regions (20 provinces)[8] the following additional incentives are recognized:

- Additional exemption from corporate income taxes for three years (however, activities in Groups A1 or A2 that were already granted an eight-year corporate income tax exemption receive a 50% reduction of corporate income tax on net profit for five years after the eight-year corporate income tax exemption period).
- Exemption of double the amount of transportation, electricity, and water supply costs for ten years from the day that revenues are first generated from the promoted business.
- Additional 25% deduction of the cost of installation or construction of facilities compared to ordinary depreciation (can be deducted from net profit for one year or two or more years in the ten-year period from the day that revenues are first generated from the promoted business).

e. Merit-Based Incentives for Industrial Area Development

The period of exemption from corporate income taxes may be extended by one year. The total period may not exceed eight years, and in the case an eligible business was initially conditioned on being conducted in an industrial estate, incentives are not granted.

(ii) Procedures for Obtaining Incentives

Detailed information on the procedure to apply for investment incentives and a timeline is available on the BOI website (http://www.boi.go.th/index.php?page=procedures&language=en; in English).

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[8] 20 provinces include Kalasin, Chaiyaphum, Nakhon Phanom, Nan, Bueng Kan, Buri Ram, Phrae, Maha Sarakham, Mukdahan, Mae Hong Son, Yasothon, Roi Et, Si Sa Ket, Sakhon Nakhon, Sa Kaew, Sukhothai, Surin, Nong Bua Lamphu, Ubon Ratchatani, and Amnatcharoen (excluding border provinces in southern Thailand and Special Economic Development Zones separately granted incentive packages).

CHAPTER 2

COMPANY LAW

CHAPTER 2 | COMPANY LAW

This chapter examines Title 22 of the Thai Civil and Commercial Code (the "**CCC**") in more depth. The Public Limited Company Act, B.E. 2535 (1992) (the "**PLCA**") governs public companies and when combined with Title 22 of the CCC, forms the laws and governance of corporate entities in Thailand.

(1) Shares

A. Private Companies

(i) Classes of Shares

The CCC contains provisions that allow private companies to issue preferred shares (preference shares) (Section 1108 (4) and (5), Section 1142 of the CCC). Therefore, the issuance of shares with different rights (referred to as "preference shares") is permitted by statute. In practice, this consists of shares with preferential (or subordinated) rights regarding the distribution of dividends and residual assets voting rights per share. The CCC does not contain any specific provisions regarding class shares nor clarify what specific types of preference shares are permitted by statute.

Companies must also note that under the CCC, the preferential rights of class shares that have been issued cannot be modified (Section 1142 of the CCC). Consequently, changes to the preferential rights of preference shares require a reduction of capital for cancellation of the relevant preference shares, and the issuance of new class shares which take times to complete the entire process.

(ii) Share Certificates

The CCC states that private companies are required to issue share certificates (Section 1127, Paragraph 1 of the CCC). Under the CCC, share certificates are not marketable securities, but are positioned as a type of evidentiary certificate that proves the shareholder, number of shares, etc. Since rights are not vested in the share certificate itself, and the certificate is no more than a document that proves certain facts, transfers cannot occur through the delivery of share certificates unless it is a bearer certificate (Sections 1129 and 1135 of the CCC).

Share certificates must contain the following information and signed by at least one director of the company (Section 1128 of the CCC):

- the name of the company;
- the numbers of shares to which the certificate applies;
- the nominal value of each share (the face value of each share must be at least five Baht (Section 1117of the CCC);
- if shares have not been paid in full, the amount paid on each share; and
- the name of the shareholder, or a statement that the certificate is issued to a bearer (in case of a bearer certificate).

Prior to 2017, all share certificates were required to be affixed with the company's seal regardless of whether the company had registered its seal for signing authority. However, under the Order of the National Council for Peace and Order (the "**NCPO**") No. 21/2560, the company's seal is no longer required for share certificates.

(iii) Share Register Book

A private company must prepare and maintain a share register book that contains the following information (Section 1138 of the CCC):

- the names, addresses, and occupations of the shareholders;
- the details, number of shares, and amount of paid-in capital of the shares owned by each shareholder;
- the date on which each shareholder became a shareholder;
- the date on which each shareholder ceased to be a shareholder;
- the numbers and dates of each certificate, and the share numbers entered on each certificate to the bearer; and
- the date of cancellation of any name or bearer certificate.

The share register book must be kept at the company's main office and remain available for gratis inspection by shareholders during business hours (Section 1139, Paragraph 1 of the CCC). In addition, the directors must, within 14 days of the ordinary general shareholders meeting, send a copy of the list of shareholders (indicating people who were shareholders at the time of the meeting and those who had ceased to be shareholders after the date of the preceding ordinary general shareholders meeting) to the registrar of the Ministry of Commerce at least once each year (Section 1139, Paragraph 2 of the CCC).

Entry in the share register book is not a condition for a transfer of shares to take effect, but it is required for that transfer to be enforceable against the company and third parties (Section 1129, Paragraph 3 of the CCC).

(iv) Subscription of New Shares and Payment

When subscribing new shares, promoters and shareholders of a company are not obligated to pay the entire nominal value of the shares up front. Instead, promoters and shareholders can subscribe shares by paying an amount equal to at least 25% of the nominal value (Section 1105, Paragraph 3 of the CCC). If less than the entire amount of the nominal value is paid, unless a resolution of the general shareholders meeting is adopted, directors can demand payment of the remaining amount at any time (Section 1120 of the CCC).

(v) Transfer of Shares

a. Methods of Transferring Shares

To affect a valid transfer of shares entered in a name certificate, the transferor and transferee must execute a share transfer instrument and their signatures must be certified by at least one witness (Section 1129, Paragraph 2 of the CCC). Since the share transfer instrument is not submitted to the Ministry of Commerce, it needs not be prepared in Thai. The share transfer instrument must include the names of the transferor and transferee, the number of shares transferred, and the share numbers.

For a share transfer to be valid against the Company and third parties, the name and address of the transferee must be entered in the share register book (Section 1129, Paragraph 3 of the CCC).

b. Restrictions on Share Transfers

Share transfers in principle are not restricted (Section 1129, Paragraph 1 of the CCC). Companies established pursuant to the CCC generally have small numbers of shareholders (particularly in the case of joint venture companies) and the individuality of shareholders is often important. Consequently, the CCC contains provisions suggesting that restrictions may be placed on all transfers of shares, as long as they are stipulated in the articles of association.

There is no statutory limitation on the method of restrictions available, and it is understood that restrictions may be freely designed. However, in general, restrictions require a majority approval or a unanimous approval from the board of directors. In the case of companies with shareholders agreements, such as joint venture companies, the restrictions on share transfers agreed upon in the shareholders agreement are generally reflected in the articles of association. The CCC does not contain explicit provisions regarding the validity of share transfers that violate restrictions established in the articles of association, but such transfers are generally understood to be invalid.

c. Acquisition by a Company of Its Own Shares

The CCC prohibits private companies from holding its own shares or taking its own shares as security[1] (Section 1143 of the CCC).

(vi) Issuance of New Shares

Private companies may only issue new shares through a special resolution (a resolution adopted by the affirmative votes of at least three-quarters of the voting rights of shareholders in attendance) established during a general shareholders meeting (Sections 1194 and 1220 of the CCC). A special resolution to increase the registered capital, amend the memorandum of association and the articles of association (if the details of shares are stipulated) must be registered with the registrar within 14 days of the adoption of the resolution (Section 1228 of the CCC).

In the case of a private company, existing shareholders have subscription rights (Section 1222, Paragraph 1 of the CCC). When the company's capital is increased, shares must first be offered to existing shareholders in proportion to the number of shares that they hold. Only if there are the unsubscribed shares by the existing shareholders, other shareholders or directors can then subscribe to the newly issued shares (Section 1222, Paragraph 3 of the CCC).

Consequently, a private company can only issue new shares to existing shareholders in proportion to their equity holdings. Capital increases through third-party allocations are not possible. Hence, in practice, an existing shareholder may transfer at least one of his/its shares to the third party so that the third party becomes the shareholder of the company and the company later adopts special resolution to increase its capital. The third party who became a shareholder can then subscribe to the newly issued shares. When increasing capital, involved parties must make sure that the transfer of shares (including perfecting the transfers against the company and third parties) is completed adequately before initiating the capital increase procedures.

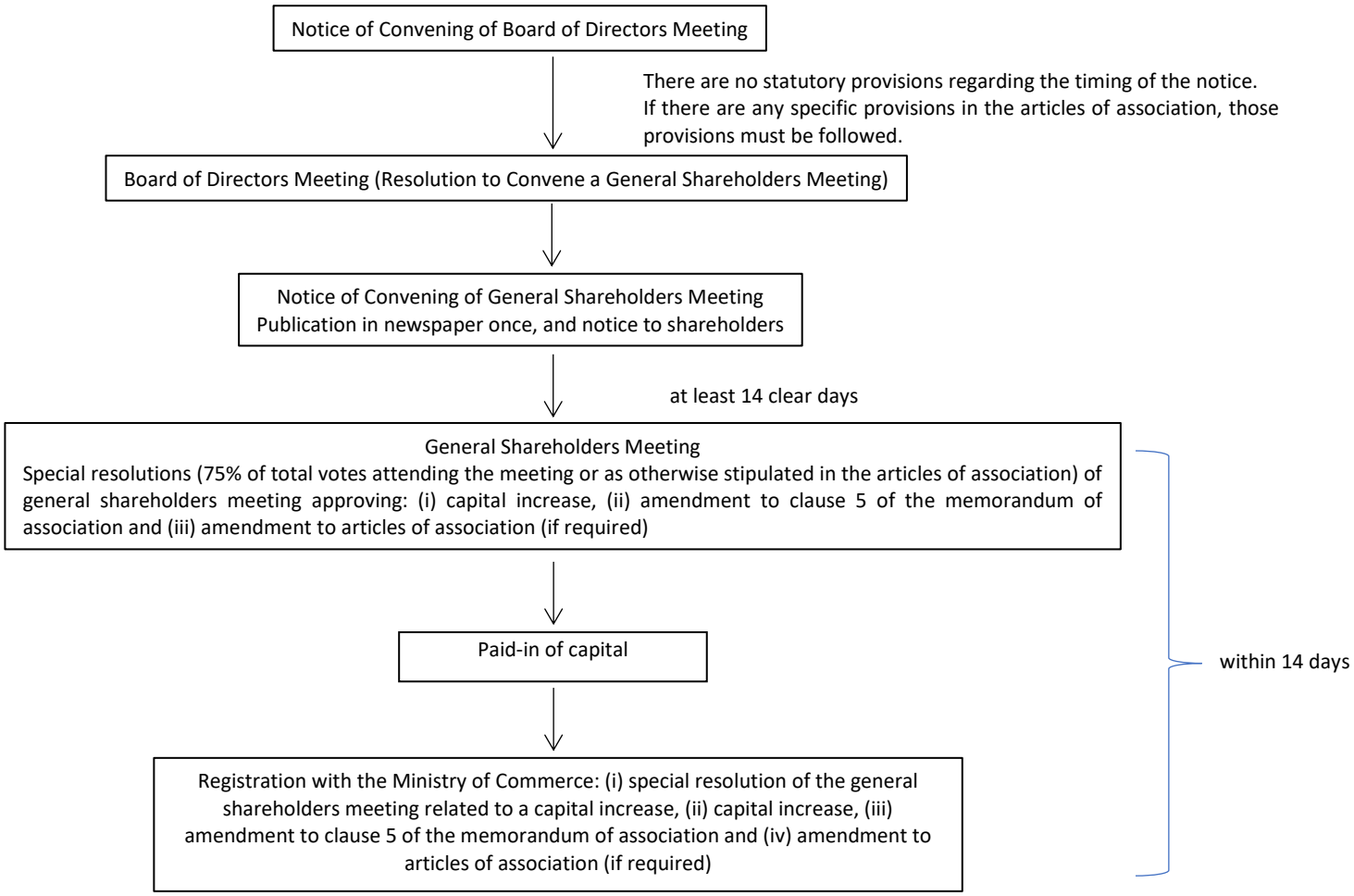
[1] In the case of shares, pledges are commonly used as security in Thailand.

Additionally, in Thailand, the concept of the nominal value of shares exists (Section 1117 of the CCC), and shares may not be issued for an amount less than the par value (Section 1105, Paragraph 1 of the CCC). However, issuing shares for an amount more than the nominal value is allowed provided that it is permissible under the company's memorandum of association.

Private companies, unlike public companies, may not issue debentures (Section 1229 of the CCC).

A summary of the procedures for issuing new shares is shown in Figure 2-1 below.

[Figure 2-1] Procedures for Issuance of New Shares by a Private Company



Source: Ministry of Commerce's Website

(vii) Reduction of Capital

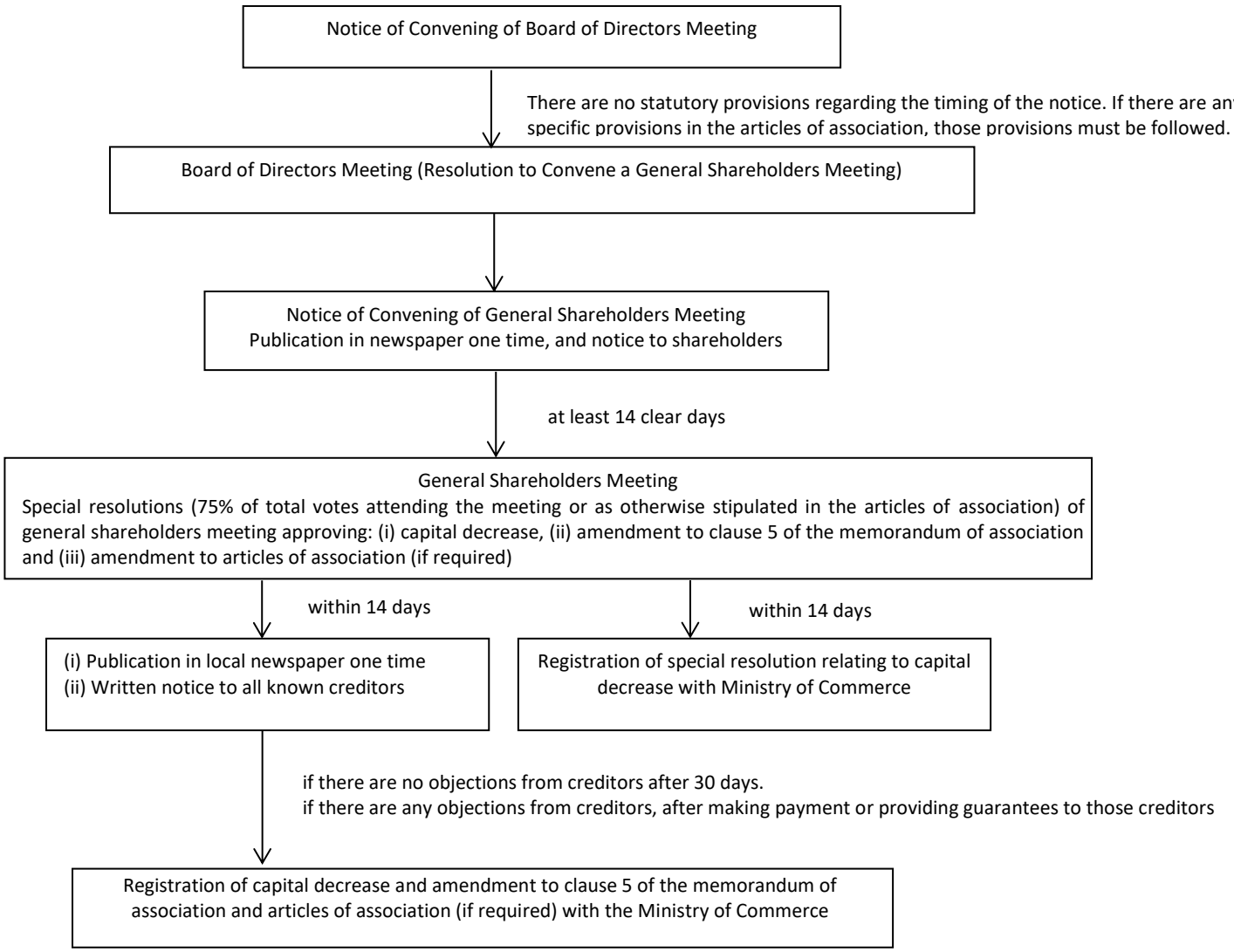
A private company can reduce its capital by reducing the nominal value of each share issued or by reducing the number of shares issued (Section 1224 of the CCC). A capital reduction requires a special resolution to reduce capital by a general shareholders meeting), and the special resolution must be registered within 14 days of the resolution's adoption (Section 1228 of the CCC). A company may not reduce its capital to less than one-fourth of the total amount of capital (Section 1225 of the CCC).

When a private company reduces its capital, it must provide notice of the capital reduction plan by publishing in a local newspaper at least once, and sending written notice to all creditors known to the company. This notice must ask the creditors present if they have any objections to the capital reduction within 30 days (of publication and sending of such notice to creditors) (Section 1226, Paragraph 1 of the CCC). If no objections are made by creditors within 30 days, the creditors are deemed not to object (Section 1226, Paragraph 2 of the CCC). If an objection is made by a creditor, the company cannot reduce its capital unless it repays the obligation, or provides a guarantee to the creditor who made the objection (Section 1226, Paragraph 3 of the CCC).

If a creditor did not make an objection because he or she was unaware of the capital reduction for which notice was provided and failure to object was not the fault of the creditor, the shareholders who received a refund for a portion of the shares that they held will be liable to the creditor for two years from the registration date of the capital reduction, up to the amount of their refund (Section 1227 of the CCC).

A summary of the procedures for reducing capital is shown in Figure 2-2 below.

[Figure 2-2] Procedure for Reducing Capital by a Private Company



Source: Ministry of Commerce's Website

B. Public Companies

(i) Classes of Shares

Similar to private companies, statutory provisions governing public company issuance of preferred shares (preference shares) (Sections 30 (5) and (6), Sections 35 (4) and (5), Section 39, Paragraph 1 (2), Section 65, Section 102, Paragraph 2, Section 115, Paragraph 2, Section 172 of the PLCA), confirm that the issuance of preference shares is permitted by statute. These issuances include shares with preferential (or subordinated) rights regarding the distribution of dividends and residual assets, shares with different numbers of voting rights per share, etc. The PLCA contains provisions governing that shares with different rights including voting rights (Section 102, Paragraph 2 of the PLCA), distribution rights (Section 115, Paragraph 2 of the PLCA), and rights to distribution of residual assets (Section 172 of the PLCA), can be issued, but the law does not specifically stipulate which types of preference shares are permitted by statute, so it is necessary to exercise caution when issuing preference shares.

Much like private companies, public companies may run into problems when modifying the particulars of preference shares. Under the PLCA, changing the particulars of preference shares that have already been issued is not permitted (Section 65, Paragraph 1 of the PLCA). Therefore, modifying the particulars of preference shares requires the cancelation of relevant preference shares through capital reduction and the subsequent issuance of new preference shares. The procedure typically requires about two and a half to three months.

The PLCA differs from the CCC as the shareholders have the rights to convert preference shares into ordinary shares via provisions in the articles of association (Section 65, Paragraph 2 of the PLCA).

(ii) Share Certificates

After registering shares, selling unsold shares, or a capital increase, a public company must issue share certificates within two months of receiving the proceeds from the shares (with regards to a capital increase, provided that registration occurs prior to the issuance of share certificates) (Section 55, Paragraph 1 of the PLCA).

Share certificates must contain the following information (Section 56 of the PLCA):

- the name of the company;
- the company's registration number and date of registration of the company;
- the share type, nominal value per share, and the numbers and quantity of the shares to which the certificate applies;
- the name of the shareholder;
- the signature of at least one director (may be printed); however, the director may grant authority to the share registrar under the Securities and Exchange Act, B.E. 2535 (1992) to sign or print the signature; and
- the date of issuance.

(iii) Share Register Book

A public company must retain a share register book and evidence related to the register (Section 62, Paragraph 1 of the PLCA).

The share register book and supporting evidence may be kept at the head office of the company or at a different location by a third-party on behalf of the company (Section 62, Paragraph 1 of the PLCA). In the case where a company entrusts storage of the share register book and supporting evidence related to the register to a third-party, notice must be provided to the shareholders and the registrar of the Ministry of Commerce (Section 62, Paragraph 1 of the PLCA). The share register book must be available for gratis inspection by the shareholders during business hours (Section 63, and Paragraph 1 of the PLCA). In addition, the company must send a copy of the list of shareholders within one month of the ordinary general shareholders meeting, indicating the shareholders at the time of the meeting, to the registrar of the Ministry of Commerce at least once each year (Section 64 of the PLCA).

Entry in the share register book is not a condition for the transfer of shares to take effect, or for the transfer to be enforceable against the company, but is required for a transfer to be enforceable against third parties (Section 58, Paragraph 1 of the PLCA).

(iv) Subscription to Shares and Payment

Under the PLCA, payment of the entire amount of the nominal value of subscribed shares is mandatory at the time of subscription (Section 37, Paragraph 2 of the PLCA).

(v) Transfer of Shares

a. Methods of transferring shares

To execute a valid transfer of shares, the name and title of the transferee must be stated on the back of the share certificate, the transferor and transferee must endorse the back of the share certificate, and the transferor must deliver the share certificate to the transferee (Section 58, Paragraph 1 of the PLCA). For a transfer to be enforceable against third parties, the transfer must actually be entered into the share register book. For a transfer of shares to be enforceable against the company, the company must receive an application to update the share register book (Section 58 of the PLCA). If the company determines that the transfer of shares is lawful, it must enter the transfer into the share register book within 14 days of receiving a request to update the register.

b. Restrictions on Share Transfers

Under the PLCA, specifying restrictions of share transfers in the company's articles of association are prohibited (Section 57, Paragraph 1 of the PLCA). Provisions restricting share transfers may only be incorporated into the articles of association in exceptional cases, for the purpose of complying with the maximum percentage of ownership by foreigners imposed by law.

c. Ownership by a Company of Its Own Shares

The PLCA prohibits public companies from owning their own shares or from taking their own shares in pledge (Section 66 of the PLCA). Nevertheless, there are exceptions to this rule. Such exceptions include cases in which a company purchases its own shares from a shareholder who

voted against a resolution to amend the articles of association in relation to the rights of shareholders, or when a company purchases its own shares for the purpose of administering surplus funds (Section 66/1, Paragraph 1(1)(2) of the PLCA), etc. Shares held by the company are excluded from calculations of a quorum at general meetings of shareholders and do not have rights to receive dividends (Section 66/1, Paragraph 2 of the PLCA).

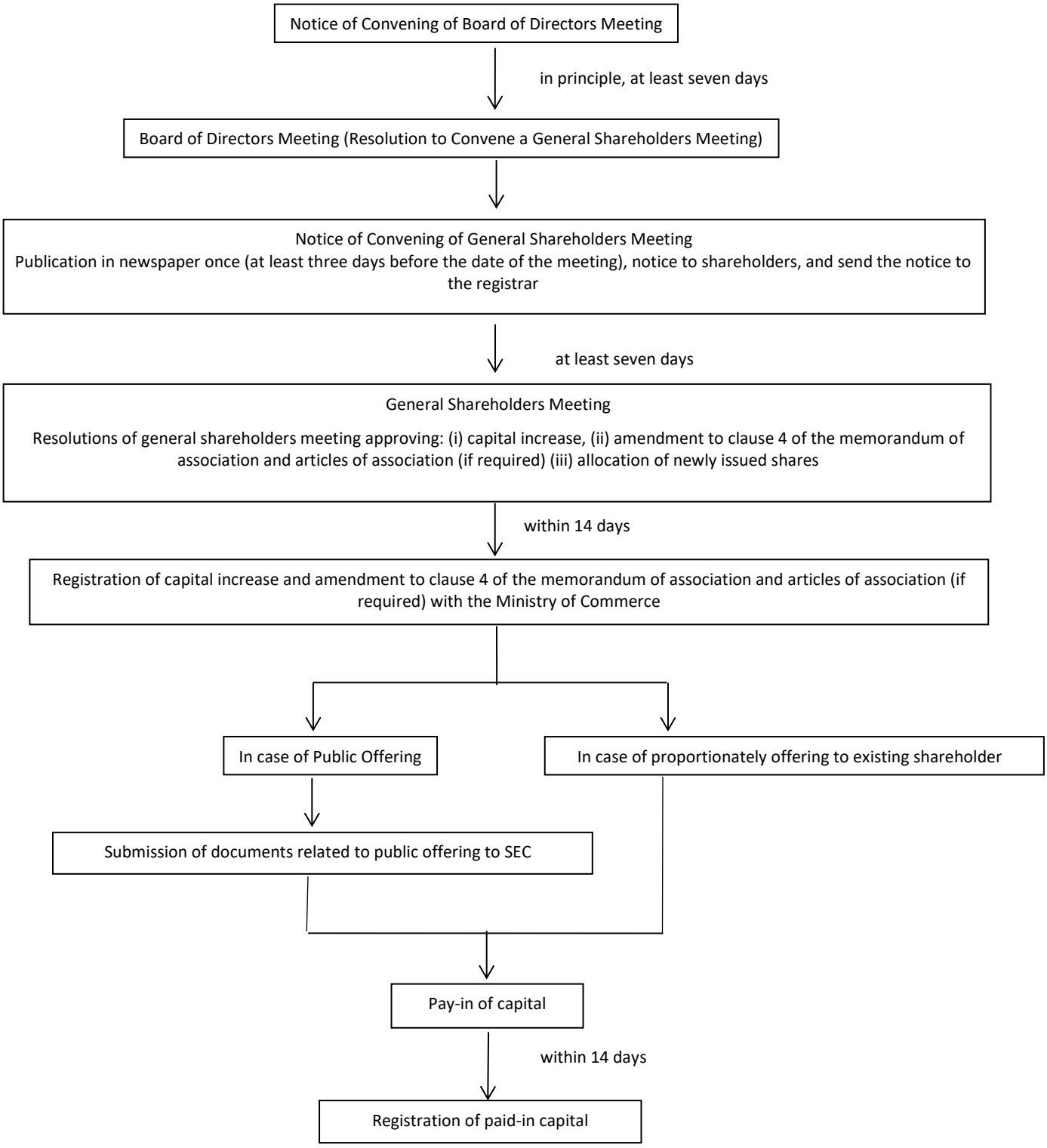
When a company lawfully acquires its own shares, it must dispose of those shares within three years of acquisition (Section 66/1, Paragraphs 3 and 4 of the PLCA; Ministerial Regulations Prescribing Rules and Procedures for Share Repurchase, Sale of Repurchased Shares and Elimination of the Company's Repurchased Shares, B.E. 2544 (2001)). If the company does not dispose of the shares within three years, the company must reduce its paid-in capital in an amount equal to the unsold portion (Section 66/1, Paragraphs 3 and 4 of the PLCA; Ministerial Regulations Prescribing Rules and Procedures for Share Repurchase, Sale of Repurchased Shares and Elimination of the Company's Repurchased Shares, B.E. 2544 (2001)).

(vi) Issuance of New Shares

Unlike the CCC, the PLCA permits public companies to issue shares up to the total authorized number of shares (authorized capital) without amending its memorandum of association. A public company may issue new shares by a public subscription, a third-party allocation, or an allocation to shareholders (Section 137 of the PLCA). Moreover, unlike private companies, public companies have no restrictions on the nominal value of their shares, though all shares must have the same value (Section 50 of the PLCA). If a public company reports a loss for one year or more, it may issue shares for an amount less than the nominal value (Section 52 of the PLCA).

In addition, public companies may issue debentures by a resolution adopted by the affirmative votes of at least three-quarters of the voting rights of shareholders in attendance of the shareholders' meeting (Section 145 of the PLCA). The procedure for issuing new shares is shown in Figure 2-3 below.

[Figure 2-3] Procedure for Issuing New Shares by a Public Company



Source: Ministry of Commerce's Website

(vii) Reduction of Capital

A public company can reduce its capital by reducing the nominal value of issued shares, reducing the number of shares issued (Section 139, Paragraph 1 of the PLCA), or canceling any unsold shares (Section 140 of the PLCA).

When a company reduces its capital by reducing the nominal value of issued shares or by reducing the number of shares issued, the law requires a resolution adopted by the affirmative votes of at least three-quarters of the voting rights of shareholders in attendance of the shareholders' meeting(Section 139, Paragraph 3 of the PLCA). This resolution must be registered within 14 days of the general meeting. Unless it seeks to make up for accumulated losses, a company may not reduce its capital to less than one-fourth of the total amount of capital (Section 139, Paragraph 2 of the PLCA). The company must provide notice of this resolution within 14 days of the resolution by publication in a local newspaper at least once and by sending a written notice to all creditors known to the company. This notice must ask creditors to present any objections to the capital reduction within two months of the date of receipt of the notice (Section 141, Paragraph 1 of the PLCA). If a creditor objects, the company cannot reduce its capital unless it repays the obligation or provides a guarantee to the creditor (Section 141, Paragraph 2 of the PLCA).

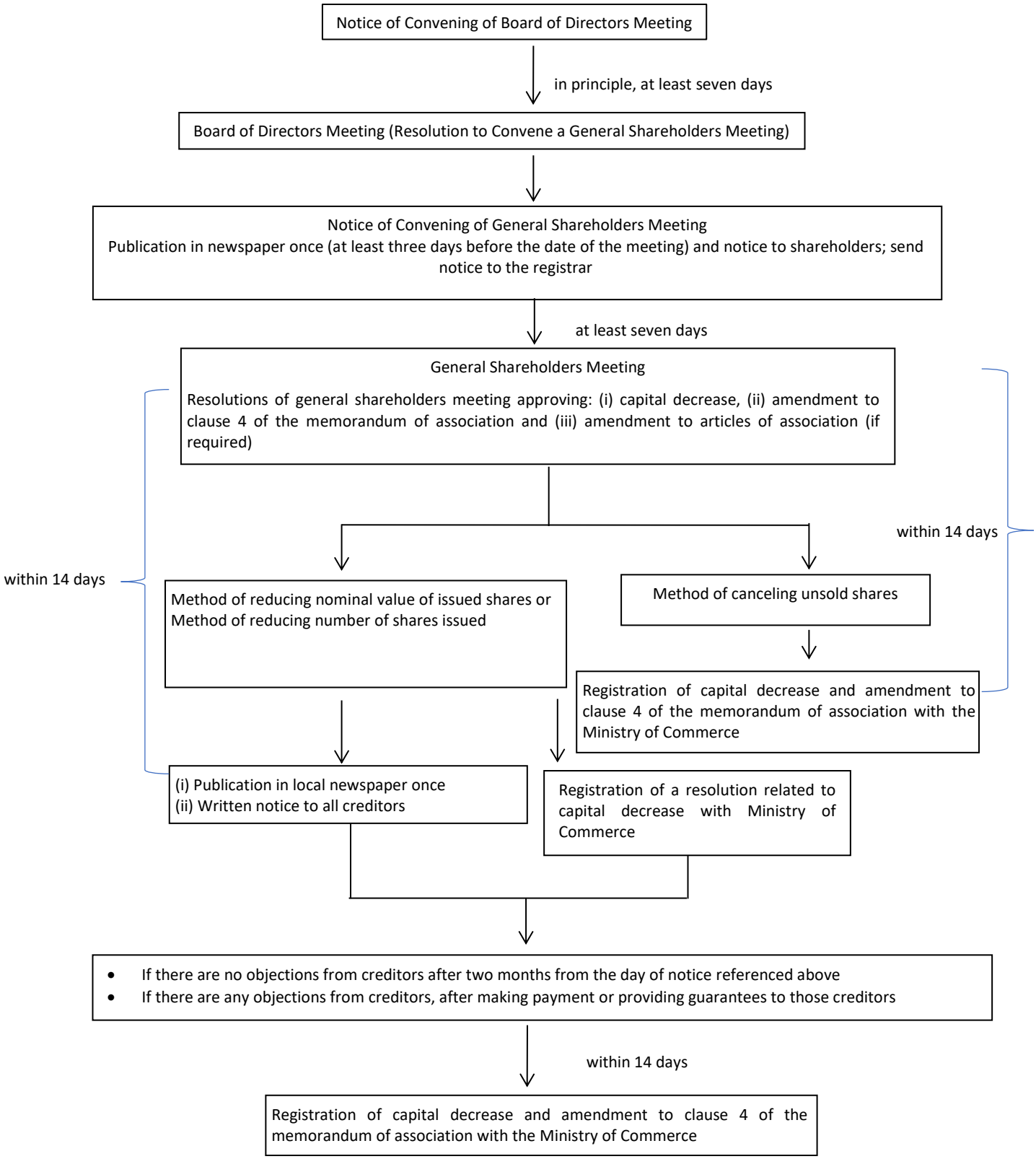
If no creditor objects, the company must register the capital reduction within 14 days after the end of creditor objection period. If an objection from a creditor is presented, the company must register the reduction of capital within 14 days from the day that the obligation is repaid, or a guarantee is provided to the creditor (Section 142 of the PLCA).

If a creditor did not object because he or she was unaware of the capital reduction for which notice was provided, and failure to object was not his or her fault, the shareholders who received a refund of a portion of the shares will be responsible for reimbursing the creditor up to the amount of the refund for one year from the date of registration of the capital reduction (Section 144 of the PLCA).

When a company reduces capital by canceling unsold shares, an ordinary resolution of the general shareholders meeting is required. The ordinary resolution reducing the capital must be registered within 14 days of the date of the general shareholders meeting (Section 140 of the PLCA).

The deadline for registration under the PLCA may be extended with an approval from the registrar of the Ministry of Commerce.

[Figure 2-4] Procedure for Reducing Capital by a Public Company



Source: Ministry of Commerce's Website

(2) Bodies and Operations (governance)

A. Governance of Private Companies

By statute, private companies must establish the following organizational bodies: the general meeting of shareholders, a board of directors (if there are multiple directors), directors with signatory authority, and auditors. An overview of each organization is set forth in Figure 2-5.

[Figure 2-5] Overview of Private Company Governance

General Shareholders Meeting	
Convening of an extraordinary general meeting	• The board of directors may summon extraordinary meetings whenever they see fit. (Section 1172, Paragraph 1 of the CCC) • Directors must, without delay, summon such meeting when the company suffers a loss amounting to half of its registered capital, in order to inform the shareholders of such a loss. (Section 1172, Paragraph 2 of the CCC) • Shareholders holding not less than one-fifth of the shares of the company may request a meeting by attaching their names to a letter specified "business to be considered." (Section 1173 of the CCC)
Ordinary resolution matters	• Director remuneration (Section 1150* of the CCC) • Appointment and removal of directors (Section 1151 of the CCC) • Director retirement by rotation (Section 1152 of the CCC) • Approval of financial statements (Section 1197 of the CCC) • Payment of dividends (Section 1201 of the CCC) • Election of auditors (interpreted to include dismissal) (Section 1209 of the CCC) • Remuneration of auditors (Section 1210 of the CCC)
Special resolution matters	• Amendment of the memorandum of association and articles of association (Section 1145 of the CCC) • Capital increase by issuing new shares (Section 1220 of the CCC) • Issuance of new shares by payment in kind (Section 1221 of the CCC) • Reduction of capital (Section 1224 of the CCC) • Dissolution (Section 1236(4) of the CCC) • Mergers (Section 1238 of the CCC)
Method of adopting resolutions	• In theory, shareholders vote by a show of hands. Every shareholder present in person, or represented by proxy, shall have one vote. However, if two or more shareholders request a poll, or if provided for in the articles of association, voting can occur by a poll, and each shareholder shall have one vote for each share held (Sections 1182 and 1190 of the CCC). • Shareholders with special interests in a resolution do not have voting rights on that resolution (Section 1185 of the CCC)
Quorum	• Attendance by shareholders holding at least one-quarter of the capital of the company (Section 1178 of the CCC)
Resolution requirements	• Ordinary resolutions: approval by a majority of the voting rights held by shareholders in attendance. In the case of a tie vote, the chairman of the meeting casts the deciding vote (Section 1193 of the CCC) • Special resolutions: approval by at least three-quarters of voting rights held by shareholders in attendance (Section 1194 of the CCC)

Board of Directors	
Number of directors and qualifications	• At least one director • No nationality or residency requirements under the CCC
Term of office of directors	• One-third of directors must resign at the first general shareholders meeting each year (if the number is not a multiple of three, then the number nearest to one-third) (Section 1152 of the CCC) • Directors may be re-appointed (Section 1153, Paragraph 2 of the CCC)
Quorum	• As stated in the articles of association. In the case of a board of directors with more than three members and no provision in the articles of association otherwise, attendance by three directors (Section 1160 of the CCC)
Resolution requirements	• Approval by a majority of the directors in attendance (Section 1161 of the CCC) • In the case of a tie vote, the chairman of the board casts the deciding vote (Section 1161 of the CCC)
Persons who carry out business	
Persons with signatory authority	• Directors with authority to sign on behalf of the company must be registered (Section 1111, Paragraph 2(6) of the CCC)
Persons authorized by the board of directors	• The board of directors may delegate authority to managers or committees (Section 1164 of the CCC)
Financial auditors	
Qualifications	• Must not have an interest in any transaction of the company, other than being a shareholder. No director, agent or employee of the company is eligible to be an auditor (Section 1208 of the CCC) • Must be a certified public accountant in Thailand (Section 37 of the Certified Public Accountant Act, B.E. 2547 (2004) (the "**Certified Public Accountant Act**"))
Term of office	• Until the next ordinary general shareholders meeting. May be re-elected (Section 1209 of the CCC)

** Unless otherwise indicated, the statutory provisions referenced in the table above are references to the CCC.*

(i) General Shareholders Meeting

Refer to Figure 2-5 for information on statutory resolution matters, quorums, and resolution requirements of the general shareholders meeting of a private company. Other resolution matters such as increasing the number required for a quorum, lengthening the advance notice period for board and shareholders meetings, changing resolution requirements, and removing the chairman's authority to cast deciding votes may be specified in the articles of association.

The notice of convening for a general shareholders meeting that will address only ordinary resolutions must be provided by publication in a newspaper once and to shareholders by registered mail at least seven days prior to the date of the general shareholders meeting. Notice of convening for a general shareholders meeting that will address a special resolution must be provided by publication in a newspaper once and notice to shareholders by registered mail at least 14 days prior to the date of the meeting (Section 1175, Paragraph 1 of the CCC). In practice, the law does not allow a reduction of these notice periods in the articles of association.

The minimum number of shareholders is three, and if the number of shareholders drops below three, this constitutes grounds for dissolution of the company (Section 1237, Paragraph 1(4) of the CCC).

(ii) Board of Directors

The board of directors has the authority and responsibility for the operation of the company in accordance with the decisions of the general shareholders meeting and the articles of association (Section 1144 of the CCC). Refer to Figure 2-5 for information on statutory quorums and resolution requirements for the board of directors, as well as the number and qualifications for directors of private companies. Clarification and resolution of matters such as increasing the number required for a quorum, lengthening the advance notice period of board and shareholders meetings, changing resolution requirements, and removing the chairman's authority to cast deciding votes, will often be specified in the articles of association. Note that a proclamation from the Department of Business Development of the Ministry of Commerce prohibits attending a meeting of the board of directors by proxy and adopting resolutions without a meeting (written resolutions).

(iii) Directors with Signatory Authority

Directors with the authority to sign on behalf of the company must be registered (Section 1111, Paragraph 2(6) of the CCC). Signatory authority differs conceptually from comprehensive representative authority, but those with such powers perform similar functions with regards to executing agreements and so on. Companies may appoint multiple persons with signatory authority and may require joint signatures, or a company may appoint a single person with signatory authority.

(iv) Auditors

Private companies do not have internal auditors for their business operations; instead, third-party auditors must be elected (Section 1208 and Section 1209 of the CCC).

B. Public Company Governance

A public company must establish a statutory organizational body which includes: the general shareholders meeting, a board of directors, the directors with signatory authority, and the auditors. In the case of a publicly traded company, appointments of independent directors and the creation of an audit committee is also required. An overview of each organization is set forth in Figure 2-6.

[Figure 2-6] Overview of Public Company Governance

General shareholders meeting	
Convening an Extraordinary General Meeting	• The board of directors may summon a meeting at any time. (Section 99 of the PLCA) • Shareholders holding not less than ten percent of the total number of shares sold may request that the board of directors summon a meeting at any time by subscribing their names to a letter specified "business to be considered. (Section 100 of the PLCA)
Ordinary resolution matters(required majority votes of total votes attending the meeting)	• Issuance of shares at a price lower than the registered nominal value (Section 52(1) of the PLCA) • Approval of transfers of shares less than two years after the promoters paid in capital (Section 57, Paragraph 2 of the PLCA) • Election or removal of directors (Section 70, Paragraph 1, Section 72(4), Section 76 of the PLCA) (cumulative voting is used) • Approval of the balance sheet and statement of profit and loss (Section 112 of the PLCA) • Approval of dividends (Section 115 of the PLCA) • Approval of share dividends (Section 117 of the PLCA) • Approval of use of reserve fund to compensate for accumulated losses (Section 119 of the PLCA) • Appointment and determination of remuneration of auditors (Section 120 of the PLCA) • Reduction of capital by canceling unissued registered shares (Section 140 of the PLCA) • Appointment and dismissal of liquidators and auditors during liquidation (Section 156, Section 163(3) of the PLCA) • Approval of liquidation balance sheet and liquidation statement of profit and loss (Section 165 of the PLCA) • Approval of report on results of liquidation (Section 176, Paragraph 1 of the PLCA)
Director remuneration	Determination of director remuneration requires a resolution adopted with the affirmative votes of at least two-thirds of the voting rights of shareholders in attendance (Section 90, Paragraph 2 of the PLCA)
Dismissal of directors	Dismissal of a director requires a resolution adopted by the affirmative votes of at least one-half of the voting rights of shareholders in attendance, with at least three-quarters of shareholders in attendance (Section 76 of the PLCA)
Other resolution matters (required 75% of total votes attending the meeting)	• Amendment of the memorandum of association and articles of association (Section 31, Paragraph 1 of the PLCA) • Approval of set offs of the payment of share price, against claims held against the company (Section 54/1, Paragraph 1 of the PLCA) • Transfer or sale of all, or of the principal part, of the business (Section 107

	(2)(a) of the PLCA) • Purchase or acquisition of the business of another company (Section 107 (2)(b) of the PLCA) • Executing, amending, or terminating a lease agreement for all, or the principal part, of the business, outsourcing management, and amalgamating the business with the objective of sharing profit and loss (Section 107(2)(c) of the PLCA) • Increasing capital (Section 136, Paragraph 2(2) of the PLCA) • Reducing capital by reducing the nominal value of shares or the number of shares (Section 139, Paragraph 3 of the PLCA) • Issuing the debentures (Section 145, Paragraph 2 of the PLCA) • Mergers (Section 146 of the PLCA) • Dissolution (Section 154(1) of the PLCA)
Method of adopting resolutions	• Vote at the general shareholders meeting (Section 107 of the PLCA)
Quorum	• Attendance by at least 25 shareholders or not less than half of the total shareholders, and attendance by shareholders holding at least one-third of issued shares (Section 103, Paragraph 1 of the PLCA)
Resolution requirements	• Ordinary resolutions: approval by a majority of the voting rights exercised by shareholders in attendance. In the case of a tie vote, the chairman of the meeting casts the deciding vote (Section 107(1) of the PLCA) • Other resolutions (required 75% of total votes attending the meeting): approval by at least three-quarters of voting rights held by shareholders in attendance (Section 107(2) and other provisions of the PLCA) (see above regarding appointment and dismissal of directors and determination of director remuneration)
Board of Directors	
Number of directors and qualifications	• At least five, of which not less than half of all directors must reside in Thailand (Section 67 of the PLCA); all directors must be registered • In the case of a listed company, election of independent directors equal to at least one-third of the total number of directors (which must number at least three) (Notification of the Capital Market Supervisory Board)
Term of office	• In principle, until the next ordinary general shareholders meeting (Section 71, Paragraph 1 of the PLCA) • When the articles of association provide that the election of directors shall be performed by a method that differs from the cumulative voting specified in Section 70 of the PLCA, the terms of office of one-third of directors shall expire at each ordinary general shareholders meeting (if the number is not a multiple of three, then the number nearest to one-third) (Section 71, Paragraphs 2 and 3 of the PLCA) • Re-election is permitted (Section 71, Paragraph 4 of the PLCA)
Quorum	• Attendance by not less than half of all directors (Section 80, Paragraph 1 of the PLCA)
Resolution requirements	• Approval by a majority of the directors in attendance (Section 80, Paragraph 2 of the PLCA) • In the case of a tie vote, the chairman of the board casts the deciding vote (Section 80, Paragraph 3 of the PLCA)

Persons who carry out business	
Persons with signatory authority	• Directors with the authority to sign on behalf of the company must be registered (if the scope of the authority is limited by the articles of association, then signatory power is limited to the extent of that authority) (Section 39 (4) of the PLCA)
Persons authorized by the board of directors	• One or more directors or other persons authorized by the board of directors may be authorized to act on behalf of the company in place of the board of directors (Section 77, Paragraph 2 of the PLCA)
Audit Committee (in the case of a publicly-traded company)	
Number of members and qualifications	• At least three people • Audit Committee must be independent directors and must meet additional qualification requirements (Notification of the Capital Market Supervisory Board)
Auditors	
Qualifications	• Must not be directors, staff, employees, or officers of the company (Section 121 of the PLCA) • Must be a certified public accountant in Thailand (Section 37 of the Certified Public Accountant Act)
Term of office	• Until the next ordinary general shareholders meeting. May be re-appointed (Section 120 of the PLCA)

** Unless otherwise indicated, the statutory provisions indicated in the table above are references to the PLCA.*

(i) General Shareholders Meeting

Refer to Figure 2-6 for information on statutory resolution matters, quorums, and resolution requirements of the general shareholders meeting of a public company. Other resolution matters such as increasing the number required for a quorum, increasing the number of resolution requirements, and removing the chairman's authority to cast deciding votes may be specified in the articles of association.

Notice of convening of a general shareholders meeting must be provided to the registrar and to the shareholders at least seven days prior to the date of the general shareholders meeting. Notice must be provided by publication in a newspaper once and to shareholders by registered mail at least three days prior to the date of the general shareholders meeting (Section 101, Paragraph 1 of the PLCA). In practice, the law does not allow for the reduction of these notice periods in the articles of association.

The minimum number of shareholders required is 15, and it constitutes grounds for dissolution if the number of shareholders in the company drops below 15. (Section 155, Paragraph 1(2) of the PLCA).

(ii) Board of Directors

The board of directors has authority over and responsibility for the operation of the company in accordance with the company objectives, the articles of association, and the decisions of the general shareholders meeting (Section 77, Paragraph 1 of the PLCA).

Refer to Figure 2-6 for information on statutory quorums and resolution requirements for the board of directors, as well as for the number and qualifications for directors of a public company.

Clarification for the resolution of matters will often be specified in the articles of association such as increasing the numbers required for a quorum, for the alteration of resolution requirements, or for the elimination of the chairman's authority to cast deciding votes. Moreover, as in the case of a private company, the law does not allow for the adoption of resolutions without holding a meeting (written resolutions) or attending a meeting by proxy of directors.

In the case of a listed company, a specific number of independent directors are required and if that requirement is not met the Securities and Exchange Commission[2] will not approve a solicitation for a subscription to newly issued shares (Section 5, Section 17, Item (1) of the Notification of the Capital Market Supervisory Board No. TorChor. 39/2559 Re: Application for and Approval of Offer for Sale of Newly Issued Shares)[3]. However, for a non-listed company that is being regulated by other government agencies (for example, commercial banks) may also be subject to the requirements on a minimum number of directors by other laws.

(iii) Directors with Signatory Authority

Directors with the authority to sign on behalf of a company (or if the scope of that authority is limited pursuant to the articles of association, then to the extent of that authority) must be registered (Section 39 (4) of the PLCA).

(iv) Audit Committee

In the case of a listed company, an Audit Committee of at least three specified, independent directors must be established (Clause 17(3) of the Notification of the Capital Market Supervisory Board No. TorChor.39/2559 Re: Application for and Approval of Offer for Sale of Newly Issued Shares). However, for a non-listed company that is being regulated by other government agencies (for example, commercial banks) may also be subject to the requirements on a minimum number of Audit Committee by other laws.

[2] The Securities and Exchange Commission was established in 1992, pursuant to the Securities and Exchange Act, B.E. 2535 (1992). It is an independent governmental agency intended to monitor and develop capital markets in Thailand.

[3] To be an independent director one cannot, among other requirements, own 1% or more of the total number of shares issued by the relevant company or its affiliated companies; be a current officer or employee, person with a familiar relationship, supplier, accounting auditor, or professional advisor of the relevant company or its affiliated companies; have been an officer or employee, supplier, financial auditor, or professional advisor during the past two years (Clause 16(2) of Notification of the Capital Market Supervisory Board No. TorChor.39/2559 Re: Application for and Approval of Offer for Sale of Newly Issued Shares).

The Audit Committee must review financial reporting process, monitor compliance with laws and regulations, consider transactions with related persons, and evaluate internal governance systems, etc, in accordance with the rules of the Stock Exchange of Thailand.

If the size of the committee falls below the required number of members and the requisite number of members are not added within a certain period, a grounds for suspension of trading and delisting is constituted (Section 3 of the Stock Exchange of Thailand's Policy Re: Listed companies required to appoint audit committee).

(v) Auditors

Public companies must appoint auditors to perform financial auditing (Section 120 of the PLCA; Section 37 of the Certified Public Accountant Act).

Ministry of Commerce Proclamation on Holding Meetings by Telephone or Videoconferencing

In 27 June 2014, the NCPO issued a promulgation stating that meetings held pursuant to the statute shall be considered lawful and valid, even when held by electronic media. Application of the promulgation was not limited to any particular provisions and was consequently believed to apply to both general shareholders and board of directors meetings. Since the Department of Business Development of the Ministry of Commerce (which oversees stock companies and partnerships) did not issue a clear opinion on whether the proclamation applies to general shareholders meetings or board of directors meetings, on 23 September 2016 the Department of Business Development clarified the promulgation's relationship (referred to as the "**Ministry of Commerce Proclamation**"). A summary of the Ministry of Commerce Proclamation is set forth below.

(1) Conditions For a Meeting To Be Considered Lawfully and Validly Held

According to the Ministry of Commerce Proclamation, meetings conducted using electronic media must meet the following qualifications to be considered lawfully and validly held: (i) at least one-third of the number of participants required for a quorum must be physically present at the same location, (ii) all participants must be present in Thailand at the time of the meeting (including those persons physically present and those attending by electronic media), and (iii) the meeting must be held using a telephone or videoconferencing method in accordance with standards specified by the Ministry of Information and Communication Technology (there must be a sound or video recording of the entire meeting, measures to prevent tampering with such meeting record must be taken, data transmitted from the meeting must be recorded, etc.). The scope of telephone and video conferencing use is narrow.

(2) Specifics of Note

According to the Ministry of Commerce Proclamation, notice of convening of general shareholders meetings and board of directors meetings held using electronic media and reference documents may be transmitted by email (keep in mind companies must still adhere to convening procedures specified in the CCC regarding notice by publication in a newspaper of general shareholders meetings, etc.). In addition, for a public company limited, trade association, or a chamber of commerce, there must be a provision in their articles of association describing that holding meeting via electronic media is allowed.

(3) Company Accounting

A. Accounting of Private Companies

The CCC contains the following provisions regarding accounting procedures for private companies.

(i) Accounting Records

The directors of private companies must prepare account books that accurately record the following items (Section 1206 of the CCC):

- the company's income and expenditures (including income and expenditure explanations); and
- the company's assets and liabilities.

(ii) Accounting Auditors

The auditors may access a company's books at any time (Section 1213 of the CCC). Auditors must submit a report regarding the balance sheet and statement of profit and loss at the ordinary general shareholders meeting (Section 1214, Paragraph 1 of the CCC). In this report, the accounting auditors must indicate their opinion as to whether the report accurately reflects the company's numbers (Section 1214, Paragraph 2 of the CCC).

(iii) Financial Statements

A private company must obtain approval of the balance sheets (reviewed by the accounting auditors, including a statement of the profits and losses (Section 1196, Paragraph 1 of the CCC)) from the general shareholders meeting within four months of the record date of the balance sheet (Section 1197, Paragraph 1 of the CCC). A copy of the audited balance sheet must be delivered to each shareholder listed in the register of shareholders at least three days prior to the date of the general shareholders meeting (Section 1197 Paragraph 2 of the CCC).

(iv) Distribution of Profits

a. Provisions on the Declaration of Dividends

In principle, shareholder approval (from the general shareholders meeting) is required to declare a dividend (Section 1201, Paragraph 1 of the CCC), but in cases in which there are sufficient profits to declare an interim dividend, directors may discretionarily declare such dividends (Section 1201, Paragraph 2 of the CCC). Dividend payments must be made within one month of the date of dividend resolution adoption by shareholders or the board of directors (Section 1201, Paragraph 4 of the CCC).

b. Distributable Amount

Dividends may be paid only from the company's profits, and if the company has an accumulated loss, it may not declare a dividend until it has paid off the accumulated loss (Section 1201, Paragraph 3 of the CCC).

Furthermore, when paying dividends the company must appropriate at least one-twentieth of the profits to a statutory reserve fund until the reserve fund reaches at least one-tenth of the company's capital (Section 1202, Paragraph 1 of the CCC).

(v) Duty to Return Unlawful Dividends

If dividends are paid in violation of (i) or (ii) above, creditors who have claims against the company may demand that shareholders return dividend payments (Section 1203 of the CCC); however, if the shareholder(s) received the payment in good faith, the shareholder may not be compelled to return the dividend.

B. Accounting of public companies

The PLCA contains the following provisions regarding the accounting of public companies.

(i) Account Books

A public company must prepare and maintain account books (Section 109 of the PLCA).

(ii) Auditors

The auditors may access the company's books, documents, and other evidence related to income, expenditures, assets, and liabilities of the company, at any time during business hours. Auditors can question the company's directors' staff, employees, persons holding any position within the company, and agents of the company, regarding examination of the books and may require such persons to submit relevant evidence (Section 122 of the CCC).

In addition, auditors must prepare and submit reports to the ordinary general shareholders meeting, as specified by law (Section 123 of the CCC) and they must also participate in the ordinary general shareholders meetings during which financial statements are approved (Section 125 of the CCC).

(iii) Financial Statements

The board of directors of a public company must obtain approval of financial statements (as audited by the accounting auditors) during the ordinary general shareholders meeting. This meeting must be held within four months of the end of the fiscal year (Section 98, Paragraph 1 of the PLCA) (Section 112, Paragraph 1 of the PLCA). In contrary to the requirements of the CCC, copies of the audited financial statements and the accounting auditor's report must be delivered upon notice convening the general shareholders meeting (Section 113(1) of the PLCA).

(iv) Distribution of Profits

a. Provisions Related to the Declaration of Dividends

As with the CCC, declaring a dividend requires the approval from the general shareholders meeting (Section 115, Paragraph 2 of the PLCA). However, in practice, if the directors determine that there are sufficient profits to declare an interim dividend, the directors may declare interim dividends in accordance with the articles of association (Section 115, Paragraph 3 of the PLCA).

b. Distributable Amount

Much like the CCC, dividends may be paid only from the company's profits, and if the company has an accumulated loss it may only pay dividends upon paying off the accumulated loss (Section 115, Paragraph 1 of the PLCA).

Furthermore, when paying dividends, the company must allocate at least five percent of the net profits generated during the relevant fiscal year (if there is an accumulated loss, profits after deducting the loss) to a statutory reserve fund until the reserve fund reaches at least one-tenth of the company's capital (Section 116 of the PLCA).

c. Payment of Dividends

A company is required to pay dividends within one month of the date of the general shareholders meeting or a board of director's resolution. The company must also publish notice (for shareholders) of dividend payments in a local newspaper (Section 115, and Paragraph 4 of the PLCA).

(v) Duty to Return Unlawful Dividends

As the CCC requires, if dividends are paid in violation of (i) or (ii) above that cause fiscal detriment to the company's creditors, creditors may demand that shareholders return the dividends within one year after the date of shareholder meeting (Section 118of the PLCA); however, if that shareholder received the payment in good faith, they may not be compelled to return the dividend.

(4) Dissolution and Liquidation

A. Dissolution and Liquidation of a Private Company

The starting point for the process of terminating a company's juristic personality is dissolution. Different types of dissolution include a voluntary dissolution (pursuant to a resolution of the company's general shareholders meeting) and dissolution pursuant to a court order.

A voluntary dissolution is a special resolution matter of the general shareholders meeting as shown in Figure 2-5 above. In the case of a voluntary dissolution, the company must apply to the Ministry of Commerce for registration of the dissolution within 14 days of the general shareholders meeting during which the resolution for the dissolution was adopted. After the dissolution is registered with the Ministry of Commerce, liquidation procedures commence, including the process of organizing the company's claims and obligations.

(i) Voluntary Dissolution

Voluntary dissolution requires a special resolution from the general shareholders meeting. Within 14 days from adoption of the dissolution resolution, the liquidators must issue notice to known creditors, provide notice of the dissolution by publication in a newspaper, and apply to register the dissolution with the Ministry of Commerce (Sections 1253 and 1254 of the CCC).

(ii) Dissolution by Court Order

A court may order a company to dissolve in the following circumstances (Section 1237, Paragraph 1 of the CCC):

- where there was a breach of duty relating to the founding meeting, or submission of the founding meeting minutes;
- where the company does not commence business activities within one year of registration of establishment, or suspends business for one year;
- where the company generates only losses from its business and lacks any prospect of a business recovery;
- where there are fewer than three shareholders; or
- where any other circumstances result in a company's inability to continue conducting business.

B. Dissolution and Liquidation of a Public Company

Similar to dissolution of a private company, dissolution of a public company occurs through voluntary dissolution pursuant to a resolution of the general shareholders meeting, corporate bankruptcy, or a court order (Section 154 of the PLCA). As shown in Figure 2-6 above, voluntary dissolution is a special resolution matter of the general shareholders meeting. Following the registration of a dissolution with the Ministry of Commerce, a liquidation processes will commence.

(i) Voluntary Dissolution

Similar to the dissolution of a private company, a voluntary dissolution of a public company requires a resolution adopted by the affirmative votes of at least three-quarters of the voting rights of shareholders in attendance of the shareholders' meeting (Section 154, Paragraph 1 of the PLCA). Within seven days of the appointment of liquidators, liquidators must be registered, the company's dissolution must be registered, and a dissolution notice must be published in a newspaper (Section 161 of the PLCA). Within one month of the appointment, liquidators must issue notice to all creditors listed in the company's account books and other documents, requesting that the creditors submit demands for payment within one month of receiving the notice. Liquidators must also issue notices demanding payment of obligations owed to the company by debtors listed in the company's account books and other documents (Section 162 of the PLCA).

(ii) Dissolution by Court Order

If any of the circumstances set forth below are present, shareholders in possession of at least one-tenth of the company's issued shares may request that a court order the dissolution of the company (Section 155 of the PLCA):

(a) in a case where there was a breach of duty by the promoters, as related to statutory meeting or preparation of the minutes of the statutory meeting, or in the case where the directors violated provisions relating to monetary payment or in-kind payment for shares, preparation of the list of shareholders or registration of the company's establishment;

(b) in the case where there are fewer than fifteen shareholders; or

(c) in the case where the company generates only losses from its business and there is no prospect of a business recovery.

In the cases of items (a) and (b) above, the court may issue an order for corrective action during a period of no longer than six months in lieu of an order for dissolution.

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CHAPTER 3

MERGERS AND ACQUISITIONS

CHAPTER 3 | MERGERS AND ACQUISITIONS

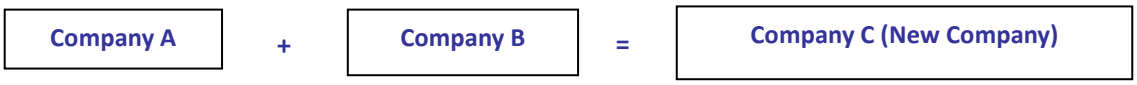
This chapter discusses and provides basic information in relation Mergers and Acquisitions ("**M&As**") in Thailand, including some details to be aware of due to the specific nature of laws in Thailand applicable to the contemplated transaction.

In Thailand, the well-known methods used for acquisition of a business or company are amalgamation, acquisition of shares, and business transfer. While reorganization through a merger is recognized in other jurisdictions, currently merger is not permitted under Thai law.

(1) Amalgamation

Under the Civil and Commercial Code (the "**CCC**") and the Public Limited Company Act, B.E. 2535 (1992) (the "**PLCA**"), amalgamation means a situation whereby two or more companies merge resulting in the establishment of a new combined entity. The new entity must be registered as a new company and will assume all the rights and duties of both merging companies (Sections 1241 and 1243 of the CCC and Sections 151 and 153 of the PLCA).

[Figure 3-1] Amalgamation



A. Amalgamation of Private Limited Companies

Sections 1238 to 1243 of the CCC govern the amalgamation of limited companies, and can be summarized, as follows:

- A limited company may not amalgamate with another limited company except by a special resolution (Section 1238 of the CCC). According to Section 1194 of the CCC, a special resolution can be passed by a majority of not less than three-fourths of the vote of a single shareholders' meeting.

- The special resolution by which an amalgamation is approved must be registered by the company within 14 days from its date (Section 1238 of the CCC).

- Under Section 1240 of the CCC, the company must advertise and announce the amalgamation to all of its creditors at least once in a local newspaper because such amalgamation may change the condition of debt, if not render it un-payable in total. In addition, the company must send all known creditors of the company notice by registered mail, which includes details of the proposed amalgamation. The creditors then have 60 days to raise any objections they may have. If no objections are raised during such period, none is deemed to exist. If an objection is raised, the company cannot proceed with the amalgamation unless it has satisfied the claim or given security for it.

- When the amalgamation has been made, it must be registered within 14 days by each merging company and the limited company formed by the amalgamation must be registered as a new company (Section 1241 of the CCC). The effect of amalgamation is that the amalgamating companies will cease to exist. As such, registration of the new company shall be done on the same day.

- According to Section 1242 of the CCC, the share capital of the new company must be equivalent to the total share capital of the amalgamating companies. For example, if Company A's registered capital is 100 million Baht and Company B's registered capital is 200 million Baht, the new company's registered capital will be 300 million Baht. Note that the proportion of the shareholding percentage in the new company may not be the same as those previously in the old companies, depending on the result of financial assessment of the two old companies before amalgamation.

- The new company is entitled to the rights and subject to the liabilities of the amalgamated companies as provided in Section 1243 of the CCC.

B. Amalgamation of Public Limited Companies

The PLCA provides the legal framework for the amalgamation of the public companies and the amalgamation by the public companies with private companies.

- Similar to the amalgamation of private companies under the CCC, amalgamation of two or more public companies, or any public company and a private company can be done by a resolution of the shareholder meeting of each company passed by a vote of not less than three quarters of the votes present and entitled to vote (Section 146, Paragraph 1 of the PLCA). The PLCA also further prescribes that in the situation that a resolution for an amalgamation can be passed but any minority shareholder objects to the amalgamation, the public company shall arrange for the purchase of his/her shares. If such shareholder does not agree to sell his shares, the company shall proceed with the amalgamation, and it shall be deemed that such shareholder is a shareholder of the company formed by the amalgamation (Section 146, Paragraph 2 of the PLCA).

- Similar to the amalgamation of private companies under the CCC, **t**he amalgamating public company shall notify its creditors in writing of the resolution of the amalgamation for the objection and publish such notice in a local newspaper. If an objection is raised, the company cannot proceed with the amalgamation unless it has satisfied the claim or given security for it. (Sections 147 together with Section 141 of the PLCA).

- After having proceeded in accordance with the requirement for objection by its creditors, the joint meeting of the shareholders of all companies to be amalgamated shall be held to consider the matters as prescribed in accordance with Section 148 of the PLCA, including amongst others, allotment of shares of the amalgamated company to the shareholders, the capital of the amalgamated company, of which the amount shall not be less than the sum of the paid-up capital of all the companies to be amalgamated, and if the companies to be amalgamated have already sold their shares according to the number registered, an increase in capital may be made at the same time. This meeting shall be completed within six months (extendable to one year) of the date on which all of the companies have passed resolutions for the amalgamation (Section 148 of the PLCA).

- The registration of the amalgamation of the companies shall be made within 14 days of the meeting (Section 151 of the PLCA) and upon registration, the amalgamating companies will cease to exist (Section 152 of the PLCA). The company which has already been amalgamated and registered shall be entitled to all the assets, liabilities, rights, duties and responsibilities of all the former companies (Section 153 of the PLCA).

Note that the transfer of rights and liabilities resulting from amalgamation is by operation of laws (Section 1243 of the CCC and Section 153 of the PLCA). Some governmental authorities treat the licenses issued to the amalgamating company as still valid and will transfer to the new company by operation of law. The new company only applies for the change of the licensee holder name in each license after completion of amalgamation. In some cases, the authorities require that the amalgamating company holding a license submit the application for the transfer of a license to the amalgamated company. Despite the automatic transfer of rights and liabilities described above, the Labor Protection Act, B.E. 2535 (1992) requires the amalgamating companies to obtain consents from their employees.

(2) Share Acquisition

A. Acquisition of Existing Shares of a Company

(i) Private Limited Companies

Transfers of shares, in principle, are not restricted unless provided in the company's articles of association (the "**AOA**") (Section 1129 of the CCC). The AOA of a company may contain restrictions on share transfers, including the requirements that any share transfer must be approved by the board of directors, or a general meeting of shareholders. In such cases, such requirements under the company's AOA must be followed, otherwise such transfers are generally understood to be invalid. In some cases, there are shareholders agreements or joint venture agreements which may contain provisions not listed in the AOA, e.g. put and call options, drag along and tag along; hence, such agreements should be taken into account while conducting due diligence, and any such terms need to be complied with for the implementation of a share acquisition.

There is no requirement that the share transfer must be made in Thai only. Parties to a share transfer may individually enter into share transfer document in English (or other language).

Generally, the transfer of shares and change in shareholding percentage, or control of the company does not have impact to the licenses held by the company. However, some licenses are granted only to the company having required qualifications, which may include Thai shareholding requirements. This factor should be taken into account before implementation. Note that every change in shareholders of different nationalities in a BOI promoted company must be notified to the Board of Investment of Thailand.

After transfer and recording of such transfer of shares in the share registry book of the Company, new share certificates issued in the name of transferee can then be issued. In practice, the updated list of shareholders will also be submitted to the Department of Business Development, Ministry of Commerce (the "**DBD**") for the public record even though this is not a legal requirement.

(ii) Public Limited Companies

A company in general cannot specify any restrictions on the transfer of shares unless such restrictions are for preserving the rights and benefits to which the company is lawfully entitled, or for maintaining the ratio of shareholding between Thais and foreigners (Section 57 of the PLCA). Similarly to the acquisition of the shares in private companies, shareholders agreements or joint venture agreements should be reviewed and any restrictions on share transfers must be complied with.

The acquisition of shares in a listed public limited company may be subject to tender offer requirements. Mandatory tender offers occur when shareholding reaches 25% or more, 50% or more, or 75% or more of total voting rights as a result of the acquisition of shares (Section 247 of the Securities and Exchange Act, B.E. 2535 (1992) and Section 4 of the Notification of the Capital Market Supervisory Board No. ThorJor. 12/2554 Re: Rules, Conditions and Procedures for the Acquisition of Securities for Business Takeovers (the "**Notification**")). The process for a tender offer shall be in accordance with this Notification.

The procedures for voluntary tender offers are similar to those for mandatory tender offers. However, unlike mandatory tender offers, a voluntary tender offer can be canceled if the number of shares tendered is less than the number of shares specified in the offer document upon closing of the offer period, provided that this condition must be stipulated in the tender offer (Section 46 of the Notification).

Consideration for a tender offer can be either money only, or valuable goods other than money in addition to money (Section 35 of the Notification).

B. Acquisition of New Shares of a Company

(i) Private Limited Company

As discussed in Chapter 2, as a general rule, new shares can only be issued by a private limited company in proportion to the shares held by existing shareholders (Section 1222 of the CCC), and a capital increase to a new shareholders requires a waiver of pre-emptive rights from the existing shareholders. If existing shareholders decline to subscribe to the newly issued shares and send notice to the board of directors of this fact, the board of directors can issue such shares to other existing shareholders.

For the acquisition of a company by a party who is not an existing shareholder of the company, the said person shall first become the shareholder of the company with the purchase of existing shares. The company then proceeds with capital increase procedures. The newly issued shares can be ordinary shares or a new class of preference shares attached with the different voting rights and dividends. The newly issued shares can be issued at the price greater than par value, and the subscription can be in form of payment in kind if the memorandum of association and the AOA of the company allow.

In practice, if the existing shareholders remain shareholders of a company after an acquisition, it is common that the parties (both the new shareholders and existing shareholders) enter into a shareholders agreement to set out the terms and conditions governing the operation of the company and the rights of each shareholder group. These terms and conditions will be reflected in the amendment to the company's AOA, which must be registered with the DBD.

(ii) Public Limited Companies

As discussed in Chapter 2, public companies differ from private companies in that it is possible to conduct a capital increase through third-party allotment of shares (Section 137 of the PLCA).

When acquiring the new shares of a listed public limited company, it is mandatory to conduct a tender offer if acquiring shares reach trigger point thresholds.

(3) Business Transfer

Business transfer by acquisition of assets (and liabilities) is one of the methods for acquiring a business of an existing company. Note that an asset transfer may require additional formalities, registration and applications depending on the types of assets being acquired; particularly, if the target company's assets include immoveable property, leases, intellectual property, and/or registered machinery.

Regarding the licensing of the target company, permits and licenses held by that company are not carried over automatically. Some licenses are transferable while some are not and the acquiring company must apply for, and obtain new licenses in its own name before the implementation of the business transfer. The qualifications required for the holder of each specific license should be taken into consideration prior to any business transfer, e.g. minimum capital requirements or Thai shareholding ratios.

The transfer of contractual arrangements can be done by assignment (if there is only rights to be transferred), or novation (if both rights and liabilities to be transferred).

In addition, note that Thai law does not include an automatic transfer of the employment in the case of a business transfer. As such, separate consent is required from employees of the target company. If such consent is not acquired, the employment of an employee is not transferred to the acquiring company.

The requirement of board and/or shareholders' resolutions approving the acquisition and/or disposal of the business as required by the company's AOA and, in case of public companies, relevant laws and regulations must be also complied with.

Note that certain business operations and specific industries have specific requirements in regard to acquisitions of a business via share acquisitions, amalgamations, or business acquisitions. Provisions of the laws governing those specific industries/businesses, for example, power, insurance, etc., may include prior approval obtained from, or notification submitted to, the regulating authority prior to any acquisitions. Such requirements must be complied with.

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CHAPTER 4

TRADE COMPETITION

CHAPTER 4 | TRADE COMPETITION

This chapter discusses and provides basic background of and primary regulations for trade competition in Thailand, including specifically three main umbrella categories of conducts that are regulated, namely merger, cartel, and abuse of others.

(1) Previous Legislation

Trade competition regulations in Thailand are not a foreign concept, as the former act – the Trade Competition Act, B.E. 2542 (1999) (the "**Old Act**") – which was superseded in October 2017, was enacted in 1999. The contents of the Old Act were similar to what one may find in progressive pro-consumer trade competition regulations from around the world, with primary contents prohibiting generally anti-competitive or abusive behaviors among domestic business operators that would result in less competition and more economic burdens on the general population from a market point of view.

As a brief summary, there were five main areas that the Old Act regulated: (i) actions that dominant players in the market could not undertake, in order to prevent bullying of competitors, trade partners, and consumers, and the suppression of their economic activities, (ii) merger of two or more businesses or entities with a focus on the prohibition against monopolies and a material reduction of competition in any particular market, (iii) unfair cartel actions between at least two competitors or operators, (iv) anti-competitive cross-border arrangements between Thai entities and foreign entities, and (v) generally unfair trade practices, which partly served as a catch-all provision to prevent undue interference between the competitors. Although this superseded body of law has received praise in many ways due to its overarching scope of regulation, it was also met with criticism, notably the weak record of actual enforcement and insufficient supplementary regulations that were necessary in order to fully implement it. As a result, the Old Act very rarely was applied, and was generally perceived by the business and legal communities as a deficient and unfinished regulation. In summary, only two cases have been publicized as having been enforced, one for a provincial fruit wholesaler for pricing abuse, resulting in a minimal fine, and the other for a national beverage manufacturer for imposing undue exclusivity on some of the local distributors, resulting in a relatively large fine.

The new Trade Competition Act, B.E. 2550 (2017) (the "**Trade Competition Act**") has been in force since 2 July 2017. This Trade Competition Act supersedes the Old Act in its entirety. The Trade Competition Act, however, is conceptually very similar to the Old Act, with some of the contents modified to provide clearer guidelines as to what can and cannot be undertaken. As a result of enhanced clarity, actual enforcement seems to be more possible under this Trade Competition Act, compared to the Old Act.

(2) Current Legislation

A. Applicability

As a general principle, the Trade Competition Act will apply to all persons and juristic entities that operate businesses, whether as a manufacturer, distributor, importer, or retailer, for goods and/or services. However, it will not apply to domestic governments of any level or agricultural or communal cooperatives.

B. Regulations

Very similar to the Old Act, the Trade Competition Act provides regulations covering five main areas of market activities and behaviors. The details are outlined below.

(i) Dominant Players

The Trade Competition Act outlines some prohibitions and restrictions specifically designed for large and powerful operators in the market. These prohibitions and restrictions are not applicable to other smaller players in the market.

Under Section 50 of the Trade Competition Act, no operator (who is a dominant player in the market by definition, as further outlined below) may:

a. unfairly fix or maintain price levels for the purchase or sale of goods or services;
b. impose unfair conditions requiring another operator who may be his business partner to limit services, production, purchases, or distribution of goods, or to limit the opportunity to choose to purchase or sell goods, to receive or provide services, and or to acquire credit from another operator;
c. unreasonably suspend, reduce, or limit services, production, purchasing, distribution, delivery, or imports into Thailand, or to destroy, or damage goods in order to reduce their volume or to be lower than market demand; or
d. unreasonably interfere with the business operation of another person.

Note that the term "dominant player" is not defined in this Trade Competition Act but has been given characteristics under a particular notification issued by the Trade Competition Commission (the "**Commission**"). Also under this Trade Competition Act, the term "market" means a market for a particular product or service, including products and services that are substitutes for such products.

(ii) Merger Control

The Trade Competition Act outlines the regulation of mergers between two businesses or entities. Under the Trade Competition Act, a business merger is broadly defined to include:

a. a corporate amalgamation between two competitors;
b. the acquisition of the whole or the part of an asset of another business in order to control its business administration policy, supervision, or management, pursuant to the guidelines prescribed and announced by the Commission; and
c. direct or indirect acquisition of all or a portion of shares of another business in order to control its business administration policy, supervision, or management, pursuant to the guidelines prescribed and announced by the Commission.

Under the Trade Competition Act, the severity of a regulation against a merger between two businesses depends on the result of the merger. If the contemplated merger between the two businesses would result in the new business operation being classified at least as a "dominant player", then the merging parties would need prior approval from the Commission before proceeding with the merger. In the case of an approval, the Commission may prescribe certain conditions for the businesses to abide by, such as specific business undertakings, timelines for mergers, etc. However, if the contemplated merger would only result in a material reduction of competition in the market (pursuant to characteristics announced by the Commission), then the

merging parties would only need to notify the Commission of the results of the merger within seven days after the date of the unification, and there would be no need for any pre-merger approval. Essentially, this provides primarily for the notification requirement.

(iii) Cartel Regulations

Under the Trade Competition Act, the cartel activities – that is, those that concern colluding practices between supposed competitors – are extensively mentioned, targeted, and regulated, mainly by two provisions, Sections 54 and 55 of the Trade Competition Act. The prohibitions under these two Sections are somewhat similar and at times appear copied almost verbatim from one another, but they have been separated on purpose, as the penalties for Section 54 are much harsher than those for Section 55, with possible imprisonment. The main difference is that Section 54 addresses colluding activities within the same "market" while Section 55 addresses colluding activities as a general matter, also governing cross-market and vertical collusion. As Section 54 is more precise and specifically designed to address a set of problems that are more severe, can easily be pinpointed, and create more severe effects on the market and consumers, the penalties are naturally harsher.

Under Section 54, two operators who compete in the same market shall not commit any act that would resemble a monopoly, reduce competition, or restrict competition in a market in the following ways:

a. directly or indirectly fixing purchase or sales prices or any commercial conditions in a way that affects the price of goods or services;
b. colluding and agreeing to limit the volume of goods or services that each operator will produce, purchase, distribute, or provide;
c. colluding and agreeing amongst themselves that one of them will win a bid or tender for goods or services, or to prevent one of them from submitting a bid or tender for goods or services; or
d. designating geographical areas for each operator to distribute or reduce distribution of or purchase goods or services in, or designating buyers or vendors from and to whom each operator can purchase or sell goods or services to, whereby other operators agree not to purchase or distribute such goods or services from and to such buyers or vendors.

Note that the restrictions outlined above shall not apply to an act between operators who are related via policy or corporate command/control pursuant to guidelines prescribed by the Commission.

Under Section 55, of which penalties are less severe when compared to those of Section 54, two operators shall not commit any act that would resemble a monopoly, cause a reduction in competition, or restrict competition in any market in the following manners:

a. directly or indirectly fixing purchase or sales prices or any commercial conditions in a way that affects the price of goods or services (between two operators who are not competitors in the same market);
b. colluding and agreeing to limit the volume of goods or services that each operator will produce, purchase, distribute, or provide (between two operators who are not competitors in the same market);
c. designating geographical areas for each operator to distribute or reduce distribution of or purchase of goods or services, or designating buyers or vendors from and to whom each operator can purchase or sell goods or services to, whereby other operators agree

not to purchase or distribute such goods or services (between two operators who are not competitors in the same market);
d. reducing the quality of goods or services below the previous level;
e. appointing or designating any person to be the sole distributor or provider of the same kind or category of goods or services;
f. fixing conditions or practices governing the purchase or distribution of goods or services for themselves to abide by; or
g. colluding or agreeing between themselves in various other ways as prescribed by the Commission.

Furthermore, the prohibitions outlined in Section 55 shall, somewhat similar to the exceptions under Section 54, not apply to:

a. an act between operators who are related via policy or corporate command/controls pursuant to guidelines prescribed by the Commission;
b. an agreement between operators with the objective to develop production, distribution of goods, and the promotion of technical or economic developments;
c. an agreement between operators with different positions, whereby one operator is a licensor of goods or services, trademarks, operation methods, or operational supports, while the other operator is a licensee with a duty to pay royalty or fees, or to provide any other compensation as provided in the agreement; and
d. any type of agreement or business model as prescribed by the Commission.

(iv) Catch-All Interference

The prohibitions regarding dominant players, mergers, and cartel activities are extensive. Nevertheless, the state has provided us with one additional set of prohibitions that serves as a catch-all provision to prohibit any unfair interference and meddling by one operator against another operator. Section 57 of the Trade Competition Act states that no operator shall do any act that causes damage to another operator in the following manners:

a. unfairly preventing/obstructing operation of another operator;
b. unfairly utilizing its market power or higher bargaining power;
c. prescribing commercial conditions which unfairly limit or obstruct operations of another operator; or
d. acting in any other manner as prescribed by the Commission, which, as of the date of the publication, has not been issued.

(v) Cross-Border Activities

As well as prescribing actions and behaviors that are prohibited among the operators in Thailand, the Act also reaches slightly beyond its original jurisdiction to prohibit some cross-border activities. Under Section 58 of the Trade Competition Act, no domestic operator shall unreasonably enter into a transaction or agreement with a foreign operator if such transaction or agreement would create a monopoly or an unfair limitation in trade, and or severely affect the economy and benefits of consumers.

(3) Penalties for Violations of the Trade Competition Act

A. Criminal Breach

Any breach under Sections 50 and 54 of the Trade Competition Act will render the offender liable to imprisonment for up to two years or a fine of not exceeding ten percent of the income from the year during which the breach has occurred, or both.

Note that in a case where the offender of a criminal provision is a juristic person (such as a company), that if the criminal offence of such juristic person was pursuant to any instruction or act of a director, a manager, or a person responsible for the operation of such a juristic person, or if such criminal offense was undertaken because a director, a manager, or a person with authority has omitted to provide instruction, such director, manager, or person shall be liable to the penalties as prescribed above.

B. Administrative Breach

In an event of breach under Section 51 of the Trade Competition Act, whereby the contemplated merger would result in a material reduction of competition in the market, and the merging parties fail to notify the Commission of the results of the merger within seven days after the date of the merger, then the merging parties will be liable for a fixed fine of not exceeding 200,000 Baht and a daily fine not exceeding 10,000 Baht for the period during which the breach continues.

In an event of breach under Section 53, or Section 51, whereby the contemplated merger would result in at least the new business operation to be classified as a "dominant player", and the merging parties fail to seek and obtain the prior approval from the Commission, then the merging parties will be liable for a fine of not exceeding 0.5% of the value of the merged businesses. Furthermore, the Commission may prescribe other orders against the merged business as well.

Any breaching party under Sections 55, 57, or 58 shall be liable for a fine of up to ten percent of their total income from the year during which the breach occurred.

Note that in the case where the offender of the administrative provision is a juristic person (such as a company), if the administrative offence of such juristic person was pursuant to any instruction or act of a director, a manager, or a person responsible for the operation of such juristic person, or if such administrative offense was undertaken because a director, a manager, or a person with authority had omitted to provide instruction, such director, manager, or person shall be liable to the penalties as prescribed above.

C. Exemption and Approval

As a general principle, any operator suspecting that it may breach any provision of Sections 50, 54, 55, 57, or 58, is encouraged to contact the Commission in order to initiate determination and obtain prior approval. The cost for consultation is 50,000 Baht per instance.

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CHAPTER 5

PROJECT FINANCE

CHAPTER 5 | PROJECT FINANCE

A project financing scheme is commonly employed to secure the necessary financing to develop large infrastructure and industrial projects in Thailand especially in the energy sector e.g., power generation, mines and pipelines. Project financing in Thailand was first introduced in 1990 by the establishment of the Map Ta Phut Industrial Estate by the Thai government in the eastern seaboard region located in Rayong Province. To this day, Map Ta Phut Industrial Estate still remains the largest industrial park in Thailand and the world's eighth-largest petrochemical industrial hub.

(1) What is "Project Financing"?

There is no standard definition of "project financing". However, it can generally be described as long-term financing of infrastructure and industrial projects where lenders rely on the revenue generated by the operation of the project as the main source of funding to repay the loan. In this regard, lenders would typically have limited recourse only to the project assets and cash flow generated by the project, rather than recourse to the project sponsors. In very limited cases may the lenders have recourse against the project sponsors.

It is important to note that the project's feasibility is the main factor which lenders take into consideration in determining whether the project is "financeable" or not. Therefore, it is important for project sponsors to be prepared to face such scrutiny from lenders. In addition to project feasibility, lenders will generally review various aspects of the project, which includes financial, technical, regulatory, legal, insurance and environmental aspects. Due to the wide range of aspects, it is common for a project sponsor to engage a financial advisor, a technical advisor (who may also act as an environmental advisor), a legal counsel, a project manager and an insurance advisor to assist in the credit evaluation process. Similarly, lenders will also appoint their technical advisors, legal advisors and insurance advisors during the evaluation process of any project for project financing.

(2) Key Features of Project Financing

- **Use of "special purpose company"**: a company established for the sole purpose of undertaking a specific project, which shields other assets of a project sponsor in case the project subsequently fails. A special purpose company usually has the assets specific to each project.

- **Capital contribution commitments**: relevant to structuring an entity or an investment in an entity, these are typically obligations agreed by project sponsors which are required to ensure that each project is financially sound, or to assure lenders of the sponsors' / owners' commitment. Capital contribution will be applied towards payment of project cost.

- **Set of project contracts**: a project finance mechanism used to allocate the risks among the various parties to each project. The contracts must efficiently allocate risk and reward.

- **Loans**: typically, lenders would provide their commitments to disburse the term loan facility to finance part of the project costs during the construction period and the working capital facilities to finance working capital requirement of the project during the operation period. It is also common for lenders to include hedging facility in a project financing package to minimize risk arising from fluctuations in currency exchange or interest rates. Loans and other facilities provided by lenders are generally secured by all of the project assets, including the revenue-producing contracts.

- **Risk identification and allocation:** a key component of project financing. A project may be subject to a number of technical, environmental, economic and political risks. Following careful due diligence, lenders will assume only measurable or measured risks and usually reserves the right to make key project decisions in the loan agreement.

(3) Project Financing Process

In the initial phase, the project sponsor, with assistance from a financial advisor, will typically prepare a memorandum which contains important information regarding the project and its financial model as well as a proposed term sheet for the project financing. A request for proposal (RFP) with the information memorandum and proposed term sheet attached will then be sent to potential lenders for consideration. There may be clarification sessions to answer questions which potential lenders may have about the project.

Lenders whose proposals are accepted by the project sponsors will then be mandated and will generally be identified as arrangers. Lenders, with the assistance of various advisors, will then conduct due diligence on the project until satisfied. Simultaneously, the term sheet and the financing documents will be negotiated by the parties involved until these documents are finalized and signed.

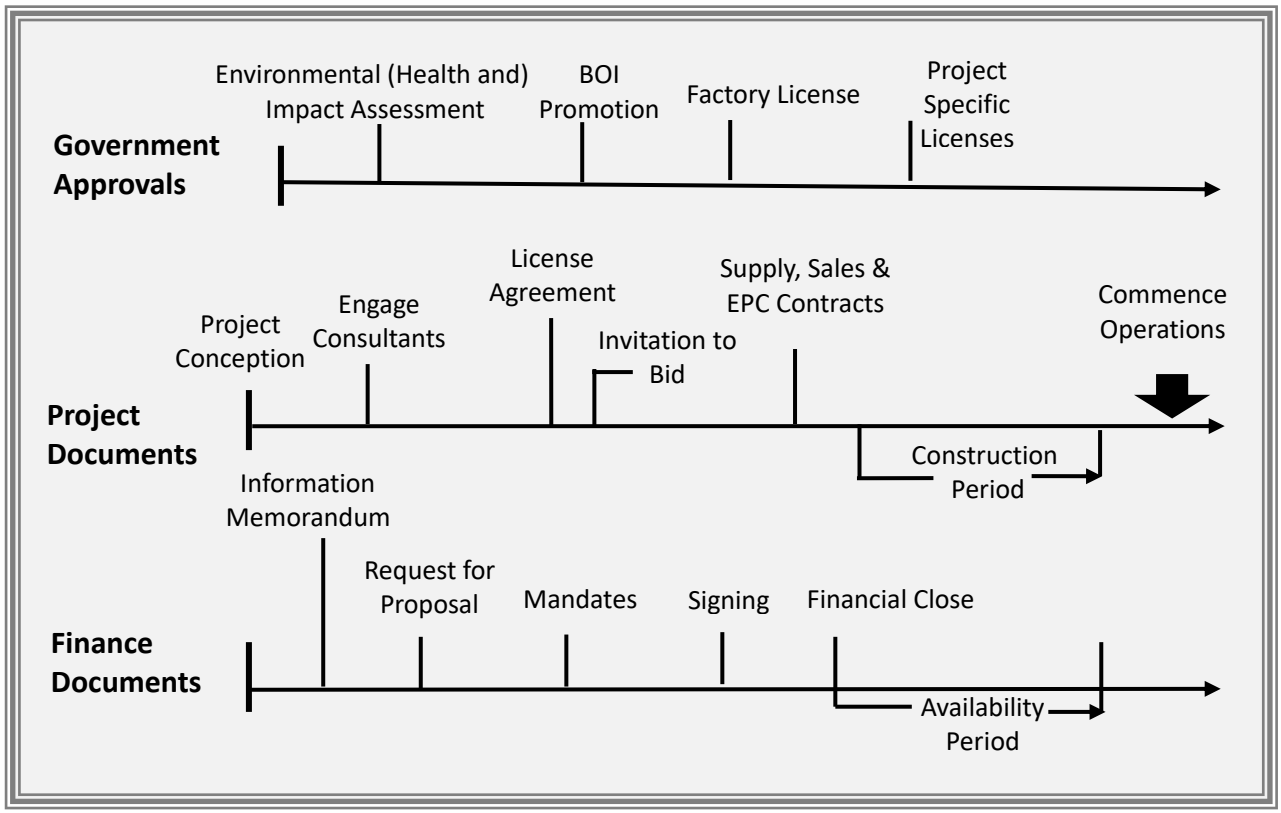
In order for the borrower to make the initial drawdown, the borrower must fulfill the condition precedents set out in the financing documents, which usually addresses concerns raised from the due diligence. Subsequent drawdowns of the loan will usually occur after a milestone in the construction of the project is achieved.

Lenders may also impose conditions subsequent that the borrower must satisfy after the initial drawdown. Failure to fulfill a condition subsequent would result in a drawstop.

(4) Project Financing Timeline

The following diagram illustrates the timeline for a typical Thai project financing:

[Figure 5-1] Project Finance Timeline



(5) Major Financing Documents

A simple project financing transaction may be governed by a single credit agreement covering details of facilities provided, conditions precedent, utilization, repayment and prepayment, cancellation, accounts and cash flow application, representations, covenants and events of default, agency provisions, etc.

On the other hand, a complex financing transaction may involve more financing documents, e.g. common terms agreement, facilities agreements, accounts agreement, etc.

If one or more foreign banks are involved in the project financing, an important issue to consider is the transition of the London Interbank Offered Rate (LIBOR) to an alternative reference rate.

(6) Major Sponsor Documents

Lenders in project financing are expected to review the shareholders' agreement among project sponsors to ensure that there are no provisions which may adversely affect the rights of the lenders.

It is also common to require project sponsors to enter into an equity contribution agreement, which is an agreement where project sponsors undertake to inject a capital contribution to the project company when required. If the project sponsor's financial strength is not acceptable to the lenders,

its parent group or company may be required to enter into an equity guarantee agreement to support the obligation of the project sponsor to make such a capital contribution, or may be required to place capital contribution security in form of standby letters of credit issued by financial institutions having acceptable minimum international credit ratings by international rating agencies such as Standard & Poor's, Moody's and / or FITCH.

In certain cases, a sponsor support agreement may also be required by lenders. A sponsor support agreement is an agreement where project sponsors undertake to provide support to the development of the project in case of cost overrun and cash deficiency as well as technical and managerial support to the project company.

Each project sponsor may also be required to enter into an equity subordination agreement with the lenders.

(7) Major Security Documents

Loans are generally secured by all of the project assets. A typical security package as required by lenders for Thai project financing may include the following:

- Land and building mortgage;
- Machinery mortgage;
- Sponsor support agreement for cost overrun support and cash deficiency support;
- Share retention agreement;
- Share Pledge Agreements in the Project Company;
- Share Pledge Agreements in the Holding Company;
- Assignments and conditional novations of project agreements, and consents of counterparties;
- Security under the Business Security Act, B.E. 2558 (2013) (also known as the Secured Transactions Act) cover:
  - bank accounts;
  - machinery and equipment;
  - rights to receive revenues;
- Pledge of Permitted Investments;
- Assignment of Insurances and Reinsurances; and
- Insurance Broker Undertaking.

For further details of security available under Thai law, please refer to Chapter 6.

(8) Major Project Documents

In developing a project where project financing will be employed major project documents in relation to the project may include a site acquisition contract, project management contract, technology license contract, engineering, procurement, construction ("**EPC**") contract, supply of raw material contract, sale of goods contract, logistics and management contract, and/or insurance contract.

Project sponsors should ensure that major project agreements meet the expectations of lenders. In general, lenders pay special attention to counterparty risk, payment terms (retention, payment curve vs. work curve, etc.), size of liquidated damages, tax planning, performance security (bank guarantee, standby letter of credit, retention, etc.), termination and suspension risk, recognition of lenders' rights in connection with assignment as security and terms of "direct agreement" with lenders, insurance (contractor's cover vs. owners' cover) as well as governing law and dispute settlement.

It is also common practice for lenders to, among others, require access to the site, the right to receive periodic reports, notices of specific events (claims, proposed change order, force majeure, etc.), approval rights regarding specific actions (increase in contract price, extension of time, right to terminate/suspend, etc.). In addition, all rights under the performance bonds and other performance security under the major project documents will be required to be assigned to lenders as part of a security package.

To protect lenders from risks under the major project documents, a "drawstop" event is usually stipulated in the finance documents for occurrences of certain events under the major project documents e.g., delays in the acquisition of right-of-way or delays in achieving major construction milestones.

Note that poor contracting practices to the major project documents may result in delays to the project due to lender's requirement to amend such major project documents; request for additional guarantees to cover contingent tax liabilities arising from inadequate tax planning in EPC contracts; and request for higher levels of sponsors' support as well as increase in the cost of borrowing due to higher risk to lenders and more restrictive covenants in the financing documents. The lack of coordination between the contract counterparties and absence of effective dispute resolution mechanism may also result in a delay and higher project costs.

(9) Equator Principles

For project financing where international financial institutions are involved, a key factor in determining a project is financeable is whether the project complies with the "Equator Principles". The Equator Principles originated from a meeting of banks led by the International Finance Corporation in London in October 2012. The purpose of the meeting was to review environmental and social issues in project financing and as a result, the Equator Principles were developed in 2013. They serve as a common global baseline and framework for the assessment of environmental and social issues for project financing in various sectors. The Equator Principles are primarily intended to provide a minimum standard or benchmark of due diligence to support responsible risk decision-making.

The Equator Principles are applicable for projects with capital costs of at least USD 10,000,000.

There are currently 101 financial institutions in 38 countries that have adopted the Equator Principles. No Thai banks have adopted the Equator Principles as of January 2020.

As such, project sponsors pursuing project financing from lenders who are international financial institutions need to ensure that they can comply with the Equator Principles.

(10) Key Government Approvals

Project sponsors need to ensure that key government approvals are obtained as and when required in each stage of the project in a timely manner as lenders will usually impose a milestone for obtaining each key government approval to ensure smooth construction and operation of the project.

Key government approvals in a common Thai project financing includes an Environmental Impact Assessment (EIA) or Environmental and Health Impact Assessment (EHIA) report (and public participation requirements, if applicable), investment promotion (BOI), factory license, and project

specific licenses.

Lenders would normally impose a “drawstop”, an event in a loan agreement which gives the lender the right to refuse to make further loan advances. For example, delays in obtaining specific government approvals.

(11) Insurance Requirement

Project sponsors must ensure that the project has a proper insurance package during the construction period of the project which is acceptable to the lenders. The procurement of the insurance package is usually a condition precedent to initial drawdown of loans. It is also important to have an agreed insurance program in place during the operation period approved by lenders. In this regard, lenders will also generally require that it be named as co-insured and sole loss payees as well as requiring assignment of all insurance (and reinsurance, for large scale projects) policies to the lenders as security.

It is also important to note that in practice, lenders may also require owner-cover insurance to ensure that the owner of the project has control over all insurance matters for the project.

(12) Accounts and Cash Waterfall

One of the key features of project financing transactions in Thailand is that lenders will closely monitor all cash flow during the construction and operation periods. Depending on the restrictiveness of the provisions, a default or an acceleration will stop the cash flow until lenders determine otherwise.

Usually, all bank accounts will be located in Thailand. However, if there is an overseas lender involved or if the project is located overseas, e.g. power plant project in Lao PDR owned by Thai investors, certain bank accounts may be offshore accounts.

(13) Debt to Equity Ratio

A debt to equity ratio is a ratio used to measure a company’s financial leverage, calculated by dividing a company’s total liabilities by its shareholders’ equity, which may be in form of capital contributions or shareholders' loans. The debt to equity ratio indicates how much debt a company is using to finance the project relative to the amount of value represented in shareholders’ equity.

Lenders in a Thai project Financing are typically willing to provide loan commitments at a higher ratio than capital contribution commitments by project sponsors, particularly project financing to energy projects.

(14) Dispute Resolution

Dispute settlement, especially in a project financing involving international financial institutes, can be an important issue for discussion. Unlike many other jurisdictions, the Thai courts will not enforce a foreign court judgment. A common solution implemented to such practice is to specify that any disputes under the finance documents shall be settled by arbitration in a neutral jurisdiction such as Singapore. Since Thailand is a party to The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Thai courts will enforce foreign arbitration awards if the criteria set out in the convention and in the Thai Arbitration Act, B.E. 2545 (2012) are met.

(15) Sector Use of Project Finance Structures

Project financing structures are commonly used in large-scale infrastructure projects, power plants, oil and gas, and mining projects. The project company will be required to comply with various licensing and permitting requirements, depending on the sector, and it will be vital for the lenders to have a clear and comprehensive understanding of the regulatory regime in each sector. Understanding the specific legal regime of such sector will also allow lenders to better assess the project company's ability to monetize the project and most importantly, possibility for lenders to recoup their investment.

A. Electricity Generation

Private power producers generally enter into power purchase agreements (PPAs) with the Thai government utilities, i.e., the Electricity Generating Authority of Thailand (EGAT), the Metropolitan Electricity Authority (MEA) or Provincial Electricity Authority (PEA), whom are the main purchasers and distributors of power in Thailand. PPAs entered into with such government utilities are generally considered bankable.

For more information on laws relating to electricity generation in Thailand, please see Chapter 7.

B. Oil and Gas

Petroleum producers commonly use some form of project financing structure. Traditionally, the only way to produce petroleum in Thailand has been by way of a concession, granted by the appropriate Ministry (currently, the Ministry of Energy) to a concessionaire. Unlike other sectors where sponsors will establish a single specific purpose company to own and operate the project and its assets, petroleum producers generally establish unincorporated joint-ventures, with one of the co-venturers acting as the operator of the project.

For more information on the laws relating to oil and gas in Thailand, please see Chapter 7.

C. Infrastructure Investment

An important legislative item that is relevant to project financing is the Public-Private Partnership Act, B.E. 2562 (2019) ("**PPP Act**"), which came into effect on 11 March 2019. The PPP Act governs government projects that involve participation and investment from private parties.

The State Enterprise Policy Office of the Ministry of Finance is responsible for administration of the PPP Act.

Both project sponsors and lenders will need to ensure that project, which falls under the PPP Act, complies with all the requirements under the PPP Act.

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CHAPTER 6

SECURITY

CHAPTER 6 | SECURITY

Under Thai law, available security interests range from mortgages, pledges, guarantees under the Thai Civil and Commercial Code (the "**CCC**"), to security interests created under specific laws such as the Business Security Act, B.E. 2558 (2015) (the "**Business Security Act**"). Additionally, there are other contractual arrangements between security provider and security receiver. In this chapter, security that is provided in financing transactions will be explained.

Note that the competent authority in Thailand generally interprets providing guarantee or collateral as constituting an "other service business" in List 3 of the Foreign Business Operations Act, B.E. 2542 (1999) (the "**FBOA**"). If a person or an entity providing the guarantee or collateral is considered as a "foreigner" under the FBOA, it is necessary to obtain a foreign business operation license prior to entering into such transactions.

(1) Guarantee (Sections 680 – 701 of the CCC)

Guarantee is a contract whereby the guarantor binds himself to a creditor to satisfy an obligation in the event that the debtor fails to perform it. A contract of guarantee is not enforceable unless there is written evidence signed by the guarantor. Note that the signature of the creditor is not required on this document.

Key features of guarantee are as follows:

A. Nature of a Guarantee

Guarantee is merely an ancillary agreement to a main obligation. In order to create guarantee, the main obligation must be valid. On the other hand, if the main obligation of the debtor is extinguished, the guarantor is discharged.

B. Right of Recourse

The guarantor who has performed the obligation has a right of recourse against the debtor and the guarantor is subrogated to the rights of the creditor against the debtor.

C. Prohibitions and Limitations on Joint Guarantee

Agreement on joint guarantee as a primary obligor by an individual (natural person) is invalid. However, if a corporation serving as a guarantor agrees to have the same responsibility as a primary debtor as a joint obligor, such agreement is enforceable.

D. Guarantee for Future Obligations and Conditional Obligations

Guarantee can secure future obligations and conditional obligations. In doing so, the purpose of the secured obligation, nature of the obligation, maximum amount of the guarantee, and period of incurrence of secured obligation must be clearly stated in the guarantee agreement; otherwise it will be void. However, the period of incurrence of secured obligation does not need to be identified if guaranteeing a series of transactions.

E. Default by the Debtor

The creditor must notify the guarantor in writing within 60 days if the debtor is in default, and the creditor cannot demand performance of the obligation from the guarantor until such notification reaches the guarantor. If the creditor neglects to provide notification within this period, the creditor will be prevented from claiming against the guarantor interest, damages, and other incidental costs incurred following the expiration of the 60-day period.

F. Debt Reduction

If the creditor and debtor reach an agreement that results in a reduction in the secured obligation (including interest, damages, and other incidental costs), the creditor must provide a written notification to the guarantor within 60 days from the date of such agreement. If the debtor and/or the guarantor performs the obligation which was reduced in full, the guarantor will be discharged from the obligation. The guarantor can make such payment even if the due date of the reduced debts has passed, but in any case shall be no later than 60 days from such due date. However, in case that the creditor delivers a notification to the guarantor after the due date of the obligation, the guarantor can still perform the obligation within 60 days from the date of that notification[1].

G. Agreement on an Extension of Time

If guarantee has been given for an obligation that is to be performed at a specific time and the creditor grants the debtor an extension of time, the guarantor is discharged unless the guarantor has agreed to such extension of time. Agreement by the guarantor to extend the time in advance cannot be enforced unless the guarantor is a financial institution or serving as a guarantor within the scope of its ordinary course of business for compensation. However, if an agreement to reduce the amount of an obligation is made after the debtor is in default and such agreement extends the due date, it will not be deemed that there is an extension of the due date[2].

(2) Mortgage (Sections 702 – 746 of the CCC)

A. Establishment and Registration of Mortgages

A mortgage is an agreement whereby the mortgagor assigns a property to a mortgagee as security for the performance of an obligation, without delivering the property to the mortgagee. Mortgages can be established over immovable property, as well as vessels weighing five tons or greater, floating houses, beasts of burden, or any other movable properties with regard to which the law may provide registration for that purpose (e.g. machinery under the Machinery Registration Act, B.E. 2514 (1971) (the "**Machinery Registration Act**")). However, for practical purposes, mortgages are mostly set on immovable property.

[1] As a result, if the creditor and debtor agree to reduce the obligation, the guarantor will always be granted a grace period of at least 60 days compared to the original terms. Note that agreements to create burden of the guarantor more than those stipulated under Section 691 of the CCC are also invalid.

[2] In other words, even if there is no agreement by the guarantor on extension of time, the guarantor is not discharged on the ground that an agreement was reached to extend the due date at that point in time. In such a case, the guarantor is entitled to perform the guarantee obligation within 60 days from the date of notification of the agreement to reduce the obligation (Section 691, Paragraph 1 of the CCC). It is believed that this is a measure for practical purposes to ensure that there are still incentives to take measures such as agreements to reduce debt and extend the due date as relief measures by the creditor after the debtor is in default.

Mortgage agreement must be made in writing in Thai, clearly indicating the mortgaged amount in Baht and using the form prescribed by the competent authority. The mortgage agreement must be registered with the competent official, i.e. the local Land Office is responsible in the case of land and building mortgage, and Machinery Registration Office is responsible in case of machinery mortgage. A machinery mortgage cannot be registered until the machinery is registered, which is upon completion of installation.

B. Enforcement of a Mortgage

Mortgage enforcement can be done either by way of public auction through legal procedure, foreclosure, or a public auction after receiving notification from the mortgagor. If there is a clause set out in advance in the agreement providing that the mortgagee has the authority to dispose mortgaged property in a manner contrary to the foregoing (i.e. a private execution agreement) in the event of non-payment, such agreement could be viewed as invalid.[3]

For enforcement of a mortgage, the mortgagee must provide the debtor of the secured obligation a notice demanding the debtor to perform his obligation within a reasonable time but no less than 60 days. If the debtor fails to comply with such notice, the mortgagee may enter an action in court for a judgment ordering the mortgaged property to be seized and sold by public auction. If a mortgage is established by a party who is not the debtor of the secured obligation (a third party mortgagor), the mortgagee must also send notification in writing to the third party mortgagor within 15 days of providing notice to the debtor. If notification is not provided within 15 days, the third party mortgagor is discharged from interest, damages and other incidental costs that occur after that 15-day period has expired.

While public auction is a general method for the enforcement of a mortgage, in case that certain requirements (to be explained below) are fulfilled, foreclosure of the mortgaged property by the mortgagee can be used as an alternative method for mortgage enforcement. In the event that there is no other mortgage or preferential right registered over the mortgaged property, and if the following criteria are met: (i) the debtor has failed to pay interest for five years, and (ii) the mortgagee has satisfied the court that the value of the property is less than the amount due, the mortgagee is entitled to claim foreclosure of the mortgage in court. However, due to the difficulties of fulfilling these requirements, foreclosure procedure is not common in practice, and in most cases, the method of enforcement is conducted by obtaining a court judgment and conducting a public auction.

Enforcement procedure can also be conducted based on the request of a mortgagor. This is out-of-court enforcement procedure designated by the revision of the CCC in 2015. If the secured obligation is due and there is no other mortgage or preferential right registered over the mortgaged property, the mortgagor can provide written notification to the mortgagee in order to conduct a public auction of the mortgaged immovable property out-of-court. The notification is deemed as the mortgagor's consent to sale by public auction. The mortgagee must sell the mortgaged property by public auction within one year from the date such notice is received, and if a sale is not conducted during that period, the mortgagor is released from interest, damages and other incidental costs that occur after that period has expired.

[3] However, for practical purposes, there is also the method of immovable property being disposed of at the discretion of the mortgagor in accordance with the procedures stipulated in a mortgage contract or other loan-related agreement, and the proceeds from disposal being used to recover the debt by the mortgagee while cancelling the mortgage (so-called optional disposition or optional sale). Note that a private execution agreement that could be viewed as invalid as described in this document refers to an agreement to the acquisition of rights to dispose of immovable property (through sales to a third party, acquisition of the mortgaged property, etc.) by the mortgagee after the due date for the secured claim contrary to the procedures stipulated in CCC, and this differs from an optional disposition or optional sale.

If the estimated value of the property, in the case of foreclosure is, or the net proceeds are, in the case of an auction, less than the amount due, Section 733 of the CCC stipulates that the debtor is not liable for the differences of the amount due and the estimated value/net proceeds (as the case may be). However, as opposed to third-party mortgagors, the debtor and the mortgagee can agree otherwise so that the debtor remains responsible for such differences. Since Thai laws prohibit third-party mortgagors from: (i) being continually responsible for the remaining balance of secured obligation when the mortgage is enforced; or (ii) being held liable for more than value of the mortgaged property; or (iii) being bound, at the same time, as a guarantor of the obligation (whether under a mortgage agreement or a separate agreement), an agreement contrary to the above is invalid[4]. However, the foregoing restriction does not apply, if the debtor is a juristic person and a separate guarantee is entered into by a party holding the power of management or a party holding controlling power of such juristic person and serving as third party mortgagor for the debtor's obligation.

Note that even if the mortgagee is a foreigner, subject to a requirement of obtainment of a proper foreign business operation license in granting loan of which the principal obligation is required to be secured by way of mortgage in Thailand, the mortgagee can hold and enforce a mortgage. However, as will be subsequently explained in Chapter 9, because the Thai Land Code prohibits foreigners from owning land, foreigners are not able to acquire immovable property themselves as a result of mortgage enforcement. This does not interfere with the enforcement of a mortgage through auction.

(3) Pledges (Sections 747 – 769 of the CCC)

A. Creation of a Pledge

A pledge is a contract whereby a pledgor delivers to the pledgee a pledged property as security for the performance of an obligation. In addition to typical movable property, securities representing value such as shares, promissory notes, and cheques can also be pledged. When pledging a security, in addition to transferring possession of the security to the pledgee, in case of pledge of share, registration in the shareholder registry is required[5]. For other securities, the endorsement on the bearing instrument may be required.

Pledged property has to be delivered by the pledgor to the pledgee to perfect a pledge, and a pledge is automatically extinguished when the secured obligation is extinguished other than by prescription, or when the pledgee returns the pledged property to the pledgor. For that reason, the pledgor cannot use the pledged property during the pledge period, and the pledgee or storage administrator assigned by the pledgee must keep the collateral. Accordingly, it was often difficult for debtors to provide raw materials, machinery, etc. required for business operation as collateral (however, as stated above, it is possible to establish mortgages over machines under the Machinery Registration Act). However, with the enforcement of the Business Security Act in July 2016, assets for which pledge is not suitable can now be provided as collateral without delivery of the possession of the collateral if the requirements of that act were fulfilled (to be explained below).

[4] Rules were introduced through the revisions of the CCC regarding mortgages in February 2015 and July 2015.

[5] It is stipulated that unless registration in the shareholder registry is conducted, a pledge cannot be set up against the company or a third person (Section 753 of the CCC).

B. Enforcement of a Pledge

While a pledge differs from a mortgage in that a pledge can be enforced by the pledgee without court procedures, it is prohibited to agree in advance to sell the pledged property through a means other than a public auction. To enforce the pledge, the pledgee must notify the debtor in writing to request performance of the obligation within reasonable time, which must be specified in the notice. The pledgee must notify the pledgor in writing of the time and place of the auction of the pledged property, and that the auction of the pledged property will be taken place if the debtor does not perform their obligation within a reasonable period of time. If notification is impractical, the pledgee may sell the pledged property by the public auction one month after the obligation becomes due. In addition, if the pledged property is a bill, as an exception, a bill can be collected on a maturity date without a prior notification.

(4) Business Security Act

In the past, mortgage and pledge in Thailand were mainly used for establishing collateral. However, mortgage only covered immovable property or machines that can be registered. Further, due to the legal requirement for the pledged property to be delivered into a possession of the pledgee, it was difficult to pledge movable property such as raw materials and inventory assets used in an ordinary course of business by the pledgor.

Against this backdrop, the Business Security Act was approved by the National Legislative Assembly on 7 August 2015, and enforced on 2 July 2016 which results in the recognition of the concept of floating charge. In connection with the Business Security Act, the Department of Business Development under the Ministry of Commerce (the "**DBD**") launched a new online registration system available for the registration of business security agreements. An overview of this Business Security Act is described below.

A. Establishing Collateral Based on the Business Security Act

Under the Business Security Act, it is possible for a security provider and a security receiver to enter a business security agreement and establish collateral for certain assets without the transfer of possession of such assets.

While there is no limitation on the eligibility of the security provider which can be either individual or corporation, security receiver has to be financial institutions and other persons as prescribed in the ministerial regulations. According to the explanatory materials of the Secured Transactions Registry Division, the DBD[6], a "financial institution" refers to a financial institution under the Financial Institutions Business Act, B.E. 2551 (2008), a company engaged in the life insurance business with the required permits and licenses based on the Life Insurance Act, B.E. 2535 (1992), a company engaged in the non-life insurance business with the required permits and licenses based on the Loss Insurance Act, B.E. 2535 (1992), or a bank or financial institution established based on the special act. Furthermore, on December 9, 2016, the Ministerial Regulation Prescribing Other Persons as Security Receivers, B.E. 2559 (2016) was published in the Government Gazette and came into force and effect.[7] Under the Ministerial Regulation, certain other entities under Thai laws, namely special purpose vehicles with the objective of securitization, trustees in the name of a trust for transactions in capital markets, securities companies and mutual funds, futures trading businesses, asset management companies, and

[6] The competent authority under the Business Security Act.

[7] According to Section 4 Paragraph 2 of the Business Security Act, the ministerial regulations and notifications are effective once published in the Government Gazette.

factoring businesses, are now eligible to be security receivers under the Business Security Act. On February 23, 2018, the Ministerial Regulation Prescribing Other Persons as Security Receivers (No. 2), B.E. 2561 (2018) was published in the Government Gazette and came into force and effect. Under this second ministerial regulation, four categories of security receivers were added, namely, the Office of the Permanent Secretary of the Ministry of Industry with respect to the SME Development Fund, foreign commercial banks where they provide facilities in a syndication with financial institutions, juristic persons having a business objective of hire-purchasing and leasing and juristic persons having a business objective of lending.

The assets that can be registered as collateral based on the Business Security Act (hereinafter "**Business Security**") are as follows (Section 8 of the Business Security Act):

(i) A business[8]
(ii) Claims[9]
(iii) Movable property used by the security provider in business operation, such as machinery, inventory, or raw materials
(iv) Immovable property, in case the security provider directly operates an immovable property business
(v) Intellectual property
(vi) Any other asset as provided in the ministerial regulation, i.e. perennial plant[10]

Note that the security provider may place property/rights it currently possesses or which are to be acquired in the future under any agreement as collateral.

A business security agreement must be prepared in writing and shall contain particulars such as the names and addresses of the parties, the secured obligation, the details of the assets designated as collateral, the maximum amount of money secured, and the grounds of the business security enforcement. Such particulars shall be registered via an online system with the Secured Transactions Registry Division.[11] In addition, it is necessary for the contracting parties to a business security agreement to appoint a security enforcer[12] as another party in the contract when granting security over a business.[13]

This permits the security provider to possess, use, dispose of, transfer, mortgage, etc., and receive benefits arising from the secured asset until the collateral is enforced, and the security provider can use the secured asset in an ordinary course of its business activity.

[8] Refers to assets used by the security provider in its business operations and other rights related to its business operations, provided that such assets and rights given as security may be transferred to a transferee in a way that the transferee could continue its ordinary business operations immediately (Section 3 of the Business Security Act).

[9] Refers to rights to receive payment and other rights that do not include rights represented by instruments (Section 3 of the Business Security Act).

[10] According to the Ministerial Regulations specifying Other Types of Asset to be a Security, B.E. 2561 (2018), an additional asset that can also be registered as a security under the Business Security Act is a perennial plant.

[11] Registration is an establishment requirement for Business Security under the Business Security Act. In any case, the DBD states in their publicly published material and guidance for registration that, absence of registration is **not** a cause of invalidation of the agreement but the parties shall not enjoy any right under the Business Security Act until the Business Security agreement has been registered. The difference is in case of mortgage, the registration is a "form" of contract which shall be done, otherwise the mortgage agreement will be invalid.

[12] Refers to the party that conducts management and operation of the business instead of the security provider upon the enforcement of collateral until the business is sold. (Section 3 of the Business Security Act)

[13] In order to serve as a security enforcer, it is necessary to acquire the prescribed license, and this license can be acquired by a minimum 3-year qualified auditor or 3-year licensed lawyer, and other persons as specified in the Notification of the Ministry of Commerce re: Criteria, Procedures and Conditions for Application, Extension, and Request for Substitution of the Security Enforcer License, B.E. 2559 (2016), in conjunction with Section 54 of the Business Security Act).

B. Enforcement of Business Security

The method for enforcement of Business Security differs depending on whether or not the secured asset is a business. First, if the secured asset is an asset other than a business, non-judicial enforcement procedure can apply[14] through either public auction or foreclosure of the secured asset by the security receiver. However, in order for the security receiver to conduct enforcement through foreclosure of the secured asset, the following criteria must be met: (i) the principal of the debt on the due date must exceed the value of the secured asset; (ii) debtor has outstanding interest payments for at least five years; and (iii) there is no other registered security receiver or preferential rights holder. This is contradict to the foreclosure procedure for a mortgage as explained above where the mortgagee has to prove in court that the value of the mortgaged property is below the secured debt amount. However, in the enforcement procedures for Business Security, proof in court is not required as out-of-court enforcement is recognized. If the proceeds derived from the sale of the secured asset cannot cover the total amount of outstanding debt, while the difference will remain as an outstanding debt for the debtor, it is not possible to demand the security provider to pay such differences in the event that the security provider is a third party providing collateral for other person's obligation.

While the recognition of non-judicial security enforcement can be noted as one of the key characteristics of the Business Security Act, in order to conduct a private auction or foreclosure, the security provider must give consent to the transfer of possession of the secured asset to the security receiver (excluding the case of security enforcement of a deposit claim). If the security provider refuses to give such consent, a court order for a public auction or foreclosure may be granted.

However, there is an exception in case where the secured asset is a deposit claim with a financial institution. In the event that the security receiver is a financial institution holding those deposits, or if the security receiver has established all of the deposits as collateral, the enforcement procedure can be conducted by delivering a subsequent notice (without obtaining consent) to the security provider and enforcing through a direct settlement from those deposits.

If the collateral is a "business", the rights relating to the business will be transferred to the security enforcer, and the business will be sold. If the security enforcer considers that ground for the enforcement of the Business Security has occurred, the security provider must deliver the letter stating the details of the secured business within seven days to the security enforcer. This timeframe can be extended by the security enforcer due to an extenuating circumstance. Consequently, the security provider shall not transfer the business to any third party after receiving such notice from security enforcer unless such property, by its nature, is perishable goods or if they are held for a long period of time, it will risk being damaged, or the expenses for maintaining them would exceed the value of the said property maintenance.

The security enforcer is obliged to manage the business until it is disposed, and when it is disposed, the sale proceeds will be allocated to the security receiver and, in some cases, to other creditors.

In the same manner as the case where the collateral is not a business, if the proceeds derived from the sale of the business cannot cover the total amount of outstanding debt, the creditor is still entitled to claim for such difference from the debtor within the prescribed time period.

[14] As to be explained in the following paragraph, if the security provider refuses to deliver the secured asset in out-of-court security enforcement procedures after grounds for the enforcement of collateral have occurred, security provider may submit a petition to a court to enforce the secured assets. (Section 46 of the Business Security Act, etc.)

(5) Other Collateral Methods

As described in Chapter 5 about project financing in Thailand, it is common practice for a borrower to agree in advance to conditionally assign its rights under project-related contracts, rights to receive proceeds under insurance policies, rights of deposit in bank accounts, etc. for the purpose of providing collateral to secure the loan obligations in favor of a lender. However, for this collateral method, there may not be a clear legal procedure in terms of the enforcement of such right in actual implementation. Under Thai law, there is no court precedent on enforcing this type of collateral, nor has it produced the effectiveness of the right of exclusion in bankruptcy proceeding. If there are uncertainties in practice, it is preferable to work closely with legal counsel regarding documentation.

Examples of the security interest under this category are as follows:

A. Assignment / Novation of EPC Contract

Under typical project financing for construction or the installation, operation, and / or maintenance of large scale projects (e.g. power generation, infrastructure, public utility projects, and so forth), one of the major project agreements is the EPC contract between the borrower and the EPC contractor. The obligation of the borrower under the contract is to pay the contract price while the obligation of the contractor is to procure services within the scope set forth thereunder. In order for the lender to have control over the project agreement, a typical form of security interest, i.e. an assignment of the EPC contract is applicable. Similar to an assignment of a project agreement, the rights over any monetary claim and other rights, including the right of suspension or termination, shall be absolutely assigned to the lender once the assignment agreement is executed. Meanwhile, the other rights, mainly the right to become a party to the agreement in place of the borrower or right to "substitution", shall be conditionally assigned if and when the event of default (the "**EOD**") occurs. Once the EOD has occurred, the lender shall have the right to request a novation so that they will become a party to the agreement for continuing the operation and management of the agreement in place of the borrower.

Upon the enactment of the Business Security Act, rights and claims under the project agreements can be placed as security in the business security agreement. Note that it is not required by law that the security documents be created over rights/claims under the project agreements shall only be in the form of a business security agreement. A financial institution may also opt for entering into the conditional assignment of project agreements or both at its own choice.

In practice, lenders may wish to take both conditional assignment of project agreements and business security agreement over project agreements as collateral. While the business security agreement gives security receiver the preferential rights over the collateral as a secured creditor, the lender will only be an ordinary creditor in the same rank as other unsecured creditors under the conditional assignment. However, the enforcement of business security agreement can only be executed by public auction while the enforcement of conditional assignment of the agreement gives lender the right to substitute itself or its designated person as a party to the agreement. Therefore, lenders may require the borrower/security provider to give security both under the business security agreement and the conditional assignment to ensure its position as a secured creditor and to be able to substitute themselves or their designated persons to continue performing under the agreement.

B. Assignment of Insurance

Insurance proceed is another source of fund the borrower may derive from the claims to be made against the insurance company under the insurance policy procured under the project. The lender usually sets out a requirement of insurance programs approved by the lender's insurance advisor, and the policies shall be subject to the creation of security interests in favor of the lender. A typical form of security document is an assignment of insurance policy, to which the rights over any monetary claim shall be absolutely assigned to the lender and the right of substitution or novation is usually to be conditionally assigned to the lender. Also, the lender shall be named as a beneficiary under the relevant policies. A similar practice is applicable to the arrangement of reinsurance.

Similarly to the rights of the project agreements, the rights under the insurance policy can also be a secured asset that the security provider can grant as collateral under the business security agreement. Note that it is not required by law that the security documents be created over an insurance shall only be in the form of a business security agreement. A financial institution may also opt for entering into the conditional assignment of insurance or both at its own choice.

C. Assignment of Account

Prior to the enactment of the Business Security Act, lenders normally requested borrowers to enter into a conditional assignment of bank account to conditionally assign rights, interests, or claims relating to a bank account agreement entered into and/or deposit account opened with themselves and/or other banks. It was agreed between the parties that such assignment will become effective once the EOD occurs.

However, after the Business Security Act became enforceable, the practice of financial institutions regarding the forms of security documents required to be created over the rights of deposits in bank accounts has changed from the typical assignment of accounts to be a business security agreement. Not only gaining control over the designated accounts of the borrower, the lender as the security receiver under the Business Security Act will also enjoy a preferential right over the account once the agreement is registered with the Secured Transactions Registry Division. If a security interest is to be created over a bank account as collateral under the business security agreement, to which account the bank is not a lender, a consent letter is required to be provided by the account bank. Upon enforcement, the security receiver will be entitled to deduct deposits from the bank account of the security provider in order to set off against the outstanding debts.

Note that it is not required by law that the security documents be created over a bank account shall only be in the form of a business security agreement. A financial institution may also opt for entering into the assignment of account at its own choice.

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CHAPTER 7

ENERGY AND NATURAL RESOURCES

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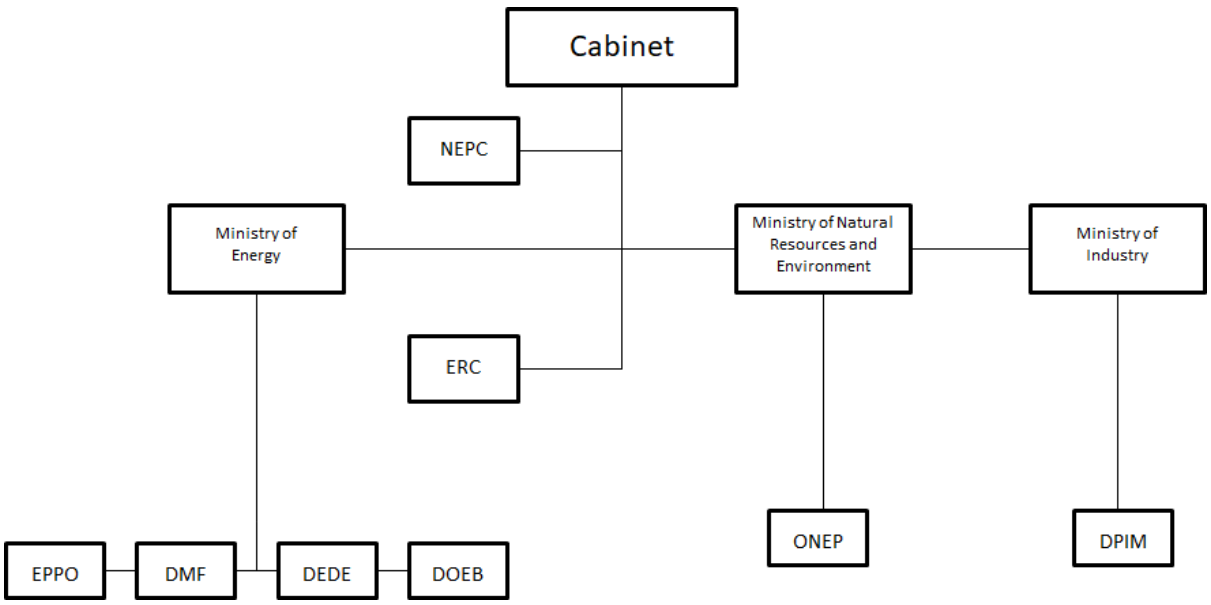
Thailand has developed specific legal regimes relating to electricity generation, upstream petroleum operations and mining. Governmental oversight in the energy sector is primarily administered through the Ministry of Energy, with various departments operating thereunder. The primary regulator of mining activities in Thailand is the Department of Primary Industries and Mines (the "**DPIM**"), Ministry of Industry (the "**MOI**").

This chapter will provide an overview of the legal regimes affecting independent power producers (including small and very small power producers), as well as private investors in the oil & gas and mining sectors.

(1) Government Oversight

The regulator that has the most direct impact on the operations of independent power producers is the Energy Regulatory Commission (the "**ERC**"). As for oil & gas producers, the Department of Mineral Fuels (the "**DMF**") is the primary regulator of sector-specific rules. There are various other departments and government agencies that have an impact on energy policy in Thailand, however, including the Department of Energy Business (the "**DOEB**"), the Department of Alternative Energy Development and Efficiency (the "**DEDE**"), the National Energy Policy Council (the "**NEPC**") and the Energy Policy and Planning Office (the "**EPPO**").

Government oversight in the energy and natural resources sectors can be illustrated as follows:



A. National Energy Policy Council

The NEPC was established under the National Energy Policy Council Act, B.E. 2535 (1992).

The NEPC has five defined duties:

(i) to recommend national energy policy and national energy management and development plans to the Cabinet;

(ii) to set regulations and conditions for the pricing of energy in accordance with national energy policies and national energy management and development plans;
(iii) to follow up, oversee, coordinate, support and expedite the operations of various committees, governmental agencies, and state enterprises related to energy, as well as the private sector, to ensure compliance with national energy policies and national energy management and development plans;
(iv) to evaluate the implementation of national energy policies and national energy management and development plans; and
(v) to perform other functions Prime Minister or Cabinet assigns.

B. Energy Regulatory Commission

The Energy Industry Act, B.E. 2550 (2007) (the "**Energy Industry Act**") establishes the ERC and mandates it with the regulation of energy industry operations to ensure compliance with the Energy Industry Act and its objectives.

Chapter II of the Energy Industry Act prescribes ERC responsibilities, including to regulate the gas and electricity industries, announcing the types of licenses required for energy industry operations, and promoting energy efficiency.

The Energy Industry Act also seeks to protect energy consumers and charges the ERC with an obligation to consider the general populace in carrying out its regulatory responsibilities. To this end, the Energy Industry Act entrusts the ERC to supervise the Power Development Fund (funds to be used for energy distribution/infrastructure development, as well as for the purposes of optimizing energy conservation and environmental protection), as well as creating regional ERC committees to monitor local needs. In the interest of protecting consumers, the Energy Industry Act requires that the ERC promote fair competition in the industry, and outlines dispute resolution mechanisms and proper industry utilization of immovable property.

Generally, as distinct from the NEPC (which determines policy relating to energy industry management), the ERC regulates energy industry operations by issuing rules, announcements, procedures and conditions regarding the function of the energy industry.

The ERC issues licenses, regulates tariffs and establishes safety standards for energy industry operations, including ensuring the security and reliability of the Thai power system. The ERC has the ability to implement urgent energy related measures, in the name of Thai energy security. ERC responsibilities also include the promotion of renewable energy and efficient use of energy, as well as providing commentary on power development and investment plans.

C. Ministry of Energy

The Ministry of Energy is the core government agency that manages most energy-related business activities. With a focus on the procurement, development, and conservation of energy, the Ministry of Energy studies, surveys, analyses, assesses, monitors, and evaluates the Thai energy landscape, and serves as an energy information center. Using the information it gathers, the Ministry formulates energy policies and plans involving business operations and alternative energy sources. The Ministry seeks to transfer technology, develop competent energy personnel, and inspire international collaboration, in order to foster energy-related innovation. It also conducts research and development in striving towards this same end.

i. Department of Alternative Energy Development and Efficiency

The Energy Conservation Promotion Act, B.E. 2535 (1992) (the "**Energy Conservation Promotion Act**"), as amended, mandates that DEDE regulates and supervises designated factories and buildings to ensure compliance with Thai energy law. These responsibilities include promoting the efficient energy usage in such buildings, and aiding these buildings in remaining legally compliant. The DEDE is empowered, along with the ERC, to issue Controlled Energy Production licenses as prescribed under the Energy Conservation Promotion Act.

ii. Department of Mineral Fuels

The DMF is the government agency responsible for oversight of the upstream sector of the nation's oil & gas industry, and administration of the Petroleum Act, B.E. 2514 (1971), as amended. The primary objectives of the DMF include promoting petroleum exploration and production, the enhancement of domestic petroleum supply, mineral fuels research and development, and the acceleration of petroleum development on land subject to multiple claims. The agency must also liaise with neighboring countries to encourage cross-country collaboration. The DMF manages and monitors many financial aspects of upstream initiatives including costs related to petroleum concession awards, royalty payments, exploration, production, storage, transportation, and sales. The DMF also seeks to increase competition and promote price stability in the upstream sector of the petroleum industry.

iii. Department of Energy Business

The DOEB was established under the Reorganization of Ministry, Bureau and Department Act, B.E. 2545 (2002) with an effort to simplify the work of governmental agencies by reducing agency overlap and specifying agency responsibilities. The DOEB's primary objectives include: (i) to strengthen security and increase the value of the nation's energy; (ii) to supervise energy business operations; and (iii) to ensure the agency effectively and efficiently governs.

iv. Energy Policy and Planning Office

The EPPO is responsible for recommending national energy policies and plans, including energy-related measures and energy conservation to ensure well-proportioned, adequate and efficient supply of energy which corresponds with the situation of Thailand's energy.

EPPO acts as the Secretariat of the NEPC. EPPO's duties are stipulated under three pieces of legislation: (i) National Energy Policy Council Act, B.E. 2535 (1992); (ii) the Royal Emergency Decree on the Solution and Prevention of Petroleum Oil Shortage, B.E. 2516 (1973); and (iii) the Energy Conservation Promotion Act.

D. Office of Natural Resources and Environmental Policy and Planning

The Office of Natural Resources and Environmental Policy and Planning (the "**ONEP**") is responsible for establishing policies and plans for the conservation and management of Thailand's natural resources. Its regulations apply across several sectors, including electricity generation, mining and upstream petroleum production. To that end, ONEP sets regulations relating to projects which require environmental impact assessments and other mandatory permissions for large-scale energy projects.

E. Department of Primary Industries and Mines

DPIM is government agency responsible for oversight the mining industry, suggesting policy formulation, strategies, action plans and measures for mining, primary and downstream industries' management in order to support raw material demand of industrial and related sectors to conform to national development plan. Included in the DPIM's scope of authority is the granting of prospecting and mining licenses, as well as setting the conditions relating thereto.

(2) Electricity Generation

Electricity generation, transmission and distribution is dominated by three state-owned utilities: the Electricity Generating Authority of Thailand (the "**EGAT**"), the Metropolitan Electricity Authority (the "**MEA**") and the Provincial Electricity Authority (the "**PEA**"). As its name suggest, the EGAT is responsible for generating electricity at power plants which it owns and operates. In addition, EGAT currently maintains a monopoly on electricity transmission in Thailand and purchases bulk electricity from private power producers and neighbouring countries and sells such electricity primarily on a wholesale basis to the MEA and PEA. The MEA is responsible for electricity distribution to end users within the Bangkok metropolitan area, whereas the PEA handles this responsibility for the rest of the country.

A number of independent power producers (the "**IPP**"), defined as power producers where the capacity of generation exceeds 90 MW, sell electricity directly to the EGAT. In addition, there are numerous small power producers (the "**SPP**"), defined as those whose generating capacity is greater than 10 MW but equal to or less than 90 MW, and very small power producers (the "**VSPP**"), those whose generating capacity is equal to or less than 10 MW, which sell directly to the EGAT, as well as the PEA and MEA.

As of January 2020, three-quarters of Thailand's electricity was generated from traditional fossil fuels, with 58% being generated from natural gas, and lignite and coal combining for the remaining 17%. Renewables and hydroelectricity (both domestic and import) currently represent 25% of total electricity generation, but this figure is expected to rise over the coming decades.

Specific legal aspects concerning renewable sources are discussed in greater detail below.

A. BOI Incentives for Renewable Energy Projects

In December 2014, the Board of Investment of Thailand (the "**BOI**") announced new incentives for the promotion of investment, including renewable energy projects. Developers of solar power plants can apply for BOI promotion under category 7.1.1.2: Production of electricity or electricity and steam from renewable energy, such as solar energy, wind energy, biomass or biogas, etc. except from garbage or refuse derived fuel. The specific condition required for this category is that the project must be approved by the relevant government agencies. Category 7.1.1.2 will be granted incentives under Group A2 as follows:

(i) eight-year corporate income tax exemption, accounting for 100% of investment (excluding cost of land and working capital);
(ii) exemption of import duty on machinery;
(iii) 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
(iv) other non-tax incentives.

B. EGAT Regulations

EGAT is the single buyer of bulk electricity in Thailand; therefore any power purchase of bulk electricity from either large-scale IPPs or SPPs occurs through EGAT. In an attempt to standardize its licensing for renewable energy, on 18 April 2007, EGAT announced the Regulation for the Purchase of Power from Small Power Producers (the "**SPPs**") exclusively for the generation of renewable energy.[1] Among other topics, this regulation covers conditions for, costs of, and procedures regarding, power purchase agreements (the "**PPAs**") between SPPs and EGAT. EGAT has published standard forms of PPAs including the Model Non-Firm Agreement.

C. PEA Regulations and MEA Regulations

Upon its receipt of bulk electricity, EGAT circulates the energy to a number of distributors. The MEA and PEA are EGAT's main distributors. The PEA and MEA may award PPAs to smaller renewable projects, the parameters for which are established in the PEA's 2006 Regulation for the Purchase of Power from Very Small Power Producers for the Generation Using Renewable Energy. The PEA has also published notifications regarding the Prescription of Increment of Power Purchase Price for Renewable Energy Very Small Power Producers and standard forms of PPAs.

D. Solar

Solar energy from various technologies is providing a growing source of energy in Thailand. The country benefits from elevated year-round solar radiation levels, resulting in the maintenance of many Thai solar energy plants / farms. Thai solar capacity has consequently grown from a mere two MW in 2010 to 507 projects with capacity of 2,962.5 MW. The Ministry of Energy has implemented the Alternative Energy Development Plan 2015-2036 (the "**AEDP**") to increase Thailand's solar energy producing capacity even further from 1,570 MW in 2014 to 6,000 MW in 2036. Thailand's Power Development Plan (the "**PDP**") for 2018 to 2037 was adopted in 2019, though it is currently undergoing further amendments. The PDP 2018 called for significant investments in renewable energy production. A further revised PDP is expected in 2020, and it is anticipated that targets for renewable energy generation, and in particular solar energy, will be increased significantly.

On 7 September 2017, the government announced that it will lift the ban on selling electric power generated by solar rooftop PV. This would include solar facilities on detached houses, warehouses, factories, and offices. According to the Ministry of Energy, the EGAT will exclusively buy at a rate below 2.6 Baht per kilowatt-hour. Currently, EGAT sells electricity to consumers at a rate of about four Baht per kilowatt-hour.

The Thai government is currently looking to promote rooftop solar on residential buildings. Under the PDP 2018, the government introduced a policy to offer 100MW of installed capacity per year for 10 years commencing in 2019, a total 1,000 MW with respect to residential solar rooftop. The initial allocation of 100 MW, which was offered in 2019, was undersubscribed, and the government is currently looking at ways to encourage participation in the scheme.

[1] The Regulation (as amended in 2009) can be found at www.egat.co.th

Notwithstanding the development in solar energy and also other renewable energy in Thailand during the past several years, on 28 March 2018, Dr. Siri Jirapongphan, the then Minister of Energy, stated that there will be no state renewable power buying for five years from 2018-2023. Even though the statement from the Minister of Energy is being contested in public, subject to further implementation by government agencies of energy sector in compliance with that vision of the Minister, it is unlikely there will be new power purchase agreements for renewable energy sector during this period. This will not affect existing PPAs signed by EGAT or PEA.

E. Wind

DEDE has conducted studies on the potential of wind power since 1975, and has since come to the conclusion that (with significant research and infrastructural development) wind energy may one day substitute fossil-based energy in Thailand. As of January 2020, there are 26 wind projects in Thailand that have reached commercial operations. Most projects are located in the northeast of Thailand.

F. Biomass

Through combustion, the biomass energy production process converts organic material into electricity or fuel. Such organic material is split into five categories:

(i) By-products of the yearly harvest (including stalks, rice straw, sugar cane, cassava leaves and shoots, leaves and stalks of corn, palm leaves, rice husk, bagasse, cobs of corn, palm fiber, palm shell, rubber wood swarf, rubber wood slab, wood chips, sawdust etc.). Type (i) biomass is commonly used as fuel and is tradable.
(ii) Materials leftover after crop processing (including bagasse, rice husk, corn cob, sawdust, slab palm fiber, palm, rice straw, cane leaves and tops, cassava roots, leaves and stalks of corn, stump and root of rubber wood branches, and leaves and stems of soybean beans, mung beans, peanut beans etc.). Type (ii) biomass is less widely used, among other reasons, due to elevated preparation expenses and the inconvenience of transporting these materials.
(iii) Natural vegetation (including trees along the highway or in deserted areas).
(iv) By-products of raw materials from tree plantations used in industry production (consider eucalyptus, parts of which are used as raw material for paper mills, and the remainder of which constitutes convertible biomass).
(v) By-products of tree plantations used as fuel (including the giant acacia, giant rudder, palm trunk, palm leaves etc.). Type (v) biomass is used the least thanks to production obstacles, such as the high humidity and heat required for conversion. Despite these confounding factors, such biomass should not be discounted as an energy source. Type (v) biomass is widely available, and Thailand thus stands to gain from proper utilization.

As Thailand's economy is agriculturally-based, and the country therefore produces these natural by-products in high volumes, the AEDP expects biomass to serve as an important source of Thai renewable energy in the years to come. The nation produces approximately 80 million tons of agricultural waste a year, suggesting that biomass energy has huge potential. The government has also chosen to include biomass energy in the country's Feed-in Tariff scheme.

G. Biogas

Biogas is produced from the by-products of pig farms, cattle farms, animal slaughter houses, palm oil production, sugar factories, paper factories, ethanol factories and municipal solid waste. The process begins when organic matter decomposes, which naturally produces gas composed of methane, mixed with carbon dioxide and trace levels of other elements. If this gas is extracted, it can be repurposed as a fuel. The government has also chosen to include biogas energy in the country's Feed-in Tariff system.

H. Waste-to-Energy

Energy production from waste occurs by converting municipal solid waste (the "**MSW**") into electrical energy though incineration via heat boilers and power turbines. Currently, there are 21 waste power plants in Thailand. The AEDP seeks to grow these numbers in the coming years and has set a target of 400 megawatts by 2021. The government has also chosen to include MSW energy in the country's Feed-in Tariff scheme.

(3) Oil & Gas

The cornerstones of the legal framework governing upstream oil & gas production in Thailand are the Petroleum Act, B.E. 2514 (1971) (as amended) (the "**PA**") and the Petroleum Income Tax Act, B.E. 2514 (1971) (as amended) (the "**PITA**").

A. Industry and Legislative History

Prior to 1954, the right to explore for petroleum was reserved exclusively for government agencies, and exploration by the Defense Energy Department led to discovery of the Fang basin in Chiang Mai Province. Between 1954 and 1960 exploration permits were awarded under the mining laws to two private Thai companies which were not successful.

In the early 1960's, agreements were signed with Union Oil and Raphael Pumpelly for areas in northeastern of Thailand, under the general provisions of the mining law. In 1964, the offshore areas in the Gulf of Thailand also attracted the attention of major international oil companies.

In 1967, the government introduced a concession system, under a document entitled "Consideration Bases in Applying for Petroleum Exploration and / or Production". The Ministry of National Development then invited applications to explore and the Cabinet approved the award of rights to six major oil companies. Agreements in an abbreviated form were signed with these companies in 1968. Under these agreements the Ministry of National Development agreed to issue concession agreements when a new petroleum law came into effect.

In 1971, Thailand promulgated the original PA and PITA. The PA established a concession system based on the Consideration Bases, and nine Ministerial Regulations were issued in 1971 dealing with major subjects under that Act. The PITA established an income tax system applicable only to concessionaires, with tax rates between 50% and 60%. A tax rate of 50% was prescribed by a Royal Decree. Three Ministerial Regulations were issued in 1971 under the PITA.

The Petroleum Act (No. 2) was enacted in 1973. It relaxed area limitations, restrictions on transfer of obligations, mandatory relinquishment requirements and royalty rates for offshore blocks with water depths over 200 meters (deep water blocks). The Petroleum Income Tax Act (No. 2) was also promulgated in 1973. It provided for increased discounts on posted prices for tax purposes of

petroleum produced from deep water blocks. Exploration in deep water blocks of the Andaman Sea has, so far, proven unsuccessful.

In 1973, Union Oil Company made the first natural gas discovery, in the Erawan Field in the Gulf of Thailand. The company was concerned about the creditability of Thai taxes under US law, as the PITA prohibited the deduction of "interest" in the calculation of taxable income. After negotiations between the Thai government and the US Internal Revenue Service, the Petroleum Income Tax Act (No. 3) was enacted in 1979. Its provisions applied only to Union Oil. Thereunder, "interest" is recognized as a deductible expense, provided the concessionaire has withheld tax at the rate of 50% on payments of interest income. Income tax rates for concessionaires falling within the Petroleum Income Tax Act (No. 3) are fixed at 35% to 48% (presently 35%) on profits and 23.08% on dividends or other after-tax remittances. The effective rate thus remains 50%, as prescribed for all other concessionaires.

In 1980, the government announced a one-year ban on the export of petroleum in the context of negotiations with concessionaires for the purchase of condensate and to prevent the diversion of oil supplies under long-term contracts. This ban was renewed annually through 1990, but it has not been imposed since then. In 1981, Shell discovered crude oil onshore in the Sirikit Field, in Kamphaeng Phet Province.

In 1982, new terms were prescribed as "conditions of bidding" for onshore blocks, in a period of rising oil prices. Additional concessions were awarded, but following the drop in oil prices and the discovery of small and marginal fields, those terms deterred further onshore activity.

The fall of oil prices in 1986, and other circumstances led the government to review its concession terms. Another factor was the difficulty of some companies to obtain permission to produce marginal or isolated wells, due to the need to demonstrate commerciality according to certain economic criteria. For crude oil, for example, each well had to demonstrate a recovery of costs within 12 years. In July 1987, Ministerial Regulation No. 13 under the PA was announced. It allowed wells in the same structure to be consolidated for purposes of applying the economic test. The definition of "production area" was also broadened, to include geological, seismic and other information, in addition to drilling data.

In 1989, the Petroleum Act (No. 4) and the Petroleum Income Tax Act (No. 4) were enacted and substantially amended the PA and the PITA. These changes were reflected in the terms of the 13th bid round invitation for concession applications, issued in July 1990.

After adoption of Thailand III terms for new petroleum concessions in 1989, there were no major amendments to the Petroleum Act until 2007. (Petroleum Act No. 5 BE 2534 (1991) dealt only with a consequential amendment to Section 70, import free of duty, arising from introduction of VAT and deletion of business tax under the Revenue Code.) However, significant new terms were introduced by way of conditions of bidding.

In 2007, the Petroleum Act (No. 6) and the Petroleum Income Tax Act (No. 6) were enacted and amended the PA and the PITA. However, the fiscal terms, as modified for the 20th bidding round, remain largely unchanged, and are set forth in Annex two.

Purposes of amendments in PA (No. 6) included:

- Revisions which are more suitable to small fields and complex geology, marginal fields and fields having declining production.

- Provisions to clarify environmental management.
- Provisions to reduce and streamline steps for approvals.
- Provisions to better compete with other countries for investors.

The new form of petroleum concession provides for arbitration according to the UNCITRAL Rules in Bangkok instead of the Rules of the International Court of Justice of 6 May 1946.

The Petroleum Act (No. 7) and the Petroleum Income Tax Act (No. 7) were published in the Government Gazette on 22 June 2017, and came into effect on 23 Jun, 2017 to establish the Production Sharing Contract (the "**PSC**") and Service Contract (the "**SC**") contract regimes.

Amendments to Section 23 of the PA include the wording that exploration and production of petroleum now require the application for, and the grant of a PSC, SC or concession. The authority to determine which form is appropriate will be vested with the Ministry of Energy, with rules and procedures to be published with the approval of the Cabinet.

Amendments to the PA with regard to PSCs include general terms and conditions that are to be included in the contract. Significant features of such contracts include the following:

(i) All actual expenses in petroleum operations are to be borne by the contractor and deducted from production, as detailed in the contract, and in accordance with the work plan and budget approved by the Director-General (such approval is required annually under Section 53/4 during the term of the contract). Deductions may not exceed 50% of the total production. If actual expenses exceed 50% in any year, the excess can be deducted in the following year, as long as such expenses for that year do not exceed 50%. Up to 50% of remainder of the total production, after deduction and payment of royalty, shall be shared with the contractor (Sections 53/3(1) and 53/3(2a, b, and c);
(ii) The portion of production owned by the State may either be sold or disposed of by the State, or by the contractor at the State's request (Section 53/3(5));
(iii) Ownership of all construction materials, equipment, properties and facilities used in petroleum operations acquired by the contractor is to be vested in the State;
(iv) Certain provisions of Division 3 of the PA on Petroleum Exploration and Production under concessions also apply to PSCs, notably as to the grant, renewal and revocation of rights; duration and renewal of exploration and production periods; demarcation, award and relinquishments of exploration blocks; award of production areas; and transfer of rights; and
(v) The contractor is to pay a royalty of 10% on the total production.

Amendments to the PA with regard to SCs also include general terms and conditions that are to be included in such contracts. Significant features of such contracts include the following:

(i) Remuneration, calculation and payment of remuneration may be made in petroleum production or money, and only upon commercial production (Section 55/11(4));
(ii) The term of petroleum exploration and production shall not exceed 30 years, with reasons for early termination to be included in the contract (Section 55/11(5));
(iii) Rules, procedures, work plan, reporting procedures and conditions of measurement are to be included in the production / exploration contract (Section 55/11(6-8);
(iv) Like PSCs, SCs require annual approval of a work plan and budget by the State, with expenses for petroleum operations to be borne by the contractor, and total production is to be owned by the State. The State may dispose of or sell any portion of its production, or may request the contractor to do so (Section 53/11(1-4));

(v) Money received by the government from the sale or disposal of production is to be first paid as a royalty, with the remainder to be paid as remuneration and expenses under the production / exploration contract. The remainder, if any, is to be remitted to the Treasury (Section 53/14); and
(vi) The government is to pay a royalty of 10% on the petroleum produced (Section 53/17).

For the adoption of the PSC form, the PITA has likewise been amended. Under its Section 65 quatervicies, a company that is a party to a PSC must pay income tax of 20% of the net profits from the petroleum business. The PITA does not mention SCs. Thus, a party to such a contract is subject to the general income tax under the Revenue Code of 20%.

In March 2018, the Ministry of Energy adopted Ministerial Regulation Re: Form of Production Sharing Contract, B.E. 2561 (2018), which prescribed the form PSC. As of January 2020, the government has not published forms of SC (three forms of SC are mentioned in the 2017 amendments to the PA).

B. Administration

Until 2002, the PA was administrated by the Ministry of Industry through the Oil Fuels Division of the Department of Mineral Resources. On 1 October 2002, responsibility for administration of the PA was transferred to a new ministry, the Ministry of Energy.

The PITA is administered by the Ministry of Finance through the Revenue Department.

Most decisions under the PA are made by the Petroleum Committee, an inter-ministerial committee established under Section 15 of the PA with the specific powers listed in Section 16.

C. Concessions

Although not expressly required by law, the Thai practice has been to award concessions only following the publication of an international invitation, usually on at least 45 days' notice. Applications were evaluated on a points system by the Petroleum Committee, which forwards its recommendations to the Cabinet for approval.

Most concession terms and conditions are prescribed in the PA and its regulations. In practice, concession applicants are rarely permitted to negotiate changes to the standard terms.

D. Recent Developments

(i) 21st Bid Round for Thai Petroleum Concessions

The Ministry of Energy announced, on 21October 2014, the 21st bid round for petroleum concessions. There were 29 exploration blocks; of these, 23 blocks are located onshore and six are offshore in the Gulf of Thailand. The deadline for submission of bids was 18 February 2015, or a new date as may be specified by future public notice.

On 27 October 2014, an NGO filed a complaint to the Administrative Court to suspend the 21st bid round. The Administrative Court accepted the case, as Case No. Sor 55/2557. There were a number of subsequent challenges to the 21st bid round, which was finally cancelled on 26 February 2015, pending enactment of amendments to the PA.

The Minister of Energy has indicated that a new 21st bid round will occur in the near future. As of 1 January 2020, no official information had been released concerning a new 21st bid round.

(ii) Gas Supply Industry Reform

Currently, PTT Public Company Limited (formerly, the Petroleum Authority of Thailand), with few exceptions, acts as the sole purchaser, transporter and distributor of natural gas in Thailand, through a 3,715 km pipeline system.

PTT was corporatized (converted from a state enterprise to a public limited company) in October 2001.

(iii) Auction of Bongkot and Erawan Fields

The current concessions for the Bongkot and Erawan fields are due to expire in 2022 and 2023. Bids for the Bongkot and Erawan gas blocks were submitted on 25 September 2018. The tender was the first time the Ministry of Energy offered petroleum producers the opportunity to operate under a PSC. The Bongkot field is currently operated under a concession by PTTEP with Total holding a minority interest, whereas the Erawan concession is operated by Chevron with Mitsui holding a minority interest.

There was limited interest in the tenders from outside tenderers, with each PSC only attracting two bids. Chevron and Mitsui submitted joint bids for each PSC; PTTEP submitted a joint bid with Mubadala Petroleum for the Erawan PSC, and PTTEP submitted a solo bid for the Bongkot PSC.

The winning bidders were announced in December, 2018, with PTTEP winning the Bongkot PSC and PTTEP and Mubadala Petroleum winning the Erawan PSC.

(iv) Overlapping Claims Area (Thailand / Cambodia)

Since 1972, a significant area in the Gulf of Thailand has been off-limits to the petroleum exploration industry due to a dispute over maritime boundaries between Thailand and Cambodia. The area is believed to include commercial fields similar to the Thailand sector of the Gulf of Thailand. Unofficial talks between the governments to find a solution are continuing.

(4) Mining

The principal law regulating the mining industry is the Minerals Act, B.E. 2560 (2017) (the "**Minerals Act**") which came into effect on 29 August 2017.

A. Industry and Legislative History

Prior to the enactment of the new Minerals Act in 2017, the principal laws regulating the mining industry were the Minerals Act, B.E. 2510 (1967) with five amendments and Mineral Royalty Rates Act, B.E. 2509 (1966) with three amendments. The new Minerals Act 2017 contains transitory provisions stating that all ministerial regulations, notifications, rules, or orders issued under the old Minerals Act, B.E. 2510 (1967) and the Mineral Royalty Rates Act, B.E. 2509 (1966) which were effective before the date the new Minerals Act came into force, continued to be effective to the extent that they are not contrary to nor inconsistent with the new Minerals Act.

Any application submitted before the effective date of the new Minerals Act will also be deemed an application under the new Minerals Act, and will be considered under the rules as specified in the new Minerals Act. Furthermore, any prospecting license, mining lease, or license issued under the old Minerals Act before the effective date of the new Minerals Act will be deemed issued under the new Minerals Act and will be effective until it expires or is revoked. Any obligation under any agreement made with the Thai government by the MOI and DPIM before the effective date of the new Minerals Act will remain effective until the expiration of that obligation.

The Minerals Act 2017 and ministerial regulations, notifications and other subordinated laws issued thereunder place significant new obligations on mining businesses. The new Minerals Act aims to provide stricter environmental controls, decentralize administrative power, encourage the use of newer mining technologies and provide more protection for those living in mining areas.

B. Administration

The Minerals Act is administered by the MOI and the DPIM.

Under the Minerals Act, there are three committees responsible for mining issues:

- the National Mineral Administrative Policy Board (the "**NMAPB**" or the "**Board**") is mainly responsible for proposing national strategy, policy and the master plan on mineral management to the Cabinet as well as monitoring and assessing the operation of work to ensure the implementation of such strategy, policy and plan;
- the Mineral Committee is charged with advising ministers on bidding and issuance of ministerial regulations and notifications, approval of licenses, renewals, transfers, revocation of conditions providing assessments of the impact on people's health and the environment; and
- the Provincial Mineral Committee is responsible for a wide range of issues re mining lease Category 1.

On 31 July 2018, the Cabinet approved a 20-year mineral management strategy for 2017 – 2036 and a five-year mineral management plan for 2017 – 2021. The strategy and master plan aim to integrate Thailand's management of mineral resources while ensuring that the mining industry will be environmentally friendly, with an elevated focus on the quality of life of people affected by the mining industry. In the approved strategy, four points of emphasis are:

- the classification of a mineral zone;
- the formulation of mineral policy;
- the development of a regulatory mechanism; and
- the promotion of general public participation.

C. Rights for Exploration and Mining

(i) Exploration rights

For exploration activities, a prospecting license must be acquired. There are three kinds of prospecting licenses that investors may apply for, namely, the general prospecting license (the "**GPL**"), the exclusive prospecting license (the "**EPL**") and the special prospecting license (the "**SPL**").

A GPL is a non-exclusive, non-renewable and non-transferable license and is valid for one year. A GPL grants rights for mineral prospecting and exploration within a designated area of an administrative district or a province. The local mineral industry official (the "**LMIO**") has the authority to issue a GPL.

An EPL grants sole mineral prospecting and exploration rights within a designated area, and is valid for no more than two years. An EPL is issued by the Director-General of DPIM, which is non-transferable and non-renewable. An EPL is limited to an area not exceeding 2,500 rai[2].

An SPL is issued by the Director-General of DPIM with approval of the Mineral Committee, and is valid for duration of five years. The SPL is non-transferable and non-renewable. The exploration area that may be granted under an SPL may not exceed 10,000 rai, except applications to explore offshore may be made for 500,000 rai each. An application for an SPL must include a work plan and an estimate of expenses for each year for the whole project, as well as an offer of 'special benefits' to the government. The special benefits will further bind the holder of the SPL upon receiving a mining lease for mining in the area for which the SPL has been granted. An SPL is suitable for large projects entailing high-value minerals or substantial investment capital, and also in the event an applicant requires more time or a larger area for exploration. The prospector may relinquish areas he or she no longer wishes to prospect. The SPL holder will generally get preferential rights to acquire a mining license for the area the SPL covers. If there are multiple applicants, owners or possessors of such land obtain priority above all other applicants under the Land Code.

(ii) Mining rights

Section 52 of the new Minerals Act states that no person shall mine in any area, regardless of any person's right over the surface area to be mined unless a mining lease has been obtained. In Thailand, minerals belong to the state. Mining rights do not grant title to minerals in the ground. There are three categories of mining as follows:

- category 1 – mining with the area of not exceeding 100 rai and not require EIA report, where the mining lease shall be issued by the LMIOs on approval of the Provincial Mineral Committee in the province where the mining is operated;
- category 2 – mining with the area of not exceeding 625 rai (equal to 1 square kilometer) and not require EHIA report, where the mining lease shall be issued by the Director-General of DPIM with approval of the Mineral Committee; and
- category 3 – mining which is (a) not Category 1 mining or category 2 mining; (b) offshore mining; (c) underground mining; (d) gold mining); (e) coal mining; (f) radioactive mineral

[2] The units of land measurement in Thailand are Wah, Ngan, and Rai. Conversion factors between Thai and other measurements are:

Thai Measurements		Other measurements	
1	Wah	2	Meters
1	Square Wah	4	Square Meters
1 100	Ngan Square Wah	400	Square Meters
1 4 400	Rai Ngan Square Wah	1,600	Square Meters
≈ 2.50	Rai	1	Acre
≈ 6.25	Rai	1	Hectare

mining; (g) mining project which shall be approved by Cabinet; and (h) mining which directly involve with activity or related activity which require EHIA, where the mining lease shall be issued by Director-General of DPIM with approval of the Mineral Committee.

There is no limit on the number of mining leases that may be acquired by one person. Therefore, in practice, if granted several mining leases, it is possible for one person to mine over a larger area than the prescribed area limits in one mining lease.

Maximum duration of mining rights is 30 years (compared with 25 years in the old Minerals Act) and may not be transferred without the approval mining right issuers.

It shall be noted that the exploration rights and mining rights under the Minerals Act do not include any rights to the surface land. Surface rights over the mine vary depending on the type of land. Before applying for a mining lease, an applicant must acquire the right to use the surface land from the public or private owner, as the case may be.

D. Mineral Royalties

Thai government collects mineral royalties from mining and mineral production. The Minerals Act provides that the persons under the Minerals Act, including the mining lease holder and metallurgical operator, must pay mineral royalty, fees and special contribution. The mineral royalty rate for each type of mineral is determined by a ministerial regulation issued under the Mineral Act, and shall not exceed 30 % of market price.

Ministerial Regulation Re: Determination of Mineral Royalties, B.E. 2561 (2018) prescribes mineral royalty rates, based on a market price announced by the Director General of DPIM, at the following rates:

- tin ore – 2.5 to 20%;
- mineral ore with tungsten oxide – 2.5 to 20%;
- lead ore – 2.0 to 15%;
- gold ore – 2.5 to 20%;
- zinc ore – 2.0 to 15%;
- gemstone – 10%; and
- other mineral ores, as per the annex to this Ministerial Regulation, at rates between 4 and 10%.

E. Investment by Foreign Investors

Government policy is not to grant mineral rights to foreign nationals (including companies in which ownership by foreign nationals exceeds 49 %). However, it is possible to grant mineral rights to a foreign company under a special agreement. Majority foreign-owned companies wishing to operate a mining business must obtain a license granted by the Minister of Commerce with the approval of the Thai cabinet as required under the Foreign Business Operations Act, B.E. 2542 (1999). The majority foreign-owned company can operate a mining business only if at least 40 %, or (with approval of the cabinet) at least 25 % of the capital is held by Thai nationals or Thai entities and at least two-fifths of the directors are Thai nationals.

On 28 December 2017, the MOI issued a new notification providing details of actions that can be as effecting a business takeover by foreigners and which are thus prohibited, as well as imposed self-certification duties on the applicants and holders of mining leases, licenses for minor-scale mining and reporting of mineral panning.

On 28 January 2020, the MOI issued a notification to revoke the notification abovementioned. This notification was published in the Government Gazette on 29 January 2020 and became effective on the day after publication, i.e. 30 January 2020. As a result, the notification abovementioned is revoked entirely, and the prohibitions and duties thereunder are no longer valid. However, the restrictions on investment in mining business by foreigners under the other relevant laws are still in effect and must be taken into account.

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CHAPTER 8

PUBLIC PRIVATE PARTNERSHIP

CHAPTER 8 | PUBLIC PRIVATE PARTNERSHIP

In recent years, some infrastructure development projects in Thailand have taken the form of public private partnerships (the "**PPP**"), with the participation of the private sector. To the extent that these projects follow the framework of the Act on Public Private Partnerships, B.E. 2562 (2019) (the "**2019 PPP Act**"), an understanding of this framework would be useful.

(1) Background of the Legislation and Competent Authorities

PPP projects in Thailand were previously governed by the Act on Private Participation in State Undertakings Act, B.E. 2535 (1992) (the "**1992 PPP Act**") and the Act on Private Investment in State Undertakings, B.E. 2556 (2013) (the "**2013 PPP Act**"). The 1992 Act had as its primary objective the prevention of corruption rather than promotion of PPP projects and was perceived as being inadequate in substance, with such defects as vagueness of the text and ambiguity in defining the scope of the subject projects. Accordingly, the 2013 PPP Act was enacted and aimed at clarifying and streamlining procedures for the selection and approval of PPP projects. The 2013 PPP Act came into force in April 2013. A new Strategic Plan for Public-Private Partnership in State Undertaking was issued in December 2017.

The 2019 PPP Act came into force on 11 March 2019 and repealed the 2013 PPP Act in its entirety; nonetheless, the 2019 PPP Act is based on similar principles to the 2013 PPP Act and was largely an attempt to improve on existing legislation which was already seen as effective.

The 2019 PPP Act provides for setting up the Public Private Partnership Policy Board (the "**Board**"), chaired by the Prime Minister, as well as the State Enterprise Policy Office (the "**SEPO**"), which functions as its secretarial office. Responsibilities of the Board include approving the basic policy of PPP projects and issuing related notifications (Section 20 of the 2019 PPP Act), while SEPO is responsible for administration of procedures, including screening and evaluation of projects, and submission of opinions to the Board (Section 21 of the 2019 PPP Act). In principle, it is assumed that SEPO would take the lead in project approval and the private entities selection processes.

(2) Projects under the PPP Act

Projects governed by the 2019 PPP Act are, in principle, investments in state undertakings of 5,000 million Baht or more[1]. However, projects with a value below the above amount may proceed under the 2019 PPP Act if the Board finds them to be important and if implementation under the PPP Act is appropriate. Otherwise, the project with value below 5,000 million Baht which fall under the scope of 2019 PPP Act shall proceed according to the notification issued under the 2019 PPP Act instead.

A "project" is defined in the 2019 PPP Act as "a state-owned investment project in an undertaking that any one or several state agencies altogether have the power and duty to operate under the law or regulation, or have the power and duty to operate under the purposes of their establishment.". Compared with the previous Acts, the 2019 PPP Act has a clearer definition on the scope of its application. In addition to than the general definition provided in 2013 PPP Act, the 2019 PPP Act further narrow down the scope of project which must comply with the 2019 PPP Act by listing out the following project types as projects related to infrastructures and public services:

[1] Section 23 of the 2013 PPP Act stipulated that projects must have a value of at least one billion Baht, but it also provided that a higher value may be prescribed by Ministerial Regulation. The minimum value was set at 5,000 million Baht under the "Determining Increase of Value of the Project Required to Comply with the Act Government Private Sector Participation in Investment in State Business, BE 2559 (2016) of 1 April 2016. Under the 2019 PPP Act, the minimum value of 5,000 million Baht is enshrined in the Act at section 8.

(1) Roads, highways, expressways, road transports;
(2) Trains, electric trains, rail transports;
(3) Airports, air transports;
(4) Ports, water transports;
(5) Water management, irrigation, water supply, water treatment;
(6) Energy;
(7) Telecommunication, communication;
(8) Hospitals, public health;
(9) Schools, education;
(10) Residences or facilities for low or medium-income earners, elderly, underprivileged, or disabled;
(11) Exhibition centers and conference centers; and
(12) Other businesses as prescribed in the royal decree.

In addition to the above, the scope of the 2019 PPP Act also includes projects for related businesses necessary for achieving the purposes of undertaking abovementioned businesses as announced and prescribed by the Board. As of February 2020, the Board had announced several businesses which are deemed to be related with the abovementioned businesses. For example, inventory services, security services, or airplanes cleaning services are deemed as business necessary for item (3) Airports and air transports.

The 2019 PPP Act also stipulates that SEPO shall prepare a PPP Project Preparation Plan consistent to the country's master plan on infrastructure and social development prepared by the Office of the National Economic and Social Development Board. However, as of date, SEPO had not issue a new PPP Project Preparation Plan under the 2019 PPP Act. Thus, the latest PPP plan is a Strategic Plan for years 2017 to 2021 issued under the 2013 PPP Act which was approved by the Cabinet on 24 October 2017.

(3) Project Approval Process

For a PPP project to be launched, and prior to the selection of private entities, the project itself must be approved. The approval process is outlined below.

- The "Project-Owner Agency", which implements the relevant project, must conduct research and analysis of the project in accordance with the rules and regulations set forth by the Board (Section 22 of the 2019 PPP Act). In conducting such research and analysis, a consultant must be hired to prepare a report of the results of the research and analysis (Section 27 of the 2019 PPP Act).

- The Project-Owner Agency must submit this report to the responsible ministry, along with other pertinent information relating to the project. If the ministry approves the project, it will forward the report to the SEPO for proposal to the Board (Section 28 of the 2019 PPP Act). The SEPO may request an amendment or submission of additional relevant materials on the project. Once the SEPO determines that the report is complete, it will propose the project to the Board (Section 29 of the PPP Act).

- Following completion of the examination by SEPO, the basic policy of the relevant project will be submitted to the Board, which will make a decision on whether or not to approve the project.

- If the Board approves the project, it will inform responsible ministry to propose the project to the Cabinet for its final approval.

As outlined above, the approval process alone involves some cumbersome procedures, but compared to the 1992 PPP Act which required a number of additional government approvals, the 2019 PPP Act has dramatically streamlined the approval requirements.

(4) Private Entities Selection Process

Once the project approval process has been completed, the next step is the selection of private entities and subsequent processes.

First, the Project-Owner Agency sets up a "Selection Committee" consisting of representatives from the Bureau of the Budget, SEPO, and the Office of the Attorney-General, as well as a few experts, to be chaired by a representative of the Project-Owner Agency (Section 36 of the 2019 PPP Act). The Selection Committee has the power and duty to approve the draft guidelines of the tender, negotiate matters related to contracts with private entities for the joint development, and to select the private entities (Section 37 of the 2019 PPP Act), thereby effectively playing a central role in the selection and other examination processes with respect to the private entities participating in the project.

The default rule for the selection of private entities is that selection is to be conducted through a bidding process (Section 32 of the 2019 PPP Act), unless otherwise approved by the Cabinet. The Selection Committee then, after obtaining the selection results and completing negotiations with the relevant private entity on an investment partnership contract, submits the selection results, negotiation issues, and the draft investment contract to SEPO, and further submits the draft investment contract to the Office of the Attorney-General. Within 45 days from the receipt of the report, SEPO forms its opinion on the private entity selection results and the fiscal obligations of the government, and submits this opinion, as well as the relevant documents, to the project owner agency. The Office of Attorney-General must review and submit the reviewed draft investment contract to the project owner agency within 45 days of receipt (Section 41 of the 2019 PPP Act).

Within 30 days from the receipt of all reports and documents mentioned above (including the draft partnership investment contract), the responsible minister presents its opinion to the Cabinet on the selection result and investment contract (Section 42 of the 2019 PPP Act). If the Cabinet approves the selection result and the draft investment contract, the Project-Owner Agency proceeds to sign the investment contract with the selected private entity (Section 42 of the 2019 PPP Act).

After completion of the entire process described above, a private entity can enter into an investment partnership contract with the Project-Owner Agency.

(5) Eastern Economic Corridor

As part of the government's overall plan to promote investment in the provinces immediately east of Bangkok, the Eastern Special Development Zone Act, B.E. 2561 (2018) (the "**EEC Act**") was enacted. This EEC Act creates an expedited process for the approval of PPP projects within the area, which mainly consists of Chachoengsao, Chonburi and Rayong provinces. The Policy Commission of the Eastern Economic Corridor (the "**EEC**") is charged with considering and approving tenders for PPP projects under the EEC Act. The Policy Commission will also establish an office to offer a one-stop service centre for investors to apply for necessary permits and licenses.

The initial six PPP projects in the EEC are:

(1) the U-Tapao Airport and Eastern Aviation City;
(2) high-Speed Railway Connection to three Major Airports;
(3) Map Ta Phut Industrial Port Phase III;
(4) Laem Chabang Port Phase III;
(5) the U-Tapao Maintenance, Repair and Overhaul Centre (MRO); and
(6) the Digital Industry and Innovation Promotion Zone (Digital Park Thailand).

The High-Speed Railway Connection to three Major Airports (item (2)) and the Map Ta Phut Industrial Port Phase III (item (3)) projects were awarded to private consortia in 2019. The remaining projects remain in the bidding process, but the PPP contracts are expected to be awarded during the course of 2020.

After the development of the initial six PPP projects, clean energy and smart city projects are the two promising PPP projects that will be open for bidding process. The clean energy project in the EEC area aims to promote solar farms in Thailand for solar energy generation, distribution and storage in the EEC area, and the smart city project is a project with an aim to integrate Chachoengsao province with public transportation, telecommunications and power generation technology while establishing a tech and financial hub. These potential projects under the EEC Act open an extensive opportunity for investors.

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CHAPTER 9

REAL ESTATE

CHAPTER 9 | REAL ESTATE

This chapter describes legal framework in Thailand that governs the rights of use, possession and various forms of ownership of immovable property, types of documents representing land rights, certain transactions relating to immovable property including the transfer and leasing of immovable property, a sample of real estate transactions, and points to note on immovable property investment schemes including real estate development for foreign investors.

(1) Overview of Immovable Property Law in Thailand

A. The Thai Civil and Commercial Code (the "CCC"), the Land Code, B.E. 2497 (1954) as amended, and various secondary laws issued thereunder (the "Land Code")

The definition of immovable property and general principles regarding ownership, possession and utilization thereof are found in the CCC. In general, the governing law of immovable property, rights, actions and juristic actions in relation thereof is Book III (Specific Contracts), and also Book IV (Property), of the CCC. Section 139 of the CCC provides a definition of immovable property, which means "the land and property permanently fixed to land or forming a component part therewith and also includes real rights in relation to the land, or the properties fixed to land, or the properties which form a component parts thereof". The CCC provides a broad definition of immovable property and sets forth the general principles regarding the various rights over immovable properties.

The Land Code provides specifically defined terms regarding land for the purpose of the issuance of documents representing each specific type of land and the rights attached thereto. Details of certain definitions in Section 1 of the Land Code will be described further in this Chapter.

There are different types of title documents representing land rights under the Land Code due to the complexity of the legislation regarding land, which is described below. In summary, in order to recognize a civil right to own and utilize land, after the enactment of the Land Code in 1954, the registration system over immovable properties was created. The competent officer who has authority over the registry system and carries out the execution of the law under the Land Code is the Land Department and Minister of Interior.

B. Historical Background

In the past, Thailand had no concept equivalent to private land ownership rights. During the 19th century, there was a system in which all land was owned by the King, and citizens were granted the right to use and occupy land. There was a civil right to utilize areas of land, demarked by boundaries, which were set up by civilians to avoid disputes regarding land possession and utilization thereof. Even though a right of use was recognized by the state, it was not a right of absolute ownership over the land.

Subsequently, the modern Torrens System[1] was introduced as a land registry system and the land office was established. When the CCC was completed in 1935, it made a clear distinction between land ownership rights and possessory rights (Book IV (Property) of the CCC). The system was improved and modified thereafter to protect land use rights under the former system. Former "use rights" also became protected in addition to land ownership rights, and these contents were also carried over into the Land Code currently in use that was promulgated in 1954.

[1] The Torrens System is a land registry system under common law, and generally under this system the country ensures that the rights holder in the registry is the genuine rights holder.

(2) Type of Evidence or Certificates of Immovable Properties in Thailand

A. Classification of the land in Thailand: state land and private land

(i) State Land

State land includes land which is in possession of private persons or entities as permitted by law as the occupiers of this land have no absolute ownership. However, land which is not owned but occupied by any person with certain evidence of occupation will not be included as state land.

Based on use, state land is categorized as follows:

a. *Publicly used land*: this is land which is commonly used by the public, e.g. roads, rivers, beaches.

b. *Waste land*: this is land which is abandoned or not in use by any person, including the government.

c. *Treasury land*: this category of land may be the major portion of the land being used by the government for the benefits of the governmental administration, e.g. the location of governmental offices and the military base. The status of treasury land is established by the Treasury Land Act, B.E. 2518 (1975) (the "**Treasury Land Act**"). According to the Treasury Land Act, the Ministry of Finance is the body which holds ownership of this category of land on behalf of the government of Thailand, meaning that the Ministry of Finance through its in-charge authority, the Treasury Department, is authorized to manage and benefit from treasury land.

d. *Land owned by other governmental agencies*: apart from the Ministry of Finance, other governmental agencies, such as the Ports Authority of Thailand, and local administrative authorities, or the municipalities in each province, are authorized to own land for their own benefits. This category of land is under the control and management of each of the governmental agencies without control of the central government.

e. *Land reserved by government*: this land is reserved by the government for the certain purposes, such as, exploration of the natural resources and environmental protection.

(ii) Private Land

Private land can either be freehold land or land with right of possession.

a. *Freehold land*: this is land freely owned by private owners. Title to freehold land is represented by the land title documents as described below. Land title deed is the most secure and marketable title document in Thailand.

b. *Land with right of possession*: owners of this category of land are permitted to use or occupy the land for specific purposes and under certain conditions as described by the relevant laws. It is generally recognized as marketable land as some kinds of the title documents of this land can be upgraded to be the land title deed.

B. Certificates for Land Rights

The following certificates for land rights are stipulated in Section 1 of the Land Code. These certificates are issued by the competent land office.

Among these certificates, the possessor can freely transfer and offer as collateral the rights for certificates in a. and b. under the law. In contrast, it is prohibited to transfer rights granted under certificates in c. below through methods other than inheritance as a general rule. Each of these certificates is described below.

(i) Land Title Deeds

The land title deed is called "NS4" (Nor Sor four), so-called a "*Chanote*" in Thai, and is issued under the Torrens System (described above), as a certificate of complete private ownership of the land. This type of title grants the holder of this document full right over the land, to deal with or to use it to the exclusion of others. Apart from ownership, land title deed also shows its land survey status, as well as encumbrances over land, e.g. mortgages, leases, servitudes, or easements.

Two originals are issued by the competent land office that has jurisdiction over the land, with one delivered to the land owner, and the other stored by the land office.

The person whose name appears on the certificate as the owner of the land may transfer, sell, dispose of and mortgage the land upon registration with the relevant local land office. Any transaction in connection with the title deed land (except a lease for less than three years) must be registered with the land office and will be shown on the back of the title deed. The title deed is equivalent to the freehold land title.

(ii) Certificate of Utilization

There are two types of certificate of utilization, which are "NS3" (Nor Sor three) and "NS3G" (Nor Sor three Gor) (the "**Certificate of Utilization**").

a. NS3

The Certificate of Utilization is called an NS3. It certifies land use rights under the traditional land system (described above), but does not certify ownership rights. Certificate of Utilization includes certificate that is issued when boundaries are not finalized due to the fact that no aerial survey photo of the land is taken, so that the specific position of the land is not identified.

b. NS3G

NS3G is a certificate certifying the usage of land by the land holder. In practical terms, this title confers the same benefit as title deed and boundaries are finalized based on land surveys.

The person whose name appears on the Certificate of Utilization as the owner may transfer, sell, dispose of and mortgage the land upon registration with the relevant local land office. Any transaction in connection with the Certificate of Utilization land (except a lease for less than three years) must be registered with the land office and will be shown

on the back of Certificate of Utilization.

The Certificate of Utilization is registered on the equivalent of freehold land title. However, in case of a transaction concerning NS3 land which is required registration with the relevant land office, the transaction must be published for 30 days, during which any interested person may object to the transaction.

c. Claim Certificate

A claim certificate is called an "SK1" (Sor Kor one), and is a certificate issued based on a claim in order to protect persons occupying land before the effective date of the Land Code. This certificate was issued based on transitional provisions in the Land Code and new certificates are currently not issued. SK1 can be upgraded to a title deed or a Certificate of Utilization (depending on the region where the land is located and provided that the final court decision providing that the holder is lawfully possessing and utilizing the land of SK1 has been made).

SK1 is not considered a certificate of ownership of the land. In the case of any dispute arising over rights to the plot of land, this certificate is required to prove possession and, therefore, the person whose name appears in SK1 certificate will be in a stronger position. Nonetheless, evidence regarding the true possession is required. Since SK1 does not represent any ownership right of real property, it is not entitled to have any encumbrance attached to it.

C. Ownership Rights for Buildings

(i) Buildings

In respect of the building or construction, unlike in the case of the land, government authorities do not issue title documents. There is no public register to verify title to, or an interest in, a building.

If the ownership of the building is unclear, the law (Section 144 of the CCC) will assume that the land owner is considered to be the owner of the buildings constructed on the land, unless the construction was carried out by another person with the consent of the land owner or the right to construct thereunder. Therefore, in summary, in order to verify the ownership of the building in Thailand, it must take into account the following:

a. a construction permit (in practice, a construction permit is prima facie evidence of ownership of a building); or

b. the official land and building sale contract or official building sale contract (in case of the building only) which was registered with the competent land office; or

c. the assumption in law that the owner of the land is the owner of the building.

Entering into any transaction over the building (e.g. purchases, sales and / or mortgage) which is required to be registered under the laws requires the registration of the transaction with the land office (i.e. ownership transfer or creating encumbrances). In case of any transaction requiring the registration of buildings separate from the land, the transaction must be published for 30 days, during which any interested person may object to the transaction.

(ii) Condominiums

The law governing condominiums is the Condominium Act, B.E. 2522 (1979) (the "**Condominium Act**"), as amended. Condominiums under the Condominium Act can be divided into separate parts of ownership comprising private property and common property. The registered rights to ownership of the property and the common property are the main feature differentiating a condominium from other types of residences. The Land Department is also the government authority responsible for the registration thereof and issuance of certificates of condominiums as evidence of ownership (similar to the land title deeds), including all other registrations in relation to the condominium including sales and purchases, transfers and mortgages.

(3) Immovable Property Transactions

In consideration of the basic rights related to immovable property as described above, in this section the crucial elements that should be noted regarding these rights when conducting actual transactions is described under this section. The transfer and leasing of immovable property will be discussed separately.

A. Transfer of Immovable Property

The flow of general procedures when acquiring land through sales in Thailand is described below.

- Land and immovable property investigation (due diligence);
- Entering into a contract to sell land and/or immovable property; and
- Registration of an official sales contract with the competent land office.

(i) Overview of Land Acquisition Procedures and Land Due Diligence

It is necessary to first confirm the contents of the various title documents related to the registry, and to check the types of rights, land applications and use conditions, limitations on rights, information on the owners, usufruct rights and collateral, and any other matter that may cause a burden on the land. It shall be noted that the information available in the documents kept with authority is in Thai language only. In principle, a name listed in the registry is the ultimate evidence indicating that rights belong to a certain party, and the registry can be used as proof of a transaction proceeded by counterparty.

Prior to the purchase of the plot of land, due diligence research at the relevant local authorities, including the land office is highly recommended. This research is to be conducted in order to verify (i) the ownership over the land title deed, (ii) encumbrances over the land, (iii) validity of the issuance of the land title documents, and (iv) whether the land is located in any restricted areas according to certain specific laws, including the Town Planning Act, B.E. 2518 (1975) (the "**Town Planning Act**").

An investor or operator of a project involved with land and/or real property must also consider regulations not only regarding the town plan but also the infrastructural construction plans. Another risk factor in connection with the real estate development is the possibility of expropriation of land under the Expropriation of Immovable Property Act, B.E. 2530 (1987) along certain routes for construction of public roads, high-speed railways, expressways, motorways, transmission lines, etc. The relevant government sector is able to exercise its right of expropriation for the purpose of public use in accordance with the applicable laws. The expropriation can be

carried out in a form of "Royal Decree" that prescribing the area to be expropriated. Such royal decree shall be in force for no longer than four years, but extendable.

(ii) Entering Contract to Sell, Official Sales Contract, and Registration Procedures for Immovable Property Transfers

In addition to the agreement to sell the land and the sales price, items that are considered include representations and warranties related to the contracting parties and land rights, prerequisites for sales payments, and undertakings on matters such as the acquisition of necessary permits and licenses. Then, when transferring land, both parties will sign the official sales contract in the presence of a registrar at the competent land office and submit a registry application at that time, in a standard format for the sales contract.

The time required for the registry application to completion is normally within one business day, excluding cases in which prior public announcement is required for registry, or cases in which there are imperfections in the application documents. For land where NS3 has been issued, or only the building transfer (separate from the land where such building is located on) it is necessary for a public announcement period of 30 days to elapse before registration.

When transferring buildings, it is necessary for the contracting parties to sign the official sales contract at the land office in the same manner as transferring land. However, there will be no title deeds issued for buildings alone. Instead, a recording system has been adopted for the registration of sales contracts for building transfers with the competent land office.

(iii) Relationship Between the Effectiveness of An Immovable Property Sales Contract and Registration

The sales contracts for immovable property are not valid unless they are in writing and registered (Section 456, Paragraph 1 and Section 1299, Paragraph 1 of the CCC)[2].

For example, in the event that a piece of land is transferred in duplicate to separate persons and the second transferee conducts registration before the first transferee, (i) if the second transferee is the bona fide purchaser, then the second transferee will acquire the land ownership rights (in this case, the first transferee can only make claims toward the original land owner for failure to perform on their obligation), conversely, (ii) if the second transferee is acting in bad faith or is not the rightful acquirer, the first transferee will take priority and be able to make a claim for cancellation of the registration by the second transferee (Section 1300 of the CCC).

B. Leasing of Immovable Property

(i) Lease under the CCC

The duration of a lease for land or a building cannot exceed 30 years as a general rule, and if a longer period is agreed to, the period will be reduced to 30 years (Section 540 of the CCC). In consideration of this limitation, the contracting parties may have an agreement in some cases that the lessor must further renew the contract period after completion of the 30-year period

[2] Section 1299 of the CCC provides: "*Subject to the provisions of this Code or other laws, no acquisition by juristic act of immovable property or of real right appertaining thereto is complete unless the juristic act is made in writing and the acquisition is registered by the competent official.*"

if requested to do so by the lessee.

If a lease period for immovable property is over three years, registration with the competent land office is necessary (Section 538 of the CCC). A lease will only be enforceable for three years without registration and may not be enforceable against an heir of the lessor (i.e. it provides rights of a personal nature between the lessor and the lessee rather than real property right). If the lessor sells or transfers the ownership of the leased property to a third party, the lease is binding on the transferee of the land. The transferee is required to assume all rights and obligations of the lessor and effectively becomes a new lessor in place of the original lessor. However, an option to renew a lease (or indeed to purchase the land) is not a real property interest under Thai law and is not itself registrable with the land office. Therefore, any subsequent buyer of the leased land from the original lessor must agree to be bound by the option to renew in order for such option to be binding on and enforceable against such subsequent buyer.

(ii) Lease under the Act on Lease of Immovable Property for Commercial and Industrial Purposes

Commercial and industrial immovable property can be leased for up to 50 years based on the Lease of Immovable Property for Commercial and Industrial Purposes Act, B.E. 2542 (1999) (the "**Lease of Immovable Property for Commercial and Industrial Purposes Act**"), if certain requirements under subordinate standards of this act are fulfilled, for example:

a. the lessor must be the owner of the property;
b. the purpose of the lease is for commercial or industrial purposes (residential lease is not qualified);
c. the property is located in a commercial or industrial zone under the Town Planning Act or in an industrial estate zone;
d. the commercial property investment cost (excluding the rental and lease premium) meets the minimum amounts of at least 20 million Baht;
e. the industrial property is for the project that is eligible for investment promotion from the Board of Investment.

The 50-year lease also has some special characteristics as it can be used as a security for a mortgage, and can be inherited and transferred or sub-let to a third party without consent from the lessor. The 50-year lease is mandated by law to be made in writing and registered with the authority, otherwise void.
In May 2018, the Eastern Special Development Zone Act, B.E. 2561 (2018) (the "**EEC Act**") came into force and allows a 50-year lease or sub-lease of land or immovable property within the special development zone (Eastern Economic Corridor, or the "**EEC**") with another 49-year period for renewal from expiration of the initial lease term. It is important to note that only certain businesses in "Targeted Industries" specified by the government i.e. digital, aviation, smart electronics, etc., are eligible to the aforementioned lease and operate its businesses in the EEC. Please see Chapter 8 for more details.

C. Sap-Ing-Sith[3]

Sap-Ing-Sith is the new type of right to use immovable property according to the Sap-Ing-Sith Act, B.E. 2562 (2019). Although Sap-Ing-Sith is similar to the leasehold rights in some respects, there

[3] "Sap-Ing-Sith" is a Thai word which literally means "the property which adheres to right". Sap-Ing-Sith is the new type of right, close to ownership, to use certain type of immovable properties. Sap-Ing-Sith right shares some similarities with the leasehold right but it is not a lease according to the CCC.

are several key differences, as the purposes of Sap-Ing-Sith is to surpass certain restrictions and limitations for the ordinary lease under the CCC, and the lease under the Lease of Immovable Property for Commercial and Industrial Purposes Act.

Sap-Ing-Sith must be made in writing and registered with the relevant land office, which will issue a Sap-Ing-Sith certificate. The maximum duration for the Sap-Ing-Sith rights is 30 years. The immovable property which Sap-Ing-Sith rights can be registered are limited to land which is represented by a title deed, land with buildings constructed on a land represented by a title deed, and condominium units as defined in the Condominium Act. Only the owner of those categories of immovable property can register a Sap-Ing-Sith in favor of another person (the "Sap-Ing-Sith Holder").

Sap-Ing-Sith rights is transferrable, inheritable and can be used as a security for a mortgage. Sap-Ing-Sith Holder also has the right to alter the Sap-Ing-Sith property without consent of the owner, and the ownership of those newly added or constructed part of the Sap-Ing-Sith property belong to Sap-Ing-Sith Holder for the duration of Sap-Ing-Sith. Further, the Sap-Ing-Sith Holder is liable to Sap-Ing-Sith property as if they were the owner, except for the right to follow and recover the property from any person not entitled to seize Sap-Ing-Sith property and the right to prevent any unlawful interference with Sap-Ing-Sith property, which the owner of the Sap-Ing-Sith property still maintain those rights.

D. Proprietary Rights

Proprietary rights or real rights mean the rights with respect to the land which survive the transfer of ownership of the land and, in general, the effectiveness and the release or discharge of such property rights would require registration with the land authority.

The proprietary rights are mainly provided and governed by the provisions of the CCC which include the following:

(i) Servitude: the concept of servitude involves one land (servient land) being subject to certain burdens, for the benefits of another plot of land (dominant land), e.g. access to the public road.

(ii) Superficies: under the superficies, the owner of the land grants the right to another person to own the structures or plantations on or beneath the land.

(iii) Usufruct: the owner of the land may grant the usufruct to any person to occupy or take the benefits from the land.

(iv) Charge on immovable property: the land may be subject to a charge entitling the beneficiary to a periodical performance or specified use and various benefits.

E. Official Fees and Applicable Tax

The official fees and general tax rate for common transactions relating to land are shown below.

[Figure 9-1] Official Fees and Applicable Tax

Transaction	Registration Fees	Tax and Duties		Responsible party
		Individual	Corporate Entity	
Sale	2% of the Assessed Price[4],	**Withholding tax**: progressive rate between 5-35% on Assessed Price after deduction with expenses depending on number of holding year **Specific Business Tax (SBT) and Local Tax**: 3.3% of Assessed Price or Selling Price, whichever is higher **Stamp Duty (if not subject to SBT)**: 0.5% of Assessed Price or selling price, whichever is higher	**Withholding tax**: 1% of Assessed Price or Selling Price, whichever is higher **Specific Business Tax (SBT) and Local Tax**: 3.3% of Assessed Price or Selling Price, whichever is higher	Under the law, the parties will be equally liable for the registration fee while tax and stamp duty will be responsible by the seller. By the market practice, the buyer is usually responsible for the registration fees, while the seller is usually responsible for applicable taxes and duties.
Lease	1% of rental fees throughout the term of lease	**Stamp Duty**: 0.1% of rental fees throughout the term of lease (lease of land for agriculture is exempted)	**Stamp Duty**: 0.1% of rental fees throughout the term of lease (lease of land for agriculture is exempted)	Under the law, the parties will be equally liable. By the market practice, the lessee is usually responsible.
Mortgage	1% of mortgage amount but not more than 200,000 Baht	None	None	Under the law, the parties will be equally liable. By the market practice, the mortgagor is usually responsible.
Servitude, Superficies, Usufruct, Charge on	**With Consideration**: 1% of such consideration	**Stamp Duty**: 0.5% of such consideration	**Stamp Duty**: 0.5% of such consideration	Official fees for these particular registrations are normally subject

[4] **Assessed Price** means the value of the property as assessed by the Tresury Department and announced by the Land Department (typically can be substantially lower than the market value).

Transaction	Registration Fees	Tax and Duties		Responsible party
		Individual	Corporate Entity	
immovable property	**Without consideration**: 50 Baht per plot	None	None	to negotiation of parties. However, it is common to find that it is often borne by the recipient of right.

(4) Real Estate Development

There is a wide range of businesses that involve immovable property, including factories operation, development of residential and commercial immovable property. In order to operate a business that utilizes immovable property, the operator must also apply for and obtain all relevant licenses and approvals applicable to the ownership and construction of each type of immovable property.

Under Thai laws, construction activities are governed by the Building Control Act, B.E. 2522 (1979) (the "**Building Control Act**") as a general law. In addition, regulations issued by each municipality also cover construction in each area.

If buildings[5], as defined under the Building Control Act, are to be constructed in an area governed by the Building Control Act, the operator shall apply for a construction license with the competent local administrative office.

Section 21 of the Building Control Act requires that any person who wishes to construct, alter or remove building must apply for a permit from the local competent officer or must first notify the local competent officer of such intention and proceed with Section 39 bis (the initial acknowledgement under Section 39 bis).

The differences between the construction license issued under Section 21 and the initial acknowledgement under Section 39 bis are principally that, in case the developer chooses to apply for a construction license, the license has to be issued prior to the commencement of the construction. The consideration period for the issuance of the license may range from 45 days to 135 days in case there are extensions of the consideration period by the competent officer. Whereas, if the developer decides to notify the local competent officer under Section 39 bis and the officer has accepted such notice, the developer may commence the construction activities after the receipt of the letter of acknowledgement of notice which normally takes 3 – 7 days.

By using Section 39 bis, the project developer may bare the risk of the objection of the construction of the building by the competent officer and may have to alter the construction if the officer inspects the site or documents and finds that any part of them is inaccurate or fails to comply with regulations during the 120 days from the date of issuance of the letter of acknowledgement of notice or from the date of commencement of the construction.

Apart from the Building Control Act, real estate development projects in Thailand are in diverse forms and purposes of residence and non-residence. Prior stage of obtaining permission for construction is critical to verify whether the project land is eligible for development under the Town Planning Act.

[5] Under the Building Control Act, "Building" is broadly defined as a place which a person can stay in and use, e.g. houses, barns, warehouses, offices, etc. That includes arenas for people's gathering, dams, bridges, tunnels, ports, signs or any construction for erecting signs of the specified size, and space or any constructions for car parking.

Moreover, a prerequisite steps to be undertaken is the preparation of environmental impact assessment report (the "**EIA report**") or initial environmental examination report (the "**IEE report**") as the case may be, if applicable. Project developers may be required to prepare an EIA report or IEE report or any other report for approval from the relevant governmental agency if the project is specified under the relevant regulations, for example, land allocation, hotels, and residential buildings. Note that commencement of construction before the approval of the EIA report (if required) shall impose heavy fines of up to one million Baht and daily fines of up to 100,000 Baht on the developer during the period that the violation continues.

Residential projects include condominiums, apartments, serviced apartments, dormitories, long-term lease residential buildings, and housing estates. Only certain types of residential projects are regulated by specific legislations, e.g. dormitories, housing estates, and condominiums where prerequisite authorization will be required in addition to building construction control.

In case the project is not subject to a specific authorization, laws and regulations on public health shall regulate the specified business that is detrimental to health while the law on building control regulates construction matters.

As to non-residential projects, operations of hotel, hospital or medical institution, school, entertainment or meeting hall, restaurant, canteen, marketplace, gas station and so on are restricted unless license, permit, approval or authorization under specific law is granted.

(5) Acquisition of Immovable Property and Immovable Property Businesses by Foreign Investors

A. Foreign Capital Restrictions on the Acquisition of Immovable Property

Land ownership by foreigners (including foreign corporations) is not permitted in Thailand as a general rule[6] (Section 86 of the Land Code). Violations will result in a fine not exceeding 20,000 Baht or imprisonment for a term not exceeding two years, or both (Section 111 of the Land Code). Here, "foreigner" under the Land Code includes Thai companies with foreign ownership of over 49%[7] of shares of the registered capital under the Land Code, or Thai companies for which foreigners account for the majority of shareholders (Section 97(1) of the Land Code).

However, there are exceptions in which foreigners are able to own land. The main exceptions are described below.

- In terms of ownership of land for residential purposes, it is possible to acquire up to one rai (1,600 square meters) of land after gaining permission from the authorities as long as certain requirements are fulfilled, such as an investment of at least 40 million Baht for certain businesses in Thailand (Section 96 bis of the Land Code).

- Based on the Investment Promotion Act, B.E. 2520 (1977), the Board of Investment of Thailand (the "**BOI**") can permit the acquisition of land ownership rights by foreigners that fulfill certain requirements.

[6] While the Land Code stipulates that foreigners may own land based on the provisions of a treaty with a foreign country (Section 86 of the Land Code), no such treaties have been entered into at this point in time.

[7] In relation to the foreign capital restrictions based on the FBOA that was explained in Chapter 1 above, as it is stipulated that Thai companies with foreign ownership of 50% or more of shares composing capital constitute a "foreigner", one needs to be aware of the slight difference in the standards for foreign capital restrictions for land acquisition.

- Based on the Act on Industrial Estate Authority of Thailand, B.E. 2522 (1979), the Industrial Estate Authority of Thailand (the "**IEAT**") can permit the acquisition of ownership rights for land within industrial estates by foreigners that fulfill certain requirements.

- Foreigners that have been granted petroleum exploration rights under the Petroleum Act, B.E. 2514 (1971) can acquire the land ownership rights necessary for operations.

- Based on the EEC Act, the approved business operators can own land within the promoted zone when certain requirements are fulfilled.

- Foreigners who are inheritors can inherit land after gaining permission from the authorities if certain requirements are fulfilled (Section 93 of the Land Code).

In the same manner as the foreign capital restrictions based on the Foreign Business Operations Act, B.E. 2542 (1999) (the "**FBOA**") explained in Chapter 1, in some cases various practical schemes will be considered to avoid the application of foreign capital restrictions on the acquisition of land. An appointment of a nominee for foreigners to effectively acquire land is prohibited,[8] and if any such transactions occur, the authorities have the ability to order a transfer of land ownership rights (Section 96 of the Land Code).

As described above, while there are foreign capital restrictions on the acquisition and holding of land, there are no such restrictions on buildings, and accordingly foreigners can acquire and hold ownership rights for buildings. However, for condominiums, under the Condominium Act, ownership by foreigners is permitted for up to 49% of the total salable space of a particular condominium (Section 19 bis of the Condominium Act). When transferring a condominium unit to a foreigner, the seller shall notify the competent authorities of the name of the foreigner together with the proportion of space of all units already owned by foreigners. If the ratio of condominium ownership by foreigners exceeds 49% as a result of such a transaction, registration will be denied (Sections 19 ter and 19 quarter of the Condominium Act). Note that approved business operators under the EEC Act may own condominium units in excess of the foreign ownership restrictions under the Condominium Act.

B. Immovable Property Businesses, the FBOA and the Land Code

All land trading businesses by foreigners are prohibited under the FBOA, and as a general rule it is necessary for foreigners to acquire permits from authorities to engage in the construction business, intermediary business, and other service businesses. The scope of "other service businesses" is broad, and for this reason a separate confirmation is required depending on the specific details of the immovable property development business. As described above, the definition of a "foreigner" under the FBOA differs slightly from the definition of a "foreigner" in the foreign capital restrictions for land ownership. For example, if a foreign corporation holds 50% or more of capital, it constitutes a "foreigner" under the FBOA.

The FBOA also provides the prohibition against acting as "nominee" for a foreigner. The key factor to ensure compliance with the FBOA is that the actual foreign shareholding in any Thai company

[8] For the purpose of evading foreign capital restrictions regarding land ownership, based on a notification from the land office, the source of funds for purchasing shares by Thai shareholders can be subject to investigation in cases in which foreigners are shareholders or directors of companies that acquired land for the purpose of an immovable property business, or other cases in which there are suspicions of appointment of nominee (for example, if a foreigner is the authorized signatory or promoter, if foreign shareholders have control of the general meeting of shareholders, or if the Thai shareholders are lawyers or brokers). In addition, if a corporation acquires land for an amount exceeding registered capital with a land mortgage, that corporation will be subject to an investigation on the source of funds for share purchases.

covered by the FBOA is less than 50%. In addition, some mechanisms put in place behind the actual shareholding are not directly indicated as purposes of compliance with the FBOA (so long as there is no document actually states that Thai shareholder was acting on behalf of a foreign shareholder).

Accordingly, it is very common to find shareholding structure with the number of elements, such as source of fund, reduced dividend rights, call options, management control and bank signatory, including restricted voting rights for Thai shareholders (eg. one vote for every ten shares compared to foreigner having one vote for each share), so-called the "Elements of Concern".

The provisions of the Land Code also contain the concept of the "nominee" prohibition. The land office monitors company structuring mechanisms to assess if it inclines to be a nominee structure in contravention of the Land Code whilst the Ministry of Commerce (the "**MOC**"), a supervisory and regulatory of the FBOA, is competent authority that would take any action against nominee structure in breach of the FBOA. The Land Department tends to follow the MOC in using the same elements of concern (including restricted voting rights for Thai shareholders) to investigate company owning land.

C. Investment Promotion for Foreign Investor Regarding Land Ownership

The key measures to attract foreign investment to the area of Thailand are mainly from investment promotion scheme from the BOI and the IEAT. In addition, the EEC Act also offers incentives to foreign investors to own land in the promoted zone in Chachoen Sao, Rayong and Chonburi provinces (and in other areas, as prescribed by Royal Decree as special development zones, in the eastern part of Thailand).

Incentives offered to promoted entities from both BOI and IEAT can be categorized into (i) tax incentives and (ii) non-tax incentives that include authorization to own land required for business operations regardless of any other contrary laws.

Specific condition of the BOI provides that such land must be disposed within one year after the promoted business is terminated or ended anyhow, otherwise the Director-General of the Land Department shall be empowered to dispose such land. The same concept applies to the business operators within the EEC who stop its operation in EEC or have not operated any businesses within 3 years after acquiring the ownership of such land in EEC.

As a slight difference, in case a business operator who is non-Thai national and granted authorization to own land under IEAT scheme dissolves its business or have its business transferred, the land must be disposed to IEAT or the transferee within three years from the date of dissolution or transfer as the case may be.

(6) Land and Buildings Tax Act

A. General Provisions

The Land and Buildings Tax Act, B.E. 2562 (2019) (the "**Land and Buildings Tax Act**") came into effect on 13 March 2019. The tax collection under the Land and Buildings Tax Act shall be effective on and from 1 January 2020, onwards. Upon the effective date of the Land and Buildings Tax Act, the laws on House and Land Tax and Local Maintenance Tax (the "**Old Laws**") shall be repealed. It should be noted at the outset that the tax payment under the Land and Buildings Tax Act shall not prejudice the duties to pay taxes on other regulations (if any) e.g. inheritance tax and gift tax. And, the provisions regarding the Old Laws, which were repealed by the Land and Buildings Tax Act, shall

continue to be enforceable for the purpose of land, building and local maintenance taxes collections that is required to be paid or payable or in arrears or required to be refunded before 1 January 2020.

B. Taxable Properties

The taxable properties under the Land and Buildings Tax Act are land, buildings and condominium units. There are certain properties that are exempted from collections of taxes under the Land and Buildings Tax Act e.g. state's properties used for the public's interest, the properties of embassies, private properties used for the benefit of the public, etc.

C. Tax Base

The tax base for taxable properties shall be calculated from the total value of properties[9] according to official property's appraised value, in which shall be in compliance with the value used for the calculation of land or building registration fee under the Land Code as will be approved and announced by the Commission on the Assessment of the Property's Appraised Value and the Treasury Department.

D. Tax Exemption

The following property shall be exempted from the value of the tax base in tax computation:

(i) In the case of the property owned by individuals and used for agricultural purpose with the appraised value of not exceeding 50 million Baht.

(ii) In case of the land and a building locating on such land that are used for residential purpose, owned by individuals as shown in the house registration certificate on 1 January in that tax year and having the appraised value of not exceeding 50 million Baht.[10]

(iii) In case of the building used for residential purpose, owned by individuals as shown in the house registration certificate on 1 January in that tax year and having the appraised value of not exceeding 10 million Baht.[11]

E. Tax Reduction

There is also a room for tax reduction of up to 90% of tax under the Act for reasons of economic necessity or other social contexts where this reduction shall be made through Royal Decrees.

According to the Royal Decree on tax reduction, the tax reduction can be categorized into two groups as follows;

(i) 50% reduction of the amount of tax payable, as follow:

a. Land and building, building, or condominium unit that are used for residential purpose, owned by individuals as shown in the house registration certificate, which specifically acquired before 13 March 2019;

[9] In the case when there are many plots of land connecting to one another and such plots of land are owned by the same person, the tax base shall be calculated from the combined values of all the connected plots of land. This provision is to prevent any subdivision of land where people try to lower the price of properties in order to avoid tax collections.

[10] This exemption only applies to the first house or the one with the owner's name in the house registration.

[11] Same as the previous, this exemption only applies to the first house or the one with the owner's name in the house registration.

b. Land which is the location of power plant and a power plant, however, including other lands or structures utilized in connection with power generation; and

c. Land and structures which are used as dam and area in connection with dam, used for power generation;

(ii) 90% reduction of the amount of tax payable, for example:

a. Land or structures which is an immovable property awaiting sale as acquired by the financial institution or asset management company for not more than five years from the date of acquiring;

b. Land or structures of an operator which is under development as a housing or industrial project under the law governing land allocation for not more than three years from the date of obtaining permission to proceed with said land allocation;

c. Land or structures of an operator which is under development as a condominium building under the law governing condominium building for not more than three years from the date of obtaining permission to proceed with the construction of said condominium building;

d. Land or structures of an operator which is under development as an industrial estate under the law governing industrial estate authority of Thailand for not more than three years from the date of obtaining permission to said establish industrial estate; and

e. Land or structures already implemented under the law governing land allocation, the law governing condominium building, or the law governing industrial estate authority of Thailand, and the operator who has obtained permission under said laws has not yet sold the property for not more than two years from 13 March 2019.

F. Tax Rates

The Land and Buildings Tax Act imposes different ceiling tax rates depending on the purpose of use of the properties. The purposes can be categorized into four groups as follows:

(i) Agricultural purpose, i.e. rice planting, farming, animal domestication, aquaculture, and others which is to be defined in Ministerial Regulations (the ceiling tax rate of 0.15%);

(ii) Residential purpose (the ceiling tax rate of 0.3%);

(iii) Purposes other than (a) and (b) e.g. commercial and industrial (the ceiling tax rate of 1.2%); and

(iv) Un-utilized land and building (the ceiling tax rate of 1.2%).

It should be noted that definitions of “residential” and “un-utilized” shall be further specified in Ministerial Regulations.

The tax rates will be subsequently announced by a Royal Decree.[12] The Land and Buildings Tax Act also allows the local Subdistrict Administrative Organization to set the rates higher than those announced by a Royal Decree, but such rates cannot be higher than the tax ceiling under the Land and Buildings Tax Act.

In any case, the following rates will apply for the tax years 2020 and 2021. (Save for land or building used for agricultural purposes and owned by individuals is exempted from tax under the Land and Buildings Tax Act during 2020 to 2022.)

[Figure 9-2] Tax Rate for the tax years 2020 and 2021

Purpose of utilization	Appraised Property Value (Baht)	Tax Rate (percent)	Remark
Agricultural	**Ceiling tax rate of 0.15%**		
	75 million and below	0.01	Land and building owned by an individual will be exempted during tax year 2020 – 2022.
	More than 75 million to 100 million	0.03	
	More than 75 million to 500 million	0.05	
	More than 500 million to 1,000 million	0.07	
	More than 1,000 million	0.1	
Residential	**Ceiling tax rate of 0.3%**		
	25 million and below	0.03	Land and building owned by an individual as shown in the house registration certificate.
	More than 25 million to 50 million	0.05	
	More than 50 million	0.1	
	40 million and below	0.02	Only building owned by an individual as shown in the house registration certificate.
	More than 40 million to 65 million	0.03	
	More than 65 million to 90 million	0.05	
	More than 90 million	0.1	
	50 million and below	0.02	Other residential land and building
	More than 50 million to 75 million	0.03	
	More than 75 million to 100 million	0.05	
	More than 100 million	0.1	

[12] As of February 2020, the Royal Decree is not yet promulgated.

Purpose of utilization	Appraised Property Value (Baht)	Tax Rate (percent)	Remark
Commercial (other than agricultural and residential purposes)	**Ceiling tax rate of 1.2%**		
	50 million and below	0.3	
	More than 50 million to 200 million	0.4	
	More than 200 million to 1,000 million	0.5	
	More than 1,000 million to 5,000 million	0.6	
	More than 5,000 million	0.7	
Un-utilized lands and buildings	**Ceiling tax rate of 1.2%**		
	50 million and below	0.3	The tax rate will increase 0.3% every 3 years for property left unused but will not exceed 3% in total.
	More than 50 million to 200 million	0.4	
	More than 200 million to 1,000 million	0.5	
	More than 1,000 million to 5,000 million	0.6	
	More than 5,000 million	0.7	

G. Tax Payment

The owner or the occupant of land or building on the 1st of January of each year shall be the person who has the duty to pay tax on such year.

The local government office has the duty to announce the official property's appraised value, the tax rate and other information necessary for the collection of tax at its office before the 1st of February of each year and has to publish the property's appraised value at their offices place and sending a filing letter specifying the amount of tax such person needs to pay within February of each year.

Tax payment under the Land and Buildings Tax Act shall be made to the local government office where the properties are located within April of each year starting from 2019. However, for the tax year 2020, the payment period shall be extended to within August of 2020 due to the delayed promulgation of subordinate laws of the Land and Buildings Tax Act.

In the case when an owner of taxable properties fails to pay tax within the specified time, such person will be subject to pay an extra charge of 1% per month of the overdue amount (tax in arrears) and a fine of 40% of the tax in arrears (extra charge excluded).[13]

[13] The fine may be reduced as follows; (i) if such person has paid the tax in arrears before receiving a warning notice from the local government office, the fine shall be reduced to 10% of the overdue amount, or (ii) if such person has paid the tax in arrears after receiving a warning notice from the local government office but within the date specified in such notice, the fine shall be reduced to 20% of the overdue amount.

Under the Land and Buildings Tax Act, transfers of ownership or registration of possessory rights on taxable properties will be prohibited if there is evidence of tax in arrears found by the local government office; unless such transfer is resulted from the sale by auction executed by the court's decision.

H. Tax Relief For tax years 2020 to 2022

The Land and Buildings Tax Act provides a tax relief for property that has been subject to the Old Laws in case the tax liable for tax years 2020 to 2022 is higher than the property tax liable for tax year 2019, the current property taxpayers are allowed to pay property tax liable for tax year 2019 plus a portion of the additional tax (as set forth below) which would be due according to the land and building tax as follows:

- Year 1: 25% of the remaining tax;
- Year 2: 50% of the remaining tax; and
- Year 3: 75% of the remaining tax.

Land or building used for agricultural purposes and owned by individuals is exempted from tax under the Land and Buildings Tax Act during 2020 to 2022.

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CHAPTER 10

REAL ESTATE INVESTMENT TRUST (REIT)

CHAPTER 10 | REAL ESTATE INVESTMENT TRUST ("REIT")

(1) Thai REIT History

After the collapse of the Thai property sector in 1996, a contributing factor to the Tom Yum Kung Crisis in 1997, Thailand's government attempted to stimulate the Thai economy through implementation of various strategies. For the real estate sector, the Securities and Exchange Commission of Thailand (the "**SEC**") helped by adapting existing mutual fund regulations to result in establishing a vehicle for Property Fund for Public Offering (the "**PFPO**"). This initiative not only helped the Thai economy, but PFPOs also became popular financial instruments for investors, and thus enhanced growth of the Thai property market overall.

PFPOs attract investors by enabling them to partially own large real estate projects through the issuance and offer of investment units. Funds raised from investors are used to refinance the existing project and enable the development of new projects, enhancing growth in a shorter time than through traditional property project development. PFPOs had also been a popular investment vehicle for Thailand's property developers for some time because of the tax benefits attached. The establishment of PFPOs had rapidly increased with 39 PFPOs trading on the Stock Exchange of Thailand (the "**SET**") to date.

Nevertheless, PFPOs also have some disadvantages. The laws and regulations when PFPOs were established focused heavily on investor protection, such as limiting types of assets in which a PFPO could invest, restricting the debt ratio and qualifications of fund managers, which made PFPO a strictly regulated vehicle for real estate investment. PFPOs also do not conform with similar types of investment vehicles used internationally. As such, under an SEC Notification in 2012, the Real Estate Investment Trust (the "**REIT**") was established. REITs are a more commonly and widely used vehicle, which involve an immovable property investment system that is easier to use and more transparent.

Though the same overall objectives and concepts for fund raising are shared between REITs and PFPOs, a REIT is a trust that does not include a corporate entity. For REITs, the ownership of property is held by a trustee on behalf of the REIT, and the REIT beneficiaries are trust unitholders.

In order to encourage establishment of new REITs and the conversion of PFPOs to REITs, relevant regulators enacted various laws and regulations. In 2014, the SEC prohibited establishment of new PFPOs and capital increases in PFPOs. Taxes and registration fee incentives for REIT conversions were also issued by the Revenue Department. Such taxes and fee incentives ended in 2017. Since the establishment of such incentives, REITs have become the preferred investments with 24 REITs in the market as of 31 December 2019.

The main characteristics of the REIT scheme in Thailand are as follows:

- REITs in Thailand are trust-type schemes based on the Trust of Transactions in Capital Market Act, B.E. 2550 (2007). The REIT in Thailand is not a corporation. Accordingly, the trustee of a REIT is formally the assets holder.

- The asset invested in consists of, (i) immovable property (freehold rights or possession rights) or (ii) the shares of companies that hold immovable property. The total value of the immovable property invested in must be at least 500 million Baht.

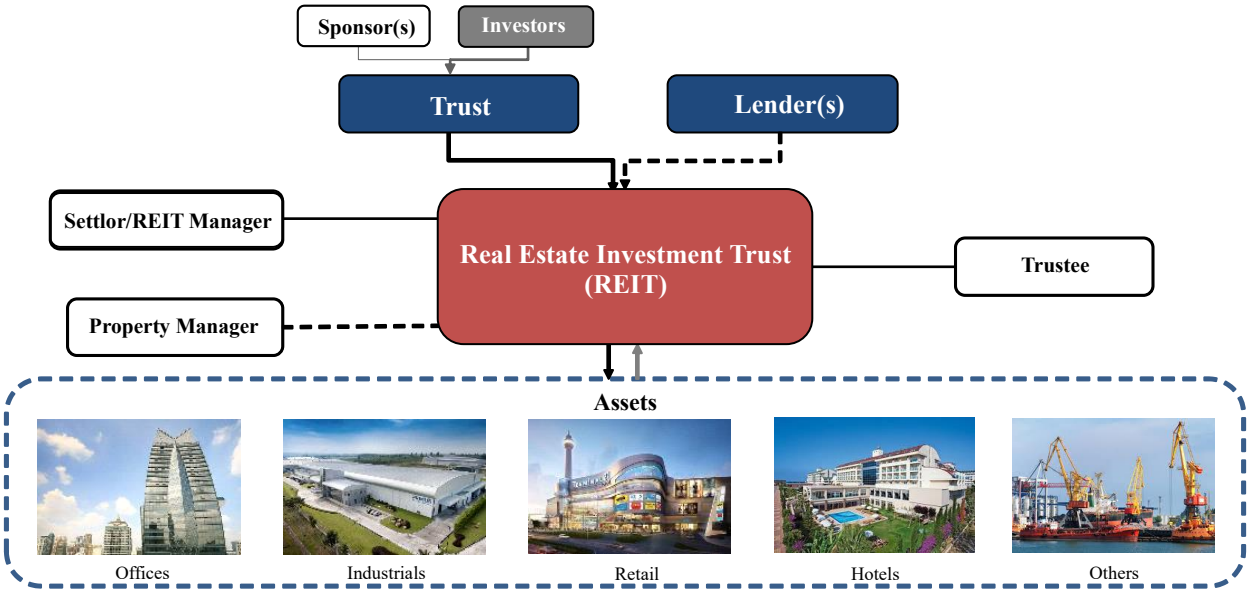
- The trust beneficiary rights units issued for REITs in Thailand must be listed on the SET; private placements of REIT units for REIT establishment are not permitted. Based on the regulations of the SEC, it is necessary to maintain at least 250 holders of trust beneficiary rights certificates, and the percentage of ownership by a single investor cannot exceed 50%. In addition, in accordance with the SET regulations, sales are not permitted unless 15% or more of total holdings are with free float unitholders. There is also a minimum offering amount for trust beneficiary rights certificates, which is at least 500 million Baht.

Another advantage of REITs is the ability to borrow money and use its assets as collateral. REITs can borrow from financial institutions up to 35% of their total asset value, or 60% if the REIT itself has an investment grade. This makes REITs attractive from investors perspective. REITs can also raise funds by issuing bonds, which can be seen more often in today's market.

(2) REIT Overview

An overview of the REIT scheme in Thailand is shown in Figure 10-1 below. First, the settlor offer for sale of REIT units after obtaining approval for sale from the SEC. Then the settlor enters into a trust deed with the trustee, and a trust is established. After the trust is established, the settlor manages and operates the REIT as the REIT manager. Trust beneficiary rights certificates are issued to investors, and the trustee utilises the proceeds from issuing these certificates (and borrowings) as the funds for investing in immovable property. The trustee distributes the profits gained from the immovable property to investors.

[Figure 10-1] Overview of the Thai REIT Scheme



- **Settlor / REIT Manager**

  Once a REIT is established, the settlor will become a REIT manager. A REIT manager's role is to conduct management and operation of the REIT. A REIT manager does not have to be an asset management company. It can be a private company being qualified under the SEC regulations.

- **Trustee**
  A trustee is a financial institution, securities company or affiliate of such company with a license to hold assets on behalf of the REIT. The trustee also supervises and monitors the REIT manager to ensure compliance with the law and the trust deed.

- **Sponsor**
  Sponsor is the asset owner injecting asset(s) into a REIT. A sponsor will usually become one of the major trust unitholders.

- **Property Manager**
  The property manager's role is to manage the assets in day-to-day operations under the scope of work empowered to the property manager by the REIT manager.

- **Financial Advisor/Underwriter**
  Apart from advising and engineering the transaction, the financial advisor is required to prepare and sign the registration statement and prospectus. Underwriter of REIT units, who proposes to effect the offering for sale of the REIT units for the account of the REIT, usually come from the same organisation as the financial advisor.

- **Lender(s)**
  The lender (or lenders in a syndicated loan) is usually involved in a REIT through injection of debt for acquisition of assets.

- **Appraisers**
  At least two independent appraisers are required by the SEC regulations to appraise the assets to be invested in by a REIT.

- **Auditor**
  Sometimes, auditors will be involved in a REIT where the underwriters and / or the REIT manager wish to publicize the proforma (projected financial statement).

- **Legal Advisor**
  The legal advisor for the transaction will be advising the REIT, Trustee, Settlor/REIT Manager and the Sponsor in relation to transaction, especially to balance the needs and requirements of the REIT, Trustee, REIT Manager and the Sponsor to be in line with legal requirements, rather than to optimize the commercial interest of either party.

(3) Thai REITs Today

The Capital Market Supervisory Board has issued a regulatory framework for establishing REITs as a new vehicle for financing real estate investments (the "**REIT Regulations**"). From January 2014, no PFPO has been allowed to be set up, so REITs have become the only vehicle in the Thai capital market which enable public investors to invest in real estate projects.

While REITs are subject to a different tax treatment, one that is less favorable than that offered to PFPOs in the past, REIT regulations provide more operational and investment flexibility and opportunity. One such incentive is that a REIT is allowed to invest in real estate projects in Thailand and overseas through acquisition of shares of such companies, subject to certain conditions. The investment in overseas assets makes it attractive for Thai and foreign owners, and for investors overall, to expand investment opportunities.

[Figure 10-2] Details of the REIT Scheme, Rules and Certain Regulations in Thailand

Topic	Details
Establishment	REITs in Thailand are a trust-type scheme based on the Trust of Transactions in Capital Market Act, B.E. 2550 (2007) and relevant notifications issued by the SEC. REITs in Thailand are not corporations. Accordingly, for REIT schemes in Thailand, the trustee of a trust is formally the asset holder.
Name	Must reflect the main characteristics and investment policy of the trust, i.e. freehold, leasehold or mixed investment. This depends on the investment plan of the REIT itself.
Minimum Size	The paid-up capital after unit offering must be not less than 500 million Baht.
Listing	Shall be listed on the SET within 45 days from the last offering date.
Tranche	Must be able to launch many types of unit trusts, which provide different rights and benefits (multi-tranche). (Must comply with the relevant regulation and trust deed.)
Main Investment	• All kinds of real estate whereby the main source of income shall be in the form of rent. • May invest in real estate domestically or abroad. • Real estate already generating income must be over 75% of the total value of units offered plus loans (if any). • Invests no more than 10% of net asset value (the "**NAV**") in green field projects.
Types of Investment	Two investment types • Direct investment by acquiring ownership or possession of the assets. • Indirect investment by investing through a company in which the REIT holds: (a) not less than 99% of the total shares and voting rights of the company; (b) not less than 75% of the total shares and voting rights of the company, in a case that the asset owner is not a related person to the REIT manager. If there is more than one level of subsidiaries, calculated on a pro rata basis, the REIT must hold not less than 51% of the total shares of the company; or (c) not less than 40% of the total shares and voting rights of such company, in a case that the REIT is unable to hold shares in the company up to the ratio of 99% or 75% of the total shares and voting rights of the company because of restrictions under relevant laws (i.e. foreign restrictions on holding titles of plots of land).
Investment Policy	• Leasing real estate without operating other businesses, such as hotels and hospitals. • Lessees must not use the real estate to operate immoral or illegal businesses.

Topic	Details
	• In the case of leasing real estate for the operation of other businesses, the portion of rent dependent on the operating results of the lessee (Variable Rent) must be less than 50% of the fixed rent.
Leverage Limit	• Not more than 35% of the total assets; in the case that the REIT obtains an investment grade, not more than 60% of the total assets. • In accordance with the trust deed. • May collateralize REIT assets. • Other commitments or agreements shall be customary commercial transactions or ordinary course of business transactions.
Distribution and Allocation of REIT Units	• Must distribute trust units through an underwriter. • Based on the regulations of the SEC, it is necessary to maintain at least 250 holders of trust beneficiary rights certificates, and the percentage of ownership by a single investor cannot exceed 50%. In addition, in accordance with the SET regulations, sales are not permitted unless 15% or more of total holdings are with free float unitholders. • Trust units must be distributed to individual unitholders in accordance with the listing criteria of the trust (not less than 20% of all trust units - in the case of tranches, 20% applies to each tranche).
Unit Holding Restriction for Any Person or Group of Persons	Must not exceed 50% of the total number of trust units (in the case of tranches, 50% applies to each tranche).
Unit Holding Restriction for Foreign Investors	In the case where the REIT invests in real estate in Thailand, the unitholding of foreign investors shall be in accordance with laws or regulations relating to such real estate. **Land Code:** A juristic person whose shares constitute its registered capital and are held by foreigners by more than 49% of its registered capital, or whose foreigners shareholders are more than one-half of the total number of its shareholders are considered as alien and shall be prohibited to hold land in Thailand.

(4) REIT Related Party Transactions and Conflicts of Interest

Similar to the listed companies, the regulators also recognize that related party transaction or transaction with conflict of interest might be implemented for the best interest of REITs and ultimately the trust unitholders and allow such transaction to be executed but subject to certain criteria and procedure in order to protect the REITs and the trust unitholders from exploitation of the related party to the REIT manager and the trustee.

In the market, REITs' assets are injected by sponsors who are the parent company of the REIT managers. Sponsors are also usually appointed to be the property managers of the REITs due to their experience and expertise in the assets.

A. Related Party Transaction

In order to enter into a related party transaction, the approval procedure is required as follows:

(1) having approved by the trustee that the transaction is in compliance with the trust deed and relevant laws;
(2) in case the value of the transaction (i) exceeds 1 million Baht or (ii) is 0.03% of NAV of the REIT or more, whichever value is higher, the approval of the board of directors of the REIT manager is required; and
(3) in case the value of the transaction (i) is 20 million Baht or more or (ii) exceeds 3% of NAV of the REIT, whichever value is higher, the resolution of approval of the trust unitholders' meeting passed by not less than 3/4 of the total number of votes of the trust unitholders who attend the meeting and are entitled to vote is required.

In case the transaction is an acquisition or a disposition of the principal asset, the calculation of the value has to be based on both value of the acquisition or disposition of the total assets of each project, which are ready to generate income, and value of other assets relating to such project.

In addition, the REIT manager also has to give an opinion on the characteristics of the transactions together with the rationale and clear supplementary information, while the trustee has the duty to give an opinion on the characteristics of the transactions regarding compliance with the trust deed and relevant laws. Nevertheless, the approval procedure as aforementioned in (2) and (3) can be exempt if the transaction has been clearly disclosed in the registration statement and the prospectus.

B. Conflict of Interest

The trustees usually are the subsidiaries of the commercial banks. In the case where the REITs use financing from the bank to invest in the assets, it usually can be seen that the bank, being a parent company of the trustee, is the lender to the REITs.

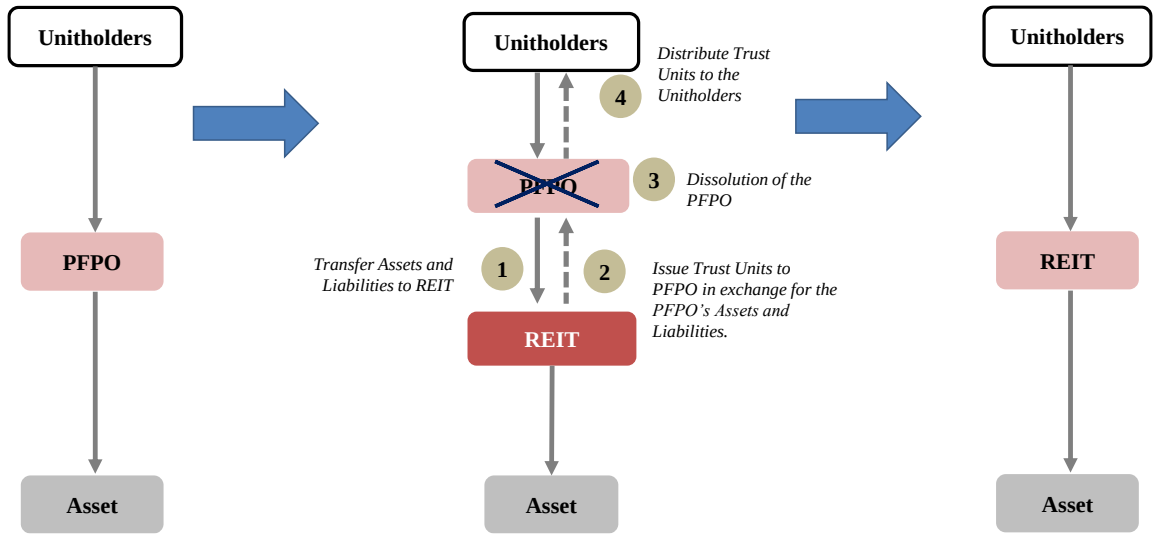
Trustees are not regulated by the same provision as the REIT manager. Transactions between the REIT and the trustee or its related party are regulated by a more extensive provision of conflict of interest. There is no specific definition of the conflict of interest or the related party of the trustee. In general, the trustee (including its related party) is prohibited to act in conflict of interest with the REIT regardless of whether such act is done for the benefit of its own or other persons. Exemptions are for the case (i) where it is the trustee's claim for its remuneration, or (ii) where the trustee is able to show that the REIT is managed with fairness under which all related information has been sufficiently disclosed to beneficiaries who thereafter hold no objection to the act. The disclosure can be done by publication on the SET for a reasonable period which shall not be less than 14 days, except in the case where such transaction is approved by the trust unitholders' meeting resolution, and such objection is to be proceeded at the time rendering for the trust unitholder's meeting resolution. If the trust unitholders object to the transaction in the amount of more than one quarter of the total trust units sold, the trustee shall not conduct or allow executing the transaction arising conflict of interest with the REIT.

(5) PFPO to REIT Conversion and Benefits

After the new set of regulations regarding REITs were issued in 2012 in substitution of those previously issued for PFPOs, existing PFPOs have been encouraged by the regulators to convert into REITs. As mentioned, since 2014, PFPOs may neither be established, nor increased capital for additional

investment. The regulators have encouraged existing players to shift from the PFPO scheme to the REIT scheme by way of conversion. To convert a PFPO to a REIT, a PFPO will transfer all of its existing rights and liabilities to a REIT. In consideration for the transfer of the PFPO's assets and liabilities, the REIT will issue trust units to the PFPO. After receiving trust units from the REIT, the PFPO will distribute all of the exchanged trust units to existing unitholders turning such unitholders of the PFPO into trust unitholders of the REIT.

[Figure 10-3] Conversion of PFPOs to REITs



The SEC issued the first regulation for the conversion of PFPOs to REITs in 2013. Unfortunately, the conversion was not, at that time, attractive to existing players due to the considerable cost of conversion and absence of some tax benefits under the REIT scheme. The conversion of PFPOs to REITs was actively supported by the SEC during the years 2016 and 2017. With the involvement of corporations with relevant regulators, certain benefits were created to attract existing PFPOs to consider conversion; such as exemption of taxes and fees for the transfer of assets from a PFPO to a REIT, or tax benefits from the increased value of the exchange of the investment units into trust units (if any) on the unitholders' level. Even though the aforementioned benefits expired on 31 December 2017, there are other benefits from the conversion of PFPOs to REITs as follows:

- **Enables further investment in additional assets and opportunity for growth**
  After 2014, all existing PFPOs were not allowed to raise capital to invest in additional assets, which made additional investment by existing PFPOs virtually impossible. Currently, the only available financial source for PFPOs for investment in additional assets is their respective and remaining working capital. The conversion will enable the existing PFPOs to make further investment in additional assets and provide opportunity for growth. REITs, however, can raise additional capital and / or get financing from banks to facilitate additional investments.

- **Diversify source of income from additional assets**
  With the ability to raise capital, REITs can utilize capital to diversify their portfolio by investing in a number of assets or by having various tenants from different sectors. This assists the REIT in not being reliant upon a single investment.

- **Gearing benefits**
  Regulations restrict PFPOs to leveraging 10% of NAV. After the conversion to a REIT, the leverage limit increases to 35% of the total assets and up to 60% of the total assets in the case that the REIT obtains an investment grade.

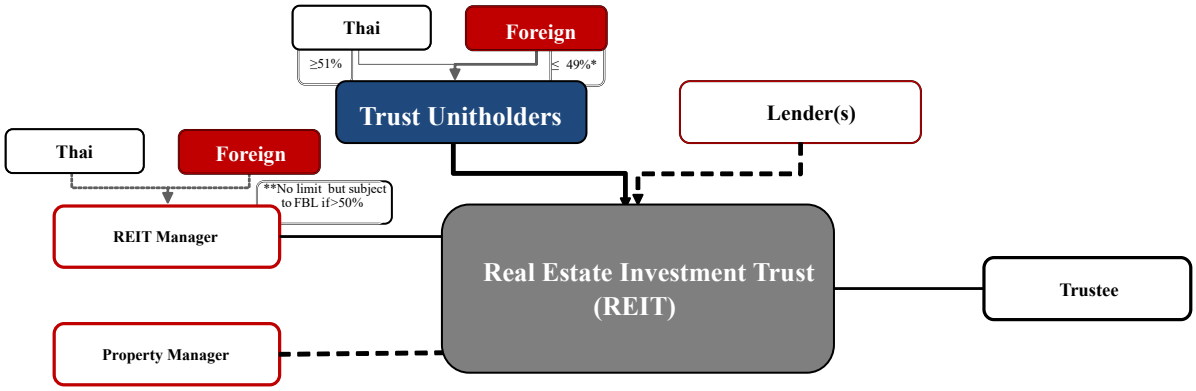
- **REIT structure is universal**
  Unlike PFPOs, REITs are more widely used internationally. Thus, REITs can be attractive to foreign investors.

- **Conversion Timeline**
  Generally, the whole process of conversion, starting from engagement of advisor until the listing of new trust units, will take approximately eight months.

(6) Foreigners' Involvement in REIT Transactions in Thailand

As previously explained, there are several parties involved in a REIT transaction such as a sponsor, a REIT manager, trustees, trust unitholders and advisors; foreigners can also participate in a REIT scheme in Thailand as shown in Figure 10-4 below.

[Figure 10-4] Foreigners' Involvement in REIT Transactions



Thai REITs investing in freehold rights over real estate in Thailand have foreign trust unitholding restriction capped at 49% as per the Land Code. This foreign unitholding restriction does not apply to Thai REITs investing in leasehold rights over real estate in Thailand. However, if such a REIT invests in mixed freehold and leasehold rights over real estate in Thailand, the REIT must apply the foreign trust unitholding restriction of 49%, similar to the REIT investing purely in the freehold rights.

A REIT Manager can be a foreign-owned company established in Thailand. However, such REIT management service is classified as "other service business" which prevents a foreign company from engaging in the same without a foreign business operation license under the Foreign Business Operations Act, B.E. 2542 (1999), List 3(21). Therefore, the foreign owned REIT Manager must apply for a foreign business operation license.

Moreover, unlike the PFPO, REITs are allowed to invest in real property both in Thailand and overseas. In the case of an investment in real property situated in a foreign country, involving foreign / Thai owners, the REIT Manager must conduct due diligence in respect of the acquisition and possession of such real property pursuant to the laws of the jurisdiction where the real property is situated. A legal opinion from a legal advisor specialized in such laws of the jurisdiction involved must also be procured in accordance with the REIT Regulations.

As for management of the real property situated in a foreign country, the REIT Manager may appoint a property manager to perform day-to-day operations as delegated by the REIT Manager, which can be specified in the Trust Deed and the REIT Manager Appointment Agreement. Although the investment in the foreign country is allowed, it is important to note that such investment may be

limited and / or restricted by relevant applicable laws of certain jurisdictions, such as foreign business laws, property laws, etc. It can also be seen that in the case where the REIT indirectly invest through holding shares in a special purpose vehicle (the "**SPV**"), the property manager is appointed by such SPV.

At this stage, there is no specific rule issued by the relevant authority in connection with the investment of the real property situated in a foreign country. However, with respect to this investment flexibility, we may begin to see the continuing growth of REITs representing a significant step in the development of Thailand's capital market.

(7) Summary of Comparison of PFPO and REIT

The information regarding a PFPO is primary information normally disclosed in the fund scheme. The details regarding a REIT would be as prescribed in the Registration Statement for the Offering for Sale of Trust Units and in the Trust Deed.

[**Figure 10-5**] **Comparison of PFPOs and REITs**

No.	Description	PFPO	REIT
1.	Legal Establishment	Laws relating to the Securities and Exchange	Laws relating to the Trust for Transactions in Capital Market
2.	Legal Structure	Mutual Fund	Trust
3.	Status	Juristic Person	Trust
4.	Minimum Size of Principal Asset Value	Not below 500 million Baht	Not below 500 million Baht (Total value of immovable properties acquired shall not be less than 500 million Baht)
5.	Number of Unitholders	Establishment period :not less than 250 Post-Establishment :not less than 35	Establishment period :not less than 250 Post-Establishment :not less than 35
6.	Registration in the SET	Investment units must be registered	Trust units must be registered
7.	Settlor	Fund Manager	Settlor of REIT, who will act as a REIT Manager after establishment of REIT
8.	Responsible Person for Management	Fund Manager	REIT Manager delegated by Trustee
9.	Name of Owner of Properties	PFPO	Trustee of REIT
10.	Name of Investment Contractual Party with Owner of Immovable Properties or the Right Grantor in Immovable Properties	PFPO	Trustee of REIT However, REIT Manager may enter into the agreements related to REIT management as assigned.
11.	Custodian of Properties	Fund Supervisor	Trustee of REIT
12.	Registrar	Fund Manager	Thailand Securities Depository Company Limited
13.	Type of Invested Assets	Positive lists according to SEC criteria	Not prescribed, but not subject to immovable properties to be

No.	Description	PFPO	REIT
			used as part of illegal or immoral business operations.
14.	Investment in Overseas Immovable Properties	Unable to invest	Able to invest
15.	Development of Immovable Properties	Able to develop (where the construction must be finished and no less than 80% of the investment value).	Able to develop (where the investment value of acquisition and development to complete for generation of benefits must not exceed 10% of total asset value of REIT - after the offering for sale of trust units).
16.	Insolvency as a Result of Fund Management	Can become insolvent due to its juristic person status.	Be ring-fenced from insolvent.
17.	Offering Criteria	At least 25% of total number of investment units must be offered to public investors, and equally allotted to every subscriber according to minimum number of subscribed investment units by continuous circulation until completing total number of investment units (Small Lot First).	Not prescribed - the offering can be allotted to the retail trust unitholders according to the criteria of trust units acceptance for registration in the SET (not less than 20% of total number of trust units / number of units in each tranche, if any).
18.	Limitation of Unit Holding for Person or the Same Group of Persons	Not allowed to hold more than one third of total number of investment units.	Not allowed to hold more than 50% of total number of trust units / number of units in each tranche (if any).
19.	Supervisory Guidelines	Similar to mutual fund	Similar to listed company
20.	Conduct of Annual General Meeting of Unitholders	Not prescribed	Conduct every year within four months from the ending date of the accounting year.
21.	Criteria of Acquisition and Disposal of Properties/Connected Transactions	The size starting from 100 million Baht or 3% of NAV of property fund, whichever is lower, PFPOs must obtain the resolution from the investment unitholders. Note that the transactions with the related parties are pursuant to the relevant notifications.	Acquisition of main assets of 30% or more of total assets or the related party transaction of 20 million Baht or more than 3% NAV (whichever is higher); the REIT must obtain the resolution from the trust unitholders.
22.	Free Float	Not prescribed	The retail trust unitholders shall hold the units of not less than 15% of total number of trust units/number of units in each tranche (if any).
23.	Tax	- Since 20 May 2019, a property fund has been included as Thai tax entity under Thai revenue code. However, only the income	- REIT is not subject to corporate income tax, but is subject to VAT, specific business tax and stamp duty.

No.	Description	PFPO	REIT
		under section 40(4)(a) (*Interest*) is required to be included for corporate income tax purpose. General rules of VAT, specific business tax and stamp duty are also applied to the property fund since 24 May 2017. - The investment unitholders are subject to various tax burdens on dividends based on types and qualifications of the unitholders. The key regulation providing an exemption for the corporate trust unitholder had been repealed in November 2019.	- Every type of trust unitholder is subject to income tax from distribution.
24.	Type of Investment	Closed-end property fund	Closed-end real estate investment trust
25.	Characteristics of Investment	Particularly identified	Particularly identified
26.	Type of Investment	Investment in freehold assets and/or leasehold and/or sub-leasehold rights of immovable properties	Investment in freehold assets and/or leasehold and/or sub-leasehold rights of immovable properties
27.	Investment Period	Investment period is not specified.	Investment period is not specified.
28.	Objective of the Investment	The objective of PFPO is to raise funds from the public investors and will utilize the funds to purchase and/or lease immovable properties as well as to procure benefits, including managing to renovate, alter, develop and/or construct immovable properties invested in or belonging to PFPO either by means of leasing, sub-leasing and/or selling or undertaking any acts for the benefit of the immovable properties so as to generate income and returns toward PFPO and its investment unitholders, as well as to invest in other properties and/or other securities and/or generate other interests as prescribed by securities law and/or any other relevant laws.	The objective of REIT is to invest in the principal assets by means of purchasing and/or leasing and/or sub-leasing and/or transferring of leasehold right and/or sub-leasehold right of principal assets. REIT will generate benefits from such properties in terms of rental fees and service fees or other income, as well as renovate, develop and / or sell the properties in order to generate income and returns to REIT for the long-term benefit of trust unitholders. In addition, REIT aims to invest in additional properties for continuous growth of the income base of REIT and/or other securities and/or generate other interests as prescribed by Securities Law

No.	Description	PFPO	REIT
			and/or any other relevant laws. In addition, REIT has set significant objectives as follows: (1) to support the conversion from property fund into real estate investment trust (2) to invest in principal assets in the future
29.	Investment Policy	PFPO aims to invest in freehold rights of high-quality immovable properties, and aims to generate benefits and revenues in terms of rental fees .PFPO also expects to generate long-term distributions to the unitholders.	REIT will invest in high-quality immovable properties and leasehold rights, by means of purchasing and/or leasing and/or sub-leasing and/or transferring of leasehold right and/or leasehold right of the principal assets; and for generating benefits in terms of rental fees and service fees or any income in the same way, as well as renovation, development, and sale of any assets to generate income and returns toward REIT for the long-term benefits of trust unitholders. Moreover, the purpose of REIT is to invest in additional assets for continuous growth of revenue base and for risk diversification through investment in properties in various locations as well as investment in other assets and/or other securities, and/or seeking other interests in accordance with Security Law and/or any other relevant and prescribed laws.
30.	Generating of Benefits from the Properties	The policy of PFPO is to generate benefits from investing in immovable properties by means of leasing out the whole space to a lessee or multiple lessees so that the lessee(s) will continue to generate benefit and pay rental fees to PFPO.	The policy of REIT is to generate benefits from investing in immovable properties and/or leasehold right in the property by means of leasing out the immovable properties to generate income.
31.	Loan Policies	PFPO may borrow money with or without collateral under the following conditions: (1) The borrowing shall be	REIT may borrow money or establish obligation which must be the borrowing or establishment of obligation for

No.	Description	PFPO	REIT
		under the following purposes: (a) To renovate PFPO's immovable properties or those where PFPO has leasehold rights in order that they remain in a proper condition and ready to generate the benefit; (b) To extend or build additional buildings on the existing land which belongs to PFPO or in which PFPO has leasehold right for the purpose of generating the benefit; (c) To invest in the additional immovable properties or leasehold rights of immovable properties; (2) The borrowing is based chiefly on the interest of investment unitholders. If the borrowing is for renovation of immovable properties that PFPO is entitled to lease according to (1)(a), or for extending or building additional buildings on the existing land which PFPO is entitled to lease according to (1)(b), the Fund Manager must take into consideration the remaining lease terms under the lease agreements; and (3) The loan must not exceed 10% of PFPO's NAV. If the ratio later exceeds this threshold but the excess is not a result of additional borrowing, the Fund Manager may maintain this ratio but will not be able to	the management of REIT and its properties, including the following purposes: (1) To invest in immovable properties or leasehold rights of immovable properties; (2) To invest in additional immovable properties or leasehold rights of immovable properties; (3) To invest in any other assets as announced or prescribed by the Office of SEC, SEC and /or Capital Market Supervisory Board as the principal assets; (4) To manage assets of REIT; (5) To improve or repair immovable properties of REIT or of which REIT has leasehold rights or possessory rights to remain in a proper condition and ready to generate benefit, as well as to improve the image of such properties; (6) To improve, repair or replace movable properties or equipment related to properties of REIT or leasehold rights or possessory rights of REIT to remain in a proper condition and ready to generate benefit; (7) To extend or build additional buildings on the existing land which belongs to REIT or where REIT has leasehold rights or possessory rights for the purpose of generating the benefit; (8) To use for working capital of REIT; (9) To settle loan or obligations of REIT;

No.	Description	PFPO	REIT
		borrow an additional loan unless the ratio is reduced to less than 10% of PFPO's NAV.	(10) To restructure loan for a settlement of the primary loans or obligations (refinance); (11) To restructure the capital of REIT; (12) To protect foreign exchange risk and / or protect interest rate risk as a result of borrowing or issuing debt instruments; and (13) Any other necessities as deemed appropriate by REIT Manager for the management purpose of REIT. However, the REIT Manager will borrow money under consideration of the benefits to REIT and trust unitholders. In the event where REIT invests in leasehold rights of immovable properties or movable properties and borrows money for any purposes as determined in (5), (6) or (7), the REIT Manager must take into consideration the remaining lease terms under the lease agreements. In the event where REIT borrows money, the borrowing ratio must not exceed any of the following criteria, except in cases where the excess is not a result of additional borrowings: (1) 35% of REIT's total asset values; or (2) 60% of REIT's total asset value if REIT is rated as investment-grade securities in the latest credit rating given by a rating company approved by the SEC no more than one year prior to the

No.	Description	PFPO	REIT
			borrowing date. Borrowing shall also cover an issuance of instrument or securities, or an entry into any form of agreement with a purpose or substance qualified as borrowing.
32.	Dividend Payment Policy of PFPO and Distribution Payment of REIT	PFPO has a policy to pay a dividend no more than four times per year with the following details: (1) In the event where PFPO generates net profit in any accounting period, the Fund Manager shall pay dividends to the investment unitholders, amounting to no less than 90% of the adjusted net profit of the accounting year The adjusted net profit means net profit after the deduction of unrealized gain from valuation or review on valuation of immovable properties or leasehold rights of immovable properties, and the adjustment with other items based on the guidelines prescribed by the Office of SEC to be consistent with the cash position of PFPO (2) In the event where PFPO has retained earnings in any accounting period, the Fund Manager can pay dividend to the investment unitholders from such retained earnings. Nevertheless, the payout from the aforesaid net profit and / or retained earnings can be performed only if such payout will not generate an increase in retained loss in the accounting period of which that dividend is paid.	(1) The REIT Manager shall make distribution to trust unitholders for no less than 90% of net adjusted profit of the accounting period at least once a year and shall make payment within 90 days from the ending date of the accounting period or any other operating period of which such distribution is paid, as the case may be Net adjusted profit from the previous paragraph means profits adjusted with the following items: (a) A deduction of unrealized gain from valuation or review of valuation of immovable properties or leasehold rights of immovable properties of REIT as well as an adjustment of other items in accordance with the guidelines of the Office of SEC to be consistent with cash position of REIT; and (b) A deduction with reserves for payment of loan or obligations from borrowing of REIT, according to the facility's approval specified in Registration Statement and Prospectus or Annual Report as the case

No.	Description	PFPO	REIT
			may be; (2) In the event where REIT has retained earnings in any accounting period, the REIT Manager may pay distribution to the trust unitholders from such retained earnings; (3) In the event where REIT has retained loss, the REIT Manager shall not pay distribution to the trust unitholders; (4) The REIT Manager will comply with distribution criteria unless the SEC, the Office of SEC and/or other relevant authorized authorities amend, announce, require, order, approve and/or relieve otherwise where the REIT Manager shall comply accordingly; (5) The REIT Manager shall pay the distribution to the trust unitholders, according to unitholding proportion of each individual trust unitholder. However, the REIT Manager reserves its right to pay distribution to the trust unitholders who hold units more than the ratio or not in line with the criteria as specified by the SEC particularly in the portion which is excessive or not in line with the said criteria. The return in part that is unable to be paid to such trust unitholders shall be distributed to other trust unitholders, according to their holding proportions.

Today, the REIT business in Thailand is projected to grow, and REITs are considered viable investment diversification and vehicles for investors and property entrepreneurs.

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CHAPTER 11

CAPITAL MARKET

CHAPTER 11 | CAPITAL MARKETS

(1) Introduction

A. Relevant Regulations

Thailand's capital markets are fundamentally regulated and monitored by the Ministry of Finance through the Securities and Exchange Commission of Thailand (the "**SEC**") which is established under the Securities and Exchange Act, B.E. 2535 (1992), as amended, (the "**SEC Act**"). The SEC acts in its capacity as an independent competent authority for formulating the policies and regulations generally concerning (i) the development of the capital markets in Thailand for both primary and secondary markets in all possible aspects; (ii) the formulation, maintenance and standardization of the capital markets in Thailand in which securities (e.g. shares, debentures, investment units) can be issued and traded in an orderly, fair, transparent and efficient manner in order to protect investors' interests to the maximum practicable extent.

There are six legislations which are governed by the SEC as follows:

1. the SEC Act;
2. the Provident Fund Act, B.E. 2530 (1987);
3. the Royal Enactment on Special Purpose Juristic Persons for Securitization, B.E. 2540 (1997);
4. the Derivatives Act, B.E. 2546 (2003);
5. the Trust for Transactions in the Capital Market Act, B.E. 2550 (2007); and
6. the Emergency Decree on Digital Asset Businesses, B.E. 2561 (2018).

B. Regulatory Bodies

In addition, the SEC is also empowered under the SEC Act to take legal actions for enforcement, including administrative action, criminal action or civil actions, as the case maybe, against any individuals and entities for the violation of the relevant securities laws under its supervision, if there is a reasonable and sufficient ground to believe that such individuals and/or entities are in violation of the relevant securities laws. Typical violations may include a regulated person fails to comply with the relevant regulations, insider trading, as well as providing false or misleading information of the securities and the issuing companies.

As to the SEC's organizational structure, its authority and supervision can be segregated into 3 tiers as follows:

1. The SEC Board – responsible for policy-level regulations and oversight of capital markets development;
2. The Capital Market Supervisory Board – issuing regulations to supervise the securities businesses and related activities; and
3. The SEC Office – implementing policies as assigned and developing financial products.

Apart from the SEC, the Stock Exchange of Thailand (the "**SET**") is also established under the SEC Act. The most noticeable differences between the key roles of the SEC and the SET are the SEC mainly regulates and monitors the primary capital markets in which the securities are issued, while the SET administers the secondary capital markets where the securities are publicly traded by investors. In addition, the SET is positioned to play several significant roles in Thailand's capital markets, such as processing the listing applications, monitoring trading activities in relation to the listed securities, supervising the disclosure requirements made by the listed companies.

Apart from the capital markets, another significant segment of the financial markets in Thailand is money markets which is regulated and monitored by the Bank of Thailand (the "**BOT**") established under the Bank of Thailand Act, B.E. 2485 (1942), as amended, (the "**BOT Act**"). According to the BOT Act, the BOT plays a significant role in fostering financial stability in Thailand, among other things, determining the standard lending rate for financial institutions, providing banking facilities to the government of Thailand, state enterprises and other government agencies.

C. Thai Regulatory Principle

Securities regulatory principle in Thailand has elements of both merit-based system disclosure-based system. The merit-based system refers to provisions prescribed based on the issuing company's qualifications and securities features, while the disclosure-based system refers to provisions prescribed based on minimum requirements on pre-offering information disclosure.

(2) Issuance and Offering of Securities

Companies can raise fund through issuance for sale of equity and/or debt securities. The securities under the SEC Act include shares, debentures, treasury bills, bonds, investment units, warrants, depository receipt. Issuance and offering of the securities by Thai private or public limited companies and by non-Thai entities to the public in Thailand must be made pursuant to the relevant regulations.

Legal requirements depend on type of the securities (e.g. new securities, existing securities) and method of offering (e.g. public offering, private placement, rights offering). In general, there are two main procedures required for issuance and offering of the securities which are:

- An approval by the SEC; and
- A disclosure of information (for example, filing of registration statement and a draft prospectus).

The SEC will consider qualifications of the issuers and supervise the disclosure of information in order for the investors to have sufficient information for making an investment decision.

A. Equity Securities

Equity securities mainly refer to shares, share warrants, investment units. This section will focus on the issuance and offering of shares by the listed companies only. Characteristics of the issuance and offering of other type of securities is similar to those of the shares in principle, nevertheless, specific requirements would be different based on impact to the existing shareholders and protection for the investors.

Shares

Initial Public Offering (the "IPO") and Public Offering (the "PO")[1]

An IPO process is conducted by the public company going to list and trade its shares on the SET. In order for the issuer to apply for an approval by the SEC for IPO, the issuer and the shares must have certain qualifications which include having clear and fair shareholding structure, no share transfer restriction, transparency on power of control and shareholders' interest, sufficient checks and balances between board and management (e.g. independent directors, audit committee),

[1] Key regulation of IPO and PO is the Notification of the Capital Market Supervisory Board No. TorChor. 39/2559 Re: Application for and Approval of the Offering for Sale of Newly Issued Shares

track record. After listing on the SET, the subsequent offering of newly issued shares to the public is called the PO.

For both IPO and PO, the issuer must file the registration statement and draft prospectus to the SEC. A financial adviser on the SEC-approved list is required to be appointed to cooperate with the issuer to prepare the application for the SEC approval and the filing of the registration statement and draft prospectus. Once the registration statement and draft prospectus have become effective and the SEC has approved the offering, the offering can be made and must be made through an underwriter.

Private Placement (the "PP")[2]

PP is an offering of newly issued shares to specific investors having value added contribution and benefits to the company. In case the offering is made in one of the following manners, an approval by the SEC is deemed to be granted and filing of the registration statement and draft prospectus is exempted:

- Offering for an amount of not more than 20 million Baht within any 12-month period;
- Offering to not more than 50 persons within any 12-month period; or
- Offering to institutional investors (e.g. commercial banks, finance companies, securities companies, insurance companies, provident fund, mutual funds).

This exemption is subject to certain requirements which include that the PP offering must be made at the market price (a discount of no more than ten per cent), the issuer must submit a report on the offering result within 15 days from the close of the offering period, restriction on advertisement, the invitation to the shareholders' meeting must contain required information as prescribed in the relevant notification.

Right Offering (the "RO")

RO must be made by offering of newly issued shares to the existing shareholders in proportion to their existing shareholding.

RO is exempted from the SEC approval and the disclosure of information requirement**.**

Employment Stock Option Program (the "ESOP")[3]

ESOP is an offering of newly issued shares to the company's directors and/or employees in order to encourage the directors and employees to take part in the company ownership and consequently maximize benefits to the company's business through their contribution at work.

In case of ESOP, an approval by the SEC is deemed to be granted and filing of the registration statement and draft prospectus is exempted.

[2] Key regulation of PP is the Notification of the Capital Market Supervisory Board No. TorChor. 72/2558 Re: Approval for Private Placement of Newly Issued Shares by Listed Company

[3] Key regulation of ESOP is the Notification of the Capital Market Supervisory Board No. TorChor 32/2551 Re: Offering for Sale of Newly Issued Securities to Directors or Employees

Share Offering by Foreign Companies[4]

Apart from the issuance and offering by Thai companies as mentioned above, the SEC regulates the foreign companies offering their shares to the investors in Thailand and to be traded on the SET.

The share offering by the foreign companies is subject to the SEC's approval and filing of the registration statement and draft prospectus in a similar manner to those applicable to Thai companies. The offering can be divided into two categories which are (i) primary listing: offering by a foreign company not having its shares listed on any foreign stock exchange and (ii) secondary listing: offering by a foreign company that has or will have its shares listed on one or more foreign stock exchanges.

B. Debt Securities[5]

Debt securities mainly refer to debentures, debenture warrants, treasury bills, bonds. Among other debt securities, issuance of the debentures is a common method of debt financing in Thailand which can be issued by both public limited companies and private limited companies. There are various characteristics of the debentures (e.g. plain-vanilla debentures, convertible debentures, debentures warrants, structured debentures) which are available for the issuer structure.

Not all of the debt instruments can be listed on the Bond Electronic Exchange (the "**BEX**"), which is a subsidiary of the SET, and traded as a secondary market. The debt instruments to be listed on the BEX must have certain qualifications include having the offering value of not less than 100 million Baht and being approved to issue and offer for sale by an agency in charge of supervising the issuance and offering of such debt instruments (e.g. the SEC).

Debentures

There are two main types of the debentures offering:

- **Public Offering**: a public offering of debentures which can be offered and sold to any investors require the SEC approval and filing of the registration statement and draft prospectus before the offering can be made.

- **Private Placement**: a private placement of debentures which can be offered and sold to certain investors (e.g. offering to no more than ten specific investors within any four-month period (PP-10), offering to institutional investors (II), offering to high net worth investors (HNW)). The offering of debentures to no more than ten specific investors and to the institutional investors shall be deemed approved by the SEC, while there is no exemption of the deemed approval by the SEC for the offering of debentures to the high net worth investors; provided that the issuer has registered the transfer restriction for the debentures with the SEC. The transfer restriction shall contain a statement that the issuer shall not accept any transfer registration if such transfer will make such debentures unqualified as private

[4] Key regulation of share offering by foreign companies are (i) primary listing - the Notification of Capital Market Supervisory Board No. TorChor 3/2558 Re: Provisions relating to Offer for Sale of Shares Issued by Foreign Company of which Shares are not Traded in Foreign Exchange; and (ii) the Notification of Capital Market Supervisory Board No. TorChor 14/2558 Re: Provisions relating to Offer for Sale of Securities Issued by Foreign Company Whose Shares Have Been Traded or Are Purposed to be Traded on Foreign Exchange

[5] Key regulation of debt securities is the Notification of the Capital Market Supervisory Board No. TorChor 17/2561 Re: Application and Approval for Offer for Sale of Newly Issued Debt Securities

placement. The offering by way of private placement generally requires the issuer to file the registration statement and draft prospectus to the SEC, except for the offering to the ten specific investors.

Medium Term Note Program (the "MTN")

Apart from the issuance of debentures on issue basis, the debentures may be issued on program basis (Medium Term Note Program: MTN). This new program has been launched in January 2018. The issuer may offer for sale of the debentures in various features under the approved principal amount and offering methods within two years from the date of approval is granted by the SEC. The issuance of debentures under the issue basis can apply to all types of debentures while the program basis cannot apply to the issuance of subordinated debentures, perpetual debentures, convertible debentures, and structured debentures. MTN program has attracted the issuers' interest and has been widely used among the issuers recently.

The issuance of debentures under the program basis requires an approval from the SEC. The form to be submitted to the SEC at the first place for the program basis is 69-BASE which the minimum information disclosure requirements is stipulated in Section 69 and Section 70 of the SEC Act. For subsequent submission of the filing and prospectus of each tranche issuance, the issuer must submit form 69-PRICING with the relevant details of features. During the program period, the issuer must update information upon the occurrence of events as specified by the SEC to ensure that the investors will have up-to-date information of the issuer and the program.

(3) Compliance After Listing

A. Listed Companies

Disclosure[6]

After listing on the SET, the listed companies are required to disclose certain information to all investors within specific timeframe via SET portal system. The disclosure requirements can be divided into two groups which are periodic disclosure and disclosure of material events. Examples of information required to be disclosed are as follows:

[Figure 11-1] Periodic Disclosure

Type of Information	Deadline of Submission
Annual Financial Statement (audited) - Without Quarter 4th Statement - With Quarter 4th Statement	 - two months - three months
Quarterly Financial Statement (reviewed)	45 days
Annual Information Disclosure Form (Form 56-1)	three months
Annual Report (Form 56-2)	four months

[6] Key regulation of the information disclosure is the Regulation of the Stock Exchange of Thailand Re: Rules, Conditions and Procedures Governing the Disclosure of Information and Other Acts of a Listed Company, B.E. 2560 (2017) (Bor.Jor./Por. 11-00)

[Figure 11-2] Disclosure of Material Events

Type of Information	Timeframe of Disclosure
Information on corporate actions or information which could potentially affect the securities price of the listed companies, investment decision making or shareholders' benefits For example, - Setting the date of shareholders' meeting - Setting the record date or book closing date for any shareholders' right - Acquisition or disposition of assets - Connected transactions - Payment or non-payment of dividend - Increase or decrease of capital - Issuance of new securities - Repurchase of shares - Change of major shareholders - Having material legal dispute - Entering into or termination of significant commercial contracts - Financial support provided to other persons or juristic persons - Default in payment obligation - Resignation of directors or audit committee	Immediately
Information which does not directly affect trading or investment decision, but should be disclosed to investors For example, - Relocation of the head office - Change of director - Change of auditor - Change of registrar	within three business days
Information which the SET has to collect for reference For example, - Minutes of the shareholders' meeting - List of major shareholders or first ten shareholders as of the date of shareholders' meeting/record date/book closing date - Report on the distribution of shares	within 14 days

Transaction on Acquisition or Disposition of Assets[7]

When a listed company or its subsidiary has acquired or disposed an asset, the listed companies must calculate the transaction value or size to determine whether such transaction will be subject to requirements and procedures prescribed under the relevant regulations (please refer to Figure 11-3 below).

The "a*sset*" means tangible items (e.g. land, building, machinery, investment) or intangible items (e.g. leasehold right, concession right, license, claim) owned by a person or business, have valued and can be transferred.

The "*acquisition or disposition of assets*" means an entering into or a decision to enter into any contract or agreement in order to cause an acquisition or disposition of assets, or a creation or waiver of right to acquire or dispose of assets, or an acquisition or transfer of right to long-term possession of assets, or an investment or cancellation of investment.

[Figure 11-3] Procedures upon the transaction size

Transaction size* (X)	Procedures			
	Information disclosure to SET	Circular notice to shareholders**	Approval from shareholders*** and IFA's opinion	Filing for new securities listing
X < 15%	-	-	-	-
X < 15% and there is an issuance of securities in consideration of the acquisition of such asset	✓	-	-	-
15% ≤ X < 50%	✓	✓	-	-
50% ≤ X < 100%	✓		✓	-
X ≥ 100% (Backdoor Listing)****	✓	-	✓	✓

Remark:

* *Calculation of the transaction size is based on different methods depending on nature of the transaction, i.e. net tangible assets, net operating profits, total value of consideration paid or received, and value of securities issued as consideration for the payment of assets.*

** *The listed company must send the circular notice to its shareholders within 21 days from the day that the listed company has disclosed to the SET with required minimum information.*

*** *The listed company must obtain an approval from the shareholders' meeting of not less than 3/4 of shareholders attending the meeting and entitled to vote, excluding the shareholders having conflict of interest in such transaction. Also, the listed company must appoint an independent financial advisor (IFA) to give an opinion (for example, the rationality of transaction and benefits to the company, fair pricing and conditions) on the transaction.*

[7] Key regulations of transaction on the acquisition and disposition of asset are the Notification of the Capital Market Supervisory Board No. TorChor. 20/2551 Re: Rules on Entering into Material Transactions Deemed as Acquisition or Disposal of Assets and the Notification of the Board of Governors of the Stock Exchange of Thailand Re: Disclosure of Information and Other Acts of Listed Companies Concerning the Acquisition and Disposition of Assets, B.E. 2547 (2004) (Bor.Jor./Por.21-01)

******** *Backdoor Listing is an acquisition by a listed company or its subsidiary of all or substantial asset of a non-listed company or an indirect listing of a non-listed company's business on the SET.*

Connected Transaction[8] (Also known as Related Party Transaction (the "RPT"))

When the listed company or its subsidiary is entering into a transaction with a *connected person* of the listed company, the listed company must consider types of the connected transactions together with calculation of the transaction value or size to determine whether such connected transaction will be subject to requirements and procedures prescribed under the relevant regulations (please refer to the table of procedures below).

The "*connected person*" (also known as a related party) means a person (either individual or juristic person) who may have a conflict of interest toward the listed company's interest causing a conflicting situation to make a decision to enter into the transaction, which includes:

(i) Directors, executives, major shareholders, controlling persons, persons to be nominated as the management or controlling persons of a listed company or a subsidiary company including related persons and close relatives of such persons;
(ii) any juristic person having a major shareholder or a controlling person as the following persons of the listed company or the subsidiary:
  (a) management;
  (b) major shareholder;
  (c) controlling person;
  (d) person to be nominated as the management or a controlling person; or
  (e) related persons and close relatives of persons from (a) to (d).
(iii) any person whose behavior can be indicated as an acting person or under a major influence of persons from (i) to (ii) above when making decision, determining policy, handling management or operation, or other persons the SET deems as having the same manner.

[Figure 11-4] Procedures upon type of the connected transactions and the transaction size

Types of Connected Transaction	Transaction Size (X) / Procedures		
	Small*	Medium**	Large***
1. Normal business transactions/ Normal business-support transactions			
- **With general commercial conditions**	-	-	-
- **Without general commercial conditions**	-	• Approval of board of directors • Information disclosure to SET	• Approval of board of directors • Information disclosure to SET

[8] Key regulations of the connected transaction are the Notification of the Capital Market Supervisory Board No. TorChor. 21/2551 Re: Rules on Connected Transactions and the Notification of the Board of Governors of the Stock Exchange of Thailand Re: Disclosure of Information and Other Acts of Listed Companies Concerning the Connected Transactions, B.E. 2546 (2003) (Bor.Jor./Por.22-01)

Types of Connected Transaction	Transaction Size (X) / Procedures		
	Small*	Medium**	Large***
			• Shareholders' approval
2. Rental or rented real estate for not longer than 3-year period, and under no general commercial conditions	-	Information disclosure to SET	• Approval of board of directors • Information disclosure to SET
3. Transaction relating to products or services	-	• Approval of board of directors • Information disclosure to SET	• Approval of board of directors • Information disclosure to SET • Shareholders' approval
4. Transaction on offering or receiving financial assistance			
- **4.1 Providing financial assistance to connected person or the company where the connected persons hold more shares than the listed company**	• Approval of board of directors • Information disclosure to SET (Less than 100 million Baht or 3% of NTA, whichever lower)	-	• Approval of board of directors • Information disclosure to SET • Shareholders' approval (Over or equal to 100 million Baht or 3% of NTA, whichever lower)
- **4.2 Providing financial assistance to a company where the listed company hold more shares than the connected person**	-	• Approval of board of directors • Information disclosure to SET	• Approval of board of directors • Information disclosure to SET • Shareholders' approval

Remark:

* *"Small" refers to X ≤ 1 Million Baht or X ≤ 0.03% of NTA[9], whichever is higher*

** *"Medium" refers to 1 Million Baht < X < 20 Million Baht or 0.03% of NTA < X < 3% of NTA, whichever is higher*

*** *"Large" refers to X ≥ 20 Million Baht or X ≥ 3% of NTA, whichever is higher*
(This remark is not applicable for No.4.1 "Providing financial assistance to connected person or the company where the connected persons hold more shares than the listed company".)

[9] NTA (Net Total Assets) refers to total assets – intangible assets – total liability – non-controlling interests (if any).

For the connected transaction which requires the shareholders' approval, the listed company must obtain an approval from the shareholders' meeting of not less than 3/4 of shareholders attending the meeting and entitled to vote, excluding the shareholders having conflict of interest in such transaction. Also, the listed company must appoint an independent financial advisor (IFA) to give an opinion (for example, the rationality of transaction and benefits to the company, fair pricing and conditions) on the transaction.

There are some transactions that are exempted from the connected transaction requirements, for example:

- granting loan in accordance with the rules on employee welfare;
- a transaction in which the other party to the listed company, or both parties are:
  - a subsidiary in which the listed company hold no less than 90% of the total shares; or
  - a subsidiary in which directors, executives, or related persons hold shares or has the interest in, directly or indirectly, no more than the ratio or qualifications determined by the Capital Market Supervisory Board.
- a transaction that has made by the listed company with its subsidiary, in which the connected person holds no more than ten percent of the total shares and has no controlling power over the subsidiary.
- a connected transaction between the listed company's subsidiaries, in which the connected person holds no more than ten percent of the total shares and are not the controlling person over the subsidiaries.

Qualification to Maintain Listing Status[10]

After listing on the SET, the listed companies are required to continue maintaining their listing status with certain qualifications relating to the shares, shareholding structure, directors and management, internal systems, other relevant details, which include, but is not limited to, that:

- a par value of shares must not less than 0.5 Baht per share;
- directors and management must have qualifications as prescribed by the SEC Act or the SEC regulations;
- a good corporate governance system is in place;
- an auditor approved by the SEC must be appointed;
- an internal control system is in place as required by the Notification of Capital Market Supervisory Board
- the listed company and its subsidiary must not have a conflict of interest as specified in the Notification of Capital Market Supervisory Board;
- disbursement of minority shareholders must meet the free float requirement (with no less than 150 retail shareholders who collectively hold no less than 15% of the listed company's' paid-up capital);
- the listed company must have a provident fund; and
- the listed company must designate the SET or a third party approved by the SET to act as its listed securities registrar.

[10] Key regulation of maintaining the listing status is the Regulation of the Stock Exchange of Thailand Re: Listing of Ordinary Shares or Preferred Shares as Listed Securities, B.E. 2558 (2015) (Bor.Jor./Ror. 01-00)

Delisting

Pursuant to the Delisting Rule[11], the delisting may be occurred by the following basis:

- voluntary delisting - delisting upon request by the listed company; or
- possible delisting - delisting in case of there is a *ground for delisting* (such as, the listed shares do not meet all listing qualification (e.g. having a par value less than 0.5 Baht per share), breaching or infringing the rules, or disclosing false information, or not disclosing material information which could severely affect the benefits or decisions of the shareholders, or changes in securities prices, auditor was unable to express opinion or expressed opinions that the financial statements were not appropriate for three years consecutively, the nature of business operation of a listed company is not suitable for it to remain as a listed company).

For the voluntary delisting, there must be a tender offer which the Takeover Rule[12] will be applied, but not for the possible delisting. The voluntary delisting must be approved by the shareholders' meeting of no less than 3/4 of the total issued shares of the listed company and also no more than 10% objection of the total issued shares.

For the possible delisting, subject to the delisting process, the Board of Governors of the SET may order the delisting of shares of the listed company upon occurrence of certain events (for instance, it is not possible to fix the ground for delisting). In ordering the delisting of shares, the Board of Governors of the SET may order to allow buying or selling of securities of that listed company be continued for a period of time prior to the effective date of delisting of shares of the listed company. After the shares are delisted, those shares shall lose their status of listed securities.

Other compliance

In addition to the abovementioned compliance requirements under the SEC Act, the SEC regulations and the SET regulations, the listed company must also comply with other legal requirements under the Public Limited Company Act, B.E. 2535 (1992) (the "PLCA"), for example, compliance with procedure for convening a shareholders' meeting (either annual general shareholders' meeting or extraordinary general shareholders' meeting), capital increase, share repurchase, amalgamation.

B. Directors and Management

Apart from compliance by the listed companies, the directors and management of the listed companies must perform their duty with responsibility, due care and loyalty, and in compliance with all laws, constitutional documents of the listed companies and resolutions of the shareholders' meeting[13]. In performing their duty, the directors and management must make a decision for the best interest of the listed company, based on sufficient information and without any conflict of interest in such transaction (also known as the Business Judgement Rule). Furthermore, the directors and management also have reporting duty, such as report to the SEC on their securities holding in the listed company, report to the listed company on their interest related to the management of the listed company or its subsidiary. In addition to legal requirements under the laws and regulations, the board of directors are encouraged to follow and

[11] Delisting Rule refers to the Regulation of the Stock Exchange of Thailand Re: Delisting of Securities, B.E. 2542 (1999) (Bor.Jor./Phor. 01-00)

[12] Please refer to the topic of "Takeover Rule" below

[13] Please refer to Section 85 of the PLCA, and Section 89/7 of the SEC Act

adopt the Corporate Governance Code for Listed Companies 2017 (CG Code) for good corporate governance to enhance a high standard of best practice of the listed company.

C. Shareholders and Investors

Report of the Acquisition or Disposition of Securities[14]

The investors (whether being the existing shareholders of the listed companies, or not) are required to report their increase or decrease of the securities held by them when holding percentage reaches or exceed any multiple of five percent of total voting rights (i.e. 5% ... 10% ... 15% ... 20% ... 25% … to 100%, each referred as a trigger point) using Form 246-2 (Report of the Acquisition or Disposition of Securities) submitted to the SEC via online system within three business days from the date of acquisition or disposition. Either direct acquisition of securities or acquisition through Chain Principle[15] is subject to this reporting obligation. Form 246-2 can be prepared in Thai or English language.

The securities that are subject to the reporting obligation using Form 246-2 are shares and convertible securities (i.e. securities that are convertible or transfer subscription rights that are issued by the listed companies).

In the case of two persons or more commencing a concert party relationship or the acquisition of a juristic person under Section 258 of the SEC Act resulting in an aggregate shareholding reaches or exceeds the trigger points for the reporting obligation, all such persons must submit Form 246 containing information of the securities held by such persons.

Takeover Rule[16]

When the investors (whether being the existing shareholders of the listed companies, or not) acquire shares in the listed companies reach or exceed 25%, 50%, 75% of the total voting rights (each referred as a trigger point), including in case of Chain Principle, such acquirer is subject to an obligation to make a mandatory tender offer of all shares, including convertible securities (i.e. securities that are convertible or transfer subscription rights that are issued by the listed companies) of such target company. Only shares of the listed company are subject to the tender offer process.

In determining the trigger point, the number of shares held by the *related persons* and *persons acting in concert* of the acquirer must be included for the calculation.

Related persons as defined in Section 258 of the SEC Act include:

[14] Key regulations of the report of the acquisition or disposition of securities are Section 246 of the SEC Act and the Notification of Capital Market Supervisory Board No. TorChor. 28/2554 Re: Requirements Related to Reporting of Acquisition and Disposal of Securities

[15] Acquisition through Chain Principle means any acquisition of the significant control over a juristic person that is an existing shareholder of the listed company. The significant control refers to (i) holding of shares equal to or in excess of 50% of the total voting rights in the immediate holding entity; or (ii) nominating a substantial number of directors to control the juristic person who is an existing shareholder of the listed company.

[16] Key regulations of the takeover rules are Section 247 of the SEC Act and the Notification of Capital Market Supervisory Board No. TorChor. 12/2554 Re: Rules, Conditions and Procedures of the Acquisition of Securities for Business Takeovers

(i) a spouse or minor child;
(ii) a natural person who is a shareholder of the acquirer in an amount exceeding 30% of the total voting rights of such acquirer (such voting rights also include his person's spouse and minor child);
(iii) a juristic person who is a shareholder of the acquirer in an amount exceeding 30% of the total voting rights of such acquirer;
(iv) a shareholder in a juristic person under (iii) and shareholders at all levels of upward shareholding beginning from the shareholder in a juristic person under (iii), where the shareholding at each level exceeds 30% of the total number of voting rights of the shareholder in the immediately lower level (in the case where the shareholder of any level is a natural person, the voting rights of his shareholders' spouse and minor child will be included);
(v) a juristic person in which the acquirer or the persons under (i) – (iii) collectively hold shares in an amount exceeding 30% of the total number of voting rights of such juristic person;
(vi) (vi)a juristic person in which the juristic person under (v) hold its shares and shareholders in all levels of downward shareholding, beginning from the shareholder in the juristic person under(v), providing that shareholders in each level exceeds 30% of the total number of voting rights of the juristic person in the immediate lower level;
(vii) an ordinary partnership in which the acquirer or the person under (i) – (vi) or the limited partnership under (viii) is a partner;
(viii) a limited partnership in which the acquirer or the person under (i) – (vi) or the ordinary partnership under (vii) is an unlimited liability partner; and
(ix) a juristic person over which the acquirer has the power of management in respect of investment insecurities.

Persons acting in concert are those who have a mutual intention to exercise their voting rights in the same direction or who allow others to exercise their voting rights for the purpose of achieving the common control of the voting rights or of the business and have a relationship or act together in the manner as set out in the SEC regulation[17].

Upon triggering the tender offer obligation, the acquirer must (i) submit a report on the total number of shares held in Form 246-2 to the SEC by the end of the next business day after the acquisition resulting in triggering the tender offer and (ii) submit a tender offer document (Form 247-4) to the SEC within seven business days from the submission date of Form 246-2. A tender offer document must be prepared by a financial advisor approved by the SEC. The acquirer must commence the tender offer period within three business days from the date of the tender offer document. The tender offer period will be not less than 25 business days but not more than 45 business days. After end of the tender offer period, the acquirer must submit the tender offer result report to the SEC within 5 business days.

After the tender offer has been made, (i) within six months from the end of tender offer period, the offeror/acquirer must not purchase additional shares of the target company with more favorable terms than those specified in the tender offer; and (ii) within one year from the end of tender offer period, the offeror/acquirer must refrain from certain actions which are of a material nature different from those specified in the tender offer document. It is worth noting that there is no a squeeze-out provision under Thai law.

Nevertheless, the acquirer can be exempted from the requirement of making a mandatory tender offer by satisfying an exemption or a waiver. For example,

[17] Notification of the Capital Market Supervisory Board No. TorChor. 7/2552 Re: Acting in concert as a result of the nature of a relationship or behavior and requirements under Sections 246 and 247

- after the acquisition, the investor could voluntarily reduce their shareholding in the target company below the relevant trigger point by selling such shares on the main board of the Stock Exchange or transferring those shares back to the transferring person within seven business days from the date on which Form 246-2 shall be submitted to the SEC.
- before the acquisition, the acquirer may submit an application for a waiver to the SEC or the Takeover Panel through the SEC (as the case may be) subject to certain circumstances. The said circumstances include, but not limited to, where the acquisition does not result in a change of control of the business, where the acquisition is made for the purpose of providing support to or rehabilitating the business, where the acquisition of a significant degree of control of the immediate holding entity (under the chain principle) is not made with the main objective of making a business takeover.

In addition to the mandatory tender offer, there is voluntary tender offer. The voluntary tender offer is an offer made voluntarily by an acquirer in case such acquirer does not acquire the shares of the target company that would trigger the tender offer trigger point, but such acquirer is desirous to takeover such target company. In this case, the acquirer must make a tender offer for all of the shares, including convertible securities, in the target company.

(4) Securities Businesses

Securities Businesses as provided in the SEC Act are as follows:

1. Securities Brokerage;
2. Securities Dealing;
3. Investment Advisory Service;
4. Securities Underwriting;
5. Mutual Fund Management (MF);
6. Private Fund Management (PF); and
7. Other business relating to securities as specified by the Minister of Finance upon recommendation of the SEC, such as Securities Borrowing and Lending (SBL), Venture Capital Fund Management (VCF).

The Credit Rating Agency (CRA)[18] which rates the creditworthiness of the bond issuer by providing advice to the public in the form of credit ratings for investment and certain types of Giving Advice to public[19] is not considered as an investment advisory service which requires a securities business license. However, the credit rating agency still has a duty to submit an application for the approval from the SEC.

Furthermore, the SEC also allows a securities company to apply for an approval to perform trust business as a trustee[20] pursuant to the Trust for Transactions in Capital Market Act, B.E. 2550 (2007).

Types of the Securities Business Licenses provided under the Ministerial Regulation Concerning Granting of Approval for Undertaking Securities Business, B.E. 2551 (2008) are as follows:

[18] Notification of the Securities and Exchange Commission No. KorChor. 1/2555 Re: Exclusion of Credit Rating Agency Business from Securities Business in the Category of Securities Investment Advisory

[19] Notification of the Securities and Exchange Commission No. KorThor. 1/2560 Re: Prescribing Natures of Giving Advice to Public Not Being Regarded as Engagement in the Securities Business of Investment Advisory Service

[20] Notification of the Securities and Exchange Commission No. KorKhor. 9/2552 Re: Rules on Application for Approval and Granting of Approval to Undertake Trust Business

1. Securities Business License Type A (Full Services) – consisting of securities brokerage; securities dealing; securities underwriting; investment advisory service; mutual fund management; private fund management; securities borrowing and lending (SBL) and venture capital fund management (VCF).
2. Securities Business License Type B (Bond Services) – consisting of securities brokerage of bond and sukuk; securities dealing of bond and sukuk; securities underwriting of bond and sukuk; investment advisory service and securities borrowing and lending.
3. Securities Business License Type C (Fund Management Services) – consisting of mutual fund management; private fund management, securities brokerage of investment units; trust certificates that has similar characteristics as mutual funds or other securities that the SEC determined as securities with similar investment characteristics as investment units; securities dealing as specified by the SEC; securities underwriting as specified by the SEC; investment advisory service and venture capital fund management (VCF).
4. Securities Business License Type D (Limited BDU Services) – consisting of securities brokerage of investment units, trust certificates that has similar characteristics as mutual funds or other securities specified by the SEC as securities with similar investment characteristics as investment units; securities dealing as specified by the SEC and securities underwriting of as specified by the SEC.
5. Others (Single Securities Business License) – For example, (i) Securities Business License in the category of investment advisory service, (ii) Securities Business License in the category of securities borrowing and lending and (iii) Securities Business License in the category of venture capital fund management (VCF).

In the case that an applicant for the securities business license is a foreigner, such applicant can directly apply with the SEC without having duty to apply for the foreign business operation license[21] as the following services are exempted:

1. Securities Business and other businesses under the SEC Act;
2. Derivatives Business under the Derivatives Act, B.E 2546 (2003); and
3. Operation of the trustee business under the Trust for Transactions in Capital Market Act, B.E. 2550 (2007).

(5) Legal Enforcement

To ensure that securities laws and regulations will be complied, legal enforcement is one of the most crucial functions under the law. The SEC is the responsible body to oversee regulatory compliance and enforcement the governing law.

If there is a suspicion of violation against securities law, the SEC will preliminary gather information and evidence. If there is a ground of infringement and sufficient evidence, the SEC will further process to enforce the law. Three enforcement actions available for the SEC are (i) administrative actions, (ii) criminal actions and (iii) civil actions. As administrative actions are only applicable to persons under the supervision of the SEC, e.g., financial advisors, securities business operators, this section will mainly focus on criminal actions and civil actions.

[21] Ministerial Regulation prescribing Service Business not subject to Application for Permission in Alien Business Operation, B.E. 2556 (2013)

Criminal Actions

Most of the cases under the securities law will fall under the process of criminal actions.

Certain offences could be settled by a criminal fine which will be determined by the Criminal Fining Committee. The SEC's right to further pursue criminal case will be ended if the offender consents to enter into the fining process and make a full payment of the ordered fine. Sample of the offences which are subject to criminal fine are non-compliance of issuance and offering of securities, non-compliance of disclosure of information, etc.

For other offences which could not be settled by fine payment or if the offender rejects to make a fining process or does not fully pay the ordered fine, the SEC will file a criminal complaint to an inquiry official and the process under the Criminal Procedure Code will be started. Certain criminal complaint of securities offences will be submitted to the Department of Special Investigation (DSI), not the Royal Thai Police, due to the complexity and specialty of the offences, such as insider trading, directors' fraud, etc.

Civil Actions

Civil actions are the newest sanction for certain offences as a result of the amendment no. 5 to the SEC Act, B.E. 2559 (2016) in order to improve the efficiency of securities law enforcement. The offences which the civil sanctions can be imposed are (i) committing unfair securities trading practice, (ii) present of a false statement or concealing material facts, (iii) failing to perform duties as director or executive under the SEC Act and (iv) nominee securities trading account or bank account. There are five available civil sanctions which are (i) monetary penalty, (ii) disgorgement, (iii) bar from trading in the capital markets, (iv) bar from acting as director or executive in the listed company or securities company and (v) reimbursement of the SEC's investigation cost. Like criminal actions, once the offender consents to enter into the civil sanction process and make a full payment as agreed with the Civil Sanction Committee, the SEC's right to pursue criminal case will be ended. But if the offender fails to fully pay the monetary penalty or does not comply with the agreed civil penalty, the SEC can ask the Civil Court to enforce for such payment or impose the sanction under the process of Civil Procedure Code, as the case may be. For the sanctions of bar from securities trading or bar from acting as directors or executive, breach of the agreed civil sanction or court's decision will be considered as another new criminal offence.

Insider Trading

Under the SEC Act, purchase or sell of securities (e.g. shares, warrants, bonds, debentures) which are listed in the Stock Exchange or traded over-the-counter while possessing inside information of the securities' issuer is prohibited, either for oneself of other persons, by which inside information means information which has not been generally disclosed to the public which is material to the change of price or value of the securities (so-called "non-public price sensitive information"). The law also prohibits the disclosure of inside information, whether directly or indirectly and by any means, while knowing or reasonably ought to knowing that the receiver of such information may exploit the information for securities trading. The new insider trading law cover the misconduct of both the inside people, i.e., directors, management, who revealed inside information (the tipper) and the person who knowingly uses such information to trade securities or releasing to other persons (the tippee). If the inside people, including close relative, trade securities while possession inside information in different manner than normal practice, the law will presume that such person is in breach of insider trading provision by which such alleged person will have to disprove.

Nevertheless, there are some exemptions to the law where person who knows or possesses inside information may sell or purchase securities as follows:

(i) action in compliance with the law, the court's order, or the order of an agency with the legal power;
(ii) action in accordance with the obligations to a derivatives contract that has been made before one becomes aware of or possesses inside information related to the securities issuing company;
(iii) action not agreed upon or decided by oneself but assigned to an approved or registered person under the law on management of capital or investment to make a securities trading decision or enter into a derivatives contract related to such securities; or
(iv) action not having a characteristic of taking an advantage of other persons or any characteristic as specified in the notification of the SEC.

(6) Regulatory Update

A. Crowdfunding and Initial Coin Offerings (and digital assets)

In Thailand, the fintech space has grown significantly over the past several years. Both the public and private sectors have shown considerable interest and as a result, new laws and regulations have been issued to address new financial products and fund raising methods. The SEC, the BOT, together with the Ministry of Digital Economy and Society leads the way in providing a favorable environment for these new developments. Two such new fund raising methods are crowdfunding and initial coin offerings.

In Thailand, start-ups and SMEs are able to legally raise capital through an equity crowdfunding portal approved by the SEC. The regulatory requirements for equity crowdfunding are more straightforward and streamlined than those of a normal IPO as the SEC recognizes that start-ups and SMEs require capital for businesses which is in its early stages and are often high-risk. The SEC does not limit how much institutional investors (non-retail investors) may invest or how much capital can be raised by an issuer from institutional investors. However, the SEC restricts the amount of capital that can be raised by an issuer from retail investors to no more than 20 million Baht within the first 12 months (and totaling no more than 40 million Baht). Retail investors are also limited to investing no more than 100,000 Baht per business enterprise and totaling no more than one million Baht annually.

In May 2018, the Royal Decree on Digital Assets Business (the "**Decree**") came into force and effect. The Decree aims to provide legal and regulatory framework for digital tokens, cryptocurrencies and initial coin offerings (the "**ICO**") in Thailand. Digital asset businesses which include digital asset exchanges, digital asset brokers and digital asset dealers are also regulated under the Decree. Under the Decree, public offerings of newly issued digital tokens (or ICO) require prior approval from the SEC and are to be offered through an SEC-approved ICO portal. A number of notifications of the SEC and the Ministry of Finance setting out the requirements and licensing procedures for the operations of digital asset businesses have also been issued. Currently, there are several approved digital asset exchanges and digital asset brokers and an approved digital asset dealer in Thailand. Several ICO portals have also been approved and are preparing operations and systems for the SEC's inspection.

B. Amendment to the SEC Act

The recent amendment to the SEC Act was made by the Securities and Exchange Act (No.6) B.E. 2562, 2019 (the "**SEC Act No.6**) which has taken effect on 17 April 2019. The main purpose of amendment is to develop Thailand's capital markets to meet international standards and develop the mechanism to supervise the securities business, which is rapidly changing resulting from financial technology, including enhancing the ability to protect investor's interests. Key amendments of the SEC Act No. 6 include the following topics:

- Supervision of securities business – the SEC is empowered to determine the undertaking of business in any manner not to be a securities business under the SEC Act and the requirement on paid-up capital of the securities business.
- Supervision of mutual fund management and fund voting – the SEC No.6 requires the asset management company to have conflict of interest policy. Also, the revision to the fund scheme must be passed by the majority vote of unitholders attending the meeting and having the right to vote (previously, the majority vote of the total investment units) which is similar to the PLCA.
- Supervision of the SET – if there will be any issuance or modification of the SET regulations that may affect the business operation or interest of members, investors or stakeholders, the SET shall arrange a hearing and deliver a report of such hearing to the SEC.
- Enhancing competitiveness of the capital market – the SEC is empowered to allow a person other than a securities company to trade a particular type of listed securities on the SET (direct access). As the SEC Act No.6 provides only a concept of such direct sale, the subordinate legislation will be announced later.
- Establishment of the Capital Market Development Fund (the "**CMDF**") – in order to promote development of Thailand's capital markets, CMDF is established as a juristic person and self-operated by the committee comprising of representatives from the SEC, the SET, other government agencies such as the Ministry of Finance, the BOT.

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CHAPTER 12

LABOR LAW

CHAPTER 12 | LABOR LAW

This chapter provides an overview of labor legislations in Thailand and the related government agencies and courts of law, and later discusses matters of importance to foreign companies such as employment, dismissal, restructuring, labor organizations, labor disputes, and rules of employment conditions, namely, wages, working hours, holidays and leave. It also includes a brief overview of the regulations on foreign workers. Finally, the government of Thailand amended the Labor Protection Act, B.E. 2541 (1998) the main legislation governing labor-related matters in Thailand in 2019 which has come into effect since 6 May 2019.

(1) Overview

A. Main Legislation

There are several legislations governing labor matters in Thailand. The main legislations related to employment in Thailand are as follows:

- **The Civil and Commercial Code (the "CCC")**
  Section 575 through Section 586 of the CCC prescribe matters related to employment.

- **Labor Protection Act, B.E. 2541 (1998) (the "Labor Protection Act")**
  The Labor Protection Act prescribes employment conditions and work rules, including recruitment, wages, allowances, working hours and dismissal.

- **Labor Relations Act, B.E. 2518 (1975) (the "Labor Relations Act")**
  The Labor Relations Act prescribes procedures for industrial disputes, labor unions and employee committees, unfair labor practice, etc.

- **State Enterprises Employees Relations Act, B.E. 2543 (2000) (the "State Enterprises Employees Relations Act")**
  The State Enterprises Employees Relations Act prescribes matters related to industrial relations in state-owned enterprises.

- **Occupational Safety, Health and Environment Act, B.E. 2554 (2011) (the "Occupational Safety, Health and Environment Act")**
  The Occupational Safety, Health and Environment Act prescribes matters related to the safety considerations and duties of employers and the appointment of safety managers, etc. It was established as a separate part of the Labor Protection Act.

- **Persons with Disabilities Empowerment Act, B.E. 2550 (2007) (the "Persons with Disabilities Empowerment Act")**
  The Persons with Disabilities Empowerment Act prescribes matters related to promotion of the employment of people with disabilities.

- **Act on the Establishment and Procedure of the Labor Court, B.E. 2522 (1979) (the "Labor Court Act")**
  The Labor Court Act prescribes matters related to the establishment of labor courts and the procedures for litigation involving employment.

- **Social Security Act, B.E. 2533 (1990) (the "Social Security Act")**
  The Social Security Act prescribes matters related to the social security fund and the provision of sickness, childbirth, disability, death and childcare payments, pensions and unemployment insurance payments.

- **Workmen's Compensation Act, B.E. 2537 (1994) (the "Workmen's Compensation Act")**
  The Workmen's Compensation Act prescribes matters related to the accident fund and the provision of workers' compensation payments.

- **Emergency Decree on Administration of Foreign Workers, B.E. 2560 (2017) (and its amendment No. 2 (B.E. 2561) (2018)) (the "Foreign Workers Decree")**

  This Foreign Workers Decree prescribes matters related to work permits for foreign nationals, etc.

B. Labor Courts

Labor courts are the only courts with jurisdiction over employment and labor matters. Regular district courts of first instance are unable to hear cases under the jurisdiction of labor courts (Section 8 to Section 10 of the Labor Court Act). The central labor court is in Bangkok. Apart from the central labor court, there are other nine regional labor courts having their different jurisdictions throughout Thailand.

Labor court judges are appointed from among judicial officials who have knowledge of employment problems and have significant experience in the court proceeding for a long period of time. In addition, associate judges are appointed from among people on the lists of representatives of the employers and the employees (Section 14 of the Labor Court Act), and participate in deliberations and judgments. There must be an equal number of specialist judges and associate judges representing both employers and employees on each side (Section 17 of the Labor Court Act). The proceedings conducted in a labor court are exempted from the court's fee.

(2) Employment

A. Definitions

(i) Employment Agreement

An "Employment Agreement" refers to a written or verbal agreement that clearly states or explains that an employee agrees to perform work for an employer and the employer agrees to pay a wage for the time worked by the employee (Section 5 of the Labor Protection Act).

(ii) Employer

An "Employer" refers to a person who agrees to hire an employee and pay a wage, including (i) a person commissioned by an employer to work as a representative of the employer or (ii) if an employer is a juristic person, a person with the authority to represent the juristic person, including a person commissioned to represent the juristic person by such person (Section 5 of the Labor Protection Act and Section 5 of the Labor Relations Act).

(iii) Employee

An "Employee" refers to a person who agrees to work for an employer in exchange for a wage, regardless of the name used to describe such person (Section 5 of the Labor Protection Act and Section 5 of the Labor Relations Act). Any types of employee (e.g. part-time or full-time) are considered as Employee.

B. Types of Employment Agreements

(i) Employment of Unspecified Duration

An "Employment Agreement of Unspecified Duration" refers to a contract without a clearly specified end of employment date. Contrary to fixed-term employment discussed below, in general, employers of an employee under an unspecified duration employment agreement must provide notice of dismissal and severance pay, and paid unused leave upon the termination of employment.

(ii) Fixed-Term Employment

A "Fixed-Term Employment" refers to an employment agreement with a clearly stated term.

However, this does not apply if the Employer has the right of termination the employment agreement before the end of the term or when only a probation period has been stipulated.

Specifically, an employment agreement ends automatically upon the expiration of its term (Section 17, Paragraph 1 of the Labor Protection Act), and notice of dismissal is not necessary.

(iii) Seasonal Employment

An employer does not have an obligation to provide severance pay for fixed-term employment if the following conditions have been satisfied (Section 118, Paragraph 3 of the Labor Protection Act).

a. The employment term does not exceed two years.
b. In the case of any of the following.

- Work regarding special business that is not regular business or a regular transaction[1];
- Temporary work; or
- Seasonal work

c. The employer and employee have executed a written agreement in relation to the above items a. and b. at the commencement of employment.

(iv) Probationary Employment

Employment Agreements with a prescribed probationary period are deemed to be an employment agreement of unspecified duration (Section 17, Paragraph 2 of the Labor Protection Act). Accordingly, if a person is not formally hired as an employee following the probationary period, procedures and conditions that are the same as the regular dismissal

[1] As regular business and transactions are generally broadly interpreted, business that falls under this item is extremely narrow and not often applied.

procedures and conditions, such as notice of dismissal, payment of unused paid leave, payment of severance pay and fair termination, are required.[2] Note, however, that probationary employment is not another type of employment *per se*. It is rather a term coined by the market to describe employees who are still on their probationary period.

(v) Outsourced Workers

"Outsourced Worker" refers to a worker loaned to a company not in the recruitment business to be engaged in the production process or a portion of a business for which the business operator is responsible. The business operator is not responsible for the supervision and management of the loaned worker or paying the wages of the loaned worker (Section 11/1, Paragraph 1 of the Labor Protection Act).

However, if the nature of the work the outsource workers engages in is the same nature as the worker who has a direct employment contract (both type of workers perform works that are the "core" business of the business operator), the business operator shall be a "deemed employer of such outsource worker. In such case the law provides that the business operator must provide fair and indiscriminatory welfares and benefits to the outsourced workers, as it does to its direct employees (Section 11/1, Paragraph 2 of the Labor Protection Act). Business operators who do not comply with this provision shall be liable to a fine of no more than 100,000 Baht (Section 144/1 of the Labor Protection Act).

C. Employment of People with Disabilities

According to the Labor Ministerial Regulations issued under Section 33 of the Persons with Disabilities Empowerment Act, employers have an obligation to employ one person with disability as soon as its total employees reach every 100 persons. From 100 employees and onward, the employers must employ another one disabled person if the excess number of such 100 employees reaches to 50 able-bodied employees but does not reach to another 100 employees. This means that, for example, if an employer has 150 employees, it must have at least two employees who are persons with disabilities, and if the employer has 240 employees, there must also be two persons with disabilities.

Employers who do not fulfill these employment obligations must make a contribution to the Fund for the Promotion and Development of Life Quality of Disabled Persons (Section 34 of the Persons with Disabilities Empowerment Act) on annual basis calculating from the minimum wages rate specified under the labor protection law in the previous year prior to the obligation to send money to the Fund multiplied by 365 and multiplied by the number of persons with disabilities not being employed.

(3) Dismissal

A. Meaning of "Dismissal"

"Dismissal" means that the employer prevents the employee from continuing work and does not continue to pay wages to the employee, whether or not due to the expiration or termination of the employment agreement (Section 118, Paragraph 2 of the Labor Protection Act).

[2] Many employers establish a probation period up to 119 days or fewer in order to avoid paying severance pay (as stated below, 120 days or more of continuous employment is required before an employee can claim the right of statutory severance pay), provided that the termination of employment shall be effective within the probationary period.

Consequently, forcing "voluntary retirement" may also be deemed to be a dismissal. In addition, this includes cases where an employee is unable to work and does not receive wages due to the employer being unable to continue business (Section 118, Paragraph 2 of the Labor Protection Act).

B. Process of Termination

In the case of employment of unspecified duration, the employer is required to provide notice of dismissal in writing at least one full wage payment period in advance (Section 17, Paragraph 2 of the Labor Protection Act).[3] In Thailand, if wages are paid by the month, it is possible that a longer notification period will be required. For example, if the wage payment day is the last day of the month, an employee may be dismissed on 31 August provided that the employer provides notice on 31 July. However, if the employer provides notice on 1 August which is after the due date of wage payment, in principle, the employee cannot be dismissed until 30 September.

Alternatively to the above, an employee may be immediately dismissed without advance notice, in the following two scenarios:

- an employer may immediately dismiss an employee without waiting for the passing of one wage payment period by paying the wage for the period in advance (Section 17, Paragraph 3 of the Labor Protection Act); or

- if an employee commits an offense stipulated in Section 119 of the Labor Protection Act, the employer may immediately dismiss the employee without notice and without severance pay. Examples of what legally constitute as "serious misconduct" are fraud, being sentenced to imprisonment by an order of the court which is final, and abandonment of works for three consecutive work days without justifiable reasons etc. (Section 17, Paragraph 4; Section 119, Paragraphs 1 and 2 of the Labor Protection Act) See item C. below for more information regarding severance pay and serious misconducts.

C. Severance Pay

(i) <u>Necessity of Severance Pay</u>

Employers must pay the amount for the number of prescribed days as a final wage in accordance with the period of continuous employment by the employee (severance pay) at the time of the termination of employment. Note, also that employers are required to provide severance pay, even if a fixed-term employment contract expires at the end of its term, given that an employment period of 120 days has elapsed (please see Figure 11-1 below). However, if an employee voluntarily resigns, he/she will have no right to severance pay.

However, as stated above, in an exceptional case in which an employee is hired with a special fixed-term employment contract that satisfies the prescribed criteria, the employer does not to provide severance pay (please see item (2)B.(iii)) above (Section 118, Paragraph 3 of the Labor Protection Act). Furthermore, there are also exceptional cases of "serious misconduct" where the employer does not have an obligation to provide severance pay.[4]

[3] However, if one pay period is three months or longer, the Labor Protection Act prescribes that notice of three months in advance is sufficient.

[4] Written notice of dismissal must contain the reasons and facts of the dismissal (Section 119 Paragraph 3 of the Labor Protection Act).

The serious misconducts stipulated in Section 119, Paragraph 1 of the Labor Protection Act are as follows:

- performing his / her duty dishonestly or intentionally committing a criminal offense against the employer;
- willfully causing damage to the employer;
- committing negligent acts causing serious damage to the employer;
- violating work rules, regulations or order of the employer that are lawful and just, and after written warning having been provided by the employer, except in serious cases with no requirement for the employer to provide warning (the written warning shall be valid for a period not exceeding one year from the date when the employee commits the offense);
- absenting himself / herself from duty without justifiable cause for three consecutive work days regardless of whether a holiday falls in-between; or
- being sentenced to imprisonment by a final court judgment. If it is an offense committed through negligence or a petty offense, it must be a case that causes the employer to suffer damage.

(ii) Calculation of Severance Pay

The period of continuous employment includes holidays, leave and days taken off with the permission of or by the order of the employer.

Specific amounts of severance pay are calculated according to the following criteria (Section 118, Paragraph 1 of the Labor Protection Act).

[Figure 11-1] Relationship between period of continuous employment and severance pay

Period of Continuous Employment	Severance Pay (Based on Last Wage Payment)
120 days or more – less than one year	30 days of wages
one year or more – less than three years	90 days of wages
three years or more – less than six years	180 days of wages
six years or more – less than ten years	240 days of wages
ten years or more – less than 20 years	300 days of wages
20 years or more	400 days of wages

(iii) Special Severance Pay

a. Compensation for Employees who Choose to Discontinue their Employment due to Relocation of Place of Business

Section 120 of the Labor Protection Act provides that:

"Where an employer relocates its place of business, whether to a new place or to another place of the employer, the employer shall post a notification informing the employees in advance. Such notification shall be posted at a highly visible place of the place of business. The notification shall contain at least a statement that is clear and sufficiently understandable, as to where and when an employee will be moved.

In the case where an employee views that such relocation will materially affect his/her ordinary course of living, and does not wish to be relocated, he or she shall notify such intention to the employer within 30 days of the date on which the notification is posted. The notice must be in writing"

If an employer fails to notify the employee, the employer will be required to pay further compensation equivalent to 30 days of wages from the day of notice of termination or the relocation date (Section 120, Paragraph 2 of the Labor Protection Act).

It is worth noting that Section 120 was recently amended in 2019, pursuant to Supreme Court Decision nos. 2228/2545 and 13550/2558, which ruled that "relocation of workplace" means shutting down one work location and changing to a new location. The court held that if an employer had more than one work location and orders employees to change their place of work to another already existing location, Section 120 of the Labor Protection Act would not apply.

b. Compensation for Dismissal due to New Machinery or Technology

If an employer is required to dismiss an employee on the grounds that it is necessary to reduce the number of employees due to a change of organization, production process or method of providing services resulting from new machinery or technology, the employer must send notification of termination of employment to the labor inspector and the relevant employee at least 60 days in advance (Section 121, Paragraph 1 of the Labor Protection Act).

Employers are also required to provide special severance pay for 60 days of wages in addition to regular severance pay (Section 121, Paragraph 2 of the Labor Protection Act). Furthermore, employers must pay a special termination payment (to be rounded up when the period less than one year exceeds 180 days) for 15 days of wages for each year of continuous employment within a 360-day period to employees who have worked for a continuous period of over six years (Section 122 of the Labor Protection Act).

D. Express Provisions on Prohibiting Termination in Individual Cases

Under the Labor Protection Act, it is illegal to dismiss an employee based on the following grounds:

- dismissal on the grounds of pregnancy (Section 43 of the Labor Protection Act);
- dismissal of members of the employees' committee. However, members may be dismissed with the approval of a labor court (Section 52 of the Labor Relations Act);
- dismissal on the grounds of an employee calling a rally, submitting a demand, filing legal action, being a witness or submitting evidence, etc., or attempting to conduct acts (Section 121 (2) of the Labor Relations Act);
- dismissal on the grounds that an employee is a member of a labor union (Section 121 (2) of the Labor Relations Act); or
- dismissal of an employee related to the submission of a demand (prerequisite procedure of a labor dispute) during the effective term of a labor agreement or the enforcement of an arbitration decision.

E. Restrictions Imposed by the Labor Court on Unfair Dismissal

(i) Outline

If a labor court determines that the dismissal of an employee is unfair, the court may order the employer to reinstate the employee at the same pay level (Section 49 of the Labor Court Act). However, if a labor court determines that an employer and an employee cannot cooperate and continue work, the court may order the employer to pay damages in lieu of reinstatement of work duties.

Note, however, that there is no statutory definition of "unfair dismissal". Therefore, what constitutes as such will be determined by the court on a case-by-case basis. For example, it has been ruled that dismissal without a justifiable ground or the ground does not proportionate to dismissal is unfair dismissal while dismissal due to the employee being caught to have gambled at the workplace is fair dismissal.

(4) Succession of Employees in relations to Business Reorganization

A. Business Transfer

Employers may transfer an employee's status to a third party only with the consent of the employee (Section 577 of the CCC). If the employees do not give their consent, the former employment agreements between the employer and employees will continue. Furthermore, it appears that in order for an assignee company to succeed an employment agreement, especially when there is no separate agreement, the assignee company will also succeed the employment term that forms the basis of the calculation of severance pay.

B. Amalgamation

In the case of an amalgamation[5] which results that employees becoming employees of the new employer (the company so formed as a result of amalgamation), the consent from the employees must be obtained. In addition, the employees continue to retain the rights held under the previous employer, and the new employer assumes the rights and obligations held by the employees (Section 13 of the Labor Protection Act). In other words, after the amalgamation, the juristic person created as a result of the amalgamation shall accepts all the rights and obligations held by the employees of the amalgamating companies after the consent of those employees are granted.

(5) Labor Organizations

A. Labor Unions

A labor union must be comprised of ten or more founding workers. It can become a juristic person after the creation of a constitution and registration with the Ministry of Labor or the provincial governor (Section 87 of the Labor Relations Act). The founding members must be employees of the same employer, or employees who work in the same industry, and must be a *sui juris* of Thai nationality (Section 88 of the Labor Relations Act).

[5] In the case of a private company in Thailand under the jurisdiction of the CCC, only consolidation-type mergers are permitted. Absorption-type mergers are not legally recognized yet.

B. Employee Committee

An employee committee may be established in a place of business with 50 or more employees. The committee members[6], who include the employer and employees, regularly discuss matters such as welfare, work rules, complaints by employees, etc. (Section 45, Paragraph 1 and Section 50, Paragraph 1 of the Labor Relations Act). Note that in case where a labor union is established, a committee of the labor union would be appointed simultaneously as a member of the employee committee to gain benefit from protection under the Labor Relations Act to avoid being terminated.

C. Welfare Committee

A place of business with 50 employees or more must establish a welfare committee consisting of at least five employees constituted by an election supervised by the employer (Section 96, Paragraph 1 of the Labor Protection Act). The welfare committee shall regularly discuss and monitor matters related to welfare and benefits with the employers (Section 97 of the Labor Protection Act). Employers must hold discussions with the welfare committee at least once every three months (or upon a reasonable request from the welfare committee). If the employee committee in item B. above exists in a place of business, that committee must act as the welfare committee.

(6) Procedures for Industrial Disputes

The Labor Relations Act approves lock-outs and strikes as a method of resolving industrial disputes.

A "Lock-out" is defined as an employer refusing to allow an employee, or employees, to work on a temporary basis. "Strike" means the stoppage of work by the employees when an industrial dispute arises (Section 5 of the Labor Relations Act). However, if an employer legally locks out the employees or the employees legally call a strike, the employer or employees must submit a letter of demand and comply with the following procedures until labor mediation has been achieved.

A. Letter of Demand

In order to execute or modify a labor conditions agreement[7], the employer or employee must submit a demand to the other party (Section 13, Paragraph 1 of the Labor Relations Act). If an employee submits a demand, the demand must contain the names and signatures of 15% or more of the total number of employees affected by the demand (Section 13, Paragraph 3 of the Labor Relations Act).

In addition, if the number of labor union members exceeds 20% or more of the total number of employees, the labor union may submit the demand in lieu of the employees (Section 15, Paragraph 1 of the Labor Relations Act).

[6] The number of members of the employee committee is from five to 21 people, depending on the number of employees in the place of business (Section 46 of the Labor Relations Act).

[7] Places of business with 20 or more employees must execute a written labor conditions agreement between the employer and employees containing specific employment conditions. However, if the existence of a labor conditions agreement cannot be confirmed, the Work Rules of the place of business shall be deemed to be the labor conditions agreement (Section 10 of the Labor Relations Act).

B. Negotiations

The employer and employees must begin negotiations no later than three days from the receipt of a demand (Section 16 of the Labor Relations Act). If an agreement is reached during the negotiations, the employer and employees prepare and sign a labor conditions agreement containing the agreed content (Section 18 of the Labor Relations Act). Conversely, if negotiations do not begin within three days of receiving a demand or if negotiations begin, but an agreement has not been reached, an industrial dispute will be deemed to have occurred and the party who submitted the demand must notify the conciliation officer no later than 24 hours after the three days have passed since the receipt of the demand, or no later than 24 hours since an agreement could not be reached (Section 21 of the Labor Relations Act).

C. Settlement

A labor conciliation officer shall proceed to settle the labor dispute within five days of receiving written notice in order to assist the parties to reach an agreement. If an agreement is reached, the employer and the employees prepare and sign a labor conditions agreement containing the agreed content. If an agreement is not reached, the matter will be deemed an unconcluded labor dispute, and the employer and employee either refer the matter to an industrial dispute arbitrator, the employer may lock out the employees, or the employees may go on strike (Section 22 of the Labor Relations Act). However, such employer or employees must provide written notice to the other party at least 24 hours prior to locking out the employees or the employees going on strike (Section 34, Paragraph 2 of the Labor Relations Act).

(7) Wages and Allowances

A. Outline

"Wages"[8] refers to the money that the employer pays to an employee in return for work performed during the hours, days, weeks, months and other regular working hours prescribed in the employment agreement, payment for output of the employee during regular working hours, or the payment that an employee has the right to receive from the employer in accordance with the Labor Protection Act for work performed on a holiday or during leave (Section 5 of the Labor Protection Act).

However, payment for work on holidays or during leave may be included in wages. Section 56 of the Labor Protection Act stipulates that an employer must pay wages to an employee equivalent to the wages of a working day for a weekly holiday (except for an employee who receives wages calculated on a daily, hourly, or output-based system), a traditional holiday, and annual holidays. Male and female employees must be paid the same wage, overtime, holiday and holiday overtime pay for the same work and work load (Section 53 of the Labor Protection Act).

(i) <u>Method of Payment</u>

The employer must pay all cash payments of the wage, overtime, holiday, holiday overtime pay and other benefits related to employment in Thai Baht, except when the employee agrees to another method of payment (Section 54 of the Labor Protection Act). In addition, the employer must pay the wages, the above payments and other monetary benefits related to employment at the workplace of the employee, except when the employee agrees to payment

[8] Employers do not have a legal obligation to pay bonuses. If bonuses are not prescribed in the work rules, internal rules, or employment agreement, etc. they are left to the discretion of the employer.

at another location (Section 55 of the Labor Protection Act). Consequently, the approval of the employee is required for wages to be transferred into a bank account. The employer must pay wages for weekly holidays (not including daily or hourly wages), customary holidays and annual paid leave to employees at the same rate as regular days (Section 56 of the Labor Protection Act). In other words, these payments are included in the wages.

The Labor Protection Act prescribes that interest on late payments of wages and the above allowances, etc. is 15% per annum. Furthermore, if an employer fails to pay these payments without reasonable grounds or intentionally, the employer has the obligation to pay an additional 15% interest of the unpaid amount for the delay every seven days (Section 9 of the Labor Protection Act).

(ii) Restrictions on Deductions

Employers must not make deductions from the wages, overtime, holiday or holiday overtime payments, except in the following cases (Section 76 of the Labor Protection Act):

(1) payment of the income tax that the employee is under an obligation to pay (withholding tax) and other payments prescribed by law[9];
(2) labor union fees prescribed in the regulations of a labor union;
(3) payment of debts to savings cooperatives or cooperatives of the same nature as a savings cooperative or debts for welfare for the sole benefit of the employee;
(4) guarantee prescribed by the Labor Protection Act or compensation for damage incurred by the employer due to the intentional or gross negligent act of an employee, with the employee approval; and
(5) employee contribution in accordance with an agreement regarding a contribution fund[10].

In addition, the above deduction amounts in items (2) to (5) each must be not greater than 10% of the wages and not greater than 20% of the basic wage and overtime payment unless the employee's consent is obtained.

(iii) Minimum Basic Wage

The Wage Committee determines the minimum wage when necessary (Section 79, Paragraph 3 of the Labor Protection Act). Note that in Thailand, the minimum wage varies in each province.

If an employer fails to comply with the payment of the minimum wage or skilled worker minimum wage, the employer may be subject to imprisonment for a term of six months or less or fine no more than 100,000 Baht or both (Section 90, Paragraph 1 and Section 144 of the Labor Protection Act).

(8) Working Hours, Rest Periods and Holidays

A. Working Hours

In principle, working hours must not exceed eight hours per day and 48 hours per week. If the working hours are fewer than eight hours in one day, the employer and employee may agree to add the remaining time to the working hours of another work day. However, working hours must

[9] Equivalent to social insurance premiums and accident insurance, etc.
[10] Equivalent to a provident fund (retirement contribution fund)

not exceed nine hours in one day or 48 hours in one week. In the case of output-based systems or hourly or daily work systems, if the total number of hours exceeds eight hours, the employer must pay one and a half times the wage for the excess portion (Section 23, Paragraphs 1 and 2 of the Labor Protection Act).

However, note that the working hours mentioned above may be different for some types of works, subject to subordinated laws prescribed by the Ministry of Labor. For example, metal wielding work or works that must be done in tunnels or underwater are subject to less hours of work (Ministerial Regulation No. 7, issued in 1998)

B. Rest Periods

In principle, employers must grant employees at least a one-hour rest period per one work day after no more than five consecutive hours of work. The employer and employees may agree to divide rest periods into segments of less than one hour. However, the total rest period cannot be less than one hour in one workday (Section 27, Paragraph 1 of the Labor Protection Act). In principle, rest periods are not included in the calculation of working hours. However, if the total of rest periods exceeds two hours in one day, any excess over two hours will be included in the calculation of working hours (Section 27, Paragraph 3 of the Labor Protection Act).

In addition, if overtime work continues for more than two hours after regular work, the employer must grant the employee at least a 20-minute rest period prior to the beginning of overtime work (Section 27, Paragraph 4 of the Labor Protection Act). If it is necessary for an employee to continue work due to the nature and circumstances of the work and the employee approves, or in the case of an emergency, Section 27, Paragraphs 1 and 4 of the Labor Protection Act will not apply.

C. Holidays

In principle, employers must not require employees to work on holidays (Section 25, Paragraph 1 of the Labor Protection Act). If an employer requires an employee to work on holidays, it must be a case where the nature or condition of the work needs continuous performance. A break from work would obstruct the performance of work due to the nature of the work or in case of an emergency, the employer may require the employee to work on a holiday to the extent necessary (Section 25 of the Labor Protection Act). In addition, employers may require an employee to work on a holiday where the place of business is a hotel, entertainment venue, transportation company, restaurant, club, association, medical institution or other place of business prescribed by the Labor Ministerial Regulations (Section 25, Paragraph 2 of the Labor Protection Act).

Employers must grant employees at least one holiday per week and there must not be more than a six-day interval between holidays.

Employers must determine 13 or more public holidays in consideration of public, religious or regional customary holidays, including the national Labor day (May Day – 1 May) designated by the Minister of Labor, and announce to the employees (Section 29, Paragraphs 1 and 2 of the Labor Protection Act). If a public holiday falls on a regular holiday during the week, the employer must grant a substitute holiday to the employees on the next work day (Section 29, Paragraph 3 of the Labor Protection Act).

D. Overtime Work and Work on Holidays

It is generally necessary to obtain the approval of employees for an employer to require an employee to work overtime, to work on a holiday, or to work overtime on a holiday (Section 24, Paragraph 1of the Labor Protection Act). An employer may require an employee to work overtime only when the nature and type of work requires continuous work and a break in work would obstruct the work, or in urgent circumstances or when prescribed by Labor Ministerial Regulations (Section 24, Paragraph 2 of the Labor Protection Act).

The total overtime, holiday work and holiday overtime work must not exceed the working hours (no more than 36 hours in one week)[11] as prescribed by the Labor Ministerial Regulations (Section 26, Paragraph 1 of the Labor Protection Act). Furthermore, an employer must not require an employee to work overtime or work on a holiday if the work is prescribed by the Labor Ministerial Regulations as harmful to the health or safety of the employee (Section 31 of the Labor Protection Act).

E. Overtime Pay, Holiday Pay and Holiday Overtime Pay

An employer must pay employees in accordance with the above if the employer requires an employee to work overtime or on a holiday. See Figure 11-2 for more details (Section 61 to Section 63 of the Labor Protection Act).

[Figure 11-2] Overtime pay, holiday pay, and holiday overtime pay

Types of overtime pay and holiday work		Additional payment amount (of the normal wage rate)
overtime work		one and half times
holiday work	(in cases of salary such as a monthly salary)	one time
	(in cases of daily wage)	two times
holiday overtime work		three Times

Employees will not have the right to receive the above payments in the case of any of the following:

- if the employee has the authority to represent the employer in regard to recruitment, the payment of bonuses and the dismissal of employees;
- if the employee conducts mobile sales of products or marketing and the employee receives sales commission;
- if the employee is engaged in the rail business (train attendants and operation assistants);
- if the employee opens and closes sewage pipes;
- if the employee measures water levels and volume;
- if the employee performs fire extinguishing or pollution prevention;
- if the employee is required to perform work outside the place of business and cannot determine the working hours due to the nature and criteria of the work;
- if the employee is engaged in irregular work involving monitoring a location or property; and
- if the employee is engaged in work prescribed by Labor Ministerial Regulations.

[11] Labor and Welfare Ministerial Regulation No. 3 in accordance with the Labor Protection Act.

(9) Leave

A. Annual Paid Leave

An employee who has worked continuously for one full year or more shall be entitled to receive annual paid leave of at least six work days or more for each year (Section 30, Paragraph 1 of the Labor Protection Act). The employer may grant more than six work days of annual paid leave in accordance with the number of continuous years of employment, but this is not a legal requirement (Section 30 Paragraph 2 of the Labor Protection Act).

In addition, the employer and the employee may agree to carry over any unused annual paid leave to the next fiscal year (Section 30, Paragraph 3 of the Labor Protection Act). The employer may grant annual paid leave to employees who have worked for less than one year on a pro-rata basis (Section 30, Paragraph 4 of the Labor Protection Act).

B. Sick Leave

An employee may take sick leave as long as he or she is actually sick. However, if an employee is absent for three or more consecutive days, the employer may require the employee to submit a medical certificate from a first-class medical practitioner or a government hospital. If the employee is unable to submit a medical certificate, the employee must provide an explanation to the employer (Section 32, Paragraph 1 of the Labor Protection Act). Wages must be provided for no more than 30 days of sick leave per year (Section 57, Paragraph 1 of the Labor Protection Act).

C. Sterilization Leave

An employee may take sterilization leave if the employee submits a medical certificate from a first-class medical practitioner that shows the required period of leave (Section 33 of the Labor Protection Act). Wages must be provided for all days of sterilization leave (Section 57, Paragraph 2 of the Labor Protection Act).

D. Personal Leave

Employees are entitled to at least three paid days of personal leave per year. Personal leave is mainly granted for attending ceremonial functions such as weddings and funerals and visiting government offices. Employers are required to pay wages for personal leave for three days (Section 57/1 of the Labor Protection Act).

E. Military Service Leave

Employees may take military service leave in order to receive inspections, military training or service according to the law related to military service (Section 35, Paragraph 1 of the Labor Protection Act). Thai men are required to undertake military service if selected by the lottery. Employers must pay wages for up to 60 days of military service leave per year (Section 58 of the Labor Protection Act).

F. Professional Development Leave

Employees may take professional development leave in order to receive training or develop skills in accordance with Labor Ministerial Regulations (Section 36 of the Labor Protection Act).

Consequently, Labor Ministerial Regulation No. 5 approves professional development leave in the following cases:

- for work or community welfare purposes or to develop the skills or specialization of employees in order to increase work efficiency; and
- government provided or approved examinations.

In addition, in order for an employee to take professional development leave, Labor Ministerial Regulations requires the employee to notify the employer at least seven days in advance, clarify the reason and submit the necessary documents (if any).

G. Maternity Leave

Pregnant female employees may take maternity leave for no more than 98 days per child birth, and that 98 days shall include holidays (Section 41 of the Labor Protection Act). The days of maternity leave shall also include leave days for pregnancy check-ups prior to delivery. The leave days during the maternity leave period shall include holidays during such leave period.

Employers must pay wages for 45 of the 90 days of maternity leave (Section 59 of the Labor Protection Act).

H. Leave for the Activities of Labor Union Committee Members

Employees who are members of a labor union may take paid leave to represent employees while they participate in negotiations, mediation, and arbitration of labor disputes and meetings designated by the government institutions (Section 102 of the Labor Relations Act).

(10) Work Rules and Labor Conditions Agreements

A. Work Rules

Employers with ten or more employees are required to create work rules in Thai language, announce them to the employees and display them in the workplace for employees to read no later than 15 days after the day the company reaches ten or more people. There is no legal requirement for submission of the work rules to the labor office. The topic which should be contained in the work rules are as follows:

- work days, regular working hours and rest periods;
- rules on holidays and taking holidays;
- rules on overtime work and work on holidays;
- payment dates and place of payment of wages, overtime payments, holiday payments and holiday overtime payments;
- rules on leave and taking leave;
- disciplinary procedures;
    - filing complaints; and
    - dismissal, severance pay and special severance pay.

As stated above, if the existence of a labor conditions agreement cannot be confirmed, the provisions of the work rules will be deemed to be the labor conditions agreement (Section 10, Paragraph 3 of the Labor Relations Act). Consequently, employers cannot make modifications to work rules that disadvantage the employees without obtaining the approval of the employees

(Judgments of the Supreme Court of Thailand No. 2127/2555 and No. 2664/2556).

B. Employment Agreements

The law does not require a written employment agreement. However, in practice, written employment agreements are usually created in order to clarify the rights and obligations between employers and employees. Employment agreements often prescribe general work conditions such as wages and anti-competition obligations, etc.

(11) Foreign Workers

A. Prohibited types of work for foreign nationals

Foreign nationals are prohibited from working in the following 39 types of work in accordance with the Royal Decree Proscribing Works Related to Occupation and Profession in Which an Alien Is Prohibited to Engage, B.E. 2522 (1979):

(1) labor work (excluding labor work in fishing vessel and labor works);
(2) agriculture, forestry or fishery (excluding specialized work in each particular field, or farm management, or labor work in fishing vessel);
(3) bricklaying, carpentry or other construction work;
(4) wood carving;
(5) driving mechanically or non-mechanically propelled vehicles (excluding international aircraft piloting);
(6) shop attendants;
(7) auctions;
(8) accounting, auditing or other accounting businesses (excluding extraordinary internal auditing);
(9) cutting or polishing jewelry;
(10) haircutting, hairdressing or beauty treatment;
(11) weaving by hand;
(12) weaving mats and other products using reeds, rattan, hemp, straw or bamboo as materials;
(13) making handmade paper;
(14) making lacquerware;
(15) making Thai musical instruments;
(16) making niello products;
(17) manufacturing products from gold, silver or gold-copper alloy;
(18) blacksmithing;
(19) making Thai dolls;
(20) making mattresses or quilts;
(21) making alms bowls;
(22) making silk products by hand;
(23) making Buddhist images;
(24) making knives;
(25) making paper or cloth umbrellas;
(26) making shoes;
(27) making hats;
(28) brokerage or agency work (excluding brokerage or agency work in international trade);
(29) designing and calculation, organization, research, planning, inspection, construction supervision or advice regarding civil engineering (excluding specialized work);

(30) designing, drawing plans, assessing, construction management or advice regarding architectural work
(31) making clothes;
(32) making ceramics;
(33) making handmade cigarettes;
(34) tour guiding or conducting;
(35) street vending;
(36) typesetting Thai characters;
(37) twisting silk;
(38) office or secretarial work; and
(39) legal or litigation services (excluding (a) arbitrator, and (b) counsel or representative of a party to arbitral proceedings provided that the applicable laws for such arbitral proceedings is not Thai laws, or the arbitral award enforcement or execution of such arbitral proceedings in Thailand is not required).

B. Outline of Work Visas and Work Permits for Foreign Nationals

Foreign nationals are required to obtain a work visa (non-immigrant visa type B (Work)) from a Thai diplomatic mission outside of Thailand and then apply for a work permit (work permit, Form WP 11) from the Department of Employment, the Ministry of Labor, etc. (Section 8 of the Foreign Workers Decree) in order to work in Thailand. The criteria for issuing work permits are determined in accordance with the regulations of the Department of Employment under the Ministry of Labor. Although it depends on factors such as the type of employer, in principle, if the employer is a juristic person established in Thailand, the juristic person must have at least 2,000,000 Baht in paid-in capital per foreign national.

Furthermore, in principle, in order for a foreign national to renew a work visa at the Immigration Bureau, Royal Thai Police, the employer must have at least four Thai employees for every foreign employee, the foreign employee must receive a specific wage (although it depends on the nationality of the employee, a foreign national must receive at least 50,000 Baht per month[12]), and must satisfy other criteria. Formerly, the requirement of four Thai employees was applied by people in charge at the time of granting a work permit.

In fact, both the capital requirement and requirement for employment of Thai nationals no longer apply if the Board of Investment of Thailand (the "**BOI**") grants an investment recommendation and the work permits will be issued for the number of employees required for the BOI business. If a foreign national works without a work permit, the foreign national is liable for a term of imprisonment of up to five years or a fine of 2,000 Baht to 100,000 Baht or both (Section 51 of the Foreign Workers Decree). In addition, the employer is liable for a fine of 10,000 Baht to 100,000 Baht for each foreign worker (Section 54 of the Foreign Workers Decree).

C. Meaning of "Work"

Although the word "work" is not defined in the Foreign Workers Decree, the Department of Employment, the Council of State has given the Opinion No. 152/2556 in 2013 to define that working shall be comprised of the following characteristics:

1. the performance has been done in Thailand using physical force or knowledge; and
2. the performance decreases demand for labor on the domestic labor market.

[12] Ordered by the Royal Thai Police

In March 2015, Ministry of Labor issued Notification Prescribing Acts that are not Considered as "Working" under the Law dated 6 March 2015. According to the above notification, the following acts are not "work activities" for the purpose of the foreign working. In other words, foreign nationals do not need to obtain a work visa or work permits to conduct the following activities:

- attending conferences or seminars;
- attending exhibitions or trade fairs;
- attending company visits or trade negotiations;
- attending special lectures or academic lectures;
- attending lectures or seminars for technical training;
- making purchases of products at exhibitions; and
- attending meetings of the board of directors.

D. Notification of Emergency Work

If a foreign national is required to perform necessary and emergency work in accordance with the Immigration Act, B.E. 2522 (1979) for no more than 15 days while staying in Thailand, the foreign national will not be required to obtain a work permit if the foreign national submits an Emergency Work Notification to the Department of Employment and receives an acceptance stamp (Section 9, Paragraph 1 of the Foreign Workers Decree).

A typical example would be a foreign national who enters Thailand in order to repair a machine because there is no one in Thailand who can conduct such repairs. However, if it is foreseeable that the maintenance would have been required, the maintenance will not be deemed to be emergency work.

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CHAPTER 13

PROTECTION OF PERSONAL DATA

CHAPTER 13 | PROTECTION OF PERSONAL DATA

This chapter will discuss and provide basic background of and primary regulation for protection of personal data in Thailand, which will come into full effect in May 2020.

(1) Overview of Historical Practices and Legislation

Protection of personal data and privacy has long been a heated topic in Thailand. In the past and to some extent up until nowadays, personal data that is commercially useful is often gathered, processed, stored, and even sold and transferred without justification, knowledge, or consent of the person who owns such data. This inappropriate and legally unsupported use of data covers the most basic of commercially usable data such as name and phone number to other more sensitive data such as health information and other delicate life choices. Most of the breaches were committed to commercialize the data, such as to enable cold calls or facilitate targeted marketing or general market analysis, but some were committed without any malfeasant intention, such as useless, perpetual storage. In the past, any breach of personal data would rely on Section 420 of the Thai Civil and Commercial Code, which is a catch-all provision which prohibits and penalizes wrongful acts in general. In this sense, breach of personal data, whether protection or privacy, has been treated as a simple tort. Due to the nature of the law, the vast majority of people would simply not pursue the supposed wrongdoer, because any pursuit will be incredibly time-consuming (both inside and outside of court) and insensibly costly (cost of court case-filing fee and lawyer fee), and the possible benefits to be reaped from the justice system would be very minimal and far outweighed by the costs, as the Thai justice system only affords actual damages to cases of tort. The practical implication of this has been the enabling of the operators to continue using people's data without any fear of repercussion.

(2) Current Legislation

The Personal Data Protection Act B.E. 2562 (2019) ("**PDPA**") was enacted on 27 May 2019. A one-year transition period has been granted to companies and government agencies handling personal data to comply with the key provisions of the PDPA which will be fully effective in May 2020. Several subordinate laws are required for implementation and expected to be announced within one year from May 2020. The Office of Personal Data Protection Commission was established and the Data Protection Commission ("**Commission**") shall be formed.

A. Applicability

As a general principle, the PDPA will apply to all persons and juristic entities that deal in any way with data of a natural person, including companies and even government entities. The PDPA, however, will not apply to the following six types of data treatment:

a. collection, use or disclosure of personal data of persons who collect personal data for personal benefit or for their family activities;
b. operations of government agencies having a duty to preserve state security, including fiscal security or public security, as well as duties relating to anti-money laundering, forensic science, or cyber security;
c. actions of persons or juristic persons who use or disclose personal data collected specifically for mass communications activities, artwork, or literary work in accordance with a professional code of conduct or for public interest;
d. actions of the House of Representatives, the Senate, and the Parliament, including commissions appointed by these bodies, which collect, use, or disclose personal data for purpose of making deliberation under their duties and powers;

e. consideration of the courts and performance by officers in legal proceedings, legal execution, and deposit of property, including implementation of the criminal judicial process; and
f. actions of the National Credit Bureau Company Limited and its members under the law on operation of credit information business.

B. Regulations

Broadly speaking, the PDPA provides for three main areas of regulations: (i) the basis under which personal data is processed and treated, (ii) rights of data subject, and (iii) storage of data by the operators.

Under the PDPA, there are mainly three definitions:

a. "**Personal Data**" means any data which, by itself or in combination with other data, can be used to trace to an individual, meaning virtually all and each piece of personal data is "Personal Data" as recognized by the PDPA;
b. "**Data Controller**" means any entity which has the power to decide how to treat Personal Data; and
c. "**Data Processor**" means any entity which treats Personal Data pursuant to instructions of the Data Controller.

(i) Basis of Treatment

The PDPA dissects Personal Data into two types: (i) ordinary data (such as name, address, phone number, email address, etc.) and (ii) sensitive data (ethnicity, race, philosophical, religious, and socio-political belief and affiliation, relationship with labor union, criminal records, diseases and bodily conditions, biometrics and DNA, sexual preference, etc.), both of which may be treated under different bases.

Similar to other data protection regulations in other countries, the PDPA provides for a set of lawful basis under which treatment of ordinary data can occur which are:

a. via consent of the data subjects;
b. for achievement of a purposes relating to preparation of historical documents or archives in public interest or relating to study, research, or statistics for which the appropriate protection standard is used to protect the rights and liberties of the data subjects as prescribed and announced by the Commission;
c. for prevention of danger to life, body, or health of persons;
d. for performance under a contract to which the data subject is a party, or for proceeding with the data subject's request before entering into such contract;
e. for performance of a Data Controller's duty for public interest or as required by the state;
f. under a legitimate interest of a Data Controller or another person or juristic person, unless such interest is less important than basic rights in the Personal Data of the data subject; and
g. for Data Controller's compliance with law.

From the list, the four most important and often used lawful bases to process personal data are: (i) consent, (ii) contractual performance, (iii) legitimate interest, and (iv) compliance with law. Additional explanations for items (i) – (iii) are:

a. Consent. Consent in general must be clear and in written, electronic, or other unequivocal manners, and different objectives should be separated to ease understanding of the data subjects. Consent must also provide other information to allow the data subjects to carefully consider whether their consent should be given to the Data Controller, such as rights of data subjects, contact information, retention period, etc. Note that consent must not be lumped with information gathered via contractual performance basis.
b. Contractual performance/entering into the contract. The most important principle to remember is that all items of Personal Data given under this basis must be absolutely necessary for performance of contract/ entering into the contract. If a piece of data is not needed for performance/ entering into the contract, then it cannot be lumped into this basis and must, by itself, find its own basis.
c. Legitimate interest. Legitimate interest of the Data Controller must always be weighted against fundamental rights of the data subjects over such Personal Data. There is no official guideline under the PDPA as to how the weighing mechanism should be, or to what extent a Data Controller can trust their own judgment. Therefore, it is highly recommended that the surrounding circumstances for a single use of data under this basis be thoroughly considered before an operator decides to proceed with the treatment. Any miscalculation will simply mean treatment of data without proper lawful basis, rendering the operator liable to the penalties under the PDPA.

Also similar to other data protection regulations in other countries, the PDPA provides for a set of bases under which treatment of sensitive data can occur. These bases, although different from bases for ordinary data, have, for a large part, been derived from the same fundamental thinking. The bases are:

a. via express consent of the data subjects;
b. for prevention of danger to life, body or health of persons, for which the data subject cannot give his/her consent;
c. for conducting legitimate activities with appropriate protection by a foundation, association, or non-profit organization having a purpose relating to politics, religion, philosophy or labor union for its members, former members, or persons with regular contact with the entity, without disclosure of such Personal Data outside the entity;
d. if sensitive data has already been disclosed to the public with the express consent of the data subject;
e. under necessity to establish a right of claim under law, comply with or exercise a legal right of claim, or raise as defense for the legal right of claim; and
f. under necessity to comply with law to ensure achievement of the purposes relating to public health, occupational health, social security, scientific study, etc.

From the list, it can be inferred that for most commercial operators, treatment of sensitive Personal Data will most likely come via express consent, as other bases are hardly available for commercial operators in day-to-day operational circumstances.

(ii) Rights of Data Subjects

The PDPA provides for an extensive list of rights of data subjects, many of which can be universally invoked while others can only be used under some circumstances. The rights are:

a. to have access to the stored Personal Data;
b. to ask for usable copies of the Personal Data;
c. to ask for disclosure of how Personal Data has come to be collected;

d. to object to the collection, use, and disclosure of Personal Data;
e. to request for deletion or destruction of Personal Data in storage of the Data Controller;
f. to ask for suspension of collection, use, and disclosure of Personal Data; and
g. to revoke any consent previously given to the Data Controller.

The rights outlined above are not always absolute, as the Data Controller may have ability to argue against such requests, depending on specific facts of such case, such as:

a. there is on-going contractual performance, and such request may obstruct such performance;
b. the law stipulates otherwise, that the Data Controller must continue such treatment of data; and
c. the Data Controller has legitimate interest that outweighs the fundamental rights of the data subjects over such Personal Data.

(iii) Safety of Storage

The PDPA provides a blanket requirement to both Data Controller and Data Processor to treat Personal Data in appropriate manners, which materially include well-organized safe-keeping of data, safe storage (physical and electronic), automatic deletion of data, etc. Although safety is of utmost concern, the PDPA itself does not provide any specific guidelines, and currently there is no detail of what characteristics safe storage must have. However, based on discussion within the industry, it is well agreed that operators must abide by at least the prevailing industrial standards used by most entities in the industry, and such standards must be appropriate in terms of cost and utility, and fitting with the type of data the operator is possessing and the operator's general and financial position and threat of loss and leakage of data in its possession. It has also been suggested that pseudonymization and anonymization will, in any case, afford additional protection against and safety from unintended and intentional leakage.

(3) Penalties for Violations under the PDPA

A. Civil Breach

A damaged data subject may bring a civil suit against the Data Controller and/or Data Processor who has/have wronged him/her. The PDPA expressly allows the court to award punitive damages, which is generally rare in Thailand, and which shall not exceed two times the actual damages, in case the court believes the breach is severe.

B. Criminal Breach

Regardless of the civil case as outlined above, the authority may pursue a criminal case against any commercial operator who has undertaken a wrongful act under the PDPA.

Any use or disclosure of sensitive data without consent and which has caused damage to the data subject shall bring penalties of imprisonment of up to six months or a fine of up to 500,000 Baht, or both. However, any use or disclosure, if undertaken for undue benefit of the commercial operator, will double the above-stated maximum imprisonment duration and fine amount.

C. Administrative Breach

Also, regardless of the civil case as outlined above, the authority may pursue an administrative case against any commercial operator who has undertaken a wrongful act under the PDPA. Besides the criminal provisions as outlined above, any other breach of the PDPA will bring penalties in term of administrative fines of up to 5,000,000 Baht for the most serious of the breaches.

(4) Data Protection Officer

The PDPA recognizes that there may be need for many commercial operators to have a data protection officer, or multiple ones in case of high complexity or large volume of work. This position, although existing under the PDPA, is not yet mandatory, as there is no supplementary regulation to provide guidelines as to what kind of commercial operators (or other types of entities) need to have a data protection officer. It is expected that possession of certain characteristics may require commercial entities to have a data protection officer, such as routine dealing with sensitive data, dealing with large amount of ordinary data, or having a certain number of employees.

In line with other jurisdictions, data protection officers must be independent and will report directly to the top of the management in each organization, thus reducing structural inefficiencies that may result in mistreatment of or delayed performance over personal data. The data protection officer is also at the front line to deal with any leakage or mistreatment, complaints from data subjects, and liaison with the state officers.

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CHAPTER 14

ANTI-CORRUPTION AND BRIBERY

CHAPTER 14 | ANTI-CORRUPTION AND BRIBERY

This chapter discusses the anti-corruption and bribery legislation and practice in Thailand as an important component of general corporate regulatory compliance. In addition, it also discusses the outline of the rules on the penalties for bribery, other areas of anti-corruption, and good governance in general.

(1) Recent Trends in the Corruption Prevention System

The current government's centerpiece of its policy to "eradicate corruption" was the revision of the anti-corruption law in July 2015 and enhancement of the anti-corruption legal system. In addition, the government also passed a law to establish a special court on corruption and illegal acts by state officials. In September 2016, General Prayut Chan-o-cha, the Prime Minister of Thailand, explained that a long-term plan for the government to eradicate corruption had been introduced and implemented, and that corruption would be completely eradicated within the next 20 years. Thailand has long been considered a country with widespread corruption, and according to the NGO Transparency International's Corruption Perceptions Index, Thailand came in at 99 out of 180 countries for 2018 ranking, and dropped slightly to 101 for the 2019 ranking, raising concerns as to how a relatively stable country has not been able to maintain the proper trajectory.

(2) Key Legislation

The basic law on bribery was prescribed in the Penal Code which covers offering and accepting bribes including the role of an intermediary. On 22 July 2018, the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, B.E. 2561 (2018) (the "**Anti-Corruption Act**") came into force, replacing the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, B.E. 2542 (1999) (the "**Counter Corruption Act**").

Other laws related to the anti-corruption include the Act on Offences Relating to the Submission of Bids to State Agencies, B.E. 2542 (1999) and the Act on Offences Committed by Officials of State Organizations or Agencies, B.E. 2502 (1959).

(3) Outline of the Anti-Bribery System for State Officials

In Thailand, the basic bodies of law on the prevention of bribes to state officials are the Anti-Corruption Act 2018, which provides for similar penalties as the basic Penal Code, and the Act on Offenses Relating to the Submission of Bids to State Agencies, which also prohibits bribery related to bids to state agencies.

A. Elements of Offense of Bribery of State Officials

The Anti-Corruption Act (along the same line with the Penal Code) prohibits anyone from providing gifts or benefits, soliciting to provide gifts or benefits, or agreeing to provide gifts or benefits to state officials in order to solicit an act, omission or delay in contravention of their duties.

There is no definition of "state official" under the Penal Code, while the Supreme Court has held and defined that the state official means a person who is appointed by the Thai government to perform governmental functions whether that person is employed on regular or non-regular basis and regardless of whether such person is Thai national. According to Section 4 of Anti-Corruption Act, the term "state official" means all state officials across the board, including

national, provincial and municipal officials, and even includes personnel performing functions for state enterprises, local administrators and members of a local assembly, but does not include a person holding political position, a judge of a constitutional court, a person holding a position in independent organization and a member of the board of National Anti-Corruption Commission (the "**NACC**").

Section 144 of the Penal Code and Section 176, Paragraph 1 of the Anti-Corruption Act prescribe penalties for bribing officers in general, while Section 167 of the Penal Code prescribes heavier statutory penalties for bribing judicial officers.

B. Cases Exempted From the Application of Offenses Regarding the Bribery of State Officials

Even though the Counter Corruption Act has been superseded by the Anti-Corruption Act, the Notification of the Office of National Counter Corruption Commission Concerning the Provisions of the Acceptance of Property or any other Benefit on Ethical Basis by State Officials (the "**Notification**") issued under Section 103 of the Counter Corruption Act remains valid pursuant to Section 194 of the Anti-Corruption Act. Therefore, providing property as a gift or benefit to the state official is allowed under Thai laws, if such gift or benefit being given meets the criteria under the Notification. The Notification is generally used as a reference for determining whether or not to pursue charges. Consequently, the following are exemptions to the offense of bribery:

The following criteria must be met in order for a state official to accept benefits as a social convention or custom (Section 5 of the Notification):

(i) If benefits are received from a family member (direct family such as a parent or child or a sibling (including a sibling from one parent), uncle, aunt, spouse, spouse of lineal family or lineal family of a spouse, adopted child and foster parent) as a gift within the means of the family member;
(ii) If benefits not exceeding 3,000 Baht in value are received from a person other than a family member (if the value is more than 3,000 Baht, it must be reported to a superior and approved); and
(iii) If benefits are considered to be a gift to an ordinary person.

C. Bribes from Foreign Juristic Persons and Individuals, Bribes to Foreign State Officials and Providing Bribes in Foreign Countries

If a foreign juristic person or individual bribes a Thai state official, the case will be treated as a criminal offense in the same manner as a juristic person or individual conducting the same act in Thailand.

Under the Anti-Corruption Act, bribery of foreign state officials (people with a position in a foreign legislative, executive, administrative or judicial agency or other people who work in a foreign government) or personnel at international institutions (people who work at international institutions or people who have been appointed by international institutions to act as representatives of such international institutions) is also prohibited. Furthermore, if a foreign juristic person or individual bribes a Thai state official in a country other than Thailand, the criminal offense of bribery is deemed to have been committed and the penalties will be applicable in Thailand (Section 5 of the Penal Code).

D. Bribes and Rebates to Executive Officers of Private Companies

Currently, criminal penalties do not exist in Thailand for providing benefits to private juristic persons and individuals. However, it is necessary to note that there are other bodies of law with penalties which may apply, such as the Act on Offenses Relating to Submission of Bids to State Agencies and the Trade Competition Act, B.E. 2560 (2017), if a private citizen conducts bid-rigging or unfair transactions.

(4) Penalties and Other Sanctions for the Offense of Bribing a State Official

A. Penalties and Sanctions for Individuals

Penalties for individuals in the case of infringement of the Anti-Corruption Act and the Penal Code are listed below.

(i) Infringement of Section 176 of the Anti-Corruption Act (bribing general state officials or members of parliament) (along the same line as Section 144 of the Penal Codes): No more than five years imprisonment and/or no more than a 100,000 Baht fine.
(ii) Infringement of Section 167 of the Penal Code (bribing judicial officers): No more than seven years imprisonment and/or no more than a 140,000 Baht fine.
(iii) Infringement of Section 5 of the Act on Offenses Relating to Submission of Bids to State Agencies: From one year to three years imprisonment and/or fine amounting to half of the highest bid between the offending parties or the closing bid, whichever is the higher amount.

B. Sanctions on Juristic Persons

In the past, the court ruled that if a representative of a juristic person conducted an act of bribery in order to benefit the juristic person within the authority of the representative, the juristic person and the representative would be prosecuted for bribing a state official. In such a case, the juristic person would be subject to pay a fine only, and the individual who conducted the act of bribery would be prosecuted as a co-defendant and possibly sentenced to a term of imprisonment (Judgment of the Supreme Court of Thailand No. 787-788/2506).

Section 176, Paragraph 2 of the Anti-Corruption Act provides penalties for juristic persons, and clarifies the requirements and impacts. In other words, if an individual (not only director or employee of that juristic person, but also agent and affiliate company regardless of whether having the power or authority to take an action) acts for the benefit of a juristic person and the juristic person fails to take the appropriate internal measures to prevent the illegal act, the juristic person will be subject to a fine amounting to one to two times the amount of the damage incurred or the benefit to the juristic person. Section 176, Paragraph 3 of the Anti-Corruption Act further stipulates that although a juristic person which operates business in Thailand is established under the foreign laws, such person shall fall under the definition of a juristic person in this section.

In August 2017, the NACC published the manual for the guidelines on appropriate internal control measures for juristic persons. This manual has been issued as an explanation of Section 123/5, Paragraphs 2 and 3 of the Counter Corruption Act (or under Section 176 of the Anti-Corruption Act) and consists of eight measures that a juristic person needs to have to comply with Section 123/5 and be exempted from liability in the case a person related to the juristic person commits bribery. The eight measures cover important issues such as prevention of

bribery, periodic review of internal controls, measures to promote internal reporting, protection of whistle blowers, human resource measures to supplement anti-bribery policies, etc.

C. Sanctions on Parent Companies in Other Countries

If an executive officer of a foreign-owned subsidiary in Thailand conducts an act of bribery, generally the parent company in another country will not be subject to criminal penalties. This is due to the general principle that, in Thailand, criminal penalties are not imposed on legal entities separate from the person who conducts the act. However, if the parent company instructs its subsidiary company to conduct an act of bribery, the parent company may be charged with the crime of aiding and abetting.

D. Penalties for Bribery Conducted by a Third Party

In Thailand, there are provisions for penalties for committing crimes through the use of third parties (Section 84 of the Penal Code). In other words, people who employ, force, threaten, subcontract, request, abet or use any other means to make another person commit a bribe will have committed the crime of "aiding and abetting" in accordance with the Penal Code, and if a person commits a bribe that is aided and abetted by another, the person abetting will be charged as the perpetrator of the crime. Consequently, if a person commits a bribe through an agent, broker, mediator, consultant or business partner, etc., that person will be charged as the perpetrator. On the other hand, if a person acts to force another to commit a bribe, but the person does not actually do so for whatever reason, the instigator will only be subject to one-third of the penalty prescribed by law.

In addition, if a third party assists or provides convenience to a person to commit a bribe separate from the offense of aiding and abetting, the third party will receive two-thirds of the penalty prescribed by law as an accomplice even if the person who actually conducted the bribe did so without being aware of assisting the third party (Section 86 of the Penal Code).

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CHAPTER 15

INTELLECTUAL PROPERTY LAW

CHAPTER 15 | INTELLECTUAL PROPERTY LAW

This chapter provides an explanation of the general intellectual property legal system in Thailand, including the main intellectual property laws, which are Trademark Act, B.E. 2534 (1991) (the "**Trademark Act**"), Patent Act, B.E. 2522 (1979) (the "**Patent Act**"), Copyright Act, B.E. 2537 (1994) (the "**Copyright Act**"), and Trade Secrets Act, B.E. 2545 (2002) (the "**Trade Secrets Act**").

(1) Current State of the Intellectual Property Legal System

Thailand joined the World Intellectual Property Organization (the "**WIPO**") in 1989, as well as the World Trade Organization (the "**WTO**") upon its establishment in 1995. The development of Thailand's intellectual property rights system is based on the minimum standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "**TRIPs Agreement**") (Section 1 of the TRIPs Agreement), which is an Annex of the Marrakesh Agreement Establishing the WTO.

In addition, Thailand joined the Paris Convention in 2008 and the Patent Cooperation Treaty in 2009. Furthermore, the amendment Trademark Act in 2016 established provisions corresponding to the Madrid Protocol, of which Thailand joined in 2017.

(2) Overview of Main Intellectual Property Laws

A. Trademark

Trademark Act, which is the current legislation on trademarks in Thailand, was enacted in 1991 and last amended in 2016.

It should be noted that the provisions for harmonization with the Madrid Protocol, after the completion of the accession procedures to the Madrid Protocol by Thailand which was enacted by the Royal Decree became effective on 7 November 2017.

(i) Object of Protections

In the Trademark Act, "*Mark*" is defined as "*a photograph, drawing, graphic, logo, name, word, statement, alphabet, number, signature, group of colors, shape or configuration of an object or any one or combination thereof*".

Note that in order for a mark to be protected; such mark must be a "*Trademark*" or a "*Service mark*" or "*Certification mark*" and "*Collective mark*" as defined in the Trademark Act. In other words, all marks are not necessarily a mark to be protected under the Trademark Act.

"*Trademark*" is defined as a mark used or intended to be used as a sign, or that relates to a product, in order to indicate that the product using the mark of the trademark right holder is different from products using trademarks of other parties,

"*Service mark*" is defined as a mark used or intended to be used as a sign, in relation to a service, in order to indicate that the service of the owner of the service mark is different from the services that have a service mark of another party (Section 4 of the Trademark Act).

"*Certification mark*" is defined as a mark agreed by its owner to be used in connection with the product or service of another party, with the objective of certifying the origin, components, manufacturing method, quality, or other characteristics of a product, or the nature, quality, type, or other characteristics of a service (Section 4 of the Trademark Act).

"*Collective mark*" refers to a trademark or service mark that is used or intended to be used by companies or businesses in the same group, associations, corporate groups, cooperatives, federations, allies, a group of individuals, or other private or government body (Section 4 of the Trademark Act).

(ii) Trademark Requirements

In order for a trademark to be registrable, it must possess the following elements (Section 6 of the Trademark Act):

a. "distinctiveness";
b. not be trademark that is prohibited under the Trademark Act; and
c. not be the same or similar to a trademark registered by another party.

To fulfill (a.), a trademark that has "distinctiveness", the meeting of certain conditions is required, such as a trademark that allows the general public or the consumer of the product to realize that the product that has the trademark is different from the products of other parties, that it is not the general name of the product, and that it does not refer directly to the nature or quality of the product (items under Section 7 of the Trademark Act). However, in the event of a trademark being used as a trademark related to a product that is widely sold or advertised in accordance with regulations prescribed by the Minister, and if there is evidence of adherence to such regulations, the trademark will be deemed distinctive. In other words, a product that has achieved wide recognition will be exempted from the requirement for distinctiveness.

With regard to (b.), trademarks that are prohibited for registration, Section 8 of the Trademark Act provides a list of items that are non-registrable. This list includes trademarks with characteristics related to a nation, royalty, royal house, local government, or foreign and international organization; trademarks that are contrary to public order and morals; marks that are the same as a generally known mark in accordance with the regulations of the Ministry of Commerce, regardless of the presence or absence of a registration; as well as marks that are similar to said marks and that may cause confusion or misunderstanding among the public regarding the owner or place of origin of a product.

The first-to-file principle is clarified under (c.) and requires that trademarks are not the same or similar to a trademark registered by another party. The requirement refers to identical or similar marks and identical or similar designated goods or designated services, both of which are examined.

(iii) Application, Examination

The examiner shall order the publication of an application for a trademark when the requirements for registration are met (Section 29 of the Trademark Act). In some cases, the applicant may not be granted protection for the whole part of trademark they are applying for. This is because although the trademark possesses certain elements of distinctiveness (possibility of registration), the overall trademark may not. Based on Section 6 of the

Trademark Act, if there is no exclusive right for one or more parts of the trademark, or if there is one or more parts that are not distinctive, the registration officer may request that the applicant abandon the exclusive right for that part within 60 days from the date of receipt of the notification (Section 17 of the Trademark Act).

The applicant, in the event of being dissatisfied with an order or notification made by the examiner, may issue a request to the Trademark Committee for a trial within 60 days from the date of receipt of said order or notification (Section 18, Paragraph 1 of the Trademark Act). The decision of the Trademark Committee regarding said request is final.

In the event of an applicant not complying with any of the aforementioned orders of the examiner, the request for said trademark is deemed to have been abandoned (Section 19 of the Trademark Act).

In the event of a disclosure of trademark application being performed, if no objections to the trademark are filed, or if an objection is filed, the decision of the Trademark Committee not to allow the objection is confirmed, the examiner shall order the registration of the trademark (Section 40 of the Trademark Act). It should be noted that trademarks are not registered while an objection to a trademark, a trial of the Trademark Committee regarding this, or revocation litigation at the Central Intellectual Property and International Trade Court (the "**CIPITC**"), is ongoing.

(iv) Objection to Trademark

Objections to a trademark are permitted prior to the granting of rights for trademark for which the application has been disclosed. A party that believes it has a higher priority right than the applicant, a party that believes the application does not meet the trademark requirements under Section 6 of the Trademark Act, or a party that believes said trademark application violates the provisions of the Trademark Act may file an objection to the examiner, together with the reason for such objection. The timeframe for filing such objection is within 60 days from the publication date (Section 35 of the Trademark Act).

The applicant of whom trademark registration is objected must submit to the registration officer an answer to the objection within 60 days after receipt of a copy of the petition of objection (Section 36, Paragraph 2 of the Trademark Act). In the event this is not submitted, said trademark application will be deemed abandoned (Section 36, Paragraph 3 of the Trademark Act).

In the event of the applicant or party that filed the objection is dissatisfied with the decision of the examiner regarding the objection, a request for a revocation trial may be filed with the Trademark Committee up to 60 days after the date of receipt of said decision (Section 37, Paragraph 2 of the Trademark Act).

In the event of dissatisfaction with the decision of the Trademark Committee, the applicant or the party that filed the objection may file litigation seeking the revocation of this with the CIPITC up to 90 days after the date of receipt of said decision (Section 38, Paragraph 2 of the Trademark Act).

(v) Duration

A trademark right is effective for ten years from the date of registration (Section 53 of the Trademark Act). If a trademark is accepted for registration, it will be deemed to have been registered *on the application date* (Section 42 of the Trademark Act), and the initial duration is for ten years from the date of application.

Furthermore, in the case of a priority application under the Paris Convention (Section 28 of the Trademark Act) or a priority application based on an international convention, etc. (Section 28 bis of the Trademark Act), the applicant may request to regard that the date of priority application is the date of application in Thailand (Section 42 of the Trademark Act).

In addition, in the event of an application based on the Madrid protocol, the date on which the international registration application was made will be the deemed registration date. (However, in the event of an application having been received after the period prescribed by the International Bureau in a Ministerial Regulation has elapsed, the date upon which the international application was received by the International Bureau shall be deemed the registration date (Section 79/7 of the Trademark Act)).

A trademark holder may file an application for renewal from three months prior to the expiration of the validity period and may renew the trademark for another ten years (Sections 53 and 54 of the Trademark Act).

(vi) License

A trademark holder may license all or part of the specified products and services to another party (Section 68, Paragraph 1 of the Trademark Act). A trademark licensing agreement is required to be executed in writing, and to be registered at the Department of Intellectual Property (the "**DIP**") (Section 68, Paragraph 2 of the Trademark Act). In such instances: (i) the trademark holder must set the conditions of the contract between the trademark holder and the licensee to ensure they maintain control over the actual management of the quality of the products manufactured by the licensee; and (ii) to clarify the scope of the products for which use of the trademark is being licensed for (Section 68, Paragraph 3 of the Trademark Act). Due care is required to the point that, in the event of such a license not being registered, said licensing agreement may be deemed invalid.

(vii) Criminal Punishment

Currently in Thailand, a significant proportion of trademark right enforcement takes the form of criminal punishment.

In procedures related to trademarks, criminal punishments are imposed on acts of submission of forged documents to the registration officer or Trademark Committee (Section 107 of the Trademark Act); acts of counterfeiting a registered trademark (Section 108 of the Trademark Act); acts of imitating a registered trademark with the purpose of misunderstanding or confusing the consumer (Section 109 of the Trademark Act); and acts in which a package or container of another party which displays a registered trademark is used for one's own product +or product of another party, with an objective of causing consumers to mistakenly believe that it is the product of said party or a license has been received for its use (Section 109/1 of the Trademark Act), etc.

Corporate entities are also subject to criminal punishment. In the event a corporate entity is a party sanctioned for a violation of the Trademark Act and where the violation occurred due to the order, act, withholding of order, or omission performed in the course of the duties of a director, manager, or supervisor of that corporate entity, the prescribed penalties for that violation will be imposed on said director, manager, or supervisor (Section 114 of the Trademark Act).

When products that are intended to be imported or that are possessed for distribution are in violation of the Trademark Act, such products will be confiscated, regardless of whether a specific individual is convicted (Section 115 of the Trademark Act).

In the event that there is clear evidence that a person is performing or intends to perform offences mentioned in the Trademark Act, the rights holder of said trademark, service mark, certification mark, or collective mark may seek an order from the courts for an injunction or the withholding of said act (Section 116 of the Trademark Act).

Note that, in addition to the penalties imposed under the Trademark Act as outlined above, Section 272 and Section 275 of the Penal Code also contain provisions on criminal punishments related to indications and trademarks.[1]

(viii) Invalidation and Revocation of Trademark Rights

Note, herewith, that even if a trademark has been registered, if there are certain reasons for revocation, registration may be revoked by the decision of the DIP, Trademark Committee or the judgment of the courts (Section 61 to Section 67 of the Trademark Act).

The main reasons for the revocation of a trademark, and the parties with the right to file the petition, are set forth in Figure 15-1 below.

[Figure 15-1] Main Reasons for Revocation of Trademark and the Parties Having the Right to File the Petition

Reason for Revocation (Applicable Clause)	Party with Right to File Petition	Recipient of Petition, Party with Decision Right	Content
Violation of the Trademark Requirements (Section 61)	Interested Parties or Trademark Registrar	Trademark Committee	If there is no distinctiveness (Violation of Section 7)
			In the event of applicable grounds for non-registration (Violation of Section 8)
			In the event of it being the same as that of an application previously filed

[1] Specifically, acts in which a product is sold, with the intent of deceiving the buyer with regard to the place of origin, nature, quality, or quantity of the product, through the use of fraud or deceptive means (Section 271 of the Penal Code), and acts in which, with the intent of making the general public believe it is the product or service of another party, using a name, photograph, image, or other content that is used in the other party's service, or indicating this on the product, packaging, or the items used for the packaging, or stating content, price, or acts of indication in letters or other objects related to the service with such an intention (Section 272 (1) of the Penal Code).

Reason for Revocation (Applicable Clause)	Party with Right to File Petition	Recipient of Petition, Party with Decision Right	Content
			by another party (Violation of Section 7)
			In the event of it being similar to that of an application previously filed by another party to the extent that the two could be mistaken and confused (Violation of Section 7)
Violation of Public Order and Morals (Section 62)	Any person	Trademark Committee	In the event of the violation of public order and morals (Violation of Section8(9))
Non-use (Section 63)	Interested Parties or Trademark Registrar	Trademark Committee	If the trademark is not used in good faith for three years. However, registration shall not be revoked if it is proved that the non-use of the trademark by the trademark right holder is due to special business-related circumstances, and that it is not due to actual intention to abandon or not to use the trademark
Having Become a General Name (Section 66)	Interested Parties or Trademark Registrar	The Court (CIPITC)	In the event of the trademark having become commonly used in business in relation to a specific product or classification, and its character as a trademark for the industry or the public having been lost
The existence of priority rights (Section 67)	Interested Parties (Limited to within five years from the date of the decision for trademark registration)	The Court (CIPITC)	In the event of there being priority rights for the trademark held by another party

**The provisions are all from the Trademark Act.*

The claimant and trademark holder (or licensed user), in the event of being dissatisfied with the decision of the Trademark Committee, may file for litigation requesting the revocation of said decision with the CIPITC within 90 days from the date of receipt of the decision. In the event of litigation not being filed within this period, the decision of the Trademark Committee will be Final (Section 65 of the Trademark Act).

CIPITC has exclusive jurisdiction for litigation to revoke a decision of the Trademark Committee and appeals to a judgment of CIPITC may be filed with the Supreme Court (a two-tier appellate system).

CIPITC has exclusive jurisdiction over litigation to revoke a trademark from initiation without a hearing by the Trademark Committee under Section 66 and Section 67 of the Trademark Act. Such litigation is civil action in nature, and the proceedings for trademark revocation litigation usually take between 18 months and two years.

Section 67, Paragraph 1 of the Trademark Act prescribes that "within five years from the date of the decision on trademark registration of the Trademark Registrar based on Section 40 of the Trademark Act, an interested person, in the event of being able to prove that they held priority rights to said trademark prior to the party registered as owner, may claim the revocation of said trademark registration with the courts".

Although what exactly is meant by "priority rights" here is slightly unclear, it is construed that if it can be proved that even prior to the application date in Thailand of the usurped trademark, said trademark was used outside of Thailand, was registered as a trademark outside of Thailand, and this was well-known or prominent, the applicant of the usurped trademark can be deemed to have filed the application in bad faith, and priority rights for said trademark are held over the party that filed the usurped application.

B. Patents

Patent Act prescribes matters regarding patents, utility models (petty patents), and designs (for convenience, this section provides a comparatively detailed explanation on patents, and the following sections provide a brief explanation on utility models and designs, with a focus on the differences from patents).

The Patent Act prescribes matters regarding patents, utility models (petty patents), and designs (for convenience, this section provides a comparatively detailed explanation on patents, and the following sections provide a brief explanation on utility models and designs, with a focus on the differences from patents).The Patent Act was enacted in 1979 and last amended in 2019 by Order No. 1/2562 of National Council of Peace and Order.

It should be noted that work is currently underway to amend the Patent Act. In terms of the content of the amendments to the Patent Act, it is expected that the acceleration of trial proceedings, the reform of the utility model system, the strengthening of the compulsory licensing system, and the addition of clauses to correspond to the accession to the Hague Agreement on designs, etc. will be incorporated. However, as of the date of this manuscript, such initiatives have not materialized into laws yet.

Most recently, however, in February 2019, the Narcotics Act, B.E. 2522 (1979) was amended to legalize the possession and use of cannabis for medicinal uses. However, parties eligible to do so are relatively limited. Essentially, the handling of cannabis can only be carried out by persons who are licensed from the Thai Food and Drug Agency (the "**FDA**") only. It also remains who be seen as what will qualify as "medicinal uses".

In relations to patent law, the National Council of Peace and Order issued an order on 28 January 2019 (the "**Order No. 1/2562**"), empowering the DIP to suspend commercial cannabis-related patent applications if it appears that the invention under the application has a commercial application and contains:

a. cannabis or cannabinoids;
b. substances having similar structural compounds; or
c. pharmaceutically acceptable salts, esters or ethers of (a) or (b).

This order gives the DIP the right to reject cannabis-related patent applications, or to request the removal of published applications that have not yet entered into substantive examination, on reasons that cannabis-related products that are not for medicinal uses are contrary to public order, morality, public health, or welfare (Section 9(5) of the Patent Act). Affected applicants can, nevertheless, appeal to the Patent Committee within 60 days of receiving the cancellation order (Section 72 of the Patent Act).

As of the date of this manuscript, there are no updates to this rule yet.

(i) Subject of Protection

The subject of protection is an invention. Invention refers to a technological innovation or invention that creates a new product or manufacturing method, or an improvement to a known product or manufacturing method. Manufacturing methods here refers to a method, technique, or process for manufacturing a product, or maintaining or improving the quality of a product, and are respectively defined as including the application of the manufacturing method (Section 3 of the Patent Act).

(ii) Patent Requirements

The requirements for a patent are novelty, inventiveness, industrial applicability, and non-applicability as an invention not permitted to be patented (Section 5 of the Patent Act).

Novelty is accepted with the following exceptions (grounds for loss of novelty, the items of Section 6 of the Patent Act):

a. inventions publicly invented in Thailand prior to the patent application date;
b. inventions stated in documents or printed materials in Thailand and overseas, or exhibited or generally disclosed by other means, prior to the patent application date;
c. inventions that have been granted a patent or utility model (petty patent) in Thailand or overseas prior to the patent application date;
d. inventions for which a patent or petty patent application was filed overseas more than 18 months prior to the patent application date, but for which a patent or utility model was not granted; and
e. inventions for which a patent or utility model (petty patent) was applied for and published within Thailand or overseas prior to the patent application date.

Attention must be paid to the fact that the public implementation of Section 6(1) of the Patent Act is limited to implementation within Thailand.

In terms of exceptional grounds for the loss of novelty described above, disclosures performed within 12 months prior to the patent application date are not considered disclosures referred to in Section 6(2) of the Patent Act, if the content of the invention is obtained illegally, or disclosures are made by the inventor exhibiting at an International Expo or other exhibition of a public organization. In addition, in the event of a party that has exhibited their invention at an exhibition sponsored by the government or that has been officially recognized and held within Thailand, the filing of a patent application for said invention shall be deemed to have been made on the first day of the exhibition if such patent filing is made within 12 months from the first day of the exhibition (Section 19 of the Patent Act). Such handling can also be considered a kind of exception to the loss of novelty.

With regard to inventiveness, this is recognized if the invention is not obvious to a person skilled in the art (Section 7 of the Patent Act).

Inventions that are not permitted to be patented are indicated below (Section 9 of the Patent Act):

a. naturally occurring microorganisms and the components therein, animals, plants, or animal or plant extracts;
b. scientific or mathematical laws and theories;
c. computer programs;
d. methods for diagnosing, treating, or curing a human or animal disease; and
e. an invention that is contrary to public order, morals, health, or welfare.

Due care is necessary regarding the fact that computer programs and methods of diagnosing, treating, or curing a human or animal disease are not subject to protection.

(iii) Attribution of Right to Obtain Patent, Moral Rights of Inventor

The inventor, as both party with the right to apply for the patent and inventor, has the right to state a name for the patent (Section 10, Paragraph 1 of the Patent Act). In other words, the right to obtain a patent, in principle, is primarily attributable to the inventor.

In the event of an invention having been made jointly by parties, the right to obtain a patent for this is shared between the inventors (Section 15, Paragraph 1 of the Patent Act).

The right to obtain a patent may be transferred by assignment or succession (Section 10, Paragraph 2 of the Patent Act). The transfer of the right to obtain a patent must be in a signed, written document (Section 10, Paragraph 3 of the Patent Act).

(iv) Applications, Examinations

When a patent application is filed, the examiner of the DIP will conduct a screening on the formal requirements for a patent application, based on Section 9 and Section 17 of the Patent Act. In the event that this formal review finds a deficiency in the application, the examiner may order amendments (Section 27, Paragraph 1 of the Patent Act). An applicant that has filed a patent application overseas must submit the application examination report,

in accordance with the regulations and procedures prescribed by the Ministerial Regulation (Section 27, Paragraph 2 of the Patent Act).

In the event that there is a deficiency in the formal examination that is not corrected in accordance with Section 17 of the Patent Act or the invention is not patentable under Section 9 of the Patent Act, the patent application will be rejected at that time (Section 28(1) of the Patent Act). In the event of the formal examination does not reveal any deficiencies, a public notice of application will be issued (Section 28(2) of the Patent Act).

The applicant, either within five years from the publication of application, or in the event of a petition objecting to patent or request for trial stated below being filed, within the deadline that expires at some time up to one year after the final decision on this, whichever occurs later, must request the examiner to investigate whether or not the invention conforms to Section 5 of the Patent Act. In the event of the applicant does not request an examination within said period, the application will be deemed abandoned (Section 29, Paragraph 1 of the Patent Act).

(v) Patent Objections

In the event the publication of a patent application is performed, a party that deems itself to have the right to receive the patent rather than the applicant, or a party that thinks the application does not conform to the provisions of Section 5, Section 9, Section 10, Section 11, or Section 14 of the Patent Act, may file a patent objection with the examiner up to 90 days after the date of publication of the patent application (Section 31, Paragraph 1 of the Patent Act).

The major points are that, after the publication of an application, an objection can be filed prior to substantive examination, and that an objection can also be filed for usurped applications.

It should be noted that if an objection is filed on the grounds that the application has been usurped, and if the right to receive the patent for said invention is determined to be attributable to the party that filed the objection, the petitioner of the objection (the true right holder) may file a patent application within 180 days from the date of the rejection based on the decision on the objection, or the final decision or judgment contesting the efficacy of said decision on the objection. Such application shall be deemed to have been filed on the date it was filed by the original usurped applicant, the publication of patent application shall be deemed to be the publication of the application of the petitioner of the objection, and furthermore, third parties shall not be permitted to file a petition of objection (Section 34, Paragraph 2 of the Patent Act).

Even in the case of such usurped application, the true right holder can file a patent objection and make an application himself, and be protected retroactively from the application date.

(vi) Effectiveness and Limitations of Patent Rights

A patent is valid for 20 years from the application date (Section 35, Paragraph 1 of the Patent Act).

The scope of exclusive rights of a patent right, in other words, the acts of implementation, is defined as indicated below (Section 36, Paragraph 1 of the Patent Act).

a. Patents for Objects: The manufacture of the patented product, use, sale, possession for sale, offering for sale, and import of the patented products.
b. Patents for Manufacturing Method: Use of the patented method, production, sale, possession for sale, offering for sale, and import of the item manufactured through the patented method.

(vii) License

A patent holder may permit another party to perform acts within the scope of its exclusive rights by granting a license. In addition, the patent right may be transferred to another party (Section 38 of the Patent Act).

Similarly to trademark license, patent licensing contracts and patent transfers must be made in writing, and registered with the DIP (Section 41, Paragraph 1 of the Patent Act). In the event this registration is not performed, the licensing contract will be deemed invalid.

The patent holder, when licensing a patent right, must not impose on the licensee unjust anticompetitive conditions, restrictions, or royalties (Section 39 of the Patent Act). The specific content is prescribed in detail in Section 3 and Section 4 of Ministerial Regulation No. 25 (B.E. 2542) issued under the Patent Act. In a licensing contract, in the event of there being a provision that violates said Section, there is no case precedent for determining whether only that provision is invalid or the entire contract is invalid; however, although it is generally construed that only provisions that violate the wording of these provisions will be invalid, due attention is required for this matter. In addition, at the time of a license registration application, in the event that the Director-General of the DIP determines that a provision of the licensing contract violates Section 39 of the Patent Act, said contract will be referred to the Patent Committee, and if the Patent Committee considers that said contract violates Section 39, the registration will be refused. However, in the event of either party concerned, in light of this situation, indicating the intent to separate the valid provisions of said contract from the invalid provisions, the Director-General of the DIP may order the registration of the valid provisions of the contract (Section 41, Paragraph 2 of the Patent Act).

(viii) Invalidity of Patent

Registered patents that violate patent requirements (Section 5, Section 9, Section 10, Section 11, and Section 14 of the Patent Act) are invalid (Section 54, Paragraph 1 of the Patent Act). An interested person or public prosecutor may file a claim to cancel an invalid patent with the courts (Section 54, Paragraph 2 of the Patent Act).

It is worth noting that the DIP has no procedures equivalent to a patent invalidation trial, and petitions regarding patent invalidity are filed directly with the courts. Such patent invalidity litigation is civil litigation rather than administrative litigation, and has binding legal effectiveness as to third parties; the CIPITC has exclusive jurisdiction.

(ix) Defense in Patent Violation Litigation

a. Defense of Patent Invalidity

Although not expressly prescribed in the Patent Act, patent invalidity can be argued as a defense in patent violation litigation.

In addition, at the same time as patent invalidity litigation described above, a counterclaim can be filed within the patent violation litigation proceedings. The differences between the two are the presence or absence of binding legal effectiveness as to third parties, and differences in the court proceedings.

b. Defense of Prior Use

The defense of prior use is permitted in case the production of patented product or use of the patented process which the producer of the patented product or user of the patented process, in good faith and without knowing or having no reason to have known of the patent registration has engaged in the production or has acquired the equipment therefor prior to the date of filing the patent application in Thailand. Nevertheless, this is not subject to Section 19 bis of the Act (Section 36, Paragraph 2 (2) of the Patent Act).

C. Utility Model Rights (Petty Patents)

As previously stated, the Patent Act also prescribes matters related to utility models (also referred to as petty patents, and referred to as "utility models" in this book). Utility model rights were introduced in the 1999 amendment (B.E.2542) of the Patent Act. Specifically, provisions Section 65 bis to 65 decies were added to the Patent Act, and prescribed in reference to provisions related to patents.

(i) Subject of Protection

The subject of protection, similarly to patents, is an invention (defined in Section 3 of the Patent Act).

(ii) Utility Model (Petty Patent) Requirements

However, in terms of the requirements for a utility model (petty patent), only novelty and industrial applicability are required. Inventiveness is not required for petty patents (Section 65 bis of the Patent Act). In regard to novelty and industrial applicability, provisions related to patents are applied *mutatis mutandis* (Section 65 decies of the Patent Act).

(iii) Application, Examination

Unlike patents, only a formal examination is performed. A substantive examination is not conducted (Section 65 quinquies of the Patent Act). Otherwise, the provisions related to patents apply *mutatis mutandis* (Section 65 decies of the Patent Act).

Note that the simultaneous application for a patent and a utility model (petty patent) is not permitted (Section 65 ter of the Patent Act), and only changes to applications (type of patent

from a patent to a petty patent or from a petty patent to a patent) are permitted (Section 65 quarter of the Patent Act).

(iv) Request for Substantive Examination

Provisions related to patent objections do not apply to utility models (petty patents). A utility model (petty patent) holder and interested person, within one year from the publication of the invention registration and the granting of a utility model (petty patent) right, may issue a request to the examiner for the performance of a substantive examination to ascertain whether or not said patent meets the utility model (petty patent) requirements of Section 65 bis of the Patent Act (Section 65 sexies, Paragraph 1 of the Patent Act).

If, as a result of this, the examination report indicates that the substantive requirements of a utility model (petty patent) right are met, as there is little possibility of said utility model (petty patent) being invalidated, the utility model (petty patent) right holder may exercise its rights.

On the other hand, in the event of rights being exercised based on a utility model (petty patent) right for which less than one year has elapsed since publication, in terms of the party subject to the exercising of rights, one may request the performance of the aforementioned examination as a part of means to defend oneself.

In the event of the results of the screening indicating that the invention does not meet the utility model (petty patent) requirements, said utility model (petty patent) rights will be revoked (Section 65 sexies, Paragraph 4 of the Patent Act).

(v) Effectiveness and Limitations of Utility Model (Petty Patent) Rights

The effective period of a utility model (petty patent) right is six years from the application date, but this may be extended by two years twice, for a total of a maximum of ten years from the application date (Section 65 septies of the Patent Act). Furthermore, when a utility model (petty patent) right holder exercises those rights, there is no requirement to obtain a technical evaluation of the utility model (petty patent), etc. Otherwise, the provisions related to patents apply *mutatis mutandis* (Section 65 decies of the Patent Act).

(vi) License

The provisions related to patents apply *mutatis mutandis* (Section 65 decies of the Patent Act).

(vii) Invalidity of Utility Model (Petty Patent) Rights

Utility model rights that are granted but that violate the utility model (petty patent) requirements (the provisions of Section 65 bis, or Section 65 decies of the Patent Act mandating the application of Section 9, Section 10, Section 11, or Section 14 are invalidated. Specific provisions similar to those for patents have been established for the specific procedures of this (Section 65 novies of the Patent Act)

(viii) Defense in Utility Model (Petty Patent) Right Violation Litigation

The provisions related to patents apply *mutatis mutandis* (Section 65 decies of the Patent Act).

D. Design Rights (Patent Act)

As previously described, the Patent Act also prescribes matters related to designs. Specifically, special provisions regarding design have been established in Section 56 thru Section 65 of the Patent Act. Otherwise the provisions related to patents shall apply *mutatis mutandis*.

(i) Subject of Protection

A design is defined as a form or composition of lines or colors serving as a pattern for an industrial product or handicraft product that gives the product a special external appearance (Section 3 of the Patent Act).

The subjects of the protection of design rights are new industrial designs, including handicraft designs (Section 56 of the Patent Act).

(ii) Design Requirements

The requirements for a design are novelty and industrial applicability.

The following designs are not considered novel (Section 57 of the Patent Act):

a. designs widely known or used by others within the country prior to the filing of the patent application;
b. designs disclosed or stated in documentation or printed publications domestically or overseas prior to the filling of the patent application;
c. designs for which registration was published publicly under Section 65 and Section 28 of the Patent Act prior to the filling of the patent application; and
d. designs regarded as imitations due to being very similar in appearance to a design of (a), (b), or (c).

In addition, designs that are contrary to public order and morals and designs prescribed by Royal Decree are regarded as not meeting the requirements (Section 58 of the Patent Act).

(iii) Application, Examination

A substantive examination is performed (Section 61, Paragraph 1of the Patent Act).

(iv) Objections to Design

In principle, the provisions related to patents apply *mutatis mutandis* (Section 65 of the Patent Act).

(v) Effectiveness and Limitations of Design Rights

The validity period of a design right is ten years from the filing application date (Section 62 of the Patent Act). With the exception of when a design is used for investigation or research, no parties other than the design right holder may hold the right to use the design in the manufacturing of a product, or the right to sell, possess for sale, supply for sale, or import products on which the design is implemented (Section 63 of the Patent Act).

(vi) License

The provisions related to patents apply *mutatis mutandis* (Section 65 of the Patent Act).

(vii) Invalidity of Design Rights

Design rights that are granted but violate the design requirements (the provisions of Section 56, Section 58, or Section 65 of the Patent Act mandating the application of Section 10, Section 11, and Section 14) are invalidated. Specific provisions similar to those for patents have been established for the specific procedures of this (Section 64 of the Patent Act).

(viii) Defense in Design Right Violation Litigation

The provisions related to patents apply *mutatis mutandis* (Section 65 of the Patent Act).

E. Copyright Act

The Copyright Act was initially enacted in 1978 and then repealed by the new act in 1994 which was last amended in 2018.

(i) Object of Protection

A copyrighted work is defined as a work of literature, dramatic works, artistic work, music, audiovisual material work, movie, recording, broadcasting of sound and image, and other copyrighted work attributable to the fields of literature, academics, or art, regardless of the format or form of the expression (Section 6, Paragraph 1 of the Copyright Act).

In addition, the protection of copyright has been prescribed as not extending to ideas or procedures, processes, systems, methods of use, operation, concepts, principles, discoveries, or scientific or mathematic theories (Section 6, Paragraph 2 of the Copyright Act).

Performer rights are also protected (Section 44 thru Section 53 of the Copyright Act). In addition, with the 2015 amendment to the Act, copyright management information and technical means have also become subject of protection.

(ii) Occurrence and Acquisition of Rights

The author of a copyrighted work becomes the copyright holder for the work he / she has created without requiring any special procedures, excluding some exceptional cases (Section 8 of the Copyright Act).

Note that because Thailand is a Berne Convention member country (not a member of the Universal Copyright Convention), the exclusive identity of copyrights for many foreigners and foreign companies is also recognized.

The copyright of a work created by an author over the course of employment (workplace works), with the exception of where otherwise agreed in writing, is attributable to the author. Even in such cases, the employer has the right to publicly transmit the work, in accordance with the purpose of the employment (Section 9 of the Copyright Act).

(iii) Efficacy

A copyright holder has exclusive rights to perform the following acts related to the copyrighted work (Section 15 of the Copyright Act):

a. reproduction or adaptation;
b. publication;
c. rental of original works or copies of computer programs, audiovisual work, cinematographic work, and audio recordings;
d. the granting of benefits arising from the copyright to others; and
e. the granting of rights stated in (a), (b) or (c) above, with or without conditions. However, such conditions must not unfairly restrict competition.

(iv) Moral Rights of Author

Holders of copyrighted works have name display rights, identity preservation rights, and the right to prohibit acts that cause harm to the honor of the work and the credibility of the author (Section 18 of the Copyright Act).

In addition, said rights are non-transferrable; however inheritance is permitted, and the relatives of the copyright holder may exercise these rights during the valid period of the copyright (Section 18 of the Copyright Act).

In addition, the 2015 amendment to the Copyright Act has resulted in the moral rights of a performer (name display rights, identity preservation rights, right to prohibit acts that cause harm to the honor of the work and the credibility of the author) now being protected. With regard to inheritance, this is also permitted in the same manner as the moral rights of the author described above (Section 51/1 of the Copyright Act).

(v) Protection Period

The protection period of a copyright is indicated below, in accordance with the type of work.

[Figure 15-2] Copyright Protection

Type of Copyrighted Work	Valid Period	Clause
Principle	The lifetime of the author and 50 years after their death	Section 19, Paragraph 1*

Type of Copyrighted Work	Valid Period	Clause
In the case of the author being a corporate entity	50 years from the creation of the work If the copyrighted work is published within this period, 50 years from the date of the initial publication.	Section 19, Paragraph 4
Performer rights	50 years from the final day of the calendar year of the performance If the performance is recorded, 50 years from the final day of the calendar year in which the recording was made	Section 49, Section 50

**The provisions are all from the Copyright Act.*

(vi) Rights Violations

Acts of rights violation are defined in detail, for each type of copyrighted work, as shown in the Figure 13-3.

[Figure 15-3] Acts of Rights Violation

Type of Copyright Work	Violating Act	Clause
Copyrighted work general	(1) Reproduction or adaptation (2) Publication	Section 27*
Audiovisual work, cinematographic work, recording work	(1) Reproduction or adaptation (2) Publication (3) Rental of original or copy of the work	Section 28
Work of sound and video broadcasting	(1) Creation of an audiovisual work, cinematographic work, recording, or a broadcast work of sound and video, regardless of whether in full or in part (2) Rebroadcasting of sound and picture, regardless of whether in full or in part (3) With the counter benefit of receiving the payment of moneys or other commercial benefit, creation of a broadcast work of sound and video to be viewed by the public	Section 29
Copyrights for computer programs	(1) Reproduction or adaptation (2) Publication (3) Rental of the original or copy of the work	Section 30
Acts performed in bad faith or for commercial	(1) Sale, possession for sale, offer to sell, offer for lease, or offer for hire-purchase (2) Publication	Section 31

Type of Copyright Work	Violating Act	Clause
purposes regarding other copyright violation acts	(3) Distribution in a manner which may that causes damage to the copyright holder (4) Self-import or import by ordering into the Kingdom	

**The provisions are all from the Copyright Act.*

Due care must be paid to the facts that use of copyrighted works of other parties in a manner that does not inhibit the regular use of the copyrighted work by the copyright holder, and that does not unduly impair the legitimate rights of the copyright holder, is not deemed a violation of copyright (Section 32, Paragraph 1 of the Copyright Act).

F. Trade Secrets Act

The Trade Secrets Act was enacted in 2002 and last amended in 2015. Note that in Thailand, there is no special law on the protection of well-known or prominent displays. However, in the exceptional case of passing off, even if the display is an unregistered trademark, the right to seek injunction and compensation for damages may be exercised (refer to Section 46, Paragraph 2 of the Trademark Act).

(i) Subject of Protection

Trade secrets are defined as commercial data that is not generally known or not yet accessible by persons who are normally connected with such information. Commercial value of such data is due to it being a secret and persons managing trade secrets has done so through appropriate means for maintaining confidentiality (Section 3 of the Trade Secrets Act). Commercial data referred to here is defined as items that communicate a meaning, regardless of form or method, in order to learn of content, matters, and facts, etc., including programs, methods, techniques, formulas, models, and duties that are included in or constitute a manufacturing process (Section 3 of the Trade Secrets Act). That is, the requirements for applicability as a trade secret, similar with many other countries, are the three requirements of not being known, usefulness, and being managed as confidential (refers to Section 39 of the TRIPs Agreement).

(ii) Requirements for Protection

A trade secret may be protected even without passing through special procedures associated with occurrence, and protection is ongoing without limit as long as the manager of said trade secret applies appropriate methods to protect confidentiality (Section 3 of the Trade Secrets Act).

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CHAPTER 16

DISPUTE RESOLUTION

CHAPTER 16 | DISPUTE RESOLUTION

Foreign companies may be involved in disputes over the course of conducting business in Thailand. This chapter provides an overview of dispute resolution options in Thailand including the dispute resolution process as a whole, explanation of the civil trial system, the arbitration system and recognition and enforcement procedures within Thailand for enforcing arbitral awards.

(1) Overview of the Dispute Resolution System

As a general rule, when any kind of dispute occurs in Thailand, there are five options for resolution, as follows:

- trial in courts in Thailand;
- trial in courts outside of Thailand;
- arbitration in Thailand;
- arbitration outside of Thailand; and
- mediation.

An overview of each option is as follows:

(i) Trial in Courts in Thailand

As detailed in Section (2) of this chapter below, the Thai court system is similar to the civil law system used in many other countries. Generally, the Thai court system is a three-stage trial system, and does not have some procedures which are applied under the British and/or US legal systems, for example, discovery procedures (evidence disclosure procedures), etc.

(ii) Trial in Courts Outside of Thailand

Thailand is not a party to any convention or treaty that allows for a recognition or enforcement of a foreign court judgment. Even if a foreign company were to file a lawsuit against a Thai company in a foreign court and obtain a judgment, Thai courts would not enforce the foreign court judgment against the Thai company directly. The foreign company has to file another lawsuit in the competent Thai court and the full trial must be taken before the competent Thai court's decision is made. In this regard, the foreign court judgment could be presented to the competent Thai court as an evidence.

(iii) Arbitration in Thailand

Domestic arbitration proceedings in Thailand are prescribed in the Arbitration Act, B.E. 2545 (2002) (the "**Arbitration Act**"), enacted in 2002. Most of provisions are based on UNCITRAL's Model Law.

Major Thai arbitration institutions include the following: (i) the Thai Arbitration Institute (the "**TAI**"); (ii) the Office of the Arbitration Tribunal of the Board of Trade of Thailand; (iii) the Thailand Arbitration Center (the "**THAC**"); and (iv) the Arbitration Institute of the Office of Insurance Commission (for insurance disputes).

(iv) Arbitration Outside of Thailand

As a contracting state to the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards of 1958 (the "**New York Convention**"), the Arbitration Act allows an arbitral award issued domestically or in a country that is also a contracting state to the New York Convention to be enforceable in Thailand. The procedures for enforcement of a foreign arbitral award are prescribed in the Arbitration Act, details of which are further explained in this chapter.

The Singapore International Arbitration Center (the "**SIAC**") (which is relatively close geographically to Thailand and considered highly reliable) is often selected by parties to an arbitration agreement as institution to administer an arbitration dispute, particularly where the dispute is between a foreign company and a Thai company. The International Chamber of Commerce Court (the "**ICC Court**") is also one of the world's leading arbitral institutions. ICC has the headquarters in Paris, the case management office in Singapore and the secretariat Asia office in Hong Kong.

(v) Mediation

In primary stages of proceedings, court-supervised mediation may be arranged where the court would play a major role and actively participate to guide the process in a constructive direction and to help the parties find their optimal solution for settling the dispute by way of compromise. If a settlement agreement is reached between the parties, a judgement will then be issued based on the settlement agreement. When a party fails to comply with any of the obligations set forth in the settlement agreement, the non-defaulting is entitled to apply to the court for enforcement and proceed with the legal execution process.

In addition to the court-supervised mediation which is most common under the Thai court system, out-of-court mediation is also available but it will generally not be automatically recognized and enforceable by Thai courts. When a party fails to comply with any of the obligations set forth in the out-of-court settlement agreement, the non-defaulting party has to bring a lawsuit to a competent court for decision prior to proceed with legal execution.

Unlike out-of-court mediation, a settlement agreement made pursuant to the particular mediation proceedings which are conducted by a registered mediator in accordance with Dispute Mediation Act, B.E. 2562 (2019) (the "**Dispute Mediation Act**") will be automatically recognized and enforceable. The Dispute Mediation Act provides comprehensive guidelines on what is mediatable. Only certain kinds of civil and criminal disputes could be mediated under the Dispute Mediation Act. These include some specific criminal disputes, land disputes which are not an ownership dispute, disputes between heirs in relation to the estate and commercial disputes with the dispute amount not exceeding five million Baht.

(2) The Thai Procedure Court System

A. Overview of the Legal Sources of the Civil Procedure Code and the Thai Judicial System

(i) Features and Legal Sources of the Civil Procedure System

The Civil Procedure Code (the "**CPC**") was enacted in 1934, and regulates overall procedures for civil litigation in Thailand. Protocols such as discovery, evidence disclosure procedures, etc., as seen in British and US laws have not been adopted in Thailand. A system for the punitive damages has been adopted on a limited basis, and a class action system was introduced in December 2015, with the first class action case being decided in September 2018.

(ii) The Thai Court System and Composition of the Court

In addition to the Court of Justice, Thailand has various special courts which hear disputes concerning certain specialized subject matters. These courts include the Constitutional Court, the Administrative Court, the Central Intellectual Property and International Trade Court, the Labor Court, the Taxation Court and the Bankruptcy Court. Regular civil cases are handled by the Court of Justice.

The Thai Court of Justice, in principle, uses a three-stage trial system which are comprising of (i) the court of first instance, (ii) the Court of Appeal and (iii) the Supreme (in Thai, "*Dika*") Court.

As a general rule, the claims will be first initiated and adjudicated in the court of first instance. The judgment of the court of first instance may be appealed to the Court of Appeal. Ultimately, with permission granted by the Supreme Court, the judgment of the Court of Appeal may be reviewed by the Supreme Court. The decision made by the Supreme Court shall be deemed final.

Note that depending on the court, the three-stage trial system mentioned above may not be applicable and two-stage trial system shall apply instead wherein that party to a dispute may appeal directly to the Supreme Court. For example, an appeal against a decision of the Administrative Court will bypass the Court of Appeal and directly be considered by the Supreme Administrative Court.

Furthermore, the procedures of each special court shall be governed by its specific procedures which is separate from the procedures under the CPC. However, the procedures under the CPC will normally be *mutatis mutandis* applied in case of the absence of specific procedures. The procedures to be further described below are generally applicable for ordinary civil disputes in the court of justice only.

B. First Instance Procedures

Court procedures in principle are performed in a courtroom open to the public. However, only parties to the case who has a legitimate interest may request for access to the documents contained in the court case file. The court may conduct procedures privately when necessary. All court proceedings are performed in Thai.

(i) Filing and Service of the Complaint

Initially, the plaintiff has to submit a complaint to the competent court, and the court will then serve a summons and the complaint on the defendant at the place of residence or business of the defendant or the involved parties. In the case of a foreign company, the documents will, in most cases, be delivered to its branch or representative office in Thailand. If the foreign company has no branch or representative office in Thailand, the service of summons and complaint shall be served on the defendant by international express mail or international courier service operator or through Office of Judiciary and the Ministry of Foreign Affairs (a diplomatic channel).

A foreign company may also appoint a person as its representative in the court case. In this regard, a power of attorney is required. If the power of attorney is executed outside of Thailand, it shall be notarized by a public notary, or through other certification procedures

required by the government of a foreign country.

(ii) Jurisdiction

Thai court system does not allow choice of jurisdiction by agreement. The competent court which have jurisdiction over certain disputes will be set forth by the CPC, or other laws in the case of special courts.

In general civil matters, where a dispute's claimed amount is less than 300,000 Baht, jurisdiction falls within district courts. Provincial courts will have jurisdiction to hear all civil claims of an amount exceeding 300,000 Baht.

(iii) Payment of Court Fees

For a civil case concerning property or money with a claimed amount less than 50 million Baht, 2% of the principal amount (up to 200,000 Baht) is to be paid by the plaintiff to the court at the time of filing the complaint. If the claimed amount exceeds 50 million Baht, in addition to the 200,000 Baht, an amount equivalent to 0.1% of the claimed amount exceeding 50 million Baht is also paid to the court at the time of filing.

(iv) Submission of a Written Defense

The defendant is required to submit its defense within 15 days after receipt of the complaint and has an additional 15 days in case the writ and copy of the complaint are served on the defendant by affixing them in a conspicuous place at the domicile or business office of the defendant, not by hand. However, if the court deems it appropriate, the deadline may be extended subject to the court's discretion. The plaintiff may not withdraw the claim without permission of the court after a written defense has been submitted. In the event that the defendant files a counterclaim, the counterclaim may be made in the same instrument as the defense.

(v) Mediation

The court, at any stage of the proceedings, may recommend the parties pursue mediation. In practice, an appointment date for mediation is often scheduled as the first hearing. Additional mediation session may be scheduled whenever the judge believes there is a reasonable chance that the parties can finally agree with settlement. If a settlement agreement is reached and conditions under which are not prohibited under the laws, the court will render an affirmative judgment to confirm the settlement agreement. Such affirmative judgment renders the settlement agreement to be legally endorsed and enforceable.

Family and employment disputes are subject to compulsory court-supervised mediation before trial proceedings is started.

(vi) Determination of Issues in Dispute

In civil cases, after the submission of written defense, if mediation is unsuccessful, the court then proceeds with a determination of issues in dispute and burden of proof for such issues.

Once the issues in dispute are determined, the court will schedule trial hearings for taking of

evidence. In practice, the trial hearings will schedule months away at average around 8 to 12 months later. An average duration from the filing date of a complaint until a judgment of the court of first instance is rendered is approximately 12 to 18 months.

(vii) Taking of Evidence

The procedures for taking of evidence will start after the issues in disputed have been settled by the court. In civil cases, the parties must submit their evidence and have their witnesses testify before the court. The court will only consider such submitted evidence and testimony given before the court in rendering a judgment.

Formal discovery procedures, as under US law, have not been adopted under Thai court system. However, a party is entitled to request the court for issuing a summons ordering a counter party or a third party to submit required evidence to the court.

No oral evidence is admissible, even with the consent of the opposing party, if documentary evidence is required by law, for example, a loan agreement over 2,000 Baht is not enforceable unless there is some written evidence of the loan signed by the borrower. In particular, no oral evidence is admissible where oral evidence is sought to be produced instead of documentary evidence, when the document cannot possibly be produced, or where, after the production of a document, oral evidence is sought to be produced in corroboration of any allegation to add to, subtract from, or to vary, its contents. However, this rule is not deemed to debar any party from alleging and producing oral evidence in corroboration of the allegation that the document produced has been forged or is inaccurate in whole or in part, or that the contract or other obligation stated therein is invalid or misconstrued by the opposing party. In principle, only an original document is admissible as an evidence. However, in case where the original document is lost due to circumstances beyond the control of the alleging party, the submission of its copy may be permitted by the court.

Evidence that requires stamp duty to be affixed in accordance with the Revenue Code will not be recognized by the court unless stamp duty has duly been affixed. In some cases, unstamped documents may be permitted as evidence once stamp duty, including any penalty rates, has been affixed at latest before the judgment of the first instance court is rendered.

Hearsay evidence is generally not permitted. In some cases, however, where it is deemed reliable due to the nature or the circumstances, or when a statement cannot be made by a direct witness, hearsay may be recognized.

All proceedings carried out by a court relating to the trial and adjudication of civil cases shall be in the Thai language. In case documentary evidence is created in a foreign language, a Thai translation is required. If a witness cannot speak Thai, a Thai interpreter must be provided. It should be noted that in case of the Central Intellectual Property and International Trade Court, the Court may admit a document which is made in English language without a Thai translation if the Court consider that it is not documentary evidence to the main issues in dispute of the case and the parties reach an agreement that a translation of the document is not required either partly or entirely.

In trial proceedings, a witness will generally be required to give oral testimony before the court. However, the court may, on a case-by-case basis and when both parties have agreed to, permit the submission of written witness statement instead of examination in chief in order to shorten time for witness examination.

(viii) Closing Statements

After the procedures for taking of evidence has been completed, and with approval from the court, the parties may submit a written closing statement clarifying their main arguments based on the submitted evidence to the court. In the event of a request by a party concerned, an opportunity to give an oral closing statement or opinion may be allowed at the discretion of the court.

There are no provisions regulating the period of time until a judgment is reached. Although it varies depending on complication of a case, the proceedings in the court of first instance may take approximately one to four months from the date the procedures for taking of evidence is completed. There have been cases in which the time taken from the initiation of the case in a trial court until a judgment of the Supreme Court is rendered has taken up to ten years.

(ix) Judgment

With the exception of special rules for cases involving small amounts, normally a statement of judgment is drafted and orally pronounced in the court.

Judgments are based on the relief sought by the plaintiff. Relief permitted in the judgment may include specific performance or a permanent injunction on actions and/or monetary damages. Under certain circumstance, the violation of certain law will empower the court to award the punitive damages, but they rarely do so in reality.

At the discretion of the court, the court may order the losing party to bear all court and attorney's fees. Attorney's fees are limited at 5% of the claimed amount in the first instance court, and 3% of the claimed amount at the appellate level. The court may also order the losing party to reimburse the expenses of proceedings to the winning party as the amount the court think fit but with a maximum of 1% of the claimed amount.

C. Appeal and Enforcement Procedures

(i) Appellate Procedures

The deadline for an appeal is generally one month from the date of the first instance court's judgment. An appeal on factual issues for a case with the claimed amount below 50,000 Baht (unless permitted by the court to do so) is prohibited. The Court of Appeal will render a judgment based on written witness statements and other submitted evidence only without conducting any witness examination.

(ii) Supreme Court Appeal Procedures

In order to appeal against the judgment of the Court of Appeal to the Supreme Court, permission from the Supreme Court must be obtained. The deadline for submission of a request for an appeal and an appeal to the Supreme Court is generally one month from the date of pronouncement of the Court of Appeal's judgment.

The Supreme Court may permit the request for an appeal when the appeal includes an important issue worth the decision of the Supreme Court. Such an issue shall include the following cases:

- the appealed issue involving the public benefit, or peace and order of the public;
- when judgment or order of the Court of Appeal on the material point of law is inconsistent, or is inconsistent to the norm of judgment or order of the Supreme Court;
- a judgment or order of the Court of Appeal on an important point of law has no precedent judgment or order of the Supreme Court;
- a judgment or order of the Court of Appeal is inconsistent to the final judgment or order of other court;
- for development and interpretation of law; and
- other material issues under the requirements of the president of the Supreme Court.

(iii) Legal Execution Procedures

The legal execution of judgments is performed through the Legal Execution Department. Legal execution officials may execute a judgment by seizing the debtor's properties and then selling them in public auction, or by other action depending on the nature of the relief.

It is worth noting that the submission of an appeal (neither in the stage of the Court of Appeal nor the Supreme Court) will not prejudice or automatically suspend the enforcement of the first instance court's judgment. Therefore, it is crucial to file a separate motion requesting for suspension of enforcement and to pay a deposit while the trial is pending for consideration in the higher court.

(iv) Recognition and Enforcement of Foreign Judgments

There are no provisions for recognition and enforcement of foreign judgments under Thai law. Thailand has not been a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters or any other treaty for the enforcement of foreign judgments. If a judgment is granted in a court of a foreign country, it is necessary to initiate a fresh litigation case within the competent Thai court in order to obtain a Thai judgment. It is, however, possible to submit a foreign judgment as evidence.

D. Class Action System

The class action system was introduced by an amendment to the CPC in 2015. Class action regulations in Thailand are heavily influenced by the American legal system and are similar to the general class action system of the US in terms of content. Litigation for which the class action system may be used is extensive and includes illegal acts, contractual violations, and other infringements of rights.

The CPC defines a "class" as "holders of identical rights arising from a common issue, and that have the same characteristics inherent in that class." The attributes of such a group are subject to procedures such as notifications at the stage where the representative of the class files the litigation. The court will permit a class action in case where the court deems it more desirable to issue a single judgment as a class action rather than holding trials for multiple individual lawsuits.

In the event that an individual belongs to a class but does not want to join the class action, just as under US law, there is a system in place to opt out.

As class actions are still a fairly new system in Thailand, how class actions affect foreign companies is yet to be determined.

In cases where litigation is filed, claiming compensation for damages can be divided into contract liability, tort liability and claim cases under various laws, for example, laws in relation to environments, consumer protection, and trade competition etc. The plaintiff who is a group member can use either of them as a ground to file a case for class action proceedings. Although in Thailand the basic underlying law is the Civil and Commercial Code with regard to contract and tort liability, other special laws have been established for consumer protection.

Unlike the normal civil case, the party to class action litigation case are entitled to appeal on the questions of factual issues irrespective of the claim amount. However, in the higher stage of the Supreme Court, they are still subject to the permission in order to appeal the judgment of the Court of Appeal.

(i) Consumer Protection Law

In order to protect consumers with regard to products and services, the Consumer Protection Act, B.E. 2522 (1979) as amended contains provisions concerning the following:

a. *advertising* – the prohibition of false advertising and violations of public order and morals;
b. *displays* – the prohibition of displays that cause misunderstandings and obligations to display certain matters;
c. *contracts* – the obligation to include certain provisions of certain contracts, and the prohibition of unfair provisions against consumers; and
d. *harmful products* – the prohibition of the sale of any product that may be harmful to consumers.

In addition, the Consumer Committee has been granted the authority to pass certain orders against businesses that violate regulations, including both prohibition orders and corrective orders.

(ii) Unsafe Product Liability Law (Product Liability Law)

The Thai Unsafe Product Liability Law, namely the Liability for Damages Arising from Unsafe Products Act, B.E. 2551 (2008) (the "**Product Liability Act**") prescribes matters related to manufacturers, sellers, importers, and manufacturing contractors, etc., who bear the responsibility to compensate damages caused to a consumer due to a product's manufacturing defects, design defects, or defective instructions or warnings. The scope of products includes all products manufactured or imported for sale including agricultural products and electricity.

Responsibility primarily lies with the manufacturer, manufacturing contractor, and importer; however, in cases where a party is not clear, the seller can also bear responsibility. In the case of a defect in a product in which multiple business operators have been involved in manufacturing and distribution, each business operator may bear responsibility jointly and severally to the consumer.

In terms of the scope of compensation for damages under the Product Liability Act, claims for consolation of money can also be included. In the event of a failure to take appropriate measures for unsafe products due to intent, gross negligence, or despite knowledge after manufacturing, import, or sale, the courts may order compensation, as punitive damages, to

be paid to the consumer as the court sees fit but no more than double of the actual damage incurred by the consumer.

Apart from none of the aforementioned defects in the product, there are cases in which responsibility to compensate for damages may be waived, namely where the consumer knew of an aforementioned defect in the product, or where the consumer misused or stored the product incorrectly.

(iii) Consumer Case Procedural Law

In order to help enhancing consumer rights, the Consumer Case Procedure Act, B.E. 2551 (2008) (the "**CCPA**") aims to provide various conveniences regarding the realization of consumer rights in civil litigation. Further, the Consumer Protection Committee and its certifying body may file representative litigation under the CCPA. In the past, the Consumer Protection Committee had filed and won a litigation against an insurance company on behalf of a specified beneficiary to a life insurance policy for which the presence or absence of the right to claim the insurance money was disputed (Supreme Court Judgment No. 2295/2545). The Consumer Protection Committee had also filed and won a litigation on behalf of victims regarding damages caused by a vehicle theft in a parking lot of a large scale retail store, filing against the store operator with the obligation to establish and manage the specified parking lot (Supreme Court Judgment No. 5800/2553).

The CCPA also prescribes special provisions on the extension of the statute of limitations for consumer cases. In consumer cases, the jurisdiction is usually limited to the court with authority over the domicile of the consumer, and consumers are allowed to file litigation orally. With regard to court proceedings, the law prescribes special provisions such as the transfer of the burden of proof when a business operator unilaterally holds information, as well as performing the examination of evidence by the court's own authority.

Furthermore, the court may select a settlement method different from that requested by the plaintiff, and order the payment of punitive damages exceeding the actual damages that were incurred up to a certain limit (limited to two times of the amount of damages actually incurred in excess of 50,000 Baht, and five times of the amount of damages actually incurred less than 50,000 Baht). In addition to being able to order the repair or replacement of a defective product, the court may also make a recall order or a disposal order.

(3) Arbitration

Arbitration is a procedure in which parties have agreed to settlement of disputes by way of arbitration. An arbitrator or arbitral tribunal, selected by the parties concerned or an arbitration institution, resolves a dispute between the parties and makes a final and definitive award based on laws and regulations.

A. Source of Law for Arbitration

The Arbitration Act was enacted in 2002 and was based on the UNCITRAL's Model Law on International Commercial Arbitration (the "**Model Law**"). There are also some distinct rules which are specific to only Thailand in addition to such Model law.

Thailand is a member of the New York Convention. Therefore, a foreign arbitral award may be recognized and enforced by the Thai courts based on Section 5 of the New York Convention.

Under the Arbitration Act, interim measures related to the subject of the dispute pending the outcome of the arbitration can be sought out by filing a petition to a competent Thai court. The arbitrators will not solely have judicial power to grant interim remedies without the court of jurisdiction involved.

The recent development of the Arbitration Act in 2019 allows parties in arbitral proceedings to choose foreigners to act as arbitrators or representatives with a special mechanism (fast-track) to apply for work permit which would last for a period of arbitral proceedings. These new standards could improve Thailand to be more "arbitration friendly" nation.

B. Domestic Arbitration and Overseas Arbitration

When conducting business in Thailand, it is often desirable to agree to settlement of disputes by arbitration as the means for resolving disputes arising under contracts. Domestic arbitration is often less costly than overseas arbitration. Domestic arbitration may also allow for easier negotiation with a Thai counterparty. The TAI described below is recognized as being an external organization of the courts, and has a high level of trustworthiness.

(i) Thai Arbitration Institute

The TAI is an intermediary which is funded by the government. Thus, there is no institutional fee. The TAI provides legal consultation with its visions to provide services with promptness, effectiveness and in compliance with international standards.

Website: http://www.tai-en.coj.go.th/

(ii) The Office of the Arbitration Tribunal of the Board of Trade of Thailand

The Office of the Arbitration Tribunal of the Board of Trade of Thailand was established as a dispute resolution institution in 1968 to provide resolution services for agreements between the parties.

Website: https://www.thaichamber.org/en/home/mainpage/3/10

(iii) Thailand Arbitration Centre

Thailand Arbitration Center (the "**THAC**") was established under the Thailand Arbitration Institution Act, B.E. 2550 (2007) and has been in operation since 2015. THAC offers international settlement in line with international standards, offers international arbitration services with specialized arbitrators from various fields, as well as mediation services. With one of its missions to support and promote the international system of arbitration, THAC includes the Alternative Dispute Resolution Academy (ADRA) which collaborates with world-class mediation and arbitration centers to educate mediators and arbitrators.

Website: http://thac.or.th/en/

(iv) Arbitration Institute of the Office of Insurance Commission

The Office of the Insurance Commission provides an arbitration service relating to insurance policies between insureds, beneficiaries and insurance companies. It offers services with promptness, cost-saving and fairness. The Office of the Insurance Commission has issued its

own rules concerning arbitration proceedings and established the Department of Dispute Resolution and Arbitration.

Website: http://www.oic.or.th/th/consumer/law/arbitration/193

C. Arbitral Award Recognition

The Arbitration Act prescribes provisions on the recognition and enforcement of arbitral awards including a provision which specifies grounds and circumstances that an arbitral award may be set aside.

As Thailand is a member of the New York Convention, a foreign arbitral award rendered in the foreign country which is a contracting state of the New York Convention will be recognized by Thai courts. The Arbitration Act provides that an arbitral award rendered in any country is binding on the parties concerned, and declares that enforcement can be sought in the courts.

An arbitral award rendered in a foreign country outside the New York Convention can also be enforced in accordance with international treaties and agreements, to which Thailand is a party. Thailand is a party to 36 bilateral investment treaties that are currently in force.

The court may set aside an arbitral award if the applicant can successfully prove any of the following:

1) either party under the arbitration agreement lacks any competence in accordance with laws applicable to that party;
2) the arbitration agreement is not binding under the laws of the country that is the choice of law or, in the absence thereof, Thai laws;
3) the applicant did not duly receive proper prior notice of the appointment or proceedings of the arbitral tribunal, or could not defend the case in the arbitration proceedings for other cause;
4) the award covers a disputed issue that falls outside the scope of the arbitration agreement or beyond the scope of the arbitration clause; however, if the award on the issue falling beyond the scope thereof can be severed from the part that is within the scope of arbitration, the court may revoke only the part that is beyond the scope of the arbitration agreement or clause; or
5) the element or proceedings of the arbitral tribunal are not as agreed upon between the parties or, if not agreed otherwise between the parties, such element is not in accordance with this law.

D. Arbitral Award Enforcement

The enforcement of an arbitral award in domestic courts requires separate proceedings by filing of a motion to a competent court within three years from the date such award was issued. The motion to the court requires submission of the arbitral award and arbitration agreement translated to Thai language.

Under Thai law, some arbitral awards may not be enforced if certain grounds for exclusion are prescribed, such as the absence of arbitration eligibility or deficiencies in the procedures of the arbitration. Furthermore, courts may refuse enforcement if they deem any arbitral award to be contrary to public order and morals. The ground for the courts to refuse enforcement include the following:

1) Any of the grounds for the arbitral award to be set aside (see Section C. Arbitral Award Recognition above);

2) The arbitral award is not yet binding, or is revoked or set aside by a court of jurisdiction or under the laws of the country where it is rendered.

Under the Arbitration Act, there is only one level of appeal, wherein the appeal against the order or judgment of the court of first instance in relation to arbitration proceedings will directly be heard by the Supreme Court. However, no appeal shall lie against the order or judgment of the court unless the following cases:

1) the recognition or enforcement of the arbitral award is contrary to public order or good morals;
2) the order or judgment is contrary to the laws governing public order;
3) the order or judgment is inconsistent with the arbitral award;
4) the judge who sat in the case gave dissenting opinions in the judgment; or
5) the order is an order imposing interim measures to protect the interest of the party to an arbitration agreement before or during the arbitral proceedings.

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Chandler MHM advises leading Thai and international clients on a wide range of projects, with principle practice areas including: banking and project financing, corporate and mergers & acquisitions, energy and natural resources, major investment projects, real estate, REITs/capital markets, regulatory, dispute resolution, litigation, restructuring and insolvency, labor and employment law, government contracts and technology, media and telecommunications law (TMT). The firm's lawyers draw on integrated practice expertise to deliver legal solutions that are practical, innovative and consistently responsive to clients' needs.

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