

# Project Finance 2022

Contributing editor  
Aled Davies



**Publisher**

Tom Barnes

tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall

claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent

adam.sargent@gettingthedealthrough.com

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# Project Finance

## 2022

**Contributing editor****Aled Davies**

Milbank LLP

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Project Finance*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.



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For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

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# Thailand

Jessada Sawatdipong, Sarunporn Chaianant and Suphachok Saengarun

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## CREATING COLLATERAL SECURITY PACKAGES

### Types of collateral

#### 1 | What types of collateral and security interests are available?

The major forms of security under Thai law are mortgage, pledge, security under the Secured Transactions Act BE 2558 (2015), assignment and guarantee. Thailand's Civil and Commercial Code BE 2468 (1925) (CCC) governs mortgage, pledge, assignment and guarantee, while the Secured Transactions Act governs security created pursuant thereto.

A mortgage is a non-possessory security 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 or certain movable properties that may be registered under relevant laws (eg, machinery registered for ownership under the Machinery Registration Act). Common assets usually registered for mortgages are land, building and registered machinery. Whereas a mortgage is applicable to registered machinery only, both registered and non-registered machinery can be secured by way of security pursuant to the Secured Transactions Act.

A pledge is a possessory security whereby a pledgor delivers to the pledgee a pledged property as security for the performance of an obligation. In addition to typical movable property, certain assets representing value such as shares, bills of exchange, promissory notes and cheques can also be pledged by delivery of documents. In the context of project financing, most common assets secured by way of pledge are shares of a borrower.

A security under the Secured Transactions Act is a non-possessory security whereby the security provider assigns certain types of assets to a security receiver for the performance of an obligation. Assets that can be registered as security are a business (property used by the security provider in its business operations and other rights related to its business operations), claims (excluding rights represented by instruments), movable property used by the security provider in business operations, for example, machinery, immovable property (if the security provider operates an immovable property business), intellectual property and any other assets as provided in the Ministerial Regulation issued under the Secured Transactions Act. A security receiver must be a 'financial institution', which encompasses:

- financial institutions pursuant to the Financial Institution Business Act (ie, commercial bank, finance company and credit foncier company);
- life insurance licensees pursuant to Thai law governing life insurance and non-life insurance licensees pursuant to Thai law governing non-life insurance; and
- commercial banks or financial institutions established pursuant to specific law, and other persons as prescribed in the Ministerial Regulation.

Note that a sole foreign commercial bank is currently not eligible to be a security receiver. However, according to the Ministerial Regulation dated 30 November 2016 (as amended), a foreign commercial bank that provides credit facilities by syndication with the 'financial institution' can be a security receiver.

In the light of project financing, the assignment of the borrower's rights against its counterparties is commonly created over material project documents, which usually includes an off-take agreement, supply agreement, engineering, procurement and construction contract, operations and maintenance contract, and land lease and land sub-lease agreements. Borrower's rights in relation to bank accounts, insurance and bonds (guarantees) given as security under material project documents are also assigned in common practice. Assignment of insurer's rights against reinsurers under reinsurances is also required by the lenders. Assignment can be absolute assignment or conditional assignment. While assignment is a mere contractual arrangement that does not cause a lender as assignee to be a secured creditor, a lender as security receiver pursuant to the Secured Transactions Act ranks in priority to an ordinary creditor in terms of repayment from a property given as security. As such, following an enforcement of the Secured Transactions Act, onshore lenders are inclined to secure such rights by way of security pursuant to the Secured Transactions Act with provisions on conditional assignment incorporated therein.

A guarantee is a contract whereby a guarantor binds itself to a creditor to satisfy an obligation in the event that the debtor (ie, borrower) fails to perform it. Under the CCC, any agreement that binds a guarantor as a natural person to be liable like or as a joint debtor (ie, primary debtor) is invalid. On the contrary, a guarantor as a juristic person may agree to bind itself to be liable for an obligation like or as a joint debtor.

On 27 October 2019, the Rights over Leasehold Asset Act BE 2562 (2019) became effective. The intention of this act is to create a new type of entitlement of land, buildings, and land or condominiums that provides more economic utilisation than leases, and shares similar characteristics to a usufruct right. In addition to utilising, sub-leasing, transferring the right over leasehold asset, the right holder can also mortgage, or use that right over leasehold assets as business security.

## Collateral perfecting

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

### Formalities

#### Security that requires registration

Mortgage agreements must be made in writing in Thai, containing the minimum required particulars, for example the mortgage amount in baht. The mortgage agreement must be registered with the competent official: the local Land Office for a land and building mortgage, the Central Machinery Registration Office for a mortgage over registered machinery and the Marine Department or relevant regional registry office for ships and barges mortgages.

A business security agreement must be prepared in writing and registered online with the Secured Transactions Registration Office. For the purpose of registration, certain particulars must be provided, for example, the names and addresses of the parties, the secured obligation, the details of the assets designated as security, the maximum secured amount and the grounds for security enforcement. In addition, it is necessary for the contracting parties to a business security agreement to appoint a security enforcer when granting security over a business.

#### Security that does not require registration

A pledge does not require registration with a governmental body. To perfect a pledge, the pledged property must be delivered by the pledgor to the pledgee. In the case of a pledge of shares represented by registered share certificate, a share certificate must be delivered to a pledgee to perfect a pledge. For a share pledge to be valid against a company and third party, a record of pledge along with a name and an address of a pledgee must be registered in a share register book of a company.

### Assignment

An assignment agreement must be made in writing. To be valid against obligors (ie, counterparties) or third parties, a written notice of assignment must be given to the obligors that owe obligations or a written consent from the same must be obtained.

### Guarantee

A guarantee requires written evidence signed by the guarantor to be admissible in court.

### Fees and taxes

For land and building mortgages, an official registration fee of 1 per cent of the mortgage amount but not exceeding 200,000 baht and other nominal fees must be paid.

For machinery mortgages, an official registration fee of 1 baht per 1,000 baht of the mortgage amount but not exceeding 120,000 baht must be paid.

In respect of security pursuant to the Secured Transactions Act, an official registration fee of 0.1 per cent of the secured amount but not exceeding 1,000 baht must be paid, except for registration of security over land where the fee shall be equivalent to the land mortgage registration fee. A fee of 200 baht per copy must be paid for issuing an evidence of registration.

For a guarantee, a stamp duty of 10 baht must be paid if the guaranteed amount exceeds 10,000 baht.

Power of attorney is subject to a maximum stamp duty of 30 baht. A maximum stamp duty of 5 baht per copy must be paid for counterparts of subjected instruments.

### Priority

Mortgagors and security receivers rank in priority over ordinary creditors for repayment out of a secured property. The security interest (ie, mortgage and security under the Secured Transactions Act) that was registered first has priority over interests registered later. Properties subject to security under the Secured Transactions Act cannot subsequently be pledged, otherwise the pledge will be invalid.

### Security agent and licensing requirement

Thai law only recognises the common law concept of trust under Trust for Capital Market Transaction Act BE 2550 (2007), which only allows a trustee to hold securities for investors for certain capital market transactions. As a result, a security trustee who holds a security on behalf of the project lenders is not recognised. Nevertheless, Thai law has a similar concept called a principal-agent relationship and permits finance parties to appoint a security agent to hold a security for and on behalf of secured parties. There is no specific licensing requirement for acting in a capacity as a security agent. The concept of a security agent is not permissible for mortgages, and thus each of the lenders needs to enter into the mortgage agreement as a mortgagee.

### Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

With respect to mortgages registered with a government official, the registration record is open to the public for searches to find the existing registered security interest. Transactions processed through a government official (including mortgages) are also recorded on a certificate representing mortgaged property (if applicable): for example, a machinery registration certificate for registered machinery and land deeds for land.

For pledges to be perfected, pledged assets or documents such as the share certificate must be granted to a pledgee. In the case of a share pledge, the share register book of a company can be searched for any registered interest.

Information about business security registration is also available to the public through the Department of Business Development's website.

### Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

### Enforcement of mortgage

Before enforcing a mortgage, a mortgagee shall notify a debtor in writing to perform its obligations within a reasonable time limit, which is no less than 60 days. If the debtor fails to perform its obligation within the time limit, the mortgagee may file a suit to a court to enforce the mortgage by ordering a seizure of mortgaged property and sale by public auction. The mortgage may be provided by a debtor who owes obligations or a third party. If the mortgagor is not a debtor, the written notice must be given to the mortgagor within 15 days from the date the mortgagee issues a written notice to the debtor. If a mortgagee fails to notify the mortgagor within such time limit, it will release the mortgagor from all liabilities of accumulated interest, compensation and charges incurred after such time limit. Apart from public auction, a mortgagee may foreclose a mortgaged property only if a debtor has failed to pay interest for five consecutive years; the value of the mortgaged property is lower

than the outstanding debt; and there is no other mortgage or other preferential right registered over the mortgaged property. A debtor as mortgagor is not liable for a shortfall even though sale proceeds are inadequate to pay the whole debt, although the parties could agree otherwise. A third-party mortgagor is not liable for a shortfall, and any agreement that holds such a mortgagor liable for a shortfall or liable as a guarantor, whether specified in a mortgage agreement or as a standalone agreement, is invalid. Such restriction is not applicable in a case where a debtor is a juristic person and its legitimate managing or controlling person mortgages his or her property to secure the obligations of such debtor and executes a separate guarantee.

#### Enforcement of pledge

Before enforcing a pledge, a written notice informing a debtor to perform obligations within a reasonable time must be served. If the debtor fails to perform its obligation after such reasonable time passed, a pledgee may sell the property by public auction, provided that it has notified the pledgor of the time and place of auction. If it is not possible to serve a notice to a pledgor, a pledgee may sell the property by public auction after one month from the date the obligation became due. Thai law prohibits parties from entering into an agreement saying that the pledgee shall become an owner of the pledged property by any way other than a public auction before the date obligation is due. If the sale proceeds are inadequate, the debtor would still be liable for the shortfall. A pledge agreement cannot contain a provision that allows enforcement of a pledge by any other method in advance before the occurrence of a default.

#### Enforcement of guarantee

Before enforcing a guarantee, the creditor shall notify the guarantor within 60 days from the date of default. The creditor cannot require the guarantor to perform the obligation prior to receipt of such notice by the guarantor. If the creditor fails to notify the guarantor within such time limit, it will release the guarantor from all liabilities of accumulated interest, compensation and charges incurred after such time limit.

#### Enforcement of business security

The enforcement of business security does not require a claim to be filed at court. The enforcement procedures of business security depend on whether the security is created over the whole business or specific assets. With respect to a business security over a whole business, the Secured Transactions Act provides that if the security enforcer determines that an enforcement event has occurred, the security provider shall deliver the business as well as the related documents, rights and liability to the security enforcer within seven days. Subsequently, the security provider shall be responsible for managing the business until it disposes of the business and allocates the sale proceeds towards the repayment of the secured obligation in accordance with the Secured Transactions Act.

With respect to a business security over specific assets, enforcement can be by way of foreclosure or public auction.

Upon receipt of an enforcement event notice by the security provider, the security provider's right to dispose of the assets will cease and the security provider must deliver the assets to the secured creditor. For bank accounts, the security receiver may immediately exercise the right to set-off upon the occurrence of an enforcement event. Upon such set-off, the security receiver must notify the security provider by written notice within seven days. If the security receiver is not the account bank, the security receiver may send a written notice to the financial institution acting as the account bank informing it of the occurrence of the enforcement event and requesting the account bank to deduct the deposit for payment of debt.

#### Enforcement by assignment

The creditor must deliver a notice stating its intent to enforce its right. If the assignee fails to perform the obligation within the specified period in the agreement or notice, the creditor must file a claim to the court.

#### Enforcing collateral rights following bankruptcy

5 | How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

A project lender having rights over the security may enforce such security without any need to apply for repayment of debt under a bankruptcy proceeding but a project lender must allow such security to be examined by the receiver. However, a project lender may apply for repayment of debt in the bankruptcy proceeding on the condition that it could claim the outstanding amount in excess of the price of the secured property (Thai mortgage laws prescribe that a debtor as mortgagor would not be liable in excess of the price of secured property unless an agreement between the parties says otherwise) and:

- when it agrees to relinquish the property given as security for the benefit of all creditors, it may apply for repayment of debt in full;
- when enforcement has been made against the property given as security, it may apply for repayment of debt in respect of the outstanding amount;
- when a request has been made to the receiver for auction sale of the property given as security, it may apply for repayment of debt in respect of the outstanding amount; or
- when valuation of the property given as security has been made, it may apply for repayment of debt in respect of the outstanding amount.

Any fraudulent act, gratuitous act or act under which the debtor receives unreasonably small remuneration can be cancelled if such act arises during the period of one year before the bankruptcy petition or thereafter. If a debtor transfers any assets or does any act with an intention to treat any particular creditor preferentially within three months before the bankruptcy petition or thereafter, such act can be cancelled. If the creditor who has become advantaged is the debtor's insider, the period of one year before the bankruptcy petition or thereafter shall be applied.

In a bankruptcy proceeding, certain taxes and employees' claims must be satisfied before any repayment to creditors. The Bankruptcy Act does not apply to Thai state agencies.

A court order is always required for a seizure of the debtor's assets and for enforcement of such assets.

### FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

#### Restrictions, controls, fees and taxes

6 | What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Under Thai exchange control law, foreign currencies are allowed to be transferred, brought into Thailand, sold, purchased or exchanged with a juristic person established by a specific law and granted permission to undertake foreign means payment business.

The purchase and exchange of foreign currency from authorised persons is generally allowed upon submission of documents evidencing

the incurred transaction provided that procedures prescribed by the Exchange Control Officer are followed.

In general, if the foreign currency exchange is intended to be paid to offshore entities, the Thai Revenue Code provides that such payments are subject to income tax. The payer has the responsibility to withhold the tax at source. The withholding rates depend on the type of income. If payments are made to a country that has a double taxation agreement with Thailand, the rate of withholding tax may be reduced or waived.

### Investment returns

**7** | What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Foreign exchange approvals can be granted by authorised agents for all bona fide transactions that do not fall within a short list of 'restricted purposes' or the negative list.

The payment of investment returns, interest, repayment of a loan (of which proceeds have been remitted into Thailand), and payments made under a guarantee are not included in the negative list. Therefore, the outward remittance of such payment can be approved by commercial banks (as the Bank of Thailand's (BOT) authorised agents), provided that the relevant supporting documents are submitted.

There is withholding tax imposed on interest or premiums on loans or bonds. The tax rate may be decreased or waived if there is a double tax agreement between Thailand and the relevant country.

### Foreign earnings

**8** | Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Pursuant to Thai exchange control law, generally, foreign earnings of export goods in an amount of US\$1 million or more must be repatriated to Thailand and deposited with an authorised juristic person within 360 days from the exportation date or the date of such transaction by the exporter. However, exporters who earn proceeds from the export of goods or other types of revenue in foreign currencies shall be able to use revenues to offset foreign currency expenses, without having to repatriate the funds.

**9** | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Under Thai exchange control law, project companies are allowed to maintain foreign currency deposit (FCD) accounts in Thailand, subject to certain limitations and requirements. The amount of foreign currency that a depositor can deposit in an FCD account shall be up to US\$15,000 per day or not more than the underlying obligation of such proceeds per the conditions as prescribed by the BOT.

There is no restriction under the Thai Foreign Exchange Control Act for project companies to maintain foreign currency accounts in other jurisdictions.

## FOREIGN INVESTMENT ISSUES

### Investment restrictions

**10** | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

The fundamental law governing foreign investment in or ownership of project companies is the Foreign Business Act BE 2542 (1999) (FBA). Under the FBA, foreign nationals, whether individuals or corporations, may not engage in restricted business activities listed thereunder unless a foreign business licence is obtained prior to operation of the respective restricted business. A corporation is considered as a foreigner under the FBA if at least one-half of its share capital is owned by a foreigner (either a foreign individual or a foreign entity).

The restricted businesses pursuant to the FBA are divided into three categories as follows:

- businesses under list 1 are strictly prohibited to foreign nationals by special reason, for instance, rice farming, forestry and land trading;
- businesses under list 2 related to national safety or security or having impacts on arts, culture, traditions, customs and folklore handicrafts or natural resources and the environment (eg, the production of firearms, ammunition, gun powders and explosives, the production of wood carvings, and mining) are prohibited from being carried out by foreign nationals unless permission is granted by the Ministry of Commerce;
- businesses under list 3 in respect of which Thai nationals are not ready to compete with foreign nationals (eg, service, construction and advertising businesses) are prohibited from being carried out by foreign nationals unless permission is granted by the Department of Business Development.

The provision of loans or guarantees may be considered a service business pursuant to list 3 above. Thus, a foreign entity that provides loans to other persons in Thailand or provides a guarantee in favour of a creditor in Thailand may be required to obtain a foreign business licence prior to the entry of the guarantee agreement. Foreign nationals may be exempted from the restriction imposed by the FBA if such foreign nationals:

- operate allowed businesses under the protection of a treaty to which Thailand is a party, for instance, the Thailand-US Treaty of Amity and Economic Relations;
- engages in regulated businesses permitted by the Thai government for a specific duration; and
- engages in businesses permitted by the Board of Investment (BOI) and foreign business certificates have been obtained.

In addition to the FBA, foreign restrictions may be imposed by other specific legislation for specific business sectors. For example, the Land Code restricts foreign ownership of land unless stated otherwise in specific laws and regulations (for instance, after obtaining approval from the BOI, Industrial Estate Authority of Thailand, etc).

If a foreign creditor wishes to enforce a security, owing to the limitations of foreign ownership in real property it may not be able to foreclose or take ownership of the mortgaged property.

### Insurance restrictions

- 11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Insurance for projects in Thailand must be placed with Thai licensed insurers, and may not be placed with foreign insurers. However, foreign insurers may write reinsurance of Thai licensed insurers.

A project company may assign its right to insurance proceeds from an insurer to the lenders or its agent, whether foreign or domestic.

### Worker restrictions

- 12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

According to the Working of Alien Act BE 2551 (2018), to work on a project in Thailand, foreign workers are required to obtain necessary work permits from the Ministry of Labour. To be qualified for obtaining a work permit for a foreign worker, the project company shall have at least 2 million baht for each foreign worker the project company has hired; and the ratio of Thai workers to foreign workers shall be 4:1. BOI-promoted project companies may hire foreign experts exceeding the above limit if the BOI's committee considers it appropriate.

Workers from Myanmar, Laos, Cambodia and Vietnam may receive benefit from the memoranda of understanding entered into between Thailand and Myanmar, Laos, Cambodia and Vietnam. Those workers may be subject to less restrictive permit requirements for working in Thailand in specific industries, including construction.

### Equipment restrictions

- 13 | What restrictions exist on the importation of project equipment?

The Export and Import Act BE 2522 (1979) is the main legislation that imposes restrictions on the importation of goods. Certain goods are prohibited from being imported into Thailand, while other goods may require a licence or are subject to other control restrictions. In addition to the Export and Import Act, import restrictions may exist in specific legislation. For example, under the Armament, Ammunition, Explosives, Fireworks, and Imitation Firearms Act BE 2490 (1947), importers of military hardware, ammunition, or explosive devices require an import licence from the Ministry of Defence.

The import of any goods shall pass the custom clearances and controls process where the duties and taxes may be imposed on the person who imports such goods pursuant to the Customs Act BE 2560 (2017). A BOI-promoted project company shall be entitled to exemption from or reduction of customs duty with respect to the importation of machinery.

### Nationalisation laws

- 14 | What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The laws regarding the nationalisation or expropriation of project companies and their assets include the Thai Constitution BE 2560 (2017), the Expropriation and Acquisition of Immovable Property Act BE 2562 (2019) and the Administrative Procedure Act BE 2539. The expropriation of immovable property shall not be permitted except by virtue of law enacted for the purpose of public utilities, national defence or acquisition of national resources, or for other public interests. Should

there be any nationalisation or expropriation of the assets or projects, fair compensation of the investment shall be paid to the owner or the affected investors as well as to all persons having rights who suffer loss from such expropriation. Other than domestic laws mentioned above, Thailand is also a party to a number of trade or investment agreements, such as the Thailand-Australia Free Trade Agreement, which has provision with respect to nationalisation or expropriation of the investment made by Australian nationals. In the event of nationalisation or expropriation, the criteria as stipulated in the trade investment agreement must be met (eg, to protect public interest purposes, to not be on a discriminatory basis, and to ensure fair compensation is provided).

## FISCAL TREATMENT OF FOREIGN INVESTMENT

### Incentives

- 15 | What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Tax incentives are generally granted to foreign investors by the Board of Investment (BOI) for certain business activities and with additional privilege in some geographical areas. Available tax incentives are as follows:

- corporate income tax holidays of three to eight years (extendable to 13 years in total);
- exemption from duties on importation on items used for, machinery, R&D raw and necessary materials imported for manufacturing for export;
- exemption from corporate income tax (CIT) equivalent to or greater than the invested amount, with an exclusion of the cost of land and working capital, for a maximum of 15 years, depending on the promoted activity;
- reduction of 50 per cent in the CIT rate for five years from the date of expiry of a tax holiday period; and
- exclusion of dividends received from promoted businesses from taxable income during the period of CIT exemption and within six months from the date on which any tax holidays expires.

In addition to the tax incentives under the BOI privileges mentioned above, investors may be eligible to obtain a subsidy from the Competitiveness Enhancement Fund established under the National Competitiveness Enhancement Act for Targeted Industries, BE 2560 (2017) (the Act). Subsidies will be granted to eligible investors in targeted industries as prescribed in the secondary law enacted under the Act, which must be industries new to Thailand or they must use new technology and leading specialist knowledge.

The Thai Revenue Code imposes a 15 per cent withholding tax on interest on both Thai and foreign loans. Nevertheless, Thailand is a party to a number of tax treaties in relation to avoidance of double taxation with 61 countries. The withholding tax rates on interest on these treaties that are more favourable to the taxpayer shall prevail over the rate imposed under the Revenue Code.



## GOVERNMENT AUTHORITIES

### Relevant authorities

- 16 | What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Government agencies or departments with authority over typical project sectors are:

- the Energy Regulatory Commission for gas and power sectors;
- the Department of Mineral Fuels oversight of the upstream sector of the nation's oil and gas industry, and administration of the Petroleum Act, BE 2514 (1971), as amended. Its primary objectives 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 Department of Alternative Energy Development and Efficiency regulate and supervise designated factories and buildings to ensure compliance with Thai energy law;
- the Department of Primary Industries and Mines of the Ministry of Industry is responsible for granting permits and supervising the operations of the mining, mineral extraction and metal industry;
- the Department of Industrial Works of the Ministry of Industry is responsible for granting permits and supervising chemical refining businesses;
- the Department of Land Transport is responsible for all land public transportation while the Marine Department is responsible for ports;
- the National Broadcasting and Telecommunications Commission is responsible for supervising telecommunications industries; and
- the Department of Industrial Works is responsible for granting a licence and supervising water treatment projects for factories releasing polluted water.

State-owned enterprises that relate to the abovementioned project sectors are: PTT Plc, a gas, oil and petrochemical enterprise; the Mass Communication Organisation of Thailand, which operates a television network; TOT Plc and CAT Incorporation Plc, which provide services relating to a telecommunications system; Airports of Thailand Plc, which owns all airports; the Electricity Generating Authority of Thailand, the Metropolitan Electricity Authority and the Provincial Electricity Authority, which together monopolise the distribution and sale of electricity for the whole country; and the Metropolitan Water Works Authority and Provincial Water Works Authority, which together operate the water supply.

## REGULATION OF NATURAL RESOURCES

### Titles

- 17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

There is no specific law that clearly stipulates the owner of all natural resources in Thailand. However, under the Thai constitution, the state has authority to manage, use or arrange for usage and protect natural resources. Laws governing natural resources vary by sector. If a person wishes to acquire rights over a certain natural resource, such person must comply with the particular law enacted for such resource. Indigenous persons do not hold any privilege in acquiring rights to natural resources. Every person is entitled to acquire rights to natural resources under the same conditions prescribed by law. For instance, oil and gas

are protected and regulated under the Petroleum Act and a concession shall be acquired from the Ministry of Energy with as suggested by the Petroleum Committee; mineral rights are regulated under the Mineral Act and a concession and a licence shall be granted by the Mineral Committee; and groundwater is regulated under the Groundwater Act and a licence is granted by the relevant local government authority. Concessionaires may gain benefits from such natural resources and have a right to prevent others from exploiting natural resource granted under the concession received. However, concession holders may have to perform obligations under the concession granted depending on the type of concession and conditions given by the relevant authority.

According to the Foreign Business Operation Act, foreign operators may be restricted to operate certain natural resource businesses, such as mining, which require an approval from the Ministry of Commerce. However, certain natural resource businesses are promoted by the Investment Promotion Act. If foreign operators obtain investment promotion under the Investment Promotion Act, such operators may procure a business operation certificate and shall be able to operate such promoted business.

### Royalties and taxes

- 18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Concessions that are granted to the private sector for natural resource exploration and extraction are generally subject to special taxes and royalties. For example, under Thai petroleum law, concessionaires have to pay royalties based on revenue and the quantity of petroleum sold in each month. In respect of income tax, concessionaires are exempted from income tax under Thai general tax law. However, such concessionaires are subject to a special annual income tax calculated based on their net profit from the petroleum business. Both local and foreign entities are subject to the same taxes and royalties rules.

### Export restrictions

- 19 | What restrictions, fees or taxes exist on the export of natural resources?

Under Thai law, the exportation of certain natural resources, such as gold and any radioactive mineral, is prohibited unless there is approval from the relevant competent authority. Thailand also complies with UN sanctions and restrictions on export.

In respect of tax implication, exports of natural resources may be subject to customs duty and value-added tax under the Customs Act.

## LEGAL ISSUES OF GENERAL APPLICATION

### Government permission

- 20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

Project finance transactions involving foreign and local parties are permitted in Thailand. No project finance-specific governmental approval is required. Parties are required to comply with other general laws (eg, exchange control regulations).

In registering certain securities under Thai law with the relevant government body, registration fees would apply. A mortgage registration for a land and building mortgage requires a fee of 1 per cent of the mortgage amount but not exceeding 200,000 baht and other nominal transactional fees. The registration fee for a machinery mortgage is 1 baht per 1,000 baht of the mortgage amount but not exceeding 120,000 baht. Registration fees for business security registration vary depending on the type of security.

## Registration of financing

### 21 | Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

A loan agreement in an amount exceeding 2,000 baht must be evidenced in writing and signed by the borrower to be enforceable in Thai courts. A share pledge agreement is enforceable against the respective company or any third party only if the creation of the pledge is reflected in the share register book of the respective company and the respective share certificate is in the possession of the pledgee or its agent. A mortgage agreement over immovable property or over certain types of movable properties must be registered with the competent authority. A business security agreement must also be registered with the Department of Business Development.

An agreement made in a foreign language is required to be translated into Thai prior to going to the courts, except in the Intellectual Property and International Trade Court, which in its discretion may waive the requirement. In addition, as a condition of admissibility into evidence of agreements in court, the applicable stamp duty is required to be affixed on certain types of agreements (eg, loan agreement, guarantee agreement, hire of service agreement) within 30 days of bringing the document into Thailand (if it is signed abroad), or within 15 days if it is signed in Thailand.

## Arbitration awards

### 22 | How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The award rendered by the arbitral tribunal shall be recognised and enforced in a Thai court under the New York Convention for recognition and enforcement of arbitral awards and the Thai Arbitration Act BE 2545 (2002). Thailand is a member of the New York Convention. Arbitral awards shall be enforced by a Thai court upon due application of a party seeking to enforce the award. Generally, the court will not review the merit of the dispute again since it has been considered and decided by the arbitration tribunal. However, a Thai court may refuse to recognise and enforce an arbitral award based on several grounds as prescribed in section 40 of the Thai Arbitration Act, for example, if the court sees that the arbitral award is against Thai laws, public order or is immoral.

Thailand is not a contracting state to the ICSID Convention. However, Arbitration and arbitral awards using ICSID and ICC arbitration process are enforceable in Thailand through the process in the Thai Arbitration Act.

Arbitrable disputes are limited to civil issues such as business and commercial disputes. Disputes arising out of administrative contracts, such as public-private partnership agreements, may also be arbitrable provided that a cabinet resolution approving the government agency's agreeing on the arbitration is required.

## Law governing agreements

### 23 | Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

The parties may agree on the governing law provision in the project agreements and financing agreements. If the project agreement or financing agreement is governed by foreign law (law other than Thai

law), in the event that there is any proceeding taken in the courts of Thailand for the enforcement of the agreement, the choice of such foreign law agreed by the parties as the governing law will be recognised and applied, but only to the extent to which such law is proven to the satisfaction of the courts of Thailand (which satisfaction is within the discretion of the courts) and is not considered by the courts of Thailand to be contrary to the public order or good morals of the people of Thailand.

The general rule of severability may apply to the terms that are contrary to the public orders or immoral meaning that the ability to void or unenforceability of any provision may not affect the other remaining provision. Project agreements, for example, land lease agreements and domestic power purchase agreements, are typically governed by Thai law. Offshore supply agreements and onshore engineering, procurement and construction (EPC) agreements may be governed by foreign law depending on the agreement among the offshore supplier, onshore contractor and the owner. Finance documents of domestic projects that are domestically funded are generally governed by Thai law. However, certain types of security document (eg, assignment of rights under the EPC contracts that are governed by foreign law, or guarantee agreement by foreign parent company) may be governed by foreign law.

## Submission to foreign jurisdiction

### 24 | Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Any agreement providing the courts of a foreign jurisdiction to have exclusive jurisdiction to settle any dispute may not be enforceable in Thailand.

However, Thai law is silent on the effect of the irrevocable submission to the jurisdiction of a foreign court, of the appointment of agents for service of process for the purposes of proceedings before such court and of the waiver to objection of venue. We are not aware of any basis under Thai law to find such submission, appointment and waiver invalid.

A judgment of a foreign court will not be enforced by the Thai courts but may, at the sole discretion of the Thai courts, be admissible in evidence in an action in the Thai courts. They may re-try the entire case on its merits.

An express waiver of sovereign immunity made in writing may be effective. Nevertheless, the government agencies generally may be sued in the courts and may not raise a defence of sovereign immunity. In any case, Thai law expressly prohibits the seizure of state property.

## ENVIRONMENTAL, HEALTH AND SAFETY LAWS

### Applicable regulations

### 25 | What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

The major environmental, health and safety laws and regulations and their regulatory bodies are as follows:

- the Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), with the Office of Natural Resources and Environmental Policy and Planning Environment as its regulatory body, and its subordinated regulations, imposes a requirement for certain types of projects to conduct an Environmental Impact Assessment or an Environmental Health Impact Assessment report;
- the Hazardous Substance Act BE 2535 (1992), with the Hazardous Substance Control Bureau, Department of Industrial Works as its regulatory body, governs the management of hazardous substance namely, oil, gas and fuel;

- the Fuel Oils Control Act, BE 2542 (1999), with the Department of Energy Business as its regulatory body, governs the operation and construction of huge oil storage facilities;
- the Petroleum Act, BE 2514 (1971), with the Department of Energy Business as its regulatory body, governs operational environment, health and safety for petroleum concessionaires;
- the Factory Act BE 2535 (1992), with the Department of Industrial Works as its regulatory body and its subordinate regulations, governs various environmental, health and safety issues such as electrical system safety, chemical and radioactive safety, workplace safety, fire hazard safety and general management for air and water pollution;
- the Building Control Act, BE 2522 (1979), with the Local Authorities as its regulatory body, governs construction and public safety;
- the Public Health Act BE 2535 (1992), with the Department of Health as its regulatory body, governs general public sanitation; and
- the Labour Protection Act BE 2541 (1998) with the Labour Department as its regulatory body, the Workplace Health and Safety Act BE 2554 (2011) with the central government, the provincial government and the local government as its regulatory bodies, and their subordinate regulations, governs various health and safety issues for employees, such as chemical, heat, brightness, noise and radiation issues, general health checks for certain groups of workers, electrical systems, and construction and machinery safety.

## PROJECT COMPANIES

### Principal business structures

- 26 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Special purpose companies are generally established in the form of a private limited liability company for the sole purpose of undertaking specific projects that shield other assets of project sponsors in the event that the project subsequently fails. However, the shareholding structures of the project companies are still subject to the restriction of the FBA.

The two main principal sources of financing available to project companies are equity finance (eg, capital contributions by the project sponsors or shareholders of the project companies) or by public offerings through capital markets and debt finance (eg, corporate or shareholder loan or project finance loan from financial institutions).

For a project finance loan, lenders would grant term loan facilities to finance part of the project costs during the construction period and working capital facilities to finance the working capital requirements of the project during the operation period. In return, lenders will have control over key project decisions through restrictive covenants.

## PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

### Applicable legislation

- 27 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The Public-Private Partnership Act BE 2562 (2019) (PPP Act) came into force on 11 March 2019. This PPP Act replaces the Private Investments in State Undertaking Act BE 2556 (2013). Under the PPP Act, pure uses of state property are excluded. The PPP Act also streamlines the process of investment partnerships between the public sector and the private sector. The Public-Private Partnership Policy Committee is established to, including but not limited to, supervise the enactment of royal decrees

or ministerial regulations, approve the plan for projects and approve amendments to the public-private partnership agreement. The PPP Act governs various types of project, ranging from infrastructure transportation, public services, energy, telecommunication, hospitals, schools and exhibition centres.

In 2018, the Eastern Special Development Zone Act, BE 2561 (2018) was enacted. This Act creates an expedited process (PPP Eastern Europe Corridor Track (EEC Track)) for the approval of public-private partnership projects within the area of Chachoengsao, Chonburi and Rayong provinces. If the PPP projects fall under this Act and have complied with the process and procedures on supervising and monitoring projects operation specifically prescribed by the EEC Committee, it shall be deemed that they are in compliance with the PPP Act.

## PPP - LIMITATIONS

### Legal limitations

- 28 | What, if any, are the practical and legal limitations on PPP transactions?

A PPP project must only be initiated by a proposal from a government sector that is an owner of the project to the minister of the responsible ministry for consideration and approval. Private entities may, however, participate in the public hearing process.

Once the proposal has been approved, the matter is referred to the Private Investments in State Undertakings Policy Committee for further approval. After having been approved by this committee, the responsible ministry submits the matter to the cabinet for approval of the project and the relevant budgets.

After that, the project-owner agency will prepare an invitation to tender for a bidding process, draft the initial private party selection documents, draft the public-private partnership agreement and will propose them to the selection committee (case-by-case appointment) for approval. After approval, the project-owner agency will proceed with the selection of the private party.

After the process of the selection of the private party and negotiation of the draft PPP agreement with the selected private party, the draft PPP agreement would be submitted to the attorney-general for approval. The project-owner agency will then refer matters to the responsible ministry and further to the cabinet. If approved, the project-owner agency will sign the PPP agreement with the selected private party.

The private party may be selected without using a bidding process. The selection of the private party without a bidding process must be in accordance with the notification regarding the criteria for the selection of the private party by not using a bidding process. This notification requires that the selection of the private party may proceed if:

- there is an urgent need for the private sector to invest in the project due to unexpected events not caused by the project owner agency and selection by means of a bidding process may cause damage in any material respect to the public interest;
- private party selection by means of a bidding process will affect the success of the project or will result in other projects not being successful in accordance with the plan; and
- the project is under the strategic plan, which requires investments from the private sector pursuant to government policies and the selection of the private party by means of a bidding process may cause a delay that will eventually affect the objectives or the achievement of such policies.

## PPP – TRANSACTIONS

### Significant transactions

29 | What have been the most significant PPP transactions completed to date in your jurisdiction?

There are PPP projects that have been approved to be processed under the EEC Track to allow the expedition of the overall approval process (eg, the consolidation of any unnecessary processes and allowing the procedures to occur in parallel), as well as to ensure transparency by the check and balance system and to exhibit strong commitment to better facilitate important investment. These include the following significant projects:

- U-Tapao Airport and Eastern Aviation City;
- High-Speed Railway Connection to Three Major Airports;
- Map Ta Phut Industrial Port Phase III;
- Laem Chabang Port Phase III;
- U-Tapao Maintenance, Repair and Overhaul Centre (MRO); and
- Digital Industry and Innovation Promotion Zone (Digital Park Thailand).

The U-Tapao Airport and Eastern Aviation City, the High-Speed Railway Connection to Three Major Airports and the Map Ta Phut Industrial Port Phase III projects were awarded to private consortia in 2019 and 2020. The construction phase of Laem Chabang Port Phase III was awarded to a private consortium in 2020. The remaining projects remain in the bidding process with the U-Tapao Maintenance Repair and Overhaul Centre project being put on hold due to the impact of the covid-19 pandemic on the aviation industry.

## UPDATE & TRENDS

### Key developments of the past year

30 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

An amendment to the Civil and Commercial Code on Interest Rate and Default Interest Rate became effective on 11 April 2021. The amendment gives effect to key changes to the applicable rate and the calculation of interest and default interest pursuant to sections 7, 224 and 224/1 of the Civil and Commercial Code (CCC) (as amended).

Formerly, pursuant to section 7 and section 224 of the CCC, an interest rate on monetary debt which had not been specified by an agreement or a provision of law and the default interest rate would be at 7.5 per cent per annum. These provisions applied for a long time and had not been revised to be in line with the current economic situation. The rates and the calculation methods have now been revised under this amendment to correspond with the current economic situation.

According to the amendment, the interest rate on monetary debt pursuant to Section 7 of the CCC, which is not specified by an agreement or a provision of law, shall be reduced from 7.5 per cent per annum to 3 per cent per annum. This rate can be adjusted in accordance with the economic situation by a Royal Decree at the consideration of the Ministry of Finance.

Pursuant to section 224 of the CCC, the default interest rate on monetary debt shall be reduced from 7.5 per cent per annum to the rate in section 7 of the CCC (ie, 3 per cent) plus 2 per cent per annum. If a creditor can demand a higher rate on any legitimate ground, such rate shall continue to apply (eg, in the case of a creditor who is a financial institution announcing its default interest rate applicable to its customers in accordance with the notification of the Bank of Thailand on interest and discount or the default interest rate is specified in the agreement).

## CHANDLER MHM

### Jessada Sawatdipong

jessada.s@mhm-global.com

### Sarunporn Chaianant

sarunporn.c@mhm-global.com

### Suphachok Saengarun

suphachok.s@mhm-global.com

17th Floor, Sathorn Square Office Tower  
98 North Sathorn Road, Silom, Bangrak  
Bangkok 10500  
Thailand  
Tel: +66 2009 5000  
www.chandlermhm.com

Furthermore, the amendment has added section 224/1 of the CCC, which provides that, where debts are due in instalments, the default interest rate shall be calculated on the due but unpaid principal amount of such default instalment. An agreement to apply default interest to the contrary shall be void.

For instance, if an agreement or a provision of law does not specify the interest rate and the default interest rate, the rate of 7.5 per cent per annum shall apply to the interest that falls due prior to the effective date of the amendment. When any interest falls due from or after such effective date, the new rate of interest and default interest shall apply. On the contrary, if an agreement or a provision of law has specified the interest rate or default interest rate, such specified rate shall apply instead of the interest rates pursuant to sections 7 and 224 of the CCC.

### Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to the outbreak of covid-19, Thai government agencies have issued emergency legislation, guidelines and policies as well as relief measures to address the impact of the pandemic in four major areas: employment, banking and finance, corporate and capital markets, and tax.

With respect to banking and finance, the Bank of Thailand (BOT), in collaboration with commercial banks, specialised financial institutions, and other financial service providers and associations, announced measures to help debtors who use credit card products, personal loans, hire purchase, leasing, housing loans and small and medium-sized enterprises (SME) loans. These measures, which were in place until 31 December 2020 and were later extended until 30 June 2021, include postponing or reducing payments and interest with respect to personal loans, credit cards, hire purchase, housing loans and car loans.

The BOT has further introduced four measures requesting cooperation from financial service providers with respect to SMEs and large enterprises as follows:

- restructuring, for instance, postponing payments, extension of due dates and conversion of short-term loans into term loans;
- postponing payments from SMEs if the credit amount does not exceed 100 million baht;
- granting appropriate leniency; and
- providing additional working capital and liquidity.

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