Doing Business in Thailand

2015
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Introduction

The attorneys of Baker & McKenzie’s Bangkok Office have prepared this publication for the benefit of foreign individuals and companies who are considering investing in Thailand. The text presents a broad overview of certain aspects of the Thai legal system that significantly affect the way business is conducted in Thailand.

This publication primarily deals with government regulation of and incentives for foreign investment, forms of business organization available to foreign investors, and the Thai tax system. The latter half of the text contains summaries of various aspects of Thai law that generally affect most business operations in Thailand, including intellectual property, competition and consumer protection, labour, immigration, import/export, currency exchange, and real estate.

This publication is intended only as a summary of certain aspects of Thai law with which a foreign investor should be familiar when initially planning a business venture in Thailand. It is not intended to serve as a substitute for specific legal advice, which one should procure before actually investing in Thailand. The materials on each topic do not exhaustively summarize all relevant laws. In addition to the topics covered, it is also important for the investor to consider the laws and regulations that govern the specific type of business activity contemplated. Finally, each of the laws discussed is, of course, subject to change.

Baker & McKenzie was established in Chicago over 60 years ago and now has 77 offices in 47 countries, including each of the world’s major commercial centers. Today the Firm has approximately 1,400 partners and 4,000 legal professionals.

With over 160 attorneys and 300 plus support staff, the Bangkok office is more than adequately equipped to offer a full range of commercial legal services. Our clients, who are active in all areas of commerce, include Thai and international public and private companies, professional firms, banks and other financial institutions,
governments, trade and industry associations, trustees, joint ventures, and partnerships. They include many significant foreign investors and companies doing business in Thailand, as well as major local companies developing their markets overseas.
1. Thailand: An Overview

1.1 Geography and Climate

Thailand is strategically situated in Southeast Asia, bordered by Cambodia to the southeast, Laos to the north and northeast, Myanmar to the north and west, and Malaysia to the south. It has extensive coastlines along the Andaman Sea to the west and the Gulf of Thailand to the east.

Thailand covers an area of approximately 512,000 square kilometers and consists of four geographic regions. The north is mountainous and forested; the northeast is semi-arid with poor soil; the central region is a vast alluvial plain; and the southern region is comprised of a narrow tropical peninsula that is rich in minerals.

The climate is generally hot and humid, but varies from semi-tropical in the north to tropical in the south. There are three seasons: hot from March to May, wet from June to October, and dry and relatively cool from November to February.

1.2 Population and Language

Thailand’s population is approximately 67.5 million, as of January 2015. The predominant ethnic group is Thai, with minorities of Chinese, Laotians, Cambodians, Malays, and various indigenous hill-tribes.

The capital, Bangkok, is its most populous city, supporting over 10% of the total population. Other major cities include Korat (northeast), Khon Kaen (northeast), Chiang Mai (north), Songkhla/Hat Yai (south), and Phuket (south).

The national language is Thai, with minor regional variations. English is used in certain commercial circles and in tourist areas, but otherwise is not widely spoken.
1.3 Religion

Approximately 95% of Thailand’s population is Buddhist. Minority religions include Islam (approximately 3%) and Christianity (approximately 1%).

Although the Christian calendar is widely used in Thailand, the Thai calendar is also used, with the Buddhist Era (B.E.) beginning with the Lord Buddha’s birth in 543 B.C.

Therefore, the legislation cited in this brief is marked by the year in which the legislation was enacted in Buddhist Era terms, followed by the Christian calendar equivalent; for example, B.E. 2546 (2003).

1.4 The Political System

Thailand’s political system is a constitutional monarchy, established in 1932, with the King as Head of State. The King is also head of the armed forces. The present monarch is King Bhumibol Adulyadej, also known as King Rama IX of the Chakri Dynasty. King Bhumibol ascended the throne in 1946.

At present, the country adopts the Interim Constitution, which was promulgated in 2014 by the National Council for Peace and Order (NCPO), as the supreme law of the land. Under the Interim Constitution, the King remains the Head of State and exercises the sovereign powers through the main three branches, namely, the legislative powers through the National Legislative Assembly, the executive powers through the government, and the judicial powers through the Courts.

The National Legislative Assembly (NLA) consists of 220 members selected and appointed by the NCPO. It is empowered to consider and enact laws in place of the House of Representatives and the Senate.

The government, administrated by the Cabinet, which consists of Ministers with a Prime Minister as the leader, is served by a large bureaucracy. There are various ministries, including the Prime
Minister’s Office (concerned with national policies), the Ministry of Finance (revenue and customs), the Ministry of Industry (development and implementation of manufacturing and industrial policies), the Ministry of Commerce (regulation of external and internal trade), the Ministry of Interior (which includes the Land Department), and the Ministry of Information and Communication Technology. Each Ministry is headed by a Minister appointed by the King on the recommendation of the Prime Minister.

Thailand can be described as a unitary state, and is made up of 76 provinces or *changwat*, each with its own governor who is responsible to the Ministry of Interior, and the Bangkok Metropolitan Administration, which is a local body headed by an elected governor.

The Interim Constitution still recognizes and adopts the dual court system, where there are separate courts for adjudicating matters under private laws (such as contractual disputes between private parties) and public laws (such as claims against a governmental agency), the detail of which is provided in item 2.2.

The NCPO, which is endorsed by the Interim Constitution, has the powers and duties to make any order to disrupt or suppress regardless of the legislative, executive or judicial force of that order when it is necessary for the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act which undermines public peace and order or national security, the Monarchy, national economics or administration of State affairs, whether that act emerges inside or outside the Kingdom.

### 1.5 Currency

The local currency is the baht, which is divided into 100 satang. Notes are available in denominations of 20, 50, 100, 500, and 1,000 and coins of 1, 2, 5, and 10, as well as 25 and 50 satang. Foreign currency can be exchanged for baht at commercial banks, authorized money exchange centers, and other authorized agents.
2. The Legal System

2.1 The Law

Thailand has a codified system of law as a result of reforms instituted by King Chulalongkorn (King Rama V) at the turn of the nineteenth century. The major legislative codes are the Civil and Commercial Code, the Penal Code, the Civil Procedure Code, the Criminal Procedure Code, the Revenue Code, and the Land Code. The content of the Codes was drawn from the laws of other countries having codified systems (e.g. France, Switzerland, and Germany), from countries with common law systems (e.g. Great Britain), and from the traditional laws of Thailand.

As mentioned above, the supreme law of Thailand at present is the Interim Constitution 2014, which still recognizes and endorses the existing Acts of the Thai Legislature, Royal Decrees, Emergency Decrees, Ministerial Regulations, Ministerial Notifications, other governmental notifications, and local government regulations, and those to be enacted or issued by the NLA and the government, which are supplementary to it.

Laws are normally drafted in broad terms, especially laws regulating commercial activities. Broad powers are delegated to government ministries or organizations, which are empowered to issue notifications or regulations.

2.2 The Courts

The Court of Justice is divided into three tiers: the Supreme Court (Sarn Dika); the Court of Appeals (Sarn Uthorn); and the Court of First Instance (Sarn Chunton). There are separate Juvenile, Labour, and Tax Courts. There are also a number of specialized courts: the Central and Regional Intellectual Property and International Trade Courts and the Central Bankruptcy Court. All these courts were created under their own enacting legislation, which also established their specialized procedures.
The Constitution established a separate system of Administrative Courts to deal with administrative law and administrative contract matters. The Constitutional Court was also established to deal with governmental matters and constitutional questions. The Military Courts were established to try and adjudicate military criminal cases and other cases as provided by law. All cases are decided by judges, as there are no juries.

2.3 Arbitration

Arbitration is available as a means of dispute settlement. Under the Arbitration Act, B.E. 2545 (2002), written agreements to arbitrate a dispute are given binding effect by the Courts of Justice or Administrative Courts, depending on the nature of the dispute. Parties to an agreement may agree that certain types of disputes should be resolved by means of arbitration. If an instance of dispute arises and one party brings the matter to litigation in court, the other party has the right to object. In this case, the Court will refuse to hear the case and will order the parties to resolve the dispute via arbitration, in keeping with the terms of the agreement.

The Arbitration Act also provides that the Courts may enforce foreign arbitration awards if the parties involved are entitled to rely on the terms of relevant international conventions. To enforce such an award, the Court requires that the petitioner submit the originals, or certified copies of the originals, and Thai translations of the agreement and the award, as evidence.

3. Foreign Investment

3.1 The Foreign Business Act

There are several laws and regulations that govern the extent of foreign participation in business activities in Thailand. The main governing law is the Foreign Business Act, B.E. 2542 (1999) (the “FBA”).
3.1.1 Prohibited and Restricted Businesses

The FBA limits the rights of foreigners to engage in certain business activities in Thailand. Investors contemplating new business ventures must carefully consider the FBA before attempting to set up operations. A foreigner may wholly own a business in Thailand, unless the specific activity of that business is restricted under the FBA or is otherwise prohibited by another law.

The FBA defines “aliens” or “foreigners” as natural persons or juristic entities (companies, registered partnerships, etc.) who do not possess Thai nationality. Companies are considered “foreign” for these purposes if 50% or more of their share capital belongs to foreign individuals or juristic entities. Partnerships are deemed to be foreign if 50% or more of the partners are foreign individuals or if the managing partner or manager is a foreigner.

The FBA lists three categories, or schedules, of controlled business activities (set forth in Appendix A):

- **Schedule One** consists of business activities from which foreigners are barred for “special reasons” and for which they cannot obtain a license;

- **Schedule Two** lists businesses that may affect national security or safety, art, culture, customs, native manufacturing/handicraft production, natural resources, or the environment. Foreigners may only engage in Schedule Two businesses if they obtain permission from the Minister of Commerce, which in turn can only be issued pursuant to a resolution of the Cabinet. In addition, Thai nationals must hold at least 40% of the capital in that foreign juristic person and two-fifths (2/5) of the directors must be Thai. With a resolution of the Cabinet, the Minister of Commerce may alter these requirements, but in no circumstances can the percentage of Thai shareholding in a Schedule Two business be less than 25%; and
Schedule Three contains business activities in which Thais are considered not adequately prepared to compete on an equal footing with foreigners. Foreigners may engage in these businesses only upon receipt of permission from the Director-General of the Department of Business Development, the Ministry of Commerce, with the approval of the Foreign Business Board. If a foreign enterprise receives this permission, the foreign juristic person can be 100% foreign-owned and there is no requirement for a minimum number of Thai directors.

The Foreign Business Board must review the businesses listed in the Schedules at least once a year and propose any necessary changes to the Minister of Commerce.

In 2013, the Ministry of Commerce issued a Ministerial Regulation removing certain categories of business from the controlled business activities in Schedule Three of the FBA. This Ministerial Regulation effectively lifts restrictions on foreign companies in conducting certain service businesses in Thailand that were under the scope of the FBA, including securities and related businesses according to the Securities and Exchange Act, derivatives services according to the Derivatives Act, and trustee businesses according to the Trust for Transactions in Capital Market Act. Consequently, foreign companies are allowed to engage in these service businesses as prescribed by the Ministerial Regulation without being required to obtain a Foreign Business License under the FBA.

3.1.2 Exemptions Granted by the Thai Government or by Virtue of a Treaty

In some instances, foreigners may be exempt from certain requirements imposed by the FBA. These include the following:

- foreigners operating a business under the protection of a treaty to which Thailand is a signatory;
• foreigners who engage in regulated businesses with the permission of the Thai government for a specified duration; or

• foreigners operating a business under a treaty imposing obligations to which Thailand conforms, even though Thailand is not a signatory.

The exemptions may include permission to engage in an otherwise prohibited or restricted business, free of the requirements respecting percentages of Thai shareholders and directors. Entitled parties must first notify the Ministry of Commerce and procure a Certificate from the Director-General. The Director-General must issue the Certificate within 30 days from the date of receipt of the notification.

3.1.3 Exemption for U.S. Companies under the U.S.-Thai Treaty of Amity

Amongst the treaties to which Thailand is a signatory, the 1966 Treaty of Amity and Economic Relations between Thailand and the United States (the “U.S. Treaty”) by far grants the most exemptions to the FBA, in that it allows American citizens and businesses incorporated in the U.S. (or incorporated in Thailand, provided they are U.S. majority-owned) to engage in business on the same basis as Thai nationals, except in certain limited cases. Under the U.S. Treaty, United States nationals (including companies) are permitted to hold a majority share in Thai companies carrying on certain business activities that would otherwise be prohibited under the FBA. In order to be eligible for the exemptions under the U.S. Treaty, it must be proven that the majority shareholders of such Thai company are U.S. citizens and/or American-owned and -controlled entities, all the way up to such company’s ultimate shareholder(s).

Furthermore, in terms of control (i) a majority of the directors must be either Thai or American nationals and (ii) only an American or a Thai director can be authorized to sign alone to bind the company. In the case of more than one authorized directors, a third-country national director cannot sign alone. If a third-country national authorized
director is required, he/she must sign jointly with a Thai or an American director. The eligible company must apply for a Certificate from the Director-General of the Ministry of Commerce, to acknowledge the company’s U.S. Treaty protection status.

Despite the protection offered under the U.S. Treaty, some businesses are still prohibited. These are communications, transport, fiduciary functions, banking involving depository functions, exploitation of benefits from land or other natural resources, and domestic trade in indigenous agricultural products. It should be noted that the U.S. Treaty actually expired in December 2005. However, there has been an extension for the submission of applications, for an unspecified period of time. Many U.S. investors have applied for protection under the U.S. Treaty during this period of extension.

3.1.4 Exemptions granted by the Board of Investment and the Industrial Estate Authority of Thailand

Foreigners that have been granted investment promotion from the Board of Investment (BOI) or permission to operate industrial or export businesses by the Industrial Estate Authority of Thailand (IEAT) for businesses described in Schedules Two or Three are also exempted from the FBA. In this respect, they must notify the Ministry of Commerce and procure a Certificate from the Director-General. The Director-General must issue the Certificate within 30 days from the date of receipt of the notification.

3.1.5 Timeframe for Processing Foreign Business License Applications

The Cabinet (for businesses in Schedule Two) or the Director-General (for businesses in Schedule Three), must complete consideration of an application for a Foreign Business License within 60 days from the date of receipt. If the Cabinet, in a case of necessity, is unable to complete its consideration within such period, it may be extended as necessary but shall not exceed a further 60 days. The Minister of Commerce or the Director-General, as the case may be, must issue the
Foreign Business License within 15 days from the date of the Cabinet’s resolution or the Director-General’s approval.

3.1.6 Conditions Attached to Foreign Business Licenses

Both the Minister of Commerce and the Director-General may be required to attach certain conditions to a Foreign Business License. When issuing conditions for Schedule Two applicants, the Minister of Commerce may be subject to a resolution of the Cabinet or to a Ministerial Regulation. The Director-General may be required to issue certain conditions regarding Schedule Three businesses by a relevant Ministerial Regulation.

The Minister of Commerce, upon the recommendation of the Foreign Business Board, is empowered to issue Ministerial Regulations imposing any of the following conditions:

- a specified debt-to-equity ratio;
- the minimum number of foreign directors who must have domicile or an address in Thailand;
- a minimum level of capital and the period for which it must be maintained in Thailand;
- required contributions of technology or assets; and
- other necessary conditions.

3.1.7 Penalties under the Foreign Business Act

Thai or foreign nationals who violate the provisions of the FBA, which include nominee structures used to avoid the law, are subject to imprisonment for a term not exceeding three years or to a fine of 100,000 baht up to 1,000,000 baht, or both. A Thai court may also order the violating entity to cease its operations. Any violation of a court order in this regard shall be subject to a daily fine of 10,000 baht to 50,000 baht.
3.2 Restrictions on Foreign Participation in Specific Sectors

In addition to the FBA, several statutes impose conditions of majority ownership and management by Thai nationals for specific business sectors, as described below. Specific regulations for some businesses, such as hotels and pharmaceuticals, require that the holder of the operating license be an individual Thai national.

3.2.1 The Financial Institutions Business Act


According to the FIBA, a “financial institution business” includes commercial banking, and the undertaking of finance and credit foncier businesses. The FIBA requires that Thai nationals hold not less than three-fourths (3/4) of the total issued voting shares in a commercial bank and that at least three-fourths (3/4) of the total number of directors be Thai nationals. The FIBA does, however, empower the Bank of Thailand (BOT), on a case-by-case basis and upon request, to permit non-Thai nationals to hold up to 49% of a company’s voting shares sold and to allow foreigners to comprise more than 25%, but less than 50%, of the directorship of a company. Moreover, the Ministry of Finance can further extend the foreign shareholding and directorship limit, in order to rectify the status and performance of a distressed financial institution or to stabilize a financial institution.

3.2.2 The Life Insurance Act and the Casualty Insurance Act

The Life Insurance Act, B.E. 2535 (1992), as amended by the Life Insurance Act (No. 2) B.E. 2551 (2008) and the Life Insurance Act (No. 3) B.E. 2558 (2015), and the Casualty Insurance Act, B.E. 2535 (1992), as amended by the Casualty Insurance Act (No. 2) B.E. 2551 (2008) and the Casualty Insurance Act (No. 3) B.E. 2558 (2015), (collectively, the “Insurance Acts”), require that (i) Thai nationals
constitute at least three-fourths (3/4) of the total number of directors and (ii) Thai nationals hold at least 75% of the total number of voting shares in an insurance company.

The Insurance Acts empower the Office of the Insurance Commission (OIC), on a case-by-case basis if there is a reasonable cause and upon request, to permit non-Thai nationals to hold up to 49% of a company’s voting shares and to allow foreigners to comprise more than 25%, but less than 50%, of the directorship of a company.

Moreover, The Minister of Finance, upon the recommendation of the Insurance Commission, is empowered to grant a relaxation to allow the company’s shareholding or directorship structure to differ (e.g. permit foreign shareholding of more than 49%): (i) when the company’s standing or operations are of a condition that might cause damage to the insured or the public; (ii) in order to strengthen the company’s stability; or (iii) in order to enhance the stability of the insurance industry.

3.2.3 Real Estate-related Legislation

As explained in section 15.1 (Foreign Ownership of Land), foreigners, including companies with more than 49% of their total shares held by foreigner(s), or more than one half of shareholders are foreigners, are prohibited from owning land pursuant to the Land Code. Apart from this restriction in the Land Code, foreigners (pursuant to the definition prescribed in the FBA) are restricted from conducting real estate development-related businesses, as follows:

- Land Trading Businesses

Land trading businesses are listed in Schedule One to the FBA. Foreigners are strictly prohibited from engaging in such businesses, which means licenses cannot be obtained.
Hotel and Condominium Development

Foreigners are restricted from engaging in hotel businesses unless a Foreign Business License is obtained, since the “hotel business” is listed in Schedule Three of the FBA. However, “hotel management” businesses are exempted from the restriction; thus, foreigners can freely carry on hotel management businesses.

Condominium development, although not one of the restricted businesses listed in the Schedules of the FBA, is also restricted as far as foreigners are concerned. The reason is that one of the criteria of condominium registration is that the project owner must own the land and building(s) which are intended to be registered as a condominium. This then reverts back to the fact foreigners are prohibited from owning land under the Land Code, as detailed further in section 15.1.

4. Investment Incentives

4.1 The Investment Promotion Act and the BOI

The Investment Promotion Act, B.E. 2520 (1977) provides the legal framework for investment incentives granted by the BOI. The BOI is responsible for promoting investment in Thailand. It has wide discretionary powers to encourage investment in areas considered to be the most beneficial to Thailand’s economic and social development. BOI incentives include (i) tax privileges, such as exemption of corporate income tax and exemption of import duties on machinery, and (ii) non-tax privileges, such as the right to own land and the right to bring in foreign experts. The members of the BOI include the Prime Minister (as chairman), the Minister of Industry (as vice-chairman), and other ministers or senior government officials, as appointed by the Prime Minister.

In December 2014, the BOI issued Announcement No. 2/2557, which repealed its August 2000 announcement and made significant changes
to a number of BOI investment promotion policies. Investment promotion privileges are no longer granted based on the location of the project but based on the type of industry. Projects that are deemed to be highly beneficial to the country and have high value-added benefits, including high tech industries, medical-related industries, and research and development centers are all eligible for special promotion and maximum tax and duty privileges.

4.2 BOI Incentives

Under the Investment Promotion Act, the BOI is able to provide the following incentives and privileges to BOI-promoted enterprises:

- **State Guarantees**: Guarantees against nationalization, competition from state enterprises and monopolies on the sale of similar products, price controls, export restrictions, and duty-free imports by government agencies or state enterprises;

- **Business Protection**: This measure is subject to justification and need, which may include: imposing a surcharge on imports of competing products (up to 50% of the CIF value, for up to one year at a time); banning the import of competing products; ordering any actions necessary to assist the promoted project; and providing tax relief for the benefit of promoted projects;

- **Relaxation of Restrictions on Participation by Foreigners**: Allowing promoted companies to bring in foreign nationals for feasibility studies; allowing companies to bring in foreign technicians and experts to work on promoted projects; allowing companies to own land for promoted activities; and allowing companies to receive foreign currency or remit it abroad; and

- **Taxation**: Various incentives include: import duty exemptions or reductions on imported machinery, imported raw materials, and components; corporate income tax
exemption for three to eight years, from the date on which income is first earned, with permission to carry forward losses and deduct them as expenses for up to five years; and exemptions from withholding tax on taxable income on dividends derived from promoted projects during the corporate income tax exemption period.

4.3 Investment Incentives

To encourage the industrial development for projects that are deemed to be highly beneficial to the country and have high value-added benefits, the BOI grants special privileges to projects depending on the type of industry of the project.

Privileges to be granted are divided into groups A1-A4 and B1-B2.

Industries that are considered to be group A1 will receive:

- exemption from import duty on machinery;
- corporate income tax exemption for eight years, without limit on the amount of corporate income tax to be exempted; and
- one year exemption from import duty on raw or essential materials used in products manufactured for export. This period can be extended at the discretion of the BOI.

Industries that are considered to be group A2 will receive:

- exemption from import duty on machinery;
- corporate income tax exemption for eight years. The amount of tax to be exempted shall not exceed the actual amount of investment capital (excluding the cost of land and working capital); and
• one year exemption from import duty on raw or essential materials used in products manufactured for export. This period can be extended at the discretion of the BOI.

Industries that are considered to be group A3 will receive:
• exemption from import duty on machinery;
• corporate income tax exemption for five years. The amount of tax to be exempted shall not exceed the actual amount of investment capital (excluding the cost of land and working capital), except in the case that the policy specifically mentioned that such industry shall have no such limit; and
• one year exemption from import duty on raw or essential materials used in products manufactured for export. This period can be extended at the discretion of the BOI.

Industries that are considered to be group A4 will receive:
• exemption from import duty on machinery;
• corporate income tax exemption for three years. The amount of tax to be exempted shall not exceed the actual amount of investment capital (excluding the cost of land and working capital); and
• one year exemption from import duty on raw or essential materials used in products manufactured for export. This period can be extended at the discretion of the BOI.

Industries that are considered to be group B1 will receive:
• exemption from import duty on machinery; and
• one year exemption from import duty on raw or essential materials used in products manufactured for export. This period can be extended at the discretion of the BOI.

Industries that are considered to be group B2 will receive:

• one year exemption from import duty on raw or essential materials used in products manufactured for export. This period can be extended at the discretion of the BOI.

All types of projects will receive non-tax privileges such as the right to own land and the right to bring in foreign experts to work.

More tax incentives may be granted if the projects (i) meet the criteria under merit based policy e.g. have sufficient expenses for research and development, human resource development, etc., (ii) locate in industrial estate or promoted industrial zone, and (iii) locate in low develop provinces, which are: Amnat Charoen, Bueng Karn, Buri Ram, Chaiyaphum, Kalasin, Mahasarakham, Nakhon Phanom, Nan, Nong Bualamphu, Mukdaharn, Maehongsorn, Phrae, Roi Et, Sakhon Nakhon, Sa Kaew, Sukothai, Sisaket, Surin, Ubon Ratchathani, and Yasothon

4.4 BOI Promotion Eligibility Criteria

The BOI employs two different sets of criteria to determine whether a proposed project is economically and technologically eligible for promotion. The first set of criteria applies to general investment projects and the second applies to government concession and privatization projects.

4.4.1 Criteria for Approval

The following are the criteria for approval:

• the value added must be at least 20% of sales revenue, except for projects that manufacture electronic products and parts or
process agricultural produce, and coil center, where the value added requirement is 10%;

- the ratio of debt-to-registered capital should not exceed three-to-one for a newly-established project, while expansion projects will be considered on a case-by-case basis;

- modern production processes and new machinery must be used; if old machinery is used, its efficiency must be certified by a reliable institution and BOI approval must be obtained;

- environmental protection systems must be installed; for projects that may pose a threat to the environment, the BOI will prescribe special conditions on the project’s location and the type of pollution treatment necessary; and

- a feasibility study on the project (as prescribed by the BOI) must be submitted if the investment capital (excluding the cost of land and working capital) is to exceed 750 million baht.

4.4.2 Government Concession and Privatization Projects

For a concession project or a project to privatize a state enterprise, the criteria set forth in the Cabinet’s decision on 25 May 1998 and 30 November 2004 will be applied, as follows:

- projects of state enterprises will not be granted promotion;

- for a private sector Build, Transfer, Operate, or a Build, Operate, Transfer concession project, the state agency that owns the project must submit the project to the BOI for its consideration prior to any invitation to bid. Bidders will be informed, prior to bidding, of any promotional privilege to which they are entitled. In principle, the BOI will not consider a project where the private sector pays for a concession,
• unless the payment is deemed to represent a reasonable investment for the state; and

• for a Build, Own, Operate project, including a lease by the private sector or rental payments to the state, the normal criteria are used.

4.5 Foreign Shareholding in BOI-promoted Projects

Foreigners may wholly or partially own a promoted project, and the following criteria apply:

• for a project in agriculture, animal husbandry, fisheries, mineral exploration and mining, and service businesses under Schedule One of the FBA, Thai nationals must hold shares totaling at least 51% of the registered capital;

• for a manufacturing project in any Zone, foreign investors may hold a majority or all of the shares in the promoted project; and

• the BOI may specifically fix the maximum foreign shareholding in some promoted projects at the level it deems appropriate.

4.6 The BOI Promotion Application Process

To help investors through the application process, the BOI has published guidelines on its website: www.boi.go.th. The application procedure diagram on the site explains the routing and timing of applications for BOI promotion. On a standard application form, applicants must describe the project and provide other related data. There is no application fee and no penalty for not proceeding if granted promotion. Applicants usually receive most of the benefits to which they are entitled, but are sometimes subject to specific conditions and/or performance requirements set by the BOI. BOI promotion is transferable.
Provided that the company receiving BOI promotion privileges is incorporated within six months after the acceptance date, an individual may apply for BOI promotion before such incorporation actually takes place.

4.7 The BOI One Start One Stop Investment Center

To expedite foreign investment in Thailand and reduce the complexity of dealing with multiple government agencies, the BOI has established a One Start One Stop Investment Center at its office in Bangkok. The Center offers assistance in obtaining work permits and visas for foreign experts and technicians.

4.8 Investment Incentives under Other Acts

4.8.1 The Industrial Estate Authority of Thailand Act

The Industrial Estate Authority of Thailand Act, B.E. 2522 (1979) details two industrial estate categories: General Industrial Zone and Free Zone. Currently, there are Industrial Estates in the vicinity of Bangkok and various parts of Thailand. These estates are operated by the IEAT, either solely or in a joint venture with private companies or government agencies. There are also privately-owned industrial estates, which are BOI-promoted enterprises.

Location in an industrial estate is encouraged by the BOI. BOI-promoted industries located within industrial estates, whether privately owned or not, are eligible for preferential treatment.

Industrialists located in government-sponsored estates also receive incentives, irrespective of whether their business operations are eligible for BOI promotion.

Free Zones are a part of industrial estates. The IEAT can grant certain tax privileges to foreign or Thai investors who establish commercial operations in an approved Free Zone. The privileges include exemption from import and export duties, as well as from Value Added Tax (VAT) on machinery, equipment, tools, raw materials, and
supplies essential for production, and on goods imported for use in production. These kinds of privileges are similar to those provided to companies promoted by the BOI.

4.8.2 The Petroleum Act

The Petroleum Act, B.E. 2514 (1971) provides concessionaires with privileges similar to those provided to BOI-promoted projects, such as assurances against nationalization, permission to own land, bring in foreign skilled workers and experts, and remit currency abroad, as well as certain exemptions from taxes and duties.

4.9 Other Investment Incentives

Additional incentives are provided under other statutes and by other bodies, if goods are produced for export. The following is a brief summary of some of the privileges available.

4.9.1 Customs Duties

The Customs Department can refund import duties on materials imported for the production of goods which are then exported. In addition, if a manufacturing firm exports its products, it is possible, with certain guarantees and fees, to procure import duty exemption on materials to be incorporated in products manufactured under bonded warehouse status. However, if the exemption applies, there are also detailed reporting requirements.

4.9.2 Taxation

Zero percent (0%) VAT applies to goods produced for export.

4.9.3 Packing Credit

Exporters may obtain financial assistance from commercial banks in the form of packing credits, by means of promissory notes discounted at the rate prescribed by the commercial bank.
5. Forms of Business Organization

The principle forms of business organization are: limited liability companies incorporated in Thailand (either private or public); partnerships; branch offices; representative offices; and regional offices.

5.1 Limited Liability Companies

The nature and form of a limited liability company in Thailand is essentially the same as in many other jurisdictions. The capital of a limited liability company is divided equally and is represented by shares of a designated (par) value. The liability of each shareholder is limited to the unpaid portion of the shares held. Limited liability companies may be either private companies, which are subject to the Civil and Commercial Code (the “CCC”), or public companies, which are subject to the Public Limited Companies Act, B.E. 2535 (1992).

5.1.1 Private Limited Companies

At least three natural persons (not necessarily Thai citizens) must act as promoters to establish a private limited company, with each promoter holding at least one share, thus becoming a shareholder upon incorporation. The par value of share of a private limited company is at least 5 baht and each share must be at least 25% paid-up. Promoters must execute a Memorandum of Association (MOA), which includes the company’s name and location, objectives, registered capital, number of shares, and details of the promoters. The company must register its MOA with the Ministry of Commerce. After the share subscription has been completed, the Promoters must hold a statutory meeting to adopt Articles of Association, elect the first directors, appoint an auditor, etc. The incorporation of a private limited company can be completed within one day, provided that all conditions under the CCC are met. Generally, there are no restrictions as to the nationality of the directors, except for companies that engage in certain commercial activities. Shares in a private limited company may not be offered publicly. However, a private limited company may issue certain debt instruments to the public, subject to the approval

Private limited companies that have registered capital of more than 5 million baht are subject to additional requirements to submit evidence issued by a commercial bank to prove that the capital injection is made into the companies' bank accounts.

5.1.2 Public Limited Companies

There must be at least 15 Promoters in order to apply to incorporate a public company. The promoters must subscribe to at least 5% of the total shares, and must hold such shares for two years from the company’s incorporation (registration) date, except where approval from the shareholders meeting has been obtained. In addition, at least 50% of the Promoters must be residents of Thailand. The shares in a public limited company must be fully paid-up. As with private limited companies, the promoters must hold a statutory meeting to elect the directors, appoint an auditor, etc. The board of directors must have no less than five members, at least half of whom must reside in Thailand. The directors must make full disclosure of their shareholdings in the company or its affiliates and generally have greater responsibility than directors of private limited companies.

The SEC, under the authority of the SEC Act, is responsible for approving the offering of securities to the public or any person and for supervising the Stock Exchange of Thailand (SET). Only the shares of public limited companies may be offered publicly and traded on the SET. Public limited companies may also issue debentures and other forms of securities to the public.

5.2 Partnerships

A partnership is a form of business organization in which two or more parties join for a common business purpose and share the profits.

Partnerships may be ordinary or limited.
In ordinary partnerships, all partners have joint and unlimited liability for the debts and obligations of the partnership. Ordinary partners may contribute money, other property, or labour to the partnership. These partnerships may be registered or unregistered.

Registering an ordinary partnership provides some protection for the partners. First, a partner in a registered partnership may make a claim on behalf of the partnership against third parties, even if the partner was not named in the transaction giving rise to the claim. Second, the liability of partners in a registered partnership ceases two years after they leave the partnership, whereas they would be continuously liable in an unregistered partnership. Third, creditors must exhaust all assets of the partnership before they can pursue claims against the individual partners. Finally, creditors of an individual partner, in their individual capacity, may only make claims against any profit that the partnership owes to the indebted partner and not against the property of the partnership as a whole.

In a limited partnership, some partners have only limited liability for the obligations and debts of the partnership. Limited partners can only contribute money or other property to the partnership, and they cannot contribute labour, participate in the management of the partnership, or have their name included in the name of the partnership. If they do so, they will lose their status as limited partners and assume full liability, along with any ordinary partners. Limited partnerships must be registered. Registered ordinary partnerships or limited partnerships that contain at least three partners may convert into private limited companies, in accordance with the CCC.

Partnerships that have registered capital of more than 5 million baht are subject to additional requirements to submit evidence issued by a commercial bank to prove that the capital injection is made into the partnerships' bank accounts.
5.3 Branch Offices

A foreign enterprise may establish a branch office in Thailand. Such branch office, in terms of its status and liability, is considered the same legal entity as its head office overseas. The branch can carry on any or all the activities within the scope of the head office’s business objectives.

There are no laws or regulations that specifically address the establishment or registration of the presence in Thailand of a foreign branch office. There is no branch registry. The only filings, registrations, or licenses required for a branch office in Thailand are those prescribed under other relevant laws, such as the Commercial Registration Act, FBA or the Revenue Code.

A branch office of a foreign company is considered a “foreigner,” just like its head office. Depending on the nature of the business it intends to carry out in Thailand, the branch office will be subject to prohibitions and restrictions under the FBA, and may be required to obtain a Foreign Business License. A branch can also enjoy protection under the U.S. Treaty, if it so qualifies. The Revenue Code requires that branch offices obtain taxpayer ID cards and register as VAT operators, on the same basis as locally incorporated companies.

5.4 Representative Offices

A foreign enterprise can establish a representative office in Thailand with the primary function of providing information and assistance to its foreign head office. A representative office has a limited scope of activity, in that it may only provide the following support services to its head office located offshore:

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1 The scope of representative offices described here is based upon the Notification of the Prime Minister’s Office issued under the now repealed Alien Business Law. These criteria are currently being used as guidelines until the government issues a new notification or Ministerial Regulation governing representative and regional offices under the Foreign Business Act, B.E. 2542 (1999), which repealed the Alien Business Law.
• finding sources from which the head office can purchase goods or services in Thailand;

• checking on and controlling the quality and quantity of goods purchased or hired to be manufactured by the head office in Thailand;

• giving advice in various respects, concerning goods the head office sold to distributors or consumers;

• disseminating information concerning new goods or services of the head office; and

• reporting on business movements in Thailand to the head office.

Although the representative office business is not expressly acknowledged in the FBA, the Ministry of Commerce has issued a Notification and clarification stating that representative offices fall within the ambit of Schedule Three, Item 21 (Service Businesses) of the FBA. Therefore, a “foreigner” must apply for a Foreign Business License in order to establish a representative office.

5.5 Regional Offices

A foreign enterprise can establish a regional office in Thailand, provided that it meets the following criteria:

• is a transnational corporation, which is defined to mean a juristic person incorporated under foreign law and entered to carry on business in other countries; and

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2 The scope of regional offices described here is based upon the Notification of the Prime Minister’s Office issued under the now repealed Alien Business Law. These criteria are currently being used as guidelines until the government issues a new notification or Ministerial Regulation governing representative and regional offices under the Foreign Business Act, B.E. 2542 (1999), which repealed the Alien Business Law.
has at least one branch or affiliate in Asia, which may include Thailand.

The regional office in Thailand must not generate income from its activities and must have no power to accept purchase orders from, make sale offers to, or carry out business negotiations with persons or juristic persons in Thailand. Furthermore, the regional office’s expenses can only be funded by the head office. The activities which a regional office is permitted to undertake are: (i) to carry out duties in communicating, coordinating, and directing, on behalf of the head office, the operations of the branches and affiliates located in the same region; and (ii) to provide the following services on behalf of the head office:

- consulting and management;
- training and personnel development;
- financial management;
- marketing control and sales promotion planning;
- product development; and
- research and development.

Although the regional office business is not expressly acknowledged in the FBA, the Ministry of Commerce has issued a Notification and clarification stating that regional offices fall within the ambit of Schedule Three, Item 21 (Service Businesses) of the FBA. Therefore, a “foreigner” must apply for a Foreign Business License in order to establish a regional office.

5.6 Joint Ventures

In general, a joint venture exists when two or more parties work together on a specific project or series of projects, or on a long-term
and continuous basis. Joint ventures can take many different forms; in some the parties preserve their own separate legal status and in others they create a new legal entity, separate and distinct from the individual joint venture parties. A joint venture agreement need not be registered with the government, as it is considered a private contract.

Most often, incorporated joint ventures are arranged between a Thai company and a foreign company. Often, the Thai partner provides local knowledge and skill and the foreign company, in turn, provides equity, technology, know-how, and patent or trademark licenses.

Non-incorporated joint ventures are often set up for specific, limited-time projects. Each party to a non-incorporated joint venture must separately obtain any registrations or licenses that they may need to conduct the business of the venture. These may include commercial registration, VAT registration, factory licenses, etc.

An unincorporated joint venture (UJV) can be set up on the basis of the parties sharing profits and losses. The Revenue Department considers a UJV a single entity for tax purposes. Thus, the UJV must file a single tax return, supported by a single balance sheet and profit and loss account. If the parties do not want such tax treatment, but wish to remain separate taxpaying enterprises, they must take extreme care in advance to properly structure their proposed contracts and operations in Thailand.

5.7 Distributorships

A distributorship is an agreement in which one party agrees to sell its product to another on a regular (sometimes exclusive) basis, in a defined geographical area. There is no specific law that censures this type of relationship. The relationship between suppliers and distributors is governed by the contract provisions of the CCC. There is no requirement or process to register such an agreement, except in the case where certain intellectual property rights are licensed to the distributor under such agreement (please refer to section 5.8 below).
The distributor, acting solely as a buyer and re-seller, is not considered to be the agent, representative, or go-between of the supplying company. Thus, an offshore company using a distributor for the sale of its goods in Thailand is not subject to any Thai tax on the income from its sales to the distributor.

5.8 Licensees

A business may license the use of its intellectual property rights, including its name, trademark, copyright, patent, trade secrets, technology, or right to manufacture or sell a product based on such intellectual property rights. Licensing agreements pertaining to inventions, designs, and trade or service marks that are patented or registered in Thailand must be made in writing and registered with the Registrar of the Department of Intellectual Property, the Ministry of Commerce. The Registrar can refuse to register a licensing agreement if the agreement does not comply with requirements under applicable law or it believes that it might confuse the public or conflict with public policy or morality.

For example, the Registrar may refuse to register a patent license agreement that contains a term or condition that could be deemed to violate anti-monopoly or unfair competition stipulations of a relevant Ministerial Regulation. In addition, the Board of Trademarks is empowered to revoke registration of a trademark licensing agreement if the licensors are not realistically able to control the quality of licensed products.

Although it is not necessary to obtain regulatory approval to enter into a licensing agreement with a foreign party, there are tax and exchange-control ramifications that need to be considered. Thai income tax is levied on license fees paid to a foreign company or partnership by withholdings made at source, at specified rates. There might also be relief effective under applicable agreements for the avoidance of double taxation.
Moreover, if the transfer of technology under a licensing agreement is related to the purchase and importation of tangible goods, the fees may be included in the value of the imported goods for the purpose of assessing customs duties.

5.9 Agencies

Agency agreements are governed by the CCC. A principal is bound by the acts of an agent acting within the scope of its actual or apparent authority. The principal is not bound by acts undertaken outside the scope of the agent’s authority, unless those acts are subsequently ratified by the principal. Tax is an important consideration in an agency arrangement. Income derived in or from Thailand by an offshore principal as a result of an agency relationship with a person in Thailand is usually subject to corporate income tax. The appointment of an agent (or an “employee, representative, or go-between”) in Thailand exposes the overseas business entity to the risk of being deemed as “conducting business in Thailand,” with a resulting tax burden. However, where the Thai agent does not act solely for the overseas company, but acts as a general agent for various companies (i.e. an independent agent), income tax liability may not be incurred. There may also be relief effective under applicable agreements for the avoidance of double taxation.

6. Taxation

6.1 General

The principal tax law is the Revenue Code and five main forms of taxation are imposed under it are: corporate income tax; personal income tax; value added tax (VAT); specific business tax (SBT); and stamp duty. There are also a number of specific revenue-collecting statutes that impose taxes such as customs and excise taxes, property and land taxes, and petroleum income tax.

- Corporate income tax applies to companies (including branches of overseas companies), registered ordinary partnerships, limited partnerships, foundations, associations,
and unincorporated joint ventures between two or more companies or partnerships, or between companies or partnerships and individuals. Moreover, certain payments, such as dividends, royalties, capital gains, and remittance of profits, interest, and fees to non-residents (including overseas companies not conducting business in Thailand) are generally subject to withholding tax.

- Personal income tax applies to individuals (including residents and non-residents), unregistered ordinary partnerships, group of persons, the deceased, and undivided estate.

- Thailand has treaties for the avoidance of double taxation, specifically relating to corporate income tax and personal income tax, with a number of countries.

- VAT is levied on the supply of most goods and services at the current reduced rate of 7%. However, from 1 October 2015 onwards, VAT will be increased to a standard rate of 10%, unless the tax reduction is continued.

- Specific business tax is levied on several businesses, including banking, real estate trading, life insurance, etc.

- Stamp duty is imposed on dutiable documents that are listed in the Stamp Duty Schedule of the Revenue Code.

- Importers are responsible for paying customs import duties, which can sometimes be exempted or reduced under various incentive schemes, notably the Investment Promotion Act, the Industrial Estate Authority of Thailand Act, and the Petroleum Act. Import duty exemption or reduction schemes are also in place based on Free Trade Agreements between Thailand and other countries.
6.2 Corporate Income Tax Categories

Corporations are taxed in one of two ways, depending on whether the company is considered to be conducting business in Thailand “onshore” or “offshore.” The definition contained in the Revenue Code of “conducting business in Thailand” is very broad and stipulates that:

If a juristic company or partnership incorporated under a foreign law has an employee, a representative, or a go-between in Thailand, for carrying on its business, and thereby derives income or gains in Thailand, such juristic company or partnership shall be deemed to be carrying on business in Thailand...

An independent sales agent is not regarded as an “employee, representative, or go-between” if the agent also engages in business independently of the principal company or partnership and meets other criteria.

A company operating onshore pays the normal spectrum of corporate income tax and must withhold certain amounts at source on some transactions. An offshore entity receiving certain types of income from Thailand must pay income tax only at a fixed percentage of gross income, and the party in Thailand who pays the income is generally required to withhold the tax at source.

6.3 Corporate Income Tax

Corporate income tax applies to companies and juristic partnerships that are registered under Thai law or that conduct business in Thailand, even if formed under foreign law. This tax also applies to members of unincorporated joint ventures, registered partnerships, foundations, and associations engaged in business activities. If the taxable entity is incorporated or established under Thai law, its worldwide income is taxable in Thailand. If the taxable entity is
established under foreign law, but conducts business in Thailand, then only income derived or gained in or from Thailand is taxable.

6.3.1 Corporate Income Tax Rates

In general, all companies and registered partnerships are subject to a corporate income tax at a flat rate of 30% of net profits, although the Thai Government has issued a royal decree to reduce corporate tax rates from 30% to 20% from 2013 to 2015. However, with respect to SMEs (companies or juristic partnerships with paid-up capital of not more than 5,000,000 baht with an annual income from the sale of goods and the provision of services of not more than 30,000,000 baht), the following progressive rates apply to net profits derived in the accounting years beginning from 1 January 2013 onwards:

<table>
<thead>
<tr>
<th>Amount (baht)</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - 300,000</td>
<td>exempt</td>
</tr>
<tr>
<td>300,001 - 1,000,000</td>
<td>15%</td>
</tr>
<tr>
<td>1,000,001 onwards</td>
<td>20%</td>
</tr>
</tbody>
</table>

There are special guidelines regarding standard deductions for foreign-incorporated companies or partnerships that conduct business in Thailand but cannot prove their expenses for the tax year. Standard deductions are allowed depending on the type of business activity that gave rise to the income. The resultant net profits are taxed at a normal rate. Any Thai or foreign-incorporated company or registered partnership conducting business in Thailand that fails to file a return in accordance with the law may, with the approval of the Director-General, be assessed income tax at a rate of 5% of the aggregate of either its gross receipts or total sales, without any deductions. Certain
types of business are subject to corporate income tax on their gross receipts or gross sales instead of net profits. For example, foreign-incorporated companies engaged in the business of international transportation of passengers or goods pay 3% corporate income tax on gross receipts of fares collected in Thailand or gross freight collected in or outside Thailand for goods carried out of Thailand. Foundations and associations pay corporate income tax at a rate of either 2% or 10% of their gross income, depending on the type of income received.

6.3.2 Determination of Net Profit for Corporate Income Tax

Corporate income tax is usually imposed on the net profits of a business in one tax year. The tax year can be any 12-month period selected by the company. Net profits are ascertained according to the conditions imposed in the Revenue Code. An all-inclusive concept of income is used and all realized economic gains are treated as income (including capital gains), whether they occur regularly or only occasionally.

Corporate income tax is generally computed on an accrual basis, i.e. income accruing in any accounting period is included as income in that period, whether or not it has been received, and expenses may be deducted as they accrue, whether or not they have actually been paid out.

As a general matter, expenses incurred exclusively for the purpose of acquiring profits or from conducting business in Thailand (other than those specifically excluded) are deductible expenses for determining net profit. Therefore, normal business expenses, qualifying bad debts, and depreciation at maximum rates ranging from 5% to 20% per annum (depending on the item) are allowed as deductions. Any generally accepted accounting method may be used to calculate depreciation, as long as the resulting depreciation rate is not more than that provided by using the straight-line method at the rate prescribed in the Revenue Code. Such accounting method must be applied consistently and may be varied only with the approval of the Director-
General. The following items, among others, are not allowed as deductions:

- reserves (other than those required by law);
- private expenses, including gifts for customers;
- gifts to charitable institutions, exceeding 2% of net profit;
- capital expenditures;
- corporate income tax, penalties, surcharges, and criminal fines under the Revenue Code; and
- portion of salary paid to shareholders which exceeds a reasonable amount.

Entertainment expenses, up to a maximum of between 0.3% of gross revenues or the paid-up capital of the company, whichever is higher, are deductible if they are generally necessary for that type of business, but only up to 10 million baht. Certain bad debts can generally be written off if reasonable efforts have been made to recover them or if such action is clearly impractical, such as in the case of the bankruptcy or death of the debtor. Net losses may be carried forward for five consecutive years. However, there is no provision for the carry-back of losses.

6.3.3 Remittance Abroad of the Profits of a Branch Office

This tax generally applies only to profits transferred overseas from a Thai branch. It is levied at the rate of 10% of the amount to be remitted and must be paid by the remitting Thai office of the company, within the seventh day of the month following the remittance.
6.3.4 Withholding of Income Tax on Payments to Offshore Companies

The Revenue Code requires that most payments to an offshore company or juristic partnership, paid either from or in Thailand, be subject to income tax. It is the responsibility of the payer to withhold the tax at source. The rates range from 10% to 15%, depending on the type of the income. If payments are made to an offshore company or juristic partnership incorporated in a country that has a double taxation agreement with Thailand, then the rate of withholding may be reduced or waived under the terms and conditions of the relevant agreement.

6.3.5 Dividends

Generally, if a Thai limited company pays dividends to another Thai limited company, 50% of the dividends paid are deemed exempt income of the recipient company. If the company receiving the dividend payment is listed on the SET, then the whole dividend is exempted. The total dividend is also exempted if the non-listed company receiving the payment holds at least 25% of the voting shares of the paying company, and there is no direct or indirect cross shareholding. In order to qualify for either the 50%- or the 100%-exempt income status, the receiving company must have held the shares for at least three months prior to the dividend declaration and must have continued to hold them for three months after the dividends were declared. Dividends paid by a Thai limited company, whether to a resident or non-resident corporate shareholder, are generally subject to 10% withholding at source, unless it is exempt income.

6.3.6 Other Taxes Withheld on Account of Income

In addition, the Revenue Code requires the payer of certain income to a company conducting business in Thailand to withhold additional sums on account of corporate income tax at source. These rates vary from 0.75% to 5%, depending on the type of income. The amount withheld can be credited against the corporate income tax of the recipient company.
6.3.7 Filing Returns and Paying Corporate Income Tax

Corporate income tax is payable twice a year. The first installment is 50% of the total tax, normally based on estimated net profits for the year. This is due within two months after the close of the first half of the financial year of the company. An annual income tax return must be filed within 150 days of the close of the company’s financial year. In the case of a failure to file, a penalty of twice the amount of tax due is imposed when the official conducts an assessment. If tax is to be paid on the basis of net profits, then the return must be accompanied by an audited balance sheet and a profit and loss account. If tax is to be paid on a gross-receipts basis, then a statement of gross receipts must be filed along with the return. Currently, filing can be done either via a paper return or an electronic form.

6.4 Personal Income Tax

Every person, resident or non-resident, who derives taxable income from employment or business conducted in Thailand, is subject to personal income tax, whether such income is paid in or outside of Thailand. Exemptions are granted to certain persons (UN officers, diplomats, and some visiting experts) under the terms of international and bilateral agreements. An individual who is present in Thailand for at least 180 days in any tax year (calendar year) is treated as a tax resident of Thailand. Tax residents are also subject to income tax on any foreign-sourced income they bring into Thailand in the year the income is earned.

6.4.1 Personal Income Tax

Taxable income includes any payment for services and any other money, property, or benefits received from hire of service or employment. It also includes dividends, interest, and any royalties or technical assistance fees. Capital gains are considered to be normal taxable income, except in the case of the sale of movable property acquired by inheritance or with no intention to trade or make a profit.
Personal income tax paid and absorbed by an employer (in effect giving the employee a net salary) is also considered taxable income to the employee, leading to a “tax pyramid” effect. Also included in taxable income are living allowances, the monetary value of rent-free accommodation, school fees paid by the employer, travel allowances for annual leave, and the monetary value of any other benefit provided by the employer.

6.4.2 Income Exempt from Personal Income Tax

Certain types of income are excluded from taxable income, including occasional business travel expenses and work-related moving expenses reimbursed by the employer, interest on savings deposited with banks in Thailand (not exceeding 20,000 baht in a calendar year), insurance benefits, inheritances, and scholarships.

6.4.3 Deduction of Allowances and Expenses for Personal Income Tax

There are various kinds of allowances (subject to certain limitations) authorized by the Revenue Code, including the standard personal allowance, allowances for life insurance premiums, provident or pension funds, interest payments, and charitable donations.

A married couple can choose to file a personal income tax return jointly or separately. Personal allowances are 30,000 baht each for the taxpayer and his/her spouse. The allowances are 15,000 baht for each child, plus a 2,000 baht educational allowance for each child.

Generally, allowances are granted for a maximum of three children, provided each child (i) is a minor; (ii) is under 25 years old and attending college or university; or (iii) has been adjudged incompetent or quasi-incompetent. Personal allowances for the spouse and children of a non-resident are allowed only if they actually reside in Thailand.

A standard expense deduction of 40%, but not exceeding 60,000 baht, is allowed against income from employment. Standard deduction of expenses from 10% to 85% is allowed against other categories of
income as well. However, for certain types of income, the taxpayer can elect to itemize expenses instead of taking the standard deduction.

6.4.4 Income from Dividends and Personal Income Tax

Dividend income is generally subject to personal income tax. Thai tax residents may choose to have tax withheld at the rate of 10% of dividend income, without including such dividend payments in their taxable income at the end of the tax year. Alternatively, Thai tax residents can claim a dividend tax credit of approximately 42% (based on the normal corporate income tax rate at 30%) or 25% (based on the reduced corporate income tax rate at 20%) if they include such dividends into their taxable income at the end of the tax year. In this case, the corporate income tax rate of the dividend-paying company is 30 or 20%, respectively. The tax credit is determined by dividing the corporate income tax rate of the dividend payer by the difference between 100 and such corporate income tax rate, then multiplying the resulting figure by the dividend amount. This tax credit is only available to individuals who are domiciled in Thailand and who have stayed in Thailand for a minimum of 180 days in a calendar year.

6.4.5 Personal Income Tax Rates

Personal income tax rates on net taxable income are as follows:

<table>
<thead>
<tr>
<th>Amount (baht)</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - 150,000</td>
<td>exempt</td>
</tr>
<tr>
<td>150,001 - 500,000</td>
<td>10%</td>
</tr>
<tr>
<td>500,001 - 1,000,000</td>
<td>20%</td>
</tr>
<tr>
<td>1,000,001 - 4,000,000</td>
<td>30%</td>
</tr>
<tr>
<td>Amount (baht)</td>
<td>Rate</td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------</td>
</tr>
<tr>
<td>4,000,001 onwards</td>
<td>37%</td>
</tr>
</tbody>
</table>

However, for net income received in the tax years 2013-2015, the following rates are applicable:

<table>
<thead>
<tr>
<th>Amount (baht)</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - 150,000</td>
<td>exempt</td>
</tr>
<tr>
<td>150,001 - 300,000</td>
<td>5%</td>
</tr>
<tr>
<td>300,001 - 500,000</td>
<td>10%</td>
</tr>
<tr>
<td>500,001 - 750,000</td>
<td>15%</td>
</tr>
<tr>
<td>750,001 - 1,000,000</td>
<td>20%</td>
</tr>
<tr>
<td>1,000,001 - 2,000,000</td>
<td>25%</td>
</tr>
<tr>
<td>2,000,001 - 4,000,000</td>
<td>30%</td>
</tr>
<tr>
<td>4,000,001 onwards</td>
<td>35%</td>
</tr>
</tbody>
</table>

6.4.6 Tax Exemptions on Bonds

In order to promote the country’s Asian bonds, a withholding tax exemption on interest, capital gains, and discounts derived from bonds issued by the government, governmental organization, or certain
specific financial institutions, is granted to non-tax resident foreign investors (i.e. investors staying in Thailand less than 180 days in a calendar year) provided that the bonds were issued and acquired before 13 October 2010.

6.4.7 Tax Relief for Mutual Fund Investment

Individuals investing in Retirement Mutual Funds (RMFs) are allowed to deduct up to 500,000 baht for the amount of RMF units purchased not exceeding 15% of income from their taxable income. They are also granted a tax exemption on capital gains derived from the sale of RMF units, provided that the terms and conditions under the applicable Revenue Regulations are met (e.g. such individual holders have held such units for at least five calendar years). Similarly, individual investors in Long-term Equity Funds (LTFs) are allowed to deduct up to 500,000 baht for the amount of LTF units purchased, not exceeding 15% of income from their taxable income. Tax exemption is also granted on capital gains derived from the sale of units held for at least five calendar years in qualified mutual funds. Ultimately, any individual holders investing in RMFs and LTFs can deduct the amount purchased, up to a maximum of 1,000,000 baht.

6.4.8 Taxes Paid by Another Person

The definition of “taxable income” includes all taxes paid for or reimbursed to the taxpayer by any other person. All such taxes paid by any person other than the taxpayer, at any stage, are in turn subject to tax.

6.4.9 Filing Personal Income Tax Returns

Personal income tax returns must be filed and the tax paid by the end of March in the year following that in which the income was earned. However, if there are certain types of income derived in the first half of the year, such as income derived from rent, income from liberal professions, income derived from a hire of work, and miscellaneous income, a half-yearly tax return must be filed and the tax paid by the end of September in the year in which such income was earned.
Currently, filing can be done either via a paper return or an electronic form.

6.4.10 Tax Clearance Certificates

Foreigners departing Thailand do not have to obtain a tax clearance certificate unless:

- their remittance of tax to the Revenue Department is either in arrears or must be paid prior to, or at the time of, departing the country; or

- they are responsible for the submission of the returns and payment of income tax for a company or registered partnership established under the laws of a foreign country, carrying on business in Thailand; or

- they receive income from being public entertainers in Thailand.

6.5 Withholding of Income Tax at Source

6.5.1 Overseas Payments

Income tax must be withheld at source by a corporate or individual payer, from taxable income paid to non-residents or persons not conducting business in Thailand. The rates are the same as those set out earlier in item 6.3.4.

6.5.2 Local Individuals

In general, payers of taxable income to individuals who must pay personal income tax are required to deduct tax at source at the time of payment. Taxable income includes salary, payment for services, value for goodwill, patents, trademarks, and copyrights, dividends, interest, bonuses, rental fees, etc.
6.5.3 Local Interest Payments

Income tax must also be withheld on the payment of interest on deposits and bills by commercial banks, and finance, securities, and credit foncier businesses, to:

- companies or juristic partnerships operating businesses in Thailand, at the rate of 1%;
- individuals, at the rate of 15%; and
- prescribed foundations or associations, at the rate of 10%.

6.5.4 Government Payments

Central government and local government organizations that pay taxable income to companies or partnerships conducting business in Thailand must withhold income tax at the rate of 1% of the total income payable. The withheld tax is credited against the total tax due for the period in which the deduction is made.

6.5.5 Tax Credits

Certain taxes withheld may be used by the recipient of the net income as a credit against year-end taxes. If the credit cannot be utilized, then it is refundable.

6.6 Treaties for the Avoidance of Double Taxation

Thailand has tax treaties (usually referred to as Double Tax Agreements, or DTAs) with 65 countries (only 58 of these agreements, however, are currently in force), namely, Armenia, Australia, Austria, Bahrain, Bangladesh, Belarus, Belgium, Bulgaria, Canada, Chile, China (People’s Republic), Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Japan, Korea (South), Kuwait, Laos, Luxembourg, Malaysia, Mauritius, Myanmar, Nepal, the Netherlands, New Zealand, Norway, Oman, Pakistan, the Philippines, Poland, Romania, Russia, Seychelles, Singapore, Slovenia, South
Africa, Spain, Sri Lanka, Sweden, Switzerland, Taiwan, Turkey, Ukraine, United Arab Emirates, the United Kingdom, the United States of America, Uzbekistan, and Vietnam. The provisions of DTAs may reduce, exempt, or allow the credit or deduction of income tax paid in the respective jurisdictions.

As of February 2015, the tax treaties with Mongolia and Egypt have been signed but have not yet come into force. In addition, Thailand is now under negotiations regarding draft tax treaties with Ireland, Brunei, Lithuania, Morocco, Papua New Guinea, Tajikistan, Zimbabwe and Kenya.

An organization is regarded as a resident of a country if under the laws of that country it is subject to taxation, due to domicile, residence, place of management, or other similar criteria. The DTAs provide additional procedures for dealing with individuals or entities with dual residency.

DTAs cover income derived from a range of sources, including immovable property, business profits, dividends, royalties, interest, and personal services. The taxation treatment varies with the source of income. Thus, income arising from immovable property is likely to be taxed in the country in which the property is located. However, business profits are taxable only in the country where the entity is a resident, unless it conducts business in another country through a permanent establishment. A “permanent establishment” generally means a fixed place in which business is either wholly or partially undertaken, and usually includes a branch, office, factory, warehouse, or mine.

Treatment given to income such as dividends, royalties, and interest differs under the various DTAs. Dividends, for example, may be taxable only in the country from which payment is made, or may be taxable in both but with a credit or deduction allowed in the receiving country. Each DTA also contains provisions for obtaining a credit in one country where tax has been levied on the income in the other country. The types of income which qualify vary among DTAs.
6.7 Value Added Tax

VAT is essentially a broad-based consumption tax on goods and services, operating at each stage of production and distribution. In effect, VAT covers all retailers, manufacturers, wholesalers, producers, and importers of goods, as well as service providers, other than those excluded by the Revenue Code.

6.7.1 VAT Rates

VAT is currently levied at a standard rate of 7%; however it will increase to 10% from 1 October 2015 onwards, unless the reduced rate is extended. VAT on exported goods and services, under the terms and conditions of the Revenue Code, is 0%.

6.7.2 VAT Exemptions

Certain businesses are exempt from VAT, including the following:

- small enterprises with annual gross sales of less than 1,800,000 baht;
- businesses producing food or agricultural products, other than for the purpose of export;
- domestic transportation;
- private and government health care services;
- educational services;
- religious and charitable organizations; and
- leasing of immovable property.
6.7.3 Zero Percent Rate for VAT

A 0% VAT rate applies to certain businesses, including the following:

- export of goods;
- provision of services performed in Thailand but used in a foreign country;
- international transportation services, by air or sea; and
- sale of goods or a provision of services between bonded warehouses, between the customs free zones, or between the bonded warehouse and the customs free zone.

6.7.4 VAT Tax Invoices

Every VAT-registered operator must issue a tax invoice to each customer and must retain copies of the tax invoices. Generally, the VAT-registered operator is responsible for collecting and remitting the VAT to the Revenue Department. A trader residing outside Thailand who sells goods or renders services in Thailand on a temporary basis or provides an offshore service that will be used in Thailand, is subject to VAT. (A “trader” is defined as a natural or juristic person or group of persons selling goods or rendering services in Thailand, and includes the agents of foreign entities.) In this regard, the Thai customer is obligated to remit the VAT on behalf of the foreign trader. The receipt issued by the Revenue Department for the remitted VAT will be deemed the tax invoice. The original tax invoice is evidence of the input tax, which may be claimed back from the Revenue Department or taken as a credit by the VAT-registered operator.

6.7.5 VAT Registration and Returns

If it is envisioned that a new business will gross more than 1,800,000 baht annually, the business operator must apply to be registered as a VAT operator, within 30 days of commencing operation. VAT-registered operators must file a monthly tax return and submit monthly
remittances to the Revenue Department, on or before the fifteenth day of the following month. The amount of VAT due must be remitted at the time the monthly VAT return is submitted. VAT operators are entitled to a tax credit for VAT paid to another VAT operator.

6.8 Specific Business Tax

There are eight categories of businesses that are not subject to VAT, but rather are subject to Specific Business Tax (SBT): banking and similar businesses; finance, securities, and credit foncier businesses; life insurance brokers; pawn brokers; traders in immovable property; securities repurchase businesses; factoring businesses; and the sale of securities on the SET. SBT is imposed on gross receipts at rates similar to those under the former business tax system. The rates vary from 0.01% to 3%, according to the nature of the services provided.

6.9 Municipal Tax

Businesses which are subject to SBT must also pay municipal tax at 10% of the SBT. As such, the effective SBT rates vary from 0.011% - 3.3%. For VAT, the municipal tax at the rate of one-ninth (1/9) of the VAT is already included in the 7% VAT rate.

6.10 Stamp Duty

A stamp duty is levied on the execution or importation of 28 dutiable documents listed in the Stamp Duty Schedule of the Revenue Code, including, for example, share transfer instruments and hire-of-work contracts. Rates and payment procedures depend upon the type of instrument. Penalties for failure to stamp documents are very high.

Penalties can be imposed at the rate of up to six times the original duty. Furthermore, documents that have not been properly stamped are not admissible as evidence in civil court proceedings.
6.11 Appeal Procedures under the Revenue Code

There is a standard appeal procedure for grievances arising from income tax assessments. To qualify for consideration, an appeal must be filed with the Board of Appeals within 30 days of receiving the notice of assessment. A further appeal can be made to the Tax Court against the Board’s decision, within 30 days from the date of receipt of the decision on appeal. A further appeal can be made to the Supreme Court against the Tax Court’s judgment, within 1 month from the date of judgment hearing. The judgment of the Supreme Court is considered final and the parties cannot make any further appeals.

6.12 Petroleum Income Tax

The Revenue Code does not apply to income derived from petroleum operations. Instead, tax is imposed, by the Petroleum Income Tax Act, B.E. 2514 (1971), on income derived by any company that owns an interest in a petroleum concession granted by the government or that purchases oil for export from a concession holder. Income includes revenue from the production, transportation, or sale of oil and gas, as well as the proceeds of a transfer of interests in a concession, and royalties, both in cash and in kind. Production royalties paid to the government for all petroleum products, including natural gas, are allowable as deductions. A number of items are specifically excluded as deductions, including the cost of property improvements, surface reservation fees, and royalty surcharges imposed under the Petroleum Act due to late or insufficient payment of royalties or a failure to cooperate with officials at the Petroleum Authority of Thailand. Losses may be carried forward for 10 financial periods, and the tax rate for most petroleum operations is 50% of net profits.

6.13 Signboard Tax

An annual signboard tax is imposed at various rates between 3 to baht 40 baht per 500 square centimeters (depending on the language) on signs or billboards that display a name, trademark, or product for the purpose of advertising or providing information about businesses.
Signboard owners are required to file an annual return before the end of March of each year, with the local municipality office where their signboard is located.

6.14 Excise Tax

Excise tax is generally imposed, under the Excise Tax Act and other specific Acts, on certain commodities and services, whether manufactured or provided locally. These include petroleum and petroleum products, alcoholic and non-alcoholic beverages, crystals, automobiles, motorcycles, yachts, perfumes, tobacco, golf courses, and horse racing tracks. Generally, tax liability is incurred when the goods leave the factory, or bonded warehouse if they are stored upon arrival in Thailand, or are imported or released from a customs free zone or bonded warehouse, as the case maybe, and is payable by the manufacturer or importer concerned.

6.15 Property and Land Taxes

Owners of land or buildings may be subject to annual taxes under either the Local Development Tax Act or the House and Land Tax Act. Both of these taxes are levied by local governments.

The Local Development Tax is imposed on land that is not exempt by the Act, such as land used by government and public organizations.

Exemption is also granted for land connected to a structure that is subject to the House and Land Tax Act. The Local Development Tax return must be filed with the local municipality office where the land is located, before the end of April of each year. The tax is based on the assessed value of the land, with assessed values being based on the area of the land in question and the median value of land within the tax district in which such land is located. Generally, this tax is imposed at a very low rate.

The House and Land Tax Act imposes a tax of 12.5% on the annual value of land with buildings. “Annual value” generally means the
annual rent or, if the property is not leased out, the amount that the owner should have received that year if the property had been leased out. Factories and other buildings with fixed industrial machinery attached are assessed at only one-third of the combined annual value of the land, buildings and fixed machinery. The Act also provides tax exemptions for certain kinds of property. Building owners are required to file an annual return before the end of February of each year, with the local municipality office where their building is located.

7. Securities Law and Regulations

7.1 Latest Amendment to the Securities and Exchange Act

In 2008, the Securities and Exchange Act B.E. 2535 (1992) (as amended) (the “SEC Act”) was amended and supplemented by the SEC Act (No. 4) B.E. 2551 (2008) (the “New SEC Act”), which came into force on 31 August 2008, with the aim to efficiently apply the former SEC Act to the highly dynamic market practices of Thailand’s capital markets and to provide more flexible regulations. The New SEC Act restructures the regulatory framework of the SEC, increasing adaptability in the enforcement of regulations regarding ongoing capital market transactions. The New SEC Act also provides increased investor protection and enhances corporate governance requirements for listed companies. In addition, the New SEC Act has also established new mechanisms to support the efficient enforcement of capital market regulations; for example, whistle blower protection, and a safe-harbor for directors’ liabilities, etc.

7.2 Regulatory Bodies

7.2.1 The Securities and Exchange Commission (the “SEC”)

The SEC Act established the SEC to oversee and regulate all aspects of securities related businesses and transactions in Thailand, including securitization, derivatives and trust for transactions in capital markets. The SEC is also responsible for promoting, developing, and supervising securities, securities businesses, the Stock Exchange of
Thailand (the “SET”), over-the-counter centers, the issuance and offer of securities for sale to the public, the acquisition of securities for business takeovers, and the prevention of unfair securities trading practices. The SEC has the authority to issue rules, regulations, and notifications mainly at the policy level. Pursuant to the 2010-2012 Strategic Plan announced by the SEC, the SEC intends to focus on four major goals: to maintain an orderly market, to provide protections for investors, to foster an innovative capital market and to promote competition.

7.2.2 The Capital Market Supervisory Board (the “CMSB”)

The CMSB was established by virtue of the New SEC Act, and has the authority to issue rules, regulations, notifications, orders, and directions at the operational level, in order to govern securities related businesses, the issuance and offering of securities, the securities exchange, the securities settlement systems, the securities business associations, and takeover transactions. The CMSB is directly responsible to the SEC.

7.2.3 The Office of the Securities and Exchange Commission (the “Office of the SEC”)

The Office of the SEC is responsible for implementing the SEC’s resolutions and has the power and duty to perform any other acts as prescribed in the SEC Act, which include, among others, granting approval for the offer of securities for sale to the public and granting waivers on tender offer obligations. In addition, the Office of the SEC also has the power to supervise the enforcement of law, particularly, with regard to persons violating the provisions of the SEC Act.

For further information about the SEC, CMSB and the Office of the SEC, please visit their website at: http://www.sec.or.th.
7.3 Securities Offerings

7.3.1 Private Placement

Private placement is an offer for sale which falls within one of the following criteria:

(1) an offer for sale of newly-issued shares to not more than 50 investors during any consecutive 12-month period;

(2) an offer for sale of newly-issued shares, with an aggregate value not exceeding 20 million baht, during any consecutive 12-month period; provided that the aggregate value of the offering shall be calculated based on the offering price of the shares; or

(3) an offer for sale of newly-issued shares made to qualified institutional investors (e.g. commercial banks, mutual funds, international financial institutions, etc.).

(4) an offer of sale is made by a juristic person, established by a specific law, to its shareholders in proportion to their shareholdings and the issuing company receives full payment from its shareholders.

For the purpose of determination of a private placement offering, the number of investors as referred to in paragraph (1), or the aggregate value of the offer as referred to in (2), shall not include any offer made to institutional investors as mentioned in (3), regardless of whether the offer is made simultaneously or at a different time.

Basically, a public limited company or its promoters, who wishes to offer securities for sale based on a private placement offering, will be deemed to have obtained approval from the Office of the SEC with regard to such offering. In addition, such offering will also be exempted from the securities filing requirements (that is, filing a registration statement and draft prospectus). However, the issuing company will still be required to report the result of the sale of shares.
to the Office of the SEC within the time prescribed by notifications of the CMSB. In addition, the private placement offering is required to comply with a number of conditions prescribed in the relevant notifications of the CMSB and the Office of the SEC. For instance, the offer for the sale of newly-issued shares must not be advertised to the public. The issuing company shall complete its offer for sale of shares within one year from the date on which the shareholders’ meeting resolves to approve an offer for sale of newly issued shares. Please note that the offering of debt instruments or debentures is subject to separate private placement exemptions and conditions.

7.3.2 Initial Public Offering/ Public Offering

Any public limited companies, juristic persons established under the laws of foreign jurisdictions and other juristic persons as prescribed by the SEC Act (the “Issuing Companies”), who wish to offer securities for sale to the public, are generally required to obtain prior approval from the Office of the SEC. Public limited companies are required to file a registration statement and a draft prospectus with the Office of the SEC and have them become effective. Additionally, the Issuing Company is required to complete certain prerequisite obligations in connection with securities offering in Thailand before proceeding with the offer and sale of securities to the public.

In relation to the post-offering obligations, the Issuing Companies must report the results of the sale of securities, submit quarterly and annual financial statements and other relevant reports to the Office of the SEC and/or the SET, and must also inform the Office of the SEC and/or SET immediately of any major events, such as a change of management, takeover, or substantial damage that may have repercussions on the Issuing Companies. Directors, managers, auditors and other management personnel (as stipulated by the SEC Act) of the Issuing Companies are obliged to make full disclosure of their shareholding status as well.
7.4 Takeover Regulations

7.4.1 Requirements in relation to Reporting Obligations

The SEC Act imposes certain reporting obligations on any person who performs any acts, either by his/her own actions or by “acting in concert with others,” and thereby increases or decreases the number of securities (particularly, shares or convertible securities) in a listed company that are held by such person and his/her “related persons,” as well as other persons acting in concert, up to or through the specified trigger points (such as, any multiple of five percent (5%) of the total voting rights in such listed company).

In addition, there have been amendments to the notifications of the CMSB promulgated under the SEC Act in 2011. These amendments resulted in developments and changes with regard to reporting the acquisition or disposition of securities. Pursuant to the new notification, any person of a listed company, by his/her own act or his/her acting in concert with others, who acquires or disposes of securities, reaches the “trigger point,” defined above, is required to submit a report of the securities holding by using an official form prescribed by the Office of the SEC. The report must be made to the Office of the SEC within three (3) business days from the date of the acquisition or disposition of securities. A copy of the report must also be submitted to the SET. Please note that in considering the acquisition or disposal of securities under the new notification, the number of the securities of a listed company held by an acquirer or disposer, other persons acting in concert, and their related persons shall be aggregated.

In this regard, the following are considered to be the ‘related persons’ of each acquirer or disposer:

(i) the spouse of the acquirer or disposer and a minor child of the acquirer or disposer;

(ii) a natural person who is a shareholder of the acquirer or disposer, in an amount exceeding 30% of the total voting
rights of such person, inclusive of the voting rights of the spouse and minor children of such shareholder;

(iii) a juristic person who is a shareholder of the acquirer or disposer, in an amount exceeding 30% of the total voting rights of such person;

(iv) a shareholder in the juristic person under (iii) and the shareholders in all levels of upward shareholding, beginning from the shareholder in the juristic person under (iii), provided that the shareholding in each level exceeds 30% of the total voting rights of the juristic person in the immediate lower level. In cases where the shareholder in any level is a natural person, the voting rights of such shareholder’s spouse and minor child must be included;

(v) a juristic person in which the acquirer or disposer or the persons under (i), (ii) or (iii) collectively hold shares in an amount exceeding 30% of the total voting rights of such juristic person;

(vi) a juristic person in which the juristic person under (v) holds its shares and its shareholders in all levels of downward shareholding, beginning from the shareholder in the juristic person under (v), provided that the shareholding in each level exceeds 30% of the total voting rights of the juristic person in the immediate lower level;

(vii) an ordinary partnership in which the acquirer or disposer or the person under (i), (ii), (iii), (iv), (v), (vi), or the limited partnership under (viii), is a partner;

(viii) a limited partnership in which the acquirer or disposer or the person under (i), (ii), (iii), (iv), (v), (vi), or the ordinary partnership under (vii), is an unlimited liability partner; and
a juristic person over which the acquirer or disposer has the power of management in respect of investment in securities.

It is advisable to note that the SEC Act provides a definition of related persons that extends to cover the upstream shareholding trail as well, and not just the downstream trail as in the original Securities Act.

In February 2009, the CMSB issued the Acting in Concert Notification and became effective from 1 August 2009 onward. Under the Acting in Concert Notification, the persons will be considered to be ‘acting in concert’ if:

(a) any person shares an intent with another person(s) to exercise their voting rights in a coordinated manner, or causes another person(s) to exercise his voting rights for the purpose of controlling the voting rights, or jointly controlling the business; and

(b) such person has relationships, or has coordinated his conduct with any person in accordance with the prescribed description for a detailed description of what situations can be deemed to constitute an act in concert), including entering into an agreement to act with respect to the exercising of voting rights held by the parties thereto in a coordinated manner, or entering into an agreement to allow any party thereto to exercise their voting rights on behalf of other parties, or by entering into an agreement to jointly manage the business.

7.4.2 Requirements on Tender Offer

The SEC Act and relevant CMSB Notification require a person, either acting alone or in concert with others, who has acquired shares in a listed company up to the percentage that is significant to the change of control or management of a company (the “Trigger Point”) to make a tender offer (the “Tender Offer Obligation”) and comply with the Tender Offer Obligation (unless such acquisition is exempted or waived) in accordance with the applicable regulations. This is in order
to allow existing shareholders the opportunity to sell their shares upon the change of control or business takeover.

The Trigger Point is prescribed as:

(1) 25% of the total voting rights;
(2) 50% of the total voting rights; or
(3) 75% of the total voting rights.

It is advisable to note that the Tender Offer Obligation will also be triggered upon the occurrence of any direct or indirect acquisition of material control over the company through the “control in existing shareholders of the company” (i.e., via an immediate entity holding shares directly in the company or an intermediary entity holding shares through the immediate entity) (“Chain Principle”), provided that the acquisition of control of an immediate or intermediary entity, the aggregate shareholdings by the acquirer, each intermediary entity, the immediate entity and their related persons in the company reaches or exceeds the Trigger Point.

In this regard, ‘control in an existing shareholder’ includes:

(1) the holding of shares representing 50% or more of the total voting rights in the immediate entity (for direct control) or in the intermediary entity which directly or indirectly holds 50% or more shares in the immediate entity (for indirect control); or

(2) control over the management or operation of the relevant entity or the company through the nomination of a substantial number of directors.
The Stock Exchange of Thailand

The SET was originally established under the Securities Exchange of Thailand Act B.E. 2517 (1974) and began trading in April 1975. The SET is the key institution permitted to operate a securities exchange in Thailand. Notably, three other securities exchanges are also permitted: the Market for Alternative Investment (MAI), the Bond Electronic Exchange (BEX) and the Thailand Futures Exchange (TFEX).

Presently, trading on the SET takes place between 10:00 am - 12:30 pm, and 2:30 - 4:30 pm, Monday to Friday (except for public holidays). The SET permits trading on margin requirements, which are applicable from time to time.

There are two SET trading methodologies in which trading takes place, via computerized systems. The first trading system is Automated Order Matching (AOM) which performs the order matching process, giving priority to the order with the best price at that time, without human intervention. AOM is comprised of the Round Lot, the Foreign and the Odd Lot. Another trading system is Trade Report (TR), or Put-through, which allows brokers to advertise their buying or selling interests through the announcement of bid or offer prices. Brokers may then deal directly with each other, either on behalf of their clients or for themselves. TR is comprised of the Big Lot Trade Report, the Foreign Trade Report, the Off-hour Trade Report, and the Buy-in Trade Report. The SET requires that bid and offer quotations for shares be at minimum spreads, depending on the market price per share and in accordance with the table of values.

Despite the limitations placed on foreign ownership of many Thai corporate entities, it is possible for foreigners to invest in Thai securities provided that the purchase does not increase the level of foreign ownership in such listed company beyond permissible levels. A special Foreign AOM and Foreign Trade Report exists where shares owned by foreigners may be traded.
The Big Lot Trade Report is where ordinary shares, preference shares, warrants and unit trusts are traded with trading volumes of one million securities or more, or trading values of 3 million baht or more. As for the Odd Lot AOM, investors may trade ordinary shares, preference shares, warrants and unit trusts, the total number of which is lower than one board lot (generally, one board lot contains 100 units).

7.6 Non-Voting Depository Receipts (NVDRs)

A non-voting depository receipt (the “NVDRs”), is a trading instrument issued by NVDR Company Limited (a subsidiary of the SET). It is a valid securities as specified by the SEC and is automatically regarded as a listed securities by the SET.

The NVDRs is an alternative option for the investment of foreign investors who previously could not trade in the Thai stock market due to the foreign investment restriction. By investing in NVDRs, NVDRs holder will receive the same financial benefits (i.e., dividends, right issues or warrants) as other shareholder of the company. However, NVDRs holders are not the shareholder of the company and they do not have voting right.

Although the NVDRs are designed mainly to facilitate foreign investors, Thai investors and institutional investors can also invest in the NVDRs. However, there is an investment limitation on NVDRs which limits each investor to hold any combination of NVDRs and shares totaling less than 25 percent of the total number of voting rights of securities of the company.

Trading NVDRs will be similar to trading other securities on the SET and NVDRs holders are obliged to submit a report of acquisition or disposal of their NVDRs to the Thai NVDR Company Limited in the same manner as reporting underlying stock acquisition or disposal.
7.7 Thailand Futures Exchange

The Thailand Futures Exchange Public Limited Company (the “TFEX”), a subsidiary of the SET, was established in 2004 as a derivatives exchange under the Derivatives Act, B.E. 2546 (2003) (the “Derivatives Act”). The TFEX operates under the supervision of the SEC. According to the Derivatives Act, the TFEX is allowed to trade futures, options, and options on futures. At present, there have been nine major products announced by TFEX, namely the SET50 Index Futures, SET50 Index Options, Single Stock Futures, Gold Futures, Interest Rate Futures, Silver Futures, Oil Futures, USD Futures, and Sector Index Futures.

7.8 Investing in the Stock Exchange of Thailand

In general, there are six steps to invest in the SET. These steps include:

(1) appointing a custodian, correspondent bank, and broker;

(2) bringing in foreign currency;

(3) buying and selling;

(4) clearing and settlement;

(5) repatriation of funds. This and more information can be found on the SET website: http://www.set.or.th.; and

(6) reporting the acquisition and disposition of securities to the SEC and the SET as mentioned in 7.4.1 (if any).

7.8.1 Appointing a Custodian, Correspondent Bank, and Broker

Local commercial banks can act as custodians and correspondent banks. Nonetheless, it is recommended that only one bank be appointed to handle each deal. A broker must also be appointed for trading execution.
7.8.2 Bringing in Money

Investors must use a correspondent bank to bring foreign exchange into Thailand for portfolio investments. The correspondent bank will act as the intermediary with the BOT, and the client itself is not required to file an inward remittance report. Only Thai baht can be used to trade on the SET.

7.8.3 Buying and Selling

Buy and Sell orders must be placed through a broker. The SET is fully computerized for the execution and confirmation of orders.

7.8.4 Clearing and Settlement

Currently, settlement of equity securities traded on the SET is completed on a $T+3$ working days basis, whilst settlement of debt securities traded on the SET or over-the-counter is completed on a $T+2$ working days basis, with “T” representing the day of the trade. The process has recently been streamlined for ease of use.

7.8.5 Repatriation of Funds

Repatriation of investment funds, dividends, and profits, as well as loan repayments and interest payments (net of all taxes), can be made through a correspondent bank, which will facilitate the outward remittance. The bank and broker can assist by filing an outward remittance report with the BOT, making it unnecessary for the client to deal with the BOT directly. The bank and broker is also responsible for calculating the capital gains tax payable on the sale of securities, if any.

7.8.6 Reporting the acquisition and disposition of securities

Please see details in 7.4.1 Requirements in relation to the Reporting Obligation
8. Intellectual Property

Thailand has laws in place relating to the protection of intellectual property, including trademarks, patents, copyright, plant varieties, layout designs of integrated circuits, and trade secrets. These laws meet Thailand’s obligation, as a member of the World Trade Organization (WTO), to provide internationally-recognized standards of protection.

8.1 Trademarks

Trademark protection is available through registration with the Department of Intellectual Property, Ministry of Commerce, under the Trademark Act, B.E. 2534 (1991), as amended by the Trademark Act (No. 2) B.E. 2543 (2000) (collectively, the “Trademark Act”).

Although unregistered trademarks are protected under the Penal Code, registration under the Trademark Act affords the best protection against infringement and counterfeiting.

To qualify for registration, a mark must satisfy the definition of “trademark,” as set forth by the Trademark Act. That is, the trademark must be distinctive, not confusingly similar to any prior registered trademarks of others, nor contain any prohibited elements under the Trademark Act and Ministerial Regulations. The Trademark Act also provides for registration and protection for service marks, certification marks, and collective marks. Once accepted, a trademark application is published in the Trademark Gazette (in Thai). If no objection is filed within 90 days of its publication, the trademark application is then further processed for registration. Trademark protection lasts for 10 years from the date of application and there is a provision for renewal for additional 10-year periods.

An application for a trademark filed in Thailand within six months of a corresponding application first filed in a foreign country, may claim priority based on such foreign application.
There are specific provisions for licensing registered trademarks. Licensing can be achieved by contract, in accordance with the CCC. However, the license agreement must be in writing and be registered with the Trademark Registrar. A licensing agreement must have terms and conditions that enable the licensor to ensure sufficient quality control for products manufactured under the agreement, an indication as to whether the license is exclusive or not, and a list of the trademarks subject to the license and the goods covered in order to meet registration requirements. Failure to register the licensing agreement will result in its being deemed void and unenforceable.

Registration is, in itself, no guarantee against infringement. Therefore, the owner of a trademark, its local distributor, or a trademark agent should monitor for possible trademark infringements. If detected, the trademark owner may initiate legal action against the infringing party. This might include filing an opposition to a published application to register a similar mark, lodging a complaint with the police, directly submitting a criminal complaint to the Courts, or initiating a civil action. Penalties for trademark violations under sections 108 and 109 of the Trademark Act include fines of up to 400,000 baht and/or four years of imprisonment, or 200,000 baht and/or two years imprisonment for any infringement, provided the trademark is registered in Thailand.

The Trademark Act imposes heavier penalties than those available under the Penal Code. According to the Trademark Act, if a juristic person commits a criminal offense, the management of that juristic person will also be held liable and will be subject to any applicable penalties, unless the management can prove that the offense took place without its knowledge or consent.

A trademark owner may also seek protection of his or her registered trademark at the border by way of recording the mark with the Customs Department. After recordal, whenever Customs comes across products it believes infringe upon the recorded mark, it will temporarily detain the shipment and contact the owner of the mark or its agent in Thailand to verify whether the detained goods are genuine.
or not. If the goods are confirmed as counterfeit, they will be seized for destruction and fines will be imposed on the importer.

The Penal Code offers protection for both unregistered trademarks and foreign registered trademarks, whether or not they are registered in Thailand. For a case of “forgery,” the penalties are imprisonment for up to three years and/or a fine not exceeding 6,000 baht.

8.2 Patents


Requirements for a patent include novelty, inventive step, and industrial application. A simpler alternative to the patent is the petty patent. Requirements for a petty patent include novelty and industrial application. Similarly, requirements for a product design include novelty and industrial application. Product designs can include handicrafts.

Some inventions cannot be patented, including those relating to innovations in naturally-occurring microorganisms, animals, and plants; scientific and mathematical rules and theories; computer programs, per se; methods of diagnosis, treatment or cure of human and animal diseases; and inventions that might constitute a threat to public order, morality, health, or welfare.

The Patent Act does not protect a patent granted in a foreign jurisdiction unless a corresponding patent application has been properly filed and granted in Thailand.

Patents are valid for 20 years, and product design patents are valid for 10 years. A petty patent is valid for six years, but may be renewed twice, with the first renewal being for two years and the second for two more years (for a total of 10 years). A patent gives the holder the
exclusive right to make, use, import, sell, and allow others to make, use, import, and sell products using the patent, design patent, or petty patent, and to use the words “Thai Patent” or “Thai Patent Pending.”

A patent holder is entitled to license his or her patent. Under certain circumstances, a compulsory license may be issued to another party for a patent. This may occur if the claimed subject matter of a patent or pending patent application is not being produced, sold, or publicly offered, or if it is being sold at an unreasonably high price three years after the patent was issued or four years after the patent application was filed but remains pending. The license agreement for the patent must be in writing and must be registered in compliance with the requirements and procedures stipulated in the relevant Ministerial Regulation.

Penalties for the infringement of patents granted in Thailand may involve imprisonment for up to two years, a fine not exceeding 400,000 baht, or both. If the infringing party is a juristic person, the operator or representative may also be subject to punishment, unless it can be proven that the juristic person carried out the infringing activities without the operator’s or representative’s knowledge or consent.

Despite the Department of Intellectual Property issuing a notification in December 2010 introducing an electronic-filing system (e-filing) as an alternative method for filing patent applications in Thailand, to date, the e-filing system is not yet operational. As such, the manual filing of applications remains the only avenue for lodging new patent applications.

8.3 Copyrights

Copyrights in Thailand are governed by the Copyright Act, B.E. 2537 (1994). The Copyright Act provides copyright protection on a range of creative works, expressed in the form of literature; drama, visual and graphic arts; music, audio-visual works, cinema, and sound recordings; sound, video, and other broadcasts; or any other work in
the literary, scientific, or artistic domain of the author, irrespective of
the mode or manner in which the works are expressed, and includes
the rights of performers. The Copyright Act provides expanded
definitions for each category. Copyright protection does not extend to
steps, processes, systems, organizations, or instructions for use. Nor
does copyright protection cover thoughts, principles, findings, or
theories in science or mathematics.

The author of a work holds the copyright to that work. The Copyright
Act defines “author” as the person who makes or causes to come into
being any creative work in which copyright subsists. Under the
Copyright Act, the acquisition of copyright is automatic and need not
be registered. A copyright can be transferred or assigned either in
whole or in part. It can also be licensed to another person for use or
for exercising rights in relation to it.

The Copyright Act stipulates that Thailand will also accord copyright
protection on a “National Treatment” basis to citizens of, and works
created or first published within, countries that are parties to
international copyright conventions to which Thailand is also a party.

Thailand is a signatory member of the Berne Convention for the
Protection of Literary and Artistic Works, the WTO, and the
Agreement on Trade Related Aspects of Intellectual Property Rights
(TRIPS).

In general, a copyright is valid for the life of the creator, plus 50 years.
When the creator is a juristic person, protection extends for 50 years
from the date of creation or first publication. The period of protection
is reduced to 25 years for applied artistic work. Generally the
Copyright Act protects against infringement through reproducing,
adapting, publishing, or renting a copyrighted work. However, the
Copyright Act states that certain uses of a creative work, such as for
research, education, teaching, or personal purposes do not constitute a
copyright infringement. The maximum penalties for copyright
infringement are a fine of up to 800,000 baht, a prison sentence of up
to four years, or both.
Copyright infringement includes reproducing, adapting, or communicating a copyrighted work to the public, without the copyright owner’s authorization. It also includes selling, offering for sale, leasing, importing, publishing or distributing unauthorized duplicates of a copyrighted work.

Copyright Amendment Bills were recently approved by his Majesty the King on 31 January 2015 after prior endorsement by the National Legislative Assembly. The Bills became laws titled Copyright Act (No. 2) B.E. 2558 (A.D. 2015), and Copyright Act (No. 3) B.E. 2558 (A.D. 2015). Both of the Bills were published in the Government Gazette on 5 February 2015. Copyright Act (No. 2) B.E. 2558 (A.D. 2015) will become effective within 180 days of the publication date and Copyright Act (No. 3) B.E. 2558 (A.D. 2015) will become effective in 60 days, i.e. 4 August 2015 and 6 April 2015 respectively.

Key details of both Acts include:

**Copyright Act (No. 2) B.E. 2558 (A.D. 2015):**

**Rights management information, technological protection measures, and avoidance of technological protection measures**

While the existing Copyright Act B.E. 2537 (A.D. 1994) does not provide any protection for “rights management information”, and “technological protection measures”, the Copyright Act (No. 2) grants protection for “rights management information”, “technological protection measures”, and against “avoidance of technological protection measures”. These are particularly relevant to electronic copyrights and performers’ rights in the form of computer code. Any act which is deemed an attempt to circumvent copyrights is considered an “avoidance of technological protection measures”. To indemnify the copyright holders, the Act introduces a court petition process for parties to compel service providers to cease and remove hosting infringing content. In addition, the Act introduces penalties for the violation of rights management information with a fine from 10,000 baht to 100,000 baht. If the infringement is committed for commercial
purposes, the violator is subject to 3 months to 2 years imprisonment and/or a fine from 50,000 baht to 400,000 baht.

Exceptions to copyright infringement

The Act grants exceptions for acts which were previously considered copyright infringement. These three new exceptions are:

Distribution of an original or a legitimate copy of a copyrighted work;

Necessary reproduction of a copyrighted work in a computer system to enable the devices equipped in the computer system, or the copyrighted work submitted via computer system to run normally; and

Service providers who can prove they did not have direct control of their computer system, did not commit the infringement themselves, or did not order anyone to commit the infringement in the service provider’s computer system, and complied with the court order to remove the infringing content from the computer system.

Copyright Act (No. 2) B.E. 2558 (A.D. 2015):

Filming in movie theatres

The Act imposes penalties for unauthorized recording of images, sound, and/or movies in movie theatres. A violator of this offence is subject to 6 months to 4 years imprisonment and/or a fine from 100,000 baht to 800,000 baht.

Reproduction or adaptation of copyrighted work for the disabled

According to the Act, the reproduction or adaptation of a copyrighted work for the benefit of the disabled, such as, blind, deaf, the cognitively impaired, or those with other disabilities would be permitted. However, any reproduction or adaptation must not be done with the intention of earning a profit.
Section 74 of the Copyright Act provides that if an offense was committed by a juristic person, every director or manager would be regarded as a joint offender with the juristic person, unless they could prove that the act of the juristic person was done without their knowledge. However, in May 2013, the Constitution Court interpreted this particular section as being in violation of section 39 of the Thai Constitution, which provides that the accused or defendant in a criminal case shall be deemed innocent unless proven otherwise.

As a result of such interpretation, even though section 74 of the Copyright Act has not yet been replaced or repealed, as all government enforcement officers follow the Constitution Court’s rulings, they are now unlikely to pre-emptively take action against directors and managers.

8.4 Plant Varieties

The Plant Varieties Protection Act, B.E. 2452 (1999) defines a plant variety as “a group of plants with the same or similar genetics and botanical description, with constant and fixed specific qualities. The subject must be different from any other group of plants of the same kind. This includes plant stems that can be propagated to obtain a group of plants with those qualities.” The Plant Varieties Act goes on to define certain set features that constitute a plant variety, such as morphology, physiology, or other properties that are the result of the genetic nature specific to one plant variety. It should be noted that novelty requirements must be met.

Priority date can be claimed based on an overseas application to register a new plant variety, provided that an application is filed in Thailand within one year of the overseas application. This provision only applies to applications filed in countries that would extend the same rights to Thai nationals. The period of protection can last from 12 to 27 years, depending on the plant variety. The validity of the certificate of registration of a new plant variety begins on the date on which the certificate is issued. Annual fees must be paid to maintain the registration. Rights holders can permit anyone to use their rights
and can assign the rights to others. Assignment or permission to others must be made in writing and lodged with the competent official. The holder of the rights in a new plant variety has the sole right to produce, sell or dispose of, and import or export the new plant variety, as well as to hold the propagating material of the new plant variety for the purpose of doing any of those acts.

A person that holds the certificate of registration for a plant variety is expected at some point to sell the propagating material for the plant variety, or sell, at a reasonable price, enough of the plant variety to satisfy public demand in Thailand. If the certificate holder has not done so within three years of obtaining the certificate, other parties may apply for and obtain the rights to that plant variety. The penalties for infringement of the rights to a registered plant variety are a term of imprisonment not exceeding two years, a fine not exceeding 400,000 baht, or both. The same penalties apply to anyone who violates community rights to a local indigenous variety or who fails to obtain permission in respect to general indigenous and forest plant varieties. The penalties for forging a plant variety registration mark are imprisonment for six months to five years, and a fine from 20,000 to 200,000 baht.

8.5 Layout Designs of Integrated Circuits

The Layout Design of Integrated Circuits Act, B.E. 2543 (2000) defines integrated circuits as “ready or pre-ready products that have electronic functionality, either alone or with other products, and that are composed of electronic-pulsing parts and connecting parts that wholly or partly lay upon or within the same product with semiconductor material.” Layout designs are defined as a “...pattern, chart, or picture that is created in any form to show the overview of integrated circuits in three dimensions.” In order to be eligible for registration, the layout design of an integrated circuit must be generally new, i.e. unknown to the integrated circuit industry.

Protection under the Integrated Circuits Act is only available for a layout design that has been registered in Thailand. Therefore, a
foreign layout design has no protection under Thai law unless it is registered in Thailand as well. Moreover, if the layout design has neither been registered nor exploited within 15 years from its creation, it is not eligible for registration in Thailand. If a layout design has already been commercially exploited, the applicant must file an application in Thailand within two years from the first date of exploitation in order to qualify for registration in Thailand.

A layout design registration, once conferred, is valid for 10 years from the filing date or the date of its first exploitation, whichever is earlier. The license agreement and assignment of a layout design registration must be in writing and registered in compliance with the requirements and procedures stipulated. The penalty for infringement of the rights to a registered layout design is a fine not exceeding 500,000 baht.

8.6 Trade Secrets

Generally, there are two types of trade secrets protected under the Trade Secrets Act, B.E. 2545 (2002): information and data or test results.

“Information” includes formulae, technical procedures and designs, compiled or assembled works, or business operation methods that the proprietor normally preserves from disclosure. The information must have commercial value and must not yet be widely known or known by people in the trade. The proprietor of the information must have taken lawful steps appropriate to the situation to keep the information secret. Data or test results require considerable effort to prepare and, in general, are submitted to state agencies as a condition upon approval being granted to import, export, or sell drugs or new agricultural chemical substances.

Generally, infringement under the Trade Secrets Act is subject to civil action. Only in certain circumstances will the infringement also be subject to criminal action. All infringement, both civil and criminal, can be submitted to the Trade Secrets Committee for conciliation or settlement out of court.
The plaintiff or injured party eligible to bring a lawsuit for infringement of a trade secret is the person who has legitimate control of the trade secret at the time of the infringement. The proprietor of the trade secret is not eligible, unless the controller and the proprietor are one and the same person. The infringement of a trade secret entitles the proprietor to bring a lawsuit against the infringer for compensation. Compensation includes the actual damages sustained by the plaintiff, and the legal fees and expenses required to prosecute the case. Infringement can also be subject to criminal penalties. The penalties are imprisonment of one year or a fine of up to 200,000 baht, or both.

### 8.7 The Intellectual Property and International Trade Court

Prompted in part by its desire to tighten intellectual property rights protection, the government passed the Intellectual Property and International Trade Court Establishment Act (the “IP/IT Act”) in October 1996. The IP/IT Act laid out the framework for the Intellectual Property and International Trade Court (the “IP/IT Court”), which was established on 1 December 1997.

Under the IP/IT Act, the IP/IT Court has exclusive jurisdiction over intellectual property and international trade cases covering such subject matter as copyrights, trademarks, patents, trade secrets, international sales, financial instruments, and international carriage of goods, among others, and is responsible for both civil and criminal cases.

The government believed that a specialized judicial tribunal was required because intellectual property and international trade cases generally involve more complex technical issues than other criminal and civil cases. Proponents of the IP/IT Act also felt that such cases should be considered by judges with expertise in intellectual property and international trade. The IP/IT Court is dedicated to resolving international trade disputes efficiently, promoting technology
transfers, and ensuring justice in cases of intellectual property rights violations.

The IP/IT Court observes different procedures from those set forth in Thailand’s civil and criminal procedural codes. For the purpose of expediency and the fairness of proceedings, the Chief Justice of the IP/IT Court is empowered, subject to the approval of the President of the Supreme Court, to issue rules of the IP/IT Court that are not in accordance with the procedural rules of other courts, if such rules do not impair the defendant’s right of defense in a criminal case.

9. **Trade Competition Law**

9.1 **The Trade Competition Act**

The Trade Competition Act, B.E. 2542 (1999) is the main piece of legislation governing competitive interactions among business operators in Thailand. The Trade Competition Act took effect on 1 May 1999. It applies to all business sectors, unless a particular sector is specifically exempted.

9.1.1 **Scope of the Trade Competition Act**

The Trade Competition Act contains provisions that are similar in many ways to those found in U.S. anti-trust laws or in the competition laws of certain European countries. The Trade Competition Act generally regulates all restrictive trade practices in all areas of business that create or might create a monopoly or reduce competition. It also established the Trade Competition Commission, a government office operating under the Department of Internal Trade, a department within the Ministry of Commerce, which is authorized to grant exemptions to prohibitions for certain types of businesses.

9.1.2 **Abuse of a Dominant Position**

The Trade Competition Act prohibits business operators from abusing their “dominant position.” A dominant position is said to exist when one or more business operators control a certain market share and
enjoy a certain sales turnover. The exact levels of dominant market share and sales turnover are defined by the Trade Competition Commission, with the Cabinet’s approval. The current criteria for defining a dominant position were announced and came into effect on 8 February 2007. According to the criteria, business operators will be considered to have a dominant position if the business meets one of the following characteristics:

(i) it individually held a market share of at least 50% and had a sales volume of at least 1,000,000,000 baht in the previous year; or

(ii) it was one of the top three business operators, with a collective market share of at least 75% and a collective sales volume of at least 1,000,000,000 baht in the previous year (unless one of the individual business operators in question had a market share of less than 10% or a sales volume of less than 1,000,000,000 baht in the previous year).

It is not illegal for a business operator to hold a dominant position in the market. However, dominant business operators may not adopt certain practices that are regarded as abusing a dominant position, including unfairly fixing the price of goods or service charges; imposing conditions in a manner that unfairly forces another business operator, who is its customer, to limit production; unreasonably suspending or reducing services or production; or unreasonably interfering with the business operations of another business operator.

If a dominant business operator has a market share of more than 75%, the Trade Competition Commission may order it to cease, withhold, or change its market share by complying with any criteria, procedures, conditions, and time periods that the Commission establishes.
9.2 Restrictive Trade Practices Jointly Undertaken by Two or More Business Operators

The Trade Competition Act prohibits any business operator from acting jointly with another business operator to create a monopoly or to act in a way that reduces or limits competition in regard to any goods or services, including entering into agreements or discussions regarding price or volume fixing, or market allocations.

9.3 Restrictive Trade Practices Jointly Undertaken with Overseas Business Operators

The Trade Competition Act also prohibits any business operator in Thailand from using a relationship with an overseas business operator to limit the ability of individuals in Thailand to purchase goods or services directly from such overseas business operator. This provision applies to business relationships formed by contracts, policies, partnerships, shareholdings, or other comparable methods.

A clear example is the case of business operators who act as sole distributors of imported goods in Thailand. The sole distributor should not, either directly or indirectly, limit opportunities of another person in Thailand to purchase goods or services directly from an overseas business operator, for his or her own consumption.

9.4 Anti-competitive Mergers and Acquisitions

The Trade Competition Act prohibits any business operator from effecting a merger that may result in a monopoly or unfair competition, without the pre-merger permission of the Trade Competition Commission. Share acquisitions, asset acquisitions, and amalgamations all fall within the ambit of the Trade Competition Act. The Commission can prescribe conditions for the mergers that are subject to the pre-merger permission requirement, with such conditions stipulating combined market share, sales turnover, and amount of capital/shares or assets. However, the Commission has yet to prescribe any conditions of this kind.
9.5 Other Acts that Restrict Competition

As a “catch-all” provision, the Trade Competition Act generally prohibits any business operator from doing anything outside the bounds of free and fair competition, which could destroy, damage, hinder, obstruct, or limit the operation of another party’s business. There is a guideline of the Trade Competition Commission which provides examples of trade practices which may give rise to the violation of this catch-all provision, including predatory pricing, price discrimination, tie-in sale, resale price maintenance, etc. Nonetheless, in order to claim that a business operator’s trade practices are unfair, the claimant must prove that such action or conduct resulted in destruction, damage, obstruction, or limitation of the business operations of other business operators.

9.6 Permissible Restrictive Trade Practices

If certain restrictive trade practices constitute a monopoly or reduce competition but are deemed commercially necessary, they may still be undertaken by or between two or more business operators, provided prior permission from the Trade Competition Commission is obtained.

9.7 Trade Competition Commission

The Trade Competition Commission consists of representatives of various government agencies, and can include eight to twelve experts. At least half of its members must be appointed from the private sector.

The Commission is empowered to, among other things:

- make recommendations to the Minister on Ministerial Regulations to be issued under the Trade Competition Act;
- determine the market share and sales turnover that would constitute a dominant position for any business;
- consider complaints regarding violations of the Trade Competition Act;
consider applications for permission for mergers or for permissible restrictive trade practices; and

institute criminal legal action in respect to violations of certain prohibited restrictive trade practices, in response to petitions by aggrieved parties.

In addition, if the Commission believes that any business operator is acting in violation of the prohibitions on restrictive trade practices, it may order the business operator to cease, withhold, or correct the violation. In its exercise of this power, the Trade Competition Act clearly provides that the Commission cannot be held responsible to a business operator for any damages that arise.

9.7.1 Violation of the Trade Competition Act

If a business operator illicitly engages in a restrictive trade practice that injures another party, the injured party may seek compensatory damages from the operator. This right to compensation may be interpreted as extending to any business competitor or individual consumer who has been injured as a result of a violation. The injured party must file a claim within one year after it learns of or should have learned of the violation.

In addition, the Trade Competition Act permits the Consumer Protection Board, or any association established under the consumer protection law, to take legal action on behalf of either an individual consumer or a member of the association. The maximum penalties for violating the Trade Competition Act are imprisonment for up to three years and/or a fine of up to 6 million baht. A multiple penalty is imposed for repeated violations. A business operator’s violation of an order of the Trade Competition Commission attracts a penalty of imprisonment for up to three years or a fine ranging from 2 million baht to 6 million baht, plus a daily fine of 50,000 baht during the period of the violation.
If a juristic person commits an offense, any managing directors, partners, or people responsible for the operation of the juristic person’s business are also personally liable to the same penalties. The only defense available to any of these people is that they must be able to prove that the violation was committed by the juristic person without their knowledge or consent, or that they took reasonable actions to prevent the violation.

9.8 Exemptions from the Trade Competition Act

The Trade Competition Act applies to agricultural, industrial, financial, insurance, and other service businesses, but not to:

- central, provincial, or local government agencies;
- state-owned enterprises;
- agricultural cooperatives established by law; and
- other businesses, as prescribed in Ministerial Regulations from time-to-time.

As of the date of publication, no regulations have been issued by the Ministry of Commerce exempting particular businesses from the Trade Competition Act.

9.9 The Prices of Goods and Services Act

9.9.1 Scope of the Prices of Goods and Services Act

The Prices of Goods and Services Act, B.E. 2542 (1999) established the Central Prices of Goods and Services Committee, whose function is to prevent price fixing and unfair trade practices relating to designated goods and services. The Act only applies to goods or services designated by the Committee. That is, the Committee has the power, with the Cabinet’s approval, to announce its control over any goods or services so as to prevent price fixing or unfair trade conditions and practices in respect to such goods or services. Once
announced by the Committee, the controls can continue for up to one year, unless they are extended by another announcement.

9.9.2 The Central Prices of Goods and Services Committee

The Committee consists of representatives of various government agencies, and includes four to eight members designated as experts. At least half of its members must be nominated by the private sector. The Committee has the ability to impose an extensive set of regulatory measures for any goods or services under its control. For example, it can fix minimum and/or maximum purchase prices for goods or services, or can fix prices at a particular level. To supplement the Committee’s tasks in areas outside Bangkok, the Act also established provincial committees.

9.9.3 Prohibitions and Control Measures

The Prices of Goods and Services Act prohibits:

- any person from (i) hoarding controlled goods, by having in their possession a volume exceeding the limit prescribed in the Committee’s announcement; (ii) storing controlled goods in places other than those notified to the competent officials;

- refusing to distribute controlled goods for sale or to offer them for sale in the ordinary course of trade; and (iv) delaying the sale or delivery of controlled goods without reasonable cause; and

- any service provider of controlled services from ceasing to provide the controlled services in the ordinary course of trade and from refusing to provide controlled services or delaying the provision of controlled services, without reasonable cause.

The Act also prohibits any business operator from willfully causing the price of any good or service to become unreasonably low or high. Other control measures under the Act include the Committee’s power to require manufacturers, sellers, distributors, or importers of
controlled goods or services to notify the Committee’s Secretary General of sales prices, standards, qualities, sizes, quantities, weights per unit, and the composition of controlled goods or services, and to display prices for any goods or services.

Violations of the Prices of Goods and Services Act are punishable by imprisonment ranging from one month to seven years and/or a fine ranging from 2,000 baht to 140,000 baht, depending on the type of offense committed. If the violation is committed by a juristic person, its managing directors, managing partners, or other people responsible for its business operations may also be personally liable to the same penalties, unless they can prove that the action in question was conducted without their knowledge or consent or they took reasonable steps to prevent such offense from occurring.

9.9.4 Exemptions

The Act applies to agricultural, industrial, commercial, service, and other similar business operators, but it does not apply to central, provincial, and local government agencies or other businesses prescribed from time to time in Ministerial Regulations.

10. Product Liability

10.1 Product Liability

There are two specific laws in Thailand related to product liability, namely, the Act on Liability for Injuries from Unsafe Products, B.E. 2551 (2008) (the “Product Liability Act”) and the Act on Court Proceedings for Consumer Cases, B.E. 2551 (2008) (the “Consumer Case Procedure Act”). These two pieces of legislation provide a number of consumer-friendly procedural elements, designed to give consumers advantages when taking cases to court against business operators.
10.1.1 Product Liability Act

The scope of the Product Liability Act is limited to injuries caused by unsafe products, whether to life, body, health, well-being, emotions or property, but excludes damages caused to the unsafe product itself. The term “product” covers all types of movable property, including agricultural products and electricity, but excluding certain products specified in subsequent Ministerial Regulations. Thus far, the types of products which have been exempted include agricultural produce grown by farmers that originated in Thailand, as well as drugs and medical devices manufactured by public healthcare service providers specifically to treat individual patients or animals, or those manufactured pursuant to the public healthcare service provider’s orders, provided that such drugs or medical devices have not been manufactured for sale to the general public.

Under the Product Liability Act, a product is deemed unsafe if it causes or is likely to cause damage. Damage, or the likelihood of damage, may arise from production or design defects, inadequate directions for use or storage, or lack of warnings or other necessary information about the product. In determining whether or not a product is unsafe, the court will take into account both the nature of the product and its ordinary use and storage.

If a consumer suffers damage as a result of an unsafe product, the relevant business operator may be liable to compensate said consumer. The courts are empowered by the Product Liability Act to award compensation for mental distress, as well as punitive damages of up to two times the actual damages incurred. In this regard, “business operator” means:

(i) manufacturers or hirers for manufacture;

(ii) importers;

(iii) sellers of products, if the products do not indicate the manufacturer, hirer for manufacture, or importer; and
(iv) persons who use a name, trademark, trade name, mark, or statement that would lead to the understanding that they are the manufacturer, hirer for manufacture or importer of the product in question.

The Product Liability Act expands the concept of “strict liability” under Thai law to mean that a business operator may not need to be at fault to be liable for an unsafe product under the Product Liability Act. Once a product is found to be unsafe, a business operator will be held jointly liable with other relevant business operators to compensate the injured persons, even if such business operator did not intend to cause injury or was not acting negligently. The defenses available to business operators include:

(i) that the product is not unsafe;

(ii) that the injured party already knew the product was unsafe; or

(iii) that the injury arose from the improper use or storage of the product in a manner not in accordance with directions for usage or storage, warnings, or information regarding the product which have been reasonably, correctly and clearly provided by the business operator.

10.1.2 Consumer Case Procedure Act

The Consumer Case Procedure Act applies to all cases arising from the consumption of goods and services, and includes cases under the Product Liability Act. The Consumer Case Procedure Act ensures that consumers are given access to cheaper, quicker and simpler proceedings. Consumers are allowed to file a complaint either verbally or in writing. In this regard, they are initially exempted from court fees; however, if the consumer loses the case, he/she will have to pay such fees. For expediency, consumer cases are guaranteed a speedy trial. A case administrator will be appointed by the court to assist consumers in the process.
During trial, the burden of proof regarding the facts surrounding the production, assembly, design or components of a product, or regarding the provision of services, rests on the business operator (the defendant), as the court is of an opinion that such facts are known only by the party that is the business operator. Unlike in a normal civil case, the court is empowered to call any evidence and witnesses it deems appropriate. With regard to damages, the Consumer Case Procedure Act provides the court with greater power than in normal civil cases, whereby the court can award/order (i) punitive damages, (ii) a product recall, and (iii) replacement damages. Furthermore, if the court finds that a business operator, which is a juristic entity, has been established or operates in bad faith, or where fraudulent acts have been committed against consumers, or where the assets of the juristic entity has been transferred for the benefit of any individual and the remaining assets of the juristic entity are insufficient to cover the amount claimed under the relevant consumer case, then the court can apply the doctrine of “piercing the corporate veil” in order to force the business operator’s shareholders, partners, or controlling persons to be jointly liable to the consumers. The foregoing also applies in the case of third parties who have received the juristic entity’s assets.

10.2 Consumer Protection

Unlike the product liability law which addresses the legal liability of business operators to consumers for injuries caused by unsafe products, consumer protection law usually refers to statutes or government efforts intended to regulate advertising, sales practices, product quality and other aspects of marketing to consumers.

Discussed below are some specific statutes that, while not always providing direct or appropriate protection to all consumers, provide some indirect protection against defective products. These laws include the Food Act, the Drug Act, the Medical Device Act, the Cosmetic Act, the Consumer Protection Act, the Hazardous Substance Act and the Industrial Product Standards Act. They all prescribe certain standards for the quality of products manufactured, imported or sold in Thailand. Also discussed below are some recent efforts by
the government to protect consumers against defective products, as well as false or misleading advertising.

10.2.1 The Food Act

The Food Act, B.E. 2522 (1979) (the “Food Act”) imposes various requirements, restrictions or prohibitions on manufacturers, importers and sellers of food products. Apart from regulatory requirements regarding product approval (e.g. the requirement to obtain a food manufacture/import/product license for certain types of food, etc.), the Food Act also addresses certain issues that relate to product liability. The requirements, restrictions and prohibitions under the Food Act cover matters including the types and amounts of ingredients which may be used in foods, the labeling of the foods, the manufacture, importation or distribution of impure or adulterated food, as well as food that do not comply with standards stipulated by the Thai Food and Drug Administration (FDA).

The Food Act also seeks to control the advertising of foods. In this respect, food advertisements cannot contain false or deceptive statements in relation to the benefits, qualities or properties of the food. Additionally, any person wishing to advertise foods for commercial purposes must first submit the advertising materials for the FDA’s review and approval, and obtain a license from the FDA, prior to being able to use and release the advertisement to the general public. However, in practice, the FDA may have specific requirements for certain types of foods which may not be outlined under the Food Act.

Those that fail to comply with the requirements, restrictions and prohibitions under the Food Act may be subject to fines and/or imprisonment.

10.2.2 The Drug Act

Under the Drug Act, B.E. 2510 (1967) (the “Drug Act”), manufacturers, importers or sellers of drugs are required to follow the requirements regarding labels and package inserts.
The Drug Act also prohibits persons from, amongst other things, manufacturing, importing or selling counterfeit, substandard, deteriorated or unregistered drugs.

As mentioned above, the Drug Act requires any person wishing to advertise drugs through audio, visual or print media to first submit the advertising materials for the FDA’s review and approval, and obtain a license from the FDA, prior to being able to use and release the advertisement to the general public, as well as to follow the conditions set by the FDA.

Among other stipulations, the Drug Act prohibits drug advertisements from:

- boasting that a drug or its ingredients are capable of miraculous cures or total treatment; and stating that a drug can relieve, cure or prevent diseases or illnesses, or use other words with a similar meaning;
- exaggerating or falsely declaring the properties of the drug; or
- creating an understanding that the drug contains any medicinal substance or ingredient it does not actually contain, or, if it contains a particular medicinal substance or ingredient, creating an understanding that it is in a quantity other than that which it actually contains.

Moreover, drug advertisements cannot be impolite, contain singing and dancing or show the suffering or distress of patients. The prohibition relating to the advertising of drugs also extends to advertising via the provision of gifts or lucky draws.

It should be noted that the advertising license which is issued by the FDA only remains valid for as long as the drug’s ingredients or properties remain the same as they were when the license was originally granted.
However, in practice, the FDA may have specific requirements for the advertisement of certain types of drugs which may not be outlined under the Drug Act.

10.2.3 The Medical Device Act

The Medical Device Act, B.E. 2551 (2008) (the “Medical Device Act”) outlines specific requirements regarding labels and package inserts for medical devices. Business operators who manufacture or import medical devices must provide labels and package inserts that conform to the rules, procedures, and conditions set out by the Minister of Public Health in a Ministerial Notification. The most important requirement is that the information placed on such labels or package inserts cannot be false or contain exaggerated information.

Additionally, the Medical Device Act also prohibits persons from, amongst other matters, manufacturing, importing or selling counterfeit, substandard, deteriorated or unsafe medical devices. In this respect, the FDA has the authority to request the manufacturer or importer of a medical device to provide documents or evidence regarding the quality, standards, efficacy or safety of the said medical device, where there is reason to believe that the medical device does not possess the required quality, standards, or efficacy, or is unsafe, or there is a change in the standard.

Furthermore, the Medical Device Act also sets out regulations governing the advertisement of medical devices. The term “advertisement” is clearly defined under the Medical Device Act as any form of action taken in order to allow the general public to see, hear or know of a statement for commercial purposes and includes sales promotion activities. In short, a license is required for persons wishing to advertise medical devices. The Medical Device Act stipulates that the advertising of medical devices must not show or contain certain information, e.g. false or exaggerated properties or qualities, a guarantee of the medical device’s properties by a particular person, the offer of rewards by means of gambling, or any wording that may cause a misunderstanding in relation to the medical device.
The FDA has the authority, by virtue of the Medical Device Act, to order the advertisement to be amended, to prohibit the use of certain statements or matters which appear in the advertisement, or to order the cessation of the advertisement in the event that the FDA deems that the advertisement is in violation of the requirements under the Medical Device Act.

However, in practice, the FDA may have specific requirements for the advertisement of certain types of medical devices which may not be outlined under the Medical Device Act.

Finally, the Medical Device Act contains interesting provisions relating to product liability. It provides protection to consumers harmed by unsafe medical devices by stipulating that manufacturers, importers, or sellers of medical devices are responsible for damages incurred from their use, unless they can prove that the damage was caused by force majeure or the injured person’s own fault, rather than defects in the medical device. However, consumers may wish to claim damages under the Product Liability Act, as it offers more protection and possibility for recourse.

10.2.4 The Cosmetics Act

All cosmetics under the Cosmetics Act, B.E. 2535 (1992) (the “Cosmetics Act”) are now considered to be controlled cosmetics. This means that the labels for all cosmetic products must now meet the requirements of the Cosmetics Act, namely;

- the statement used on the label must be true and must not contain any statements which may cause a misunderstanding about the essence of the cosmetics; and

- must contain all necessary information, whereby if such information was not stated then the consumer may misunderstand the essence of the cosmetics.
Additionally, no persons may manufacturer for sale, import for sale, or sell unsafe, counterfeit or substandard cosmetics.

Lastly, the Cosmetics Act does not contain any specific provisions regarding the advertising of cosmetics but stipulates that the provisions of the Consumer Protection Act (as described in further detail below) will apply.

10.2.5 The Consumer Protection Act

The Consumer Protection Act, B.E. 2522 (1979) (the “Consumer Protection Act”), as amended in 1998, aims to protect the interests of consumers, rather than to protect the economy or preserve business competition. The Consumer Protection Board, established under the Consumer Protection Act and chaired by the Prime Minister, is responsible for protecting the rights of consumers and enforcing the Consumer Protection Act. The Consumer Protection Act also established three committees responsible for different matters: the Committee on Advertisement, the Committee on Labeling, and the Committee on Contracts. The Consumer Protection Board is charged with considering complaints made by consumers, taking action against those that infringe on the rights of consumers, and regulating the performance of, and hearing appeals from, decisions of the three Committees. The Consumer Protection Board is also empowered to require a business operator who wishes to sell a particular product to conduct tests, at the operator’s expense, to ensure that the product is safe.

The Committee on Advertisement is empowered to prescribe the text, warning, or advice that must be included in advertisements for designated products. The Committee on Advertisement may also impose advertising restrictions or entirely prohibit the use of advertising for a particular product. The Consumer Protection Act is specifically directed at protecting consumers from false, exaggerated, materially misleading, illegal or indecent advertising, or advertising that may cause harm to the public.
The Committee on Labeling is primarily concerned with ensuring that information necessary to protect the health of consumers is included on labels and that labels do not contain misleading information.

Generally, all goods produced for sale by factories covered by the Factories Act and goods imported for sale in Thailand are subject to labeling control. If a label does not conform to the requirements of the Act, the Committee on Labeling may issue an order for it to be discontinued or modified.

The Committee on Contracts is empowered to declare any business, for which contracts are either required by law to be made in writing or are customarily made in writing, to be a controlled business. A controlled business must not use a contract for its business that contains any terms creating an unreasonable advantage over consumers or that are unfair to consumers. Certain businesses, e.g. those relating to credit cards, car hire purchasing, and condominium unit sales, have been declared controlled businesses by the Committee on Contracts.

10.2.6 The Hazardous Substance Act

Under the Hazardous Substance Act, B.E. 2535 (1992) (the “Hazardous Substance Act”), a hazardous substance means any of the following substances: explosives, flammable substances, oxidizing agents and peroxides, toxic substances, infectious substances, radioactive substances, mutant causing substances (mutagens), corrosive substances, irritating substances and other substances which may be harmful to humans, animals, plants, properties, or the environment.

Besides regulatory requirements in relation to product approval, the Hazardous Substance Act imposes various requirements, restrictions and prohibitions on manufacturers, importers, carriers, sellers and persons in possession of hazardous substances and also addresses issues regarding duties and liabilities of such persons. Those failing to
comply with the requirements, restrictions and prohibitions may be subject to fines and/or imprisonment.

10.2.7 The Industrial Product Standards Act


The Ministry of Industry may issue a Notification prescribing industrial standards for any industrial product with which manufacturers or importers may voluntarily comply for the promotion of the industry. Any manufacturer or importer who wishes to comply with the standards must obtain a license from the Ministry of Industry. Once the license is granted, the products of the manufacturer or importer can bear the industrial standards logo.

The Ministry of Industry may also, by way of a Royal Decree, prescribe compulsory industrial standards for any industrial product, either manufactured in, or imported into, Thailand. Compulsory industrial standards are issued to ensure the safety of, or prevent harm to, the public, the industry, or the economy. Once any product becomes subject to a compulsory industrial standard, it cannot be manufactured or imported unless the appropriate license is obtained from the Ministry of Industry. Once a license is obtained, manufacturers or importers must display the industrial standards logo on their products.

A licensed manufacturer is prohibited from using the standards logo on products that do not conform to the industrial standards prescribed by law. In addition, a licensed manufacturer is prohibited from advertising or selling a product known to violate standards defined by law.
In the event of a violation, the Ministry of Industry is empowered by the Act to revoke or suspend the license of the manufacturer or importer.

10.2.8 Food and Drug Administration (FDA) Scheme

The Healthcare Products Complaints and Law Enforcement Center, an organization under the FDA, has announced a plan to obtain information regarding complaints from consumers. The sources of this information will not only come from consumers who are affected by the manufacturing, importation or sale of healthcare products, but also from those who are affected by false advertisements from various media outlets including television, radio, printed materials and the internet. The information obtained will be analyzed and forwarded to the responsible regulatory agencies to perform investigations and pursue legal action accordingly.

In some cases, cash rewards are provided to consumers who assist in targeting business operators who violate controlling statutes. According to the FDA, the scheme is intended to help ensnare business operators (who undertake food, drugs, cosmetics, medical devices, and chemicals businesses) who publish false advertising claims or who sell low-quality products that adversely affect the health of consumers. Consumers filing complaints may be entitled to a part of the amount of court fines levied against the business operator, if such business operator is found liable.

11. Labour Laws

11.1 General

Thailand’s labour force is largely non-unionized even though the labour unions have begun to play more active roles in recent years. Although there are labour unions in operation under the auspices of the Labour Relations Act, B.E. 2518 (1975), working conditions are governed more by statute than by collective agreements.
11.2 Leave and Holidays

Under the Labour Protection Act, B.E. 2541 (1998), all employees, whether full-time, part-time, seasonal, casual, occasional, or contract, are entitled to weekly leave and traditional paid holidays. Employees are also entitled to paid annual holiday leave. There are provisions for certain maximum periods of paid sick leave and military leave (if military service is required by law) and partially paid maternity leave.

Maximum working hours are generally fixed at eight hours per day and 48 hours per week; or seven hours per day and 42 hours per week for work considered hazardous to health.

11.3 Severance Pay

All employees who have worked for a continuous period of 120 days or more are entitled to severance pay if their employment is terminated without cause. “Cause” has a very limited definition under the law.

Employees are not entitled to severance pay if they resign or are hired for a maximum period of two years and the nature of the work is not in the normal course of business of the employer, or for work that is, by its nature, occasional, casual, or seasonal; and their employment ends upon the expiry of such definite period. In such case, the employee and the employer must also have executed an employment agreement in writing that stipulates the employment commencement and termination dates.

Severance pay entitlement depends on the period of employment and ranges from 30 days’ wages, for service of 120 days or more but less than one year, to 300 days’ wages, for service of 10 years or more.

Regardless of the amount of severance pay due to an employee, in the case where an employee is hired for an indefinite period, the Labour Protection Act and the CCC require employers to provide employees with notice of termination. Notice must be given at or before any time
of wage payment, to take effect at the following time of wage payment, although not more than three months’ notice is required.

Payment for an equivalent length of time can be given in lieu of such notice. In the event of unfair dismissal, an employee may claim damages or reinstatement.

11.4 Other Regulations

Any employer having at least one employee must make an annual contribution to the Workmen’s Compensation Fund, which is currently managed by the Office of Social Security under the Ministry of Labour. The level of contribution depends on the type of business and ranges between 0.2 - 2.0% of each employee’s annual wage. Any employer with at least one employee must also make a monthly contribution as well as deducting the employee’s wage each month and submitting such to the Social Security Fund of the Office of Social Security. The level of contributions for each employer and employee is equal to 5% of each employee’s monthly wage (if the employee’s monthly wage is more than 15,000 baht, the amount of his/her monthly wage to be used for calculation of monthly contributions shall be capped at 15,000 baht, thus making the maximum contribution amount that of 750 baht).

Any employer who employs 10 or more employees must establish, post, and file work regulations covering working conditions, including such matters as working days, holidays, overtime, and wage payment; rules regarding leaves of absence; discipline and submission of grievances; and termination of employment. Minimum wages are prescribed by law for all employees except agricultural workers. Effective as of 1 January 2013, the minimum daily wage rates in all provinces in Thailand have increased to 300 baht. If an employer defaults on a wage payment, a penalty of 15% interest per annum on the amount due is imposed.

Criminal sanctions of imprisonment not exceeding six months or a fine not exceeding 100,000 baht, or both, may also be imposed.
12.  Immigration and Work Permit

12.1  Introduction

The Thai work permit requirements and immigration law are based primarily with a view towards maintaining national security, and fundamentally serve to control foreign nationals staying and working in the country. However, there are some provisions that facilitate foreign investors. A foreign national therefore needs to plan carefully in order to utilize or legally enjoy the privileges afforded under the law. Otherwise, he may find himself at risk of a criminal offense, which carries a severe penalty of imprisonment of up to five years.

12.1.1  Key Government Agencies

The Police Immigration Bureau is responsible for screening all foreign nationals arriving at ports of entry nationwide. Foreign nationals may enter the country with an appropriate visa issued by a Thai Embassy outside of Thailand. Upon the supervision of the Ministry of Foreign Affairs, a Thai Embassy may grant a visa based on the relevant regulations and Ministerial Policy. A foreign national who wants to work in Thailand must separately apply for a work permit through the Employment Department, the Ministry of Labour.

12.1.2  Current Trends

Strict enforcement of the Immigration and work permit laws are emphasized, to counter the illegal entry of neighbor country nationals. The rigid rules apply to all foreign nationals without discrimination based on race or nationality. Some of the current rules may be impractical for foreign investors to legally work in Thailand. A large number of foreign nationals come to illegally work without an appropriate visa, _e.g._ a tourist visa, since they do not have an employer in Thailand to sponsor their proper applications. Some immigration rules and work permit internal practices of authorities have been recently changed. The criteria for the granting of a work permit take into account demand for specific expertise of certain categories of foreign workers.
12.2 Entry Regulations

There are several Thai visa categories. The type of visa granted depends on the purpose of the visit. It is important to obtain the correct visa to minimize difficulties at the port of entry or exit. There are no visa waivers for any foreign business persons to work in Thailand. All foreign nationals need to apply for a non-immigrant business visa from a Thai Embassy. Otherwise, a foreign national will not be eligible to apply for a work permit in the country.

Consequently, the foreign national cannot legally work in Thailand, although he can easily enter Thailand with a visa exemption for the purpose of tourism, which is permitted to some specific foreign nationals. The length of such a stay is 30 days. At present, the following countries are qualified under the visa exemption scheme: Australia, Austria, Bahrain, Brunei, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Kuwait, Luxembourg, Malaysia, the Netherlands, Norway, New Zealand, Oman, the Philippines, Portugal, Qatar, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the UAE, the US, and the UK.

Visitors from Argentina, Brazil, Chile, Peru, South Korea and some countries from Middle East countries may be granted visas free for permits-to-stay of up to 90 days. In both cases, only a limited extension is available, unless there are exceptional circumstances e.g. under medical treatment in a local hospital.

Tourist visas are issued for permits-to-stay of up to 60 days. They are renewable at the discretion of the Immigration Bureau. Tourist visas must initially be obtained from a Thai embassy or consulate outside the country.

Other visas are non immigrant. Foreigners intending to remain in Thailand for some time or to work in Thailand should obtain a non-immigrant business visa. There are several types of non-immigrant visas depending on their purpose of journey e.g. Business (Category
B); Dependant/Other (Category O); Education (Category ED); Diplomatic and Consular (Category D); and Official (Category F). The holder of a non-immigrant visa is granted a 90-day permit-to-stay.

12.2.1 Permits-to-stay

Unlike in some other countries, in Thailand a “visa” and a “permit-to-stay” are different. A visa must be obtained from a Thai embassy or consulate, whereas a permit-to-stay is granted upon arrival. The length of the permit-to-stay depends on the type of visa held by the foreigner upon entry. The permit-to-stay may be extended, depending on the reason and the type of visa initially obtained for entry. For example, a person who enters on a non-immigrant “B” (Business) visa is initially granted 90 days permit-to-stay. This type of visa is supportive of a one-year extension of the initial permit-to-stay if a work permit is procured and sponsored by a qualified local employer.

12.2.2 Re-entry Permits

A permit-to-stay is automatically cancelled if a foreigner departs the country without first obtaining a “re-entry permit.” A foreigner who intends to exit Thailand and wants to return and stay up to the expiry date of the permit-to-stay previously granted is required to apply for a re-entry permit before departing. Applications for re-entry permits must be lodged with the Immigration Bureau, with either a single or multiple re-entry permits suitable for an applicant’s need. Individuals who depart Thailand using a re-entry permit must return to Thailand prior to the expiry date of their maintained permit-to-stay. If a return journey cannot be made prior to the expiry date, then the individual must obtain a new non-immigrant business visa from a Thai embassy or consulate before returning.

12.3 Immigration Compliances

A visa from a Thai embassy or consulate or a permit-to-stay does not constitute permission to work. Such work permission is only granted by the Department of Employment, Ministry of Labour, with the
issuance of a work permit, for which entry on a non-immigrant business visa is a prerequisite.

The current process of procuring a work permit and related immigration approvals is extremely complicated and requires separate dealings with the Immigration Bureau of the Ministry of the Interior and the Department of Employment, Ministry of Labour. This can be a very time-consuming and frustrating process for foreign employees and their families and may, in some cases, require departure from and re-entry into the country. However, the government established a One-stop Service Center to facilitate the issuance of relevant work permit and immigration authorizations. The center’s services are available only to investors sponsored by a qualified employer who meets certain criteria.

Visitors to Thailand should be aware that overstaying a visa constitutes an offense. The penalties include mandatory imprisonment in some cases. Another concern to keep in mind is that holders of permits-to-stay must report to Immigration every 90 days to keep their permit up-to-date. Fines are now being levied against foreigners who fail to report to Immigration every 90 days. This requirement is not enforced against foreigners who exit and then re-enter within the 90 days, because the exit constitutes reporting under this regulation. However, if foreigners reside beyond the 90 days, then they must report toward the end of their current 90-day stay.

12.4 Work Permits Restriction

Under the current Work Permit Act, it requires all foreigners to obtain a work permit prior to working in Thailand. The Act provides a broad definition of “work,” which includes “engaging in work by exerting energy or using knowledge, whether or not in consideration for wages or other benefits.”

The Act lists certain occupations that are reserved exclusively for Thai nationals, for which a work permit cannot be granted. Generally, foreigners are prohibited from working in manual and industrial
labour and some professional occupations. With certain exceptions (diplomats, United Nations officers, and individuals performing duties under agreements between Thailand and a foreign government), all foreigners must obtain a work permit from the Department of Employment, Ministry of Labour, before commencing work in Thailand. The granting of a work permit is discretionary. However, where government contracts or BOI-promoted companies are involved, there are more formalities to be taken before applying for a work permit.

A foreigner applying for a work permit must hold a non-immigrant business visa or permanent residence permit before a work permit will be issued. Normally, the validity of work permit is one year, except in the case of work permits issued to foreigners given permission to work in Thailand under BOI promotion. In such cases, the permit will last for the period stipulated under BOI approval. According to the current practice of the authorities, one year period is always granted for annual renewal. Work permits are restricted to the particular occupation, employer, and locality for which they are issued, and any change necessitates an application for a new permit, or an amendment of the existing permit, depending on the nature of the change.

In general, a local sponsor acting as an employer in Thailand is needed to support a work permit application. Overseas employment based category, a work permit structure should be consulted.

It is a criminal offense and against national security for a foreigner to work in Thailand without a specific work permit or in an occupation or location other than that specified in the individual’s work permit. Working in prohibited occupations can lead to imprisonment of up to five years or a fine from 2,000 baht to 100,000 baht, or both imprisonment and fine.
13. Importing, Exporting, and Trade Remedies

13.1 Import Controls

The Export and Import Act, B.E. 2522 (1979), one of the general laws governing import and export controls, authorizes the Ministry of Commerce to designate classes of goods that are subject to import and export controls. Controls usually take the form of permission and licensing, or prohibition. Currently, approximately 44 classes of goods are under import controls (e.g. import licenses and quota licenses), or are prohibited from importation by the Ministry of Commerce. The categories of import-controlled goods are subject to change at any time under Notifications of the Ministry of Commerce, so any prospective importer should always check for the latest Notifications from the Ministry. The Export and Import Act also established the Foreign Trade Board.

In addition to the Export and Import Act, a number of goods are subject to import controls under other laws, such as the following:

- the Drug Act, B.E. 2510 (1976) stipulates that in order to import a modern drug, one must obtain a license from the Food and Drug Administration, Ministry of Public Health;

- the Minerals Act, B.E. 2510 (1967) stipulates that without appropriate permission, an importer is prohibited from importing tungstic oxide, tin ore, and metallic tin in quantities exceeding two kilograms;

- the Ancient Monuments, Antiques, Objects of Art, and National Museum Act, B.E. 2504 (1961) stipulates that antiques or objects of art, whether registered or not, must not be delivered without permission from the Director-General of Fine Arts;

- the Armament, Ammunition, Explosives, Fireworks, and Imitation Firearms Act, B.E. 2490 (1947) prohibits all persons
from producing, buying, possessing, using, ordering, or importing military hardware, ammunition, or explosive devices unless with a license from the Ministry of Interior. An importer or manufacturer must also obtain the appropriate license from the Ministry of Defense in order to process military equipment, ammunition, and explosive devices, or the raw materials for their manufacture; and

- the Cosmetics Act, B.E. 2535 (1992) stipulates that for the purpose of protecting public health, any importer of controlled cosmetics must provide the name and location of the office and place of manufacture or storage of the cosmetics; the name, category, or kind of cosmetics to be imported; and major components of such cosmetics.

13.2 Export Controls

The Export and Import Act also authorizes the Ministry of Commerce to subject products to export control. The Act stipulates many classes of goods that are subject to export controls. Currently, approximately 40 classes of goods are under export controls.

Certain goods require export licenses under other laws as well, such as under the Tobacco Act, B.E. 2509 (1966). According to the Tobacco Act, the seeds, plants, and leaves of tobacco cannot be exported from Thailand without permission from the Director-General of the Excise Department.

Certain goods such as sugar and rice are subject to export licenses under the Export Standards Act, B.E. 2503 (1960). The purpose of the Export Standards Act is to ensure that such goods comply with set quality standards when being exported from Thailand.

In addition, exporters of agricultural commodities may find that membership in certain trade associations is mandatory. These trade associations may impose their own regulations for membership, which act as additional export controls.
13.3 Prohibited Products

Importers and exporters are prohibited from importing into and exporting out of Thailand products that infringe copyrights, bear the trademarks of others, or bear unregistered trademarks.

13.4 Exchange Control

In addition to the import and export permissions and licenses discussed above, business operators must comply with Thai Exchange Control laws.

13.5 Customs Duty

Customs duties are an important part of the Thai taxation system. The relevant governing acts are the Customs Act, B.E. 2469 (1926) and the Customs Tariff Decree, B.E. 2530 (1987). Duties are collected on both imports and selected exports.

The classification of goods for duty purposes is based upon The Harmonized Commodity Description and Coding System (commonly referred to as the “Harmonized System” or “HS Code”) and is, therefore, consistent with the classifications used by most of Thailand’s trading partners. Duties are levied on an ad valorem basis or at a specific rate, whichever is higher. As of 1 January 2000, Thailand adopted the GATT Valuation Agreement.

Imported articles are subject both to duties and to VAT, which is also administered by the Customs Department. Export duties are imposed on only a few items, including rawhide and wood. Exports are taxable at a 0% VAT rate.

13.5.1 Customs Procedures Related to Taxes and Duties

Customs procedures for goods arriving in Thailand are similar to those in most other countries. An importer must file an entry form plus other requisite documents (e.g. bill of lading, invoice, and packing list) with the Customs Department through an electronic channel called the
“Paperless System.” For certain goods, an import license is required and duties and VAT are due upon the arrival of a vessel. When total duties have yet to be determined or urgent clearance is required, a deposit may be paid. Finally, landing and storage charges must be paid before the goods are released.

Imported goods can also be stored in bonded warehouses. Generally the obligation to pay duties arises at the time of import, whereas stored goods are assessed at the tariff rate in effect on the date of release.

To expedite customs clearance, an advance entry system allows importers to file the required forms, including the bill of lading, prior to the arrival of the goods in Thailand. The amount of duties can then be determined with reference to the bill of lading. Once the goods arrive, the duties and port charges need only be paid before the goods are released. It is often worthwhile to use the services of an experienced agent to assist with clearing goods through customs.

Shipping agents often provide their own clearing agents.

Where goods accompany passengers arriving by air, sea, or land, a declaration is required. If necessary, customs officers, at their discretion, can assess the value of the imported goods and collect any shortfall duties.

13.5.2 Generalized System of Preferences

The Generalized System of Preferences (GSP), which was introduced in 1971, allows industrialized countries to grant non-reciprocal tariff reductions to developing countries as an exception under the WTO rules to the principle of most-favored-nation treatment. Under the GSP, tariff preferences have been granted to Thailand by certain countries, i.e. the U.S., Japan, Canada, Switzerland, Norway and Russia. Such tariff preferences may exist in the form of duty-free admission of industrial products and semi-industrial products; and duty-free or reduced duty admission of certain agricultural products.
The European Union has modified their GSP, excluding certain products exported from Thailand which will be delisted as they meet the threshold prescribed by the European Union. Under the new system, upper-to-middle income countries (UMICs) will be removed from the program and trade preferences will shift to least-developed countries. Thailand has been considered a UMIC since 2010. To this end, Thailand was no longer eligible for GSP tariff privileges from the European Union since 31 December 2014.

13.5.3 Bilateral and Multilateral Agreements

Thailand has implemented bilateral trade agreements with various countries including Australia, New Zealand, Japan, Peru, and India. The negotiation between Thailand and the European Union is currently being suspended.

Thailand is also a member of ASEAN which was established in 1967. ASEAN is currently comprised of 10 members including Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

The ASEAN also implemented a number of FTA with its trading partners, including ASEAN-Australia and New Zealand, ASEAN-Japan, ASEAN-China, ASEAN-Japan and ASEAN-India. The latest and the largest FTA, the Regional Comprehensive Economic Partnership (RCEP), is now being negotiated between the 10 ASEAN members and its 6 trading partners, namely, Australia, China, India, Korea, Japan and New Zealand with a view to expand the economic cooperation among them.

The customs duty on goods to be imported from and exported to the parties of these bilateral and multilateral agreements are reduced or eliminated in accordance with the agreed terms.

13.6 The Anti-dumping and Subsidies Act

As a member of the WTO, Thailand is bound by the Agreement on Implementation of Article VI of GATT 1994 (the “WTO Anti-
dumping Agreement”). To this effect, it implemented the Anti-dumping and Subsidies Act, B.E. 2542 (1999) (the “AD Act”), which took effect on 30 June 1999. The provisions of the AD Act are in line with Thailand’s international obligations as a WTO member. In order to deal with procedural and administrative matters relating to dumping and injury investigations, the AD Act gives the Ministry of Commerce and the Ministry of Finance the authority to issue Ministerial Regulations.

13.6.1 Dumping

Based upon strict criteria for the determination of dumping, a product is considered to have been dumped when its export price is less than the normal value (i.e. the price at which the product is offered for sale on the domestic market of the exporting country). The dumping margin is the amount by which the export price is lower than the normal value.

13.6.2 Requirement of Material Injury in Dumping

It is essential to establish, through investigation, whether increased imports of the dumped product are causing material injury or a threat of material injury to the domestic industry, or material retardation to the establishment or development of the domestic industry. Thus, in this context, the AD Act adopts the condition of a causal link between the dumped imports and the alleged injury to the domestic industry, as required by the WTO Anti-dumping Agreement.

13.6.3 Initiation of Dumping Proceedings

The Department of Foreign Trade (DFT), Ministry of Commerce, may conduct a dumping investigation on its own initiative or if a petition is submitted by or on behalf of the domestic industry producing a product similar to that suspected of being dumped. The DFT is empowered to conduct investigations to determine the existence of both dumping and injury. Upon the conclusion of an investigation, the DFT must refer its findings and opinions to a body called the Anti-
dumping and Subsidies Committee (the “Committee”) for deliberation and final determination.

13.6.4 Provisional Measures

If the preliminary investigation indicates that dumping and consequent injury exist, and if it is essential to prevent injury to the domestic industry, the Committee may impose provisional measures by levying a provisional duty or requiring submission of a guarantee for such provisional duty. However, such duty must not exceed the dumping margin estimated at the time of preliminary investigation.

13.6.5 Price Undertakings with Respect to Dumping

Pursuant to the preliminary determination, a foreign exporter or the DFT, in order to stop the dumping proceedings, may propose a price undertaking. However, the DFT may refuse to accept the offer made by the foreign exporter and any price undertaking agreement will be valid only if the Committee approves it.

13.6.6 Anti-dumping Duties

The imposition of anti-dumping duties must be made on a non-discriminatory basis, in an amount necessary to remove the injury, and in any case, not greater than the dumping margin. Definitive anti-dumping duties may be levied throughout the period of dumping and injury, and in certain exceptional circumstances, may be levied retroactively not more than 90 days prior to the application date of provisional measures. A definitive anti-dumping duty must be terminated no later than five years after its imposition or after its most recent review (if that review covers both dumping and injury), unless it is determined that the termination could likely lead to a continuation or recurrence of dumping. The Committee’s final determination on the imposition or review of anti-dumping duties is subject to judicial review by the Intellectual Property and International Trade Court, provided that an appeal is made to the Intellectual Property and
International Trade Court within 30 days of notification of such determination.

13.6.7 Maximum Time-limit for Dumping Proceedings

Once initiated, the AD Act requires that the overall dumping proceedings must be concluded within one year. However, if it is deemed necessary, this period may be extended for an additional period not exceeding six months.

13.6.8 Review of Anti-dumping Duties

One year after anti-dumping duties are levied, the existing duties may be reviewed by the Committee, either at its own initiative or at the request of an interested party. The review must be concluded within one year of its initiation.

13.6.9 Subsidies

Under the AD Act, a “subsidy” is a benefit received by reason of actions undertaken by the government of the country of origin (or of the exporting country), including the provision of a financial contribution and/or the provision of any form of income or price support, directly or indirectly, to increase exports of any product or to reduce imports of any product. However, the granting of an exemption from or reduction of taxes or duties borne by a like product, when destined for domestic consumption, or the granting of tax rebates not exceeding the taxes and duties that have accrued, does not constitute a subsidy under the AD Act.

13.6.10 Specific Subsidies

Subsidies that are granted to certain enterprises are deemed specific subsidies. Subsidies that are granted and limited to certain enterprises located within a designated geographical region are also deemed specific, with the exception of the setting or changing of generally applicable tax rates. However, subsidies that are granted pursuant to general criteria or conditions applicable to all enterprises at the same level of trade, on a non-discriminatory basis and in conformity with
fundamental economic reasons, do not constitute specific subsidies, provided that such criteria are strictly adhered to. The AD Act requires that a determination as to whether a specific subsidy exists must be directly substantiated on the basis of positive evidence.

13.6.11 Actionable Specific Subsidies

Subject to certain conditions, as stipulated under the AD Act and Ministerial Regulations, those specific subsidies that are actionable include subsidies granted for exports, for domestic use over imported products, and those granted in a manner affecting national interests. However, specific subsidies granted by the Minister of Commerce in relation to assistance for research activities, assistance to disadvantaged regions, or assistance to promote compliance with laws, rules, and regulations concerning the enhancement and preservation of environmental quality, shall not be subject to the imposition of countervailing duties.

13.6.12 Subsidy Consultations/Remedies

Upon receiving a request from a representative acting on behalf of the domestic industry, or upon receiving a proposal from the DFT to consider countervailing measures, the Committee will notify and invite officials from the relevant country (the country believed to be granting a subsidy to the product in question) for consultation. If the existence of prohibited and actionable specific subsidies is determined, the DFT will notify the relevant country in order to consult on and seek settlement of the matter. The Committee shall determine whether countervailing measures are deemed appropriate. If so, countervailing duties will be imposed.

13.6.13 Calculation of Countervailing Duties for Subsidies

A countervailing duty shall be calculated on the basis of the benefits received during the time in which the subsidy existed and in terms of the subsidization per unit of subsidized product. A countervailing duty may be levied only to the extent necessary to remove injury and
cannot exceed the amount of the subsidy found to exist. In
determining the benefits received, various rules apply, as
supplemented by rules and procedures stipulated in Ministerial
Regulations. Such Ministerial Regulations may also be issued to deal
with any case specifically.

13.6.14 Other Procedures Relevant to Subsidies

The procedures applicable to anti-dumping in relation to export prices,
normal value, dumping margins, material injury, domestic industries,
investigations, the imposition of duties, periods for duty imposition,
and administrative/judicial reviews, shall apply to subsidies, *mutatis
mutandis*. However, the agreement to cease subsidization, between an
exporter and the DFT, shall also be subject to approval by the
exporting country.

13.7 The Safeguard Act

Similar to the Thai anti-dumping law, Thailand has enacted the
Safeguard Act B.E. 2550 (2007) (the “Thai Safeguard Act”) as it is
bound by the WTO Agreement on Safeguards (the “WTO Safeguard
Act”). The provisions of the Thai Safeguard Act are in line with
Thailand’s international obligations as a WTO member. The Ministry
of Commerce and the Ministry of Finance are the authorities
responsible for carrying out the implementation of this Act.

The Thai Safeguard Act aims to protect the domestic industry from
serious injury resulting from an increase in importation of certain
goods. The Thai Safeguard Act provides the authorities with the
power to (i) collect safeguard duty, (ii) impose quota on the
importation of certain goods, and (iii) impose any other measure as
necessary in order to decrease the importation of certain goods. These
powers may be exercised in the case that the authorities find, as a
result of investigation as requested by the interested party, that there
has been an increase in importation of certain products and such
increase has caused or will soon cause serious injury to the domestic
industry.
14. Exchange Control

14.1 General

The BOT administers Thailand’s system of exchange control on behalf of the Ministry of Finance. Although the BOT has delegated its authority to authorized agents (the “Licensed Agents”), which includes all non-retail commercial banks licensed in Thailand, to approve certain commercial transactions that involve foreign exchange and remittance of monies, some transactions still require the direct approval of the BOT. While the granting of permission is discretionary, they are normally granted if reasonable grounds for the proposed transaction can be proven and the legal procedures are duly followed. In all matters involving foreign currency, currency inflows must be properly recorded.

The government has implemented a number of foreign exchange deregulations, which were intended to make funds for international business transactions freely available and to remove the requirement for prior direct approval from the BOT for certain transactions. As a result, most foreign currency exchange transactions can be processed through the Licensed Agents.

14.2 Importing and Repatriating Personal Funds

14.2.1 Foreigners in Transit

There is no limit on the amount of foreign currency a foreigner (i.e. a non-Thai resident) in transit may bring into or export out of Thailand; however, such foreigner is required to notify the customs officer if the aggregate amount of the foreign currency exceeds USD 20,000 or its equivalent. On the other hand, the exportation of baht out of Thailand requires prior approval from the Competent Officer except for (i) the exportation of baht up to 2,000,000 baht to neighboring countries, including Vietnam and China (only Yunnan province) (although it must be declared to a customs officer if the aggregate amount of the foreign currency to be exported exceeds 450,000 baht), and (ii) the
exportation of baht out of Thailand to other countries up to 50,000 baht.

14.2.2 Residents

Residents may bring an unlimited amount of foreign currency into Thailand, but must either sell it to a Licensed Agent against baht or deposit the same in a foreign currency deposit (FCD) account opened with a Licensed Agent, within 360 days from the date on which the foreign currency is brought into Thailand.

While the Licensed Agents can generally sell foreign currency to a resident, subject to certain limitations and conditions, the Licensed Agent must inquire as to the reason for any foreign currency purchase and request relevant documents from the purchaser.

For example, the Licensed Agent may grant permission for the purchase and remittance of foreign currency to purchase immovable property located offshore in the amount not exceeding USD 10,000,000 per year per person, or foreign securities of at least 10% of the total equity interest in an offshore company (which can be done without limit). Investors are also permitted to remit foreign currency out of Thailand to make offshore investments in foreign securities issued and offered offshore through duly licensed brokerage companies or asset management companies in Thailand, subject to the investment quota allotted by the Securities and Exchange Commission of Thailand.

14.3 Exchange Controls on Trading

14.3.1 Imports

Most outward remittances for the payment for imported goods can be approved by the Licensed Agents. In this regard, the Licensed Agents will require that certain documents such as invoices, bills of collection and import permits, be submitted as evidence of the underlying transaction before approving each remittance. Importers may make the remittance by either withdrawing the foreign currency from their own
14.3.2 Exports

Following any export of goods, the exporter is required to obtain the relevant export proceeds within 360 days from the date of export and the proceeds must be repatriated into Thailand immediately. Upon receipt of such proceeds, the Thai resident exporter is required to sell them against baht with a Licensed Agent, or deposit them into an FCD account opened with a commercial bank in Thailand within 360 days from the date on which such proceeds enter Thailand.

14.3.3 Foreign Currency Deposit Accounts

FCD accounts may be opened by residents and non-residents at commercial banks in Thailand. In this respect, non-residents include offshore branches or offshore agents of companies incorporated in Thailand or individuals residing outside Thailand, but not onshore branches or onshore agents of companies incorporated outside Thailand or individuals residing in Thailand.

The foreign currency deposited in an FCD account must be (a) received from an offshore source or (b) funds bought, converted, or borrowed by a resident from the Licensed Agents. In the case of funds received onshore without eligible foreign currency denominated obligations payable to a non-resident or the Licensed Agent, the maximum amount of funds that can be deposited in the FCD account is USD 500,000 for each person at the end of any given day.

As regards the transfer of funds, Thai exporters receiving export proceeds in a foreign currency from an offshore source deposited in an FCD account can transfer such foreign currency (up to the amount of the export proceeds so received) to other entities in Thailand via their FCD accounts for the payment for goods or services.
14.3.4 Non-resident Baht Accounts and Non-resident Baht Accounts for Securities

Generally, a non-resident may open a non-resident baht account, of which there are two primary types: Non-resident Baht Accounts (NRBAs) and Non-resident Baht Accounts for Securities (NRBSs).

In general, baht can be deposited into an NRBA if, among others, such funds (i) represent the exchange value of foreign currency remitted into Thailand or withdrawn from an FCD account of a non-resident; (ii) are transferred from another NRBA; (iii) are received as payment for goods; or (iv) are baht borrowed from the Licensed Agents. Conversely, withdrawal of baht from an NRBA can be made for various purposes excluding, among others, investment in securities or other financial instruments (save for investments in any securities of the company in which the non-resident holds at least 10% of its total equity interest) and in derivatives traded on exchange.

With regard to Non-resident Baht Accounts for Securities (NRBS), the deposit and withdrawal of baht into or from an NRBS is limited to certain purposes prescribed by law only. In particular, baht can be deposited into an NRBS if, among others, the funds (i) represent the exchange value of foreign currency remitted into Thailand or withdrawn from an FCD account of a non-resident; (ii) are transferred from another NRBS; or (iii) are received as a return on investment in securities and derivatives traded on an exchange. Conversely, withdrawal must be made, among others, for investing in securities or other financial instruments. In any event, please note that the transfer of funds from an NRBA to an NRBS, or vice versa, is not permissible.

The maximum balance at the end of any given day in all NRBAs or NRBSs owned by each non-resident cannot exceed 300 million baht.
14.4 Importing and Exporting Investment Funds

14.4.1 Importing Investment Funds

Subject to restrictions on the holding of foreign currency by a resident, the remittance of funds into Thailand for investment and loans of foreign currency from an offshore source are generally permitted. However, if the amount of foreign funds involved is USD 50,000 or more, a Foreign Exchange Transaction Form must be submitted to the relevant Licensed Agent. Additionally, Thai residents will be required to either convert the foreign currency so received into baht or deposit such foreign currency into its FCD account opened with a commercial bank in Thailand, within 360 days of the date on which the fund enters Thailand.

14.4.2 Exporting Investment Funds

Repatriation of investment funds or profits to an offshore entity and outward remittance of foreign currency for payment of dividends to the shareholders abroad may be made by submitting relevant documents to the Licensed Agent. If the fund to be remitted is USD 50,000 or more, a Foreign Exchange Transaction Form must be submitted to the relevant Licensed Agent.

While the remittance of loans from an offshore source into Thailand is not subject to any exchange control restrictions, the repayment of the principal and interests can be made by purchasing foreign currency from a Licensed Agent who are authorized to approve the exchange transaction if the onshore borrower presents certain requisite evidence of repatriation of the loan proceeds when submitting the Foreign Exchange Transaction Form. Certain other cases require prior approval directly from the BOT, which can be sought by submitting a letter requesting approval, along with relevant documents, through a Licensed Agent.

The Licensed Agents may also grant approval for the remittance of payments under sale and purchase agreements, hire of work or service agreements or franchise and license agreements. However, if the fund
to be remitted is USD 50,000 or more, a Foreign Exchange Transaction form must be submitted to the relevant Licensed Agent.

14.5 Exchange Control and Promoted Businesses

Under the Investment Promotion Act, B.E. 2520 (1977), foreign investments in promoted industries that are approved by the authority are accorded certain incentives and privileges, including the ability to make an outward remittance for certain purposes. Specifically, non-residents promoted under this Act are permitted to remit to an offshore entity any foreign currency relating to the return of capital (whether in form of dividends or otherwise), repayments of loans and payment for services/licensing arrangement under other contracts approved by the authority.

15. Real Estate

15.1 Land Development

Development on land may be for a commercial, industrial or residential purpose, and there are restrictions and regulations relating to such development. In general, the use of land may be subject to certain restrictions under the laws of town planning, building control, or environmental conservation. Specific developments and operations, such as factories, hotels, condominiums, superstores, or housing estates, are all closely regulated. Investors need to check all relevant criteria and requirements carefully.

15.2 Foreign Ownership of Land

The Land Code contains a provision allowing foreigners to acquire land if allowed to do so by the provisions of a treaty giving land ownership rights. Subject to the provisions of the Land Code, and to limitations on rights over land for religious purposes, foreigners are permitted under this provision to acquire land for residential, commercial, industrial, agricultural, burial, charitable, or religious purposes, under the conditions and procedures prescribed in
Ministerial Regulations and with the permission of the Minister of the Interior.

While the Land Code contains this provision, no treaty giving foreigners the right to own land actually exists. In addition, government policy has generally not permitted foreigners to own land. However, there are a number of limited circumstances in which land ownership by foreigners is officially permitted.

Currently, foreigners may own up to one rai (1,600 square meters) of land for residential use, provided that the foreigner brings in not less than 40,000,000 baht from abroad to invest in specified businesses in Thailand and obtains permission from the Ministry of the Interior.

This permission is subject to the criteria, procedures, and conditions prescribed in Ministerial Regulations. Foreign land ownership exceptions are also granted for businesses having BOI promotion privileges, oil concessions under the Petroleum Act, and businesses located in certain industrial estates. It is possible for a company with non-Thai shareholders to own land, provided that not more than 49% of shares in the company are owned by foreigners and a numerical majority of the shareholders are Thai persons or companies.

Significant penalties may be imposed on any Thai person or company found to have acquired land as an agent of a foreign person or company. These penalties include a fine of up to 20,000 baht or imprisonment for up to two years, or both.

15.3 Foreign Ownership of Condominiums

Foreigners may own up to 49% of the total area of all condominium units in a condominium project. With certain exceptions relating to persons with resident status and companies meeting certain conditions, the Condominium Act, B.E. 2535 (1992), as amended in 2008, stipulates that a foreign individual or juristic person wishing to purchase a condominium must remit foreign currency into Thailand,
or withdraw baht or any foreign currency from their non-resident account, in an amount not less than the condominium’s unit price.

Proof of these remittances must be shown to the Land Department at the time the transfer of ownership of the condominium unit is registered.

15.4 Foreign Ownership of Buildings

Foreigners may own buildings directly and freehold, provided that they have the rights to locate the buildings on land and use the land. Please see 15.5 below for these rights.

15.5 Alternatives to Land Ownership for Foreigners

Development on land may be for a commercial, industrial or residential purpose, and there are restrictions and regulations relating to such development. In general, the use of land may be subject to certain restrictions under the laws of town planning, building control, or environmental conservation. Specific developments and operations, such as factories, hotels, condominiums, superstores, or housing estates, are all closely regulated. Investors need to check all relevant criteria and requirements carefully.

Given the restrictions on the outright ownership of land, foreigners sometimes employ alternative forms of land or building tenure. The CCC allows forms of possessory rights such as a lease and the Roman law concepts of usufruct or superficies. Unlike the Land Code, the CCC does not distinguish between foreigners and Thai nationals.

15.5.1 Normal Leases

A lease allows land and buildings to be used for a maximum term of 30 years. In order to be enforceable, any lease for a period longer than three years must be registered, which involves paying a registration fee and stamp duty based on a percentage of the rental fee for the whole lease term. The original registered lease remains in full force.
and effect with respect to the property, even if there is a change in ownership of the land. The parties can contractually agree to renewals, but this right cannot be registered and is not effective against a purchaser of the property unless the purchaser agrees to assume it. A lessee can only use the property for the purposes stated in the lease.

However, a lessee can sublease, sell, transfer an interest in, modify, or improve the property, provided that the lessor’s permission is obtained.

15.5.2 Leases of Immovable Property for Industrial and Commercial Purposes

The nature and needs of a given business determine which of the various tenures is most appropriate for a foreign enterprise. In addition, the Act on Leasing Immovable Property for Industrial and Commercial Purposes allows immovable property to be leased for 30 to 50 years, provided that the lease is for industrial or commercial purposes. Such a lease is also subject to certain conditions as prescribed in Ministerial Regulations. The lease can be renewed for the same lease term.

15.5.3 Usufruct Interest

A usufruct interest gives temporary ownership rights to things on or arising from the land and the right to enjoy the products of the land, such as the crops from a field or the rocks from a quarry, but does not give ownership in the land itself. In practice, a usufruct is limited to a 30-year period. As with a lease, such an agreement can be successively renewed. In contrast to a lease, however, a usufructuary interest can be sold or transferred but, as it expires upon the death of the holder, cannot be inherited.

Any use is allowed (except destruction), without the land owner’s permission. The usufructuary is responsible for routine maintenance and must insure the property for the benefit of the owner. If the property is destroyed, then the usufruct is extinguished. However, the usufruct will be revived to the extent to which the owner restores the
land. Upon its return to the owner, the property must be substantially unaltered from its original condition.

15.5.4 Superficies

A superficies is similar to a usufruct, but provides more security for the interests of the holder of the rights. A superficies has the right to own things on or under the land, such as buildings, structures, or plantations, but not the land itself. A renewable 30-year maximum term applies. Unlike a usufruct, a superficies can be both transferred and inherited. Further, a superficies is not extinguished by the destruction of the buildings, structures, or plantations.

The superficies has the right to remove the buildings, structures, or plantations upon the expiry of the superficies, provided the owner of the land is first given the opportunity to purchase them at market value. As with a usufruct, the land must be restored to its former condition prior to it being returned to the owner.

15.6 Alternative Investment in Real Estate for Foreigners

Further to direct investment of the foreigners in real estate, Thailand currently offers an alternative investment for the foreigners who are interested to invest in real estate, i.e. Real Estate Investment Trust (REIT), after the regulations governing the issuance and offering of Real Estate Investment Trust (REIT) units in Thailand (the “REIT Regulations”) becoming effective on 1 January 2013. Under REIT Regulations, REITs shall mainly invest in certain properties, i.e. (1) real property of any kind with the purpose of seeking rental; and (2) offshore property if permissible.

The foreigners can invest in REITs by purchasing REIT units of REITs listed on the Stock Exchange of Thailand, provided that the foreign restrictions are also applicable to REITs investing in freehold real property in Thailand.
16. Escrow Arrangements

16.1 The Escrow Act

The Escrow Act B.E. 2551 (2008) (the “Escrow Act”), which took effect 20 May 2008, was issued due to the need to regulate participation of escrow agents in share or land acquisition transactions. With the advent of the Escrow Act, however, parties must comply with certain provisions regarding licensing, duties and responsibilities of agents, and fees, among others.

16.2 Nature of Escrow Arrangements

The Escrow Act allows parties in a reciprocal agreement to appoint an escrow agent, by entering into an escrow agreement. The Escrow Act does not clearly specify the kinds of transactions for which an escrow arrangement is required. Therefore, the parties concerned can voluntarily use an escrow arrangement for any legal transaction. Share and land acquisitions are transactions in which parties would typically prefer to have an escrow agent’s assistance.

16.3 Escrow Agents

Each escrow agent must be licensed by the Minister of Finance, following the recommendation of the Escrow Supervisory Committee (the “Committee”). The escrow agent must be a commercial bank, or a financial institution established under the laws governing financial institutions, or another juristic person specified by the Ministerial Regulations issued under the Escrow Act.

The Escrow Act sets out the duties and responsibilities of escrow agents. For example, an escrow agent who has a conflict of interest, either directly or indirectly, in a particular transaction cannot act for any of the parties thereto. The Escrow Act also stipulates that escrow agents’ fees will be controlled by the Committee.
16.4 Duties of Escrow Agents

When an escrow agent is appointed and the relevant parties have deposited the escrow property (e.g. money, share certificates, or land title deeds), the escrow agent must:

- With respect to money, remit the funds to the escrow account within one business day after receiving them and immediately issue a receipt to the depositor and notify the counterparty of the deposit; or

- With respect to a land title deed, notify the relevant land officer in writing. Upon receiving the notification, the land officer must (i) record in the system that the land title deed in question is under an escrow arrangement and (ii) ensure that no transfer of ownership of the land title deed is permitted, unless the land officer has obtained written confirmation from the escrow agent.

If there is a dispute between the parties to a transaction in relation to the rights and obligations of the parties, unless the escrow agreement specifies otherwise, the escrow agent must not transfer the escrow property to any party unless (i) the parties have reached an agreement with respect to the escrow property or (ii) there is a final court judgment on that issue.

For the protection of the parties to an escrow agreement, the Escrow Act stipulates that escrow property is ring-fenced from the escrow agent’s assets, if the agent becomes bankrupt. Escrow property is thus protected from seizure or attachment by the creditors of the escrow agent.

16.5 The Escrow Agent Fee

The escrow agent’s fee must be levied at the rate prescribed by the Committee. The maximum rate of the escrow agent’s fee is prescribed at 0.3 percent per annum calculated from the value under the escrow agreement. The fee must be paid twice a year. In case the term of the
escrow agreement is shorter than 6 months, the fee must be paid once at the time the parties enter into the escrow agreement. In transactions where an escrow arrangement is set up and concluded before the agreed escrow term, the escrow agent is required to return the escrow fee, pro rata with the remaining term, to the relevant party. The escrow agent fee incurred cannot be set-off with money kept in the escrow account nor deducted from the escrow property. Unless the parties agree otherwise, each party to the transaction must equally share the escrow agent’s fee.

17. Dispute Resolution

Note: This chapter on Dispute Resolution is current as of 1 January 2015. Changes are currently ongoing with regard to this area of Thailand’s regulatory environment.

17.1 Litigation

17.1.1 The Courts

(a) Court of Justice

The Court of Justice in Thailand is divided into three tiers:

(i) **The Supreme Court** ("Sarn Dika") is the highest court of the Thai Court of Justice. The Supreme Court reviews appeals against judgments of the lower courts, usually judgments of the Court of Appeals. However, judgments of the specialized courts, such as the Labour Court, the Intellectual Property and International Trade Court, the Bankruptcy Court, or the Revenue Court, may also be appealed directly to the Supreme Court, without having to go through the Court of Appeals.

(ii) **The Court of Appeals** ("Sarn U-Thorn") is the second tier, and has jurisdiction to hear appeals against judgments of the Court of First Instance.
(iii) **The Court of First Instance** ("Sarn Chun-Ton") consists of many courts located throughout the country, each of which has separate geographical jurisdiction to rule various types of litigation cases. There are more than 20 courts located in different parts of Bangkok alone, each of which has different jurisdictional power to hear cases and divided by geographical areas. For example, disputes related to normal civil and commercial matters will be within jurisdiction of the Civil Court, the Southern Bangkok Civil Court, the Thonburi Civil Court, the Prakanong Provincial Court, the Minburi Provincial Court, the Taling Chan Provincial Court, or several other district courts located throughout the city. As a general rule, a civil complaint has to be submitted to the court within which the defendant is domiciled, or to the court within which the cause of action arose, regardless of whether the defendant has domicile within the country or not.

There are also a number of specialized courts that fall within the category of the Court of First Instance: the Intellectual Property and International Trade Court, the Labour Court, the Revenue Court, and the Bankruptcy Court. All these courts were established under their own enacting legislation, which also established their specialized procedures.

(b) **Administrative Court**

The Constitution established a separate system of Administrative Courts to deal with administrative law and administrative contract matters. The Constitutional Court was also established to deal with governmental matters.

17.1.2 **Regular Proceedings in Thailand**

All cases are heard and decided by professional judges, as there are no juries in the Thai legal system. A civil proceeding is commenced by a plaintiff submitting a complaint to a Court of First Instance within a competent jurisdiction. The service of the claim is made by court officers to the named defendant(s). The defendant(s) who properly
receives the service of the claim is required to submit an answer to the claim within a limited period. Each party then presents their respective witnesses to testify in court. A witness will be cross-examined by the lawyer of the opposite party, followed by a re-examination by the lawyer who adduced the witness. Upon completion of the witness examination, each party may submit a closing statement in writing to the court. A judgment will be made within one or two months upon the completion of the witness examination. A party who disagrees with the judgment of the lower court may appeal the judgment to a court in a higher level.

17.1.3 Foreigners Participating in Thai Proceedings

A foreigner can file a lawsuit, or can be sued in a Thai court, even if the foreign defendant is not domiciled within the Kingdom of Thailand. Where a foreign defendant does not have domicile in Thailand, the plaintiff can submit a lawsuit to the court within which the plaintiff is domiciled.

17.1.4 International Service of Process

Where a lawsuit is filed in a Thai court against a foreign defendant who is not domiciled in Thailand, the plaintiff may conduct service of process to the foreign defendant in one of the following ways:

(i) if the foreign defendant has appointed a service agent in writing in Thailand, the plaintiff may serve the summons to the foreign defendant via the service agent at the domicile of the service agent;

(ii) if the foreign defendant carries on business in any part of Thailand, whether in person or by agent, the service process can be made in Thailand at the place of business of the foreign defendant in Thailand, or at the domicile of the agent who carries on business on behalf of the foreign defendant;

(iii) Apart from the cases in (i) and (ii) above, the service process has to be served to the foreign defendant at the domicile of the
defendant outside Thailand. This process is time-consuming and is rather complicated. At present, there is no known bi-
lateral or multi-lateral treaty between Thailand and a foreign state for coordination of international service process.

Therefore, the plaintiff has to submit a motion to the competent court, with a translation of all pleadings and documents in English. The court accepting such a motion shall proceed with a service to the Ministry of Justice, and then to the Ministry of Foreign Affairs of Thailand, in order to forward the same service to the Ministry of Foreign Affairs of the country within which the foreign defendant is domiciled. The service of process served this way shall become effective only after a period of 60 days has elapsed from the date of a service.

17.1.5 Choice of Foreign Law in Thai Proceedings

The parties’ choice of foreign law as the law applicable to their contractual relationship is generally recognized and given effect by Thai courts, unless the application of the foreign law is contrary to the public order and good morals of Thai citizens. Foreign law is considered as a matter of fact, and the party wishing to rely on the application of foreign law has a burden to prove such foreign law to the satisfaction of Thai court. In practice, the proof of foreign law can be done by a testimony of a foreign law expert, law professor, or practitioner supported by foreign court judgments and precedents.

17.1.6 Recognition and Enforceability of Foreign Judgments

A judgment rendered by a foreign court is not recognized or enforced directly in a Thai court. Thailand does not have any bi-lateral or multi-lateral treaties with any country for the recognition and enforcement of foreign judgments. A party who has obtained a foreign court judgment, and wishes to enforce the foreign judgment against the defendant in Thailand, is required to start new proceedings in a competent Thai court. The foreign court judgment may be submitted to the Thai court but as a mere convincing piece of evidence, or as
supportive evidence for interpretation and application of the governing foreign law as chosen by the parties in their contract.

17.1.7 Costs of Proceedings

Court fees payable upon the submission of a claim shall be calculated based on the amount of the claim or on the value of the property in dispute. In a case where the amount of the claim or the value of the property is not exceeding 50 million baht, the court entry fee shall be calculated at 2% of the amount of the claim or the value of the property with a cap at 200,000 baht. If the amount of the claim or value of the property is exceeding 50 million baht, the first 50 million baht is subject to a court entry fee of 200,000 baht and the amount of the claim/value of property that exceeds 50 million baht shall be subject to an additional fee of 0.1% of the exceeding amount, without any cap.

The ultimate liability for costs shall be borne by the party losing the case. However, the court has discretion to order that the costs be borne by the winning party, or that each party shall bear its own costs, with due regard being paid to the reasonableness and good faith of the parties’ contentions or the conduct of the case by the parties.

17.2 Arbitration

17.2.1 Arbitration in Thailand

Arbitration is an alternative means of dispute settlement. Parties to a dispute may mutually agree to submit their dispute to be resolved by a tribunal of arbitrator(s). The agreement to arbitrate can be made either before or after the dispute arises. When the agreement to arbitrate exists and is valid, the parties are prohibited to file a lawsuit to a national court, but are bound to refer the dispute to arbitration. If any party brings the dispute to litigation in court in breach of the arbitration agreement, the other party may ask the court to stay the litigation proceedings, so that the case is referred to arbitration. Unless the arbitration agreement is void or not enforceable, Thai court usually
gives effect to it, and will stay the litigation proceedings (section 14 of the Thai Arbitration Act 2002).

17.2.2 Arbitration Law in Thailand (lex arbitri)

The Arbitration Act 2002 (the “Act”) provides legislation framework that governs the conduct of arbitration in Thailand. Unlike some other countries, such as Singapore, Hong Kong or Malaysia, Thai arbitration law does not separate arbitration law regimes between domestic and international arbitrations. Therefore, both arbitrations seated in Thailand and those seated in other countries are subject to the same Act. The Act was largely adopted from the UNCITRAL Model Law on International Arbitration, and thus could ensure its compliance with internationally recognized arbitration principles. The Act also provides the limited grounds for Thai courts to refuse the recognition and enforcement of arbitral awards (see below), which are the same grounds as stipulated in Article V of the New York Convention 1958, in which Thailand is a member state.

17.2.3 Leading Arbitral Institutions in Thailand

The Thai Arbitration Institution (TAI) is a leading arbitration institution in Thailand. TAI is an organization under the supervision of the Office of the Judiciary of Thailand, but has its own arbitration rules.

Another leading arbitration institution in Thailand is the Office of the Arbitration Tribunal of the Thai Chamber of Commerce and Board of Trade of Thailand. This institution has its own arbitration rules, which are largely based on the ICC International Arbitration Rules.

17.2.4 Recourse against arbitral award

An arbitral award shall be final and binding against the parties in the arbitration proceedings. Under the Act, neither party can appeal against the merit of the arbitral award, whether to the arbitral tribunal or the courts. The only available recourse for the losing party in arbitration is to apply to a competent court to set the award aside. The
petition for setting aside an arbitral award must be submitted to the competent court within 90 days from the date of receipt of the award. The petition for setting aside must stipulate one or more of the following grounds to set aside the award:

(i) a party to the arbitration agreement is under some incapacity according to the law applicable to that party;

(ii) the arbitration agreement is not valid under the applicable laws the parties mutually agreed, or in absence of such agreement, under Thai law;

(iii) the party seeking an order to set aside the award was not given due notice of the proceedings or the appointment of an arbitral tribunal, or was unable defend the case in the arbitral proceedings due to any other reasons;

(iv) the award deals with a dispute that falls outside the scope of the arbitration agreement or beyond an agreement to submit the dispute to the tribunal. However, if the decision of the award that deals with the matter outside the scope of the parties’ agreement can be separated from the decision that is within the scope of the arbitration agreement, the courts may set aside the part of the award that is outside the scope of the arbitration agreement or outside the parties’ agreement;

(v) the composition of the arbitral tribunal or the arbitral proceedings are not in accordance with the parties’ agreement, or in absence of the parties’ agreement, the composition or the proceedings are contrary to the Act;

(vi) the award deals with a dispute that is not arbitrable under the law; or

(vii) the recognition or the enforcement of the award shall be contrary to the public order or good morals of Thailand.
17.2.5 Recognition and enforcement of arbitral award

Thai courts generally recognize and enforce arbitration awards whether they are made in Thailand or elsewhere. However, the courts may enforce foreign arbitration awards if the parties involved are entitled to rely on the terms of relevant international conventions to which Thailand is a party. At present, Thailand is a member state in the Convention on Recognition and Enforcement of Foreign Arbitral Award 1958 (a.k.a. the New York Convention 1958), and the Convention on the Execution of Foreign Arbitral Awards 1927 (a.k.a. the Geneva Convention 1927). Therefore, an arbitral award made in a member state under any of the above conventions will be recognized and enforced in Thai courts.

To enforce an arbitration award, the petitioner (i.e. the party seeking enforcement of the award) has to submit the original or certified copies of the originals, and Thai translations of the agreement and the award, as evidence. The petition for enforcement of the awards must be submitted to the competent court within three years of the date the awards become enforceable.

The party against whom the enforcement of an arbitral award is sought may apply to the court to refuse the recognition and/or enforcement of the award if (i) the award was set aside by a competent court, or (ii) there is one or more grounds similar to the grounds to set aside the arbitral awards stated in B(4) above.

17.2.6 Costs and Fees

(i) Costs and fees for arbitration proceedings

Unless the parties to an arbitration agree otherwise, liability for costs and fees in arbitration proceedings, including the arbitrators’ fees, shall be determined by the arbitral tribunal in the arbitral award. Lawyers’ fees and costs will not be determined in the award, and thus are not recoverable.
Where the parties agree to conduct the arbitration proceedings under institutional arbitration rules, the applicable rules may provide specific details on liability for costs and fees.

(ii) Costs and fees for enforcement of arbitral award in Thai courts

Where an arbitral award is brought to a Thai court for enforcement, the claimant is required to pay a court fee based on the amount of the claim as stipulated in the arbitral award.

For enforcement of a *domestic arbitral award*, if the amount of the claim is not exceeding 50 million baht, the court fee shall be calculated at 0.5% of the amount of the claim with a cap at 50,000 baht. If the amount of claim exceeds 50 million baht, the first 50 million baht is subject to a court fee of 50,000 baht and the amount of the claim that exceeds 50 million baht shall be subject to an additional fee of 0.1% of the exceeding amount, without any cap.

For enforcement of a *foreign arbitral award*, if the amount of the claim is not exceeding 50 million baht, the court fee shall be calculated at 1% of the amount of the claim with a cap at 100,000 baht. If the amount of the claim is exceeding 50 million baht, the first 50 million baht is subject to a court fee of 100,000 baht, and the amount of claim that exceeds 50 million baht shall be subject to an additional fee of 0.1% of the exceeding amount, without any cap.

18. Security and Enforcement in Thailand

18.1 Security

The security interests available under Thai law remains in the traditional forms of mortgages, pledges, guarantees and avals. In some cases, an assignment of rights and obligations under a contract is also implemented as a security. Besides the aforementioned, hire-purchase, leasing, conditional sale and trust receipts are commonly used to provide creditors certain protection whereby the “sale of goods” is
involved. The concept of fixed charge or floating charge is not recognized under the laws of Thailand.

However, the Government of Thailand are making the efforts to facilitate asset based financing of businesses as evidenced by the proposed draft of the Business Security Act. The provisions of the Business Security Act provide that a debtor may use certain types of assets to secure the performance of its obligation, including inventories, raw materials and other claims. Currently, the proposed Business Security Act is being reviewed by the National Legislative Assembly.

The law concerning guarantees and mortgages under the Civil and Commercial Code of Thailand has also been recently amended by the Civil and Commercial Code Amendment Act (the “CCC Amendment Act”) which became effective on 11 February 2015. The key objective of the amendments was to increase the rights and protections of guarantors and mortgagors and as a result, the amendment has caused a material adverse effect on the commercial value of guarantees and mortgages given as securities.

To improve the commercial value of guarantees and mortgages given as securities, there is currently a new draft of an additional amendment on guarantees and mortgages which is being submitted to the National Legislative Assembly for further consideration and approval. Once promulgated, the amendment is expected to have a retrospective effect on 11 February 2015, which is the effective date of the CCC Amendment Act, and to lessen the adverse effects on guarantees and mortgages that the CCC Amendment Act has imposed on commercial transactions. Under the draft amendment, the guarantors and mortgagors can enter into guarantees and mortgages on different conditions, in accordance with their classifications.

18.1.1 Types of Security

(i) Mortgage
A mortgage is a contract whereby a mortgagor designates its own property as security for the performance of an obligation of the mortgagor itself or a third party debtor. Under the law on mortgage, a mortgage will be created upon registration with the relevant authority, the details of which are set out in the section headed “Registration.” A mortgage agreement must be made in an official form specified by the relevant authority while a supplement to the official mortgage agreement can be attached. Such mortgage agreement and its supplemental agreement must be executed in the presence of a competent officer at the time of filing an application for registration with the relevant authority. The secured amount of the mortgage must be stated in Thai baht currency in the mortgage agreement.

Under Thai law, a mortgage can be granted over immovable property (e.g. land represented by registered ownership documents, buildings, etc.) or certain kinds of registrable movable property (e.g. ships of five tons and over, machinery, etc.) Recently, there was an attempt to allow the granting of a mortgage over a duly registered car. However, in practice, it is still not possible to register such mortgage as the draft Ministerial Regulation on the rules and procedures regarding registered car mortgages and registration fees is currently awaiting enactment.

Under the CCC Amendment Act, a mortgage for future debt or debt with conditions is required by virtue of the CCC Amendment Act to specify details of the mortgaged obligations (i.e. the purpose, the underlying debt, the maximum mortgage amount and the period for mortgage), the failure to comply with these requirements will render such mortgage agreement void. In addition, a provision which requires a third-party mortgagor to become liable (i) beyond the value of the mortgaged asset, or (ii) as a guarantor for the same underlying debt, will be void, regardless of whether such provision has been agreed in the mortgage agreement or in a separate agreement.

(ii) Pledge
A pledge is a contract whereby a pledgor delivers a pledged property to the possession of a pledgee as a security for the performance of an obligation. A pledgor can either be a debtor itself or a third party. As the pledge requires a delivery of the pledged property into the possession of the pledgee (or any third party that the parties thereto mutually agree), a pledge can be granted over a movable property, including a certain right represented by an instrument (e.g. promissory note, bill of exchange, cheque, etc.) If a pledged property is a company’s share certificate or an instrument, such share certificate or instrument must also be delivered to the pledgee. However, such pledge cannot be set up against the company or other third parties unless the creation of such pledge has been recorded in the company’s shareholder registration book or, as the case may be, a pledge of instrument has been endorsed on the back of such instrument.

A pledge is automatically released and discharged when (i) the obligation secured is extinguished, or (ii) when the pledgee allows the pledged property to return into the possession of the pledgor. The requirement to deliver the pledged property into possession of the pledgee of the pledged property renders the pledge impractical when the pledgor still requires the pledged property for its operation. Accordingly, the proposed Business Security Act mentioned above also provides for the giving of security in moveable property without delivery of possession. This will enable the debtor to still occupy, use, exchange and transfer such assets, and the creditor will be protected by having the right to conduct physical inspection of such assets.

(iii) Guarantee (Suretyship)

A guarantee is not a security as such, but it is a contractual right in personam given by a third party to secure the performance of an obligation of a debtor. In the event that the debtor defaults in the performance of its obligation under a separate underlying agreement, the guarantor has to assume the payment obligations of such debtor. Though a guarantee made verbally to the creditor is not considered void or invalid, in order to be enforceable in court, guarantee
agreements must be made in writing and signed by the guarantor. It is not necessary, however, for the creditor to sign a guarantee agreement.

Under the CCC Amendment Act, a guarantee for future debt or debt with conditions is required by virtue of the CCC Amendment Act to specify details of the guaranteed obligations (i.e. the purpose, the underlying debt, the maximum guaranteed amount and the guaranteed period), the failure to comply with these requirements will render such guarantee agreement void. In addition, the joint and several liability provisions or provisions causing a similar effect in a guarantee will be void, thus a guarantor can no longer assume the same obligation as the primary obligor. Unless the debtor is adjudged bankrupt or his whereabouts in Thailand is unknown, the creditor is not permitted to pursue the guarantor until all alternatives of pursuing the primary obligor have been exhausted. The guarantor will have the right to delay payment under the guarantee by claiming that the beneficiaries are still in the position to demand payments from, or enforce the debts against, the primary obligors.

The guarantor has rights of subrogation. After a guarantor has made a payment under the guarantee, the guarantor will have the right of recourse against the debtor for the amount paid.

(iv) Aval

Similar to a guarantee, an aval is given by a third party to secure the performance of an obligation of the person who is liable under a bill of exchange or promissory note. An aval may be given by signing a name on the face of the instrument with or without stating that it is 'good as aval,' or endorsing on the back of the instruments that it is 'good as aval.'

(v) Assignment

An assignment does not create security interest under Thai law. However, in project financing transactions, it is common that a debtor may be required to assign its rights (and/or obligations) under the
major project documents to secure performance of its obligations and/or to facilitate the enforcement of secured assets under the project. However, it should be noted that there is uncertainty as to the legal operation of an assignment as a form of security in practice due to the lack of legislation governing such matter.

Assignments of property lease rights and accounts receivable are the most common in business transactions.

The creation of assignment of right and/or obligation under a contract is made by way of a written assignment agreement between the assignor and the assignee with notification to and/or consent from the counterparty of the contract under which the right and/or obligation has been assigned. It is important to note that if an assignment of obligation or so-called “novation” is made, such novation must also receive a written consent as mentioned above.

18.2 Foreign Creditors / Foreign Lenders

A creditor is not required to be resident, domiciled in or doing business in Thailand in order to execute or enforce a security in Thailand. A foreign creditor can take a mortgage and pledge as security over property situated in Thailand as long as it has corporate power to do so under its constitutional document.

When a foreign creditor wishes to enforce the security, no approval from a government authority is required. However, due to the limitations on foreign ownership of real property in Thailand, foreign creditors, except a foreign bank which has a branch office in Thailand, are restricted in foreclosing (taking ownership) on a mortgage or tendering a bid at a public auction upon the enforcement of a mortgage on land.

18.3 Exchange Control

In Thailand, a remittance of money (including loans, interests, fees and other charges) by a debtor to a lender overseas, either voluntarily or upon the enforcement of the security, is subject to the law and
regulations on exchange control. A debtor is required to obtain prior approval from the Bank of Thailand (the “BOT”). A debtor, however, has to withhold tax at source (if any) before such outward remittance.

If the mortgage secures an obligation or debt denominated in a foreign currency, the mortgagee can use Thai baht enforcement proceeds to purchase such foreign currency, provided that evidence of the foreign currency obligation or debt has been produced to the satisfaction of the BOT or authorized agents.

As for a guarantee, to ensure the capability to perform the onshore guarantor’s obligation when the guarantee is called, in practice an offshore beneficiary often requires an onshore guarantor to procure the approval in principle’ from the BOT prior to issuance of a guarantee to the offshore beneficiary. The consideration for granting the ‘approval in principle’ usually takes 2 – 4 weeks. Once the guarantee has been called, the onshore guarantor is required to obtain an ‘actual approval’ from the BOT to remit the amount claimed under the guarantee to the offshore beneficiary. The approval in principle’ will shorten the period for obtaining this ‘actual approval’.

18.4 Registration

There is no requirement for a foreign bank, not having a branch in Thailand, to register or report a loan, either secured or unsecured loan, with any Thai authority.

To perfect a mortgage, it is required that such mortgage is registered with the relevant authority. For example, mortgage on land and buildings must be registered with the relevant Land Department Office of the Ministry of the Interior, while mortgage on machinery must be registered with the Central Office for Machinery Registration of the Ministry of Industry. Registration of second or subsequent mortgages is permissible, priority being given to that which is first registered in point of time. The registration fees will be calculated by reference to the mortgage amount with the applicable capped amount.
A pledge does not require registration. Nonetheless, some types of pledged property may be subjected to further formality. A pledge over a share certificate must be recorded in the company’s shareholder registration book; otherwise it cannot be set up against the company or any third party. In practice, both a pledgor and a pledgee will jointly notify a company of the pledge of share certificate, so that the registrar of the company can record such pledge in the company’s shareholder registration book and confirm to both parties that the pledge has been recorded. A pledgor of an instrument (e.g. bill of exchange, promissory note, cheque, etc.) must endorse a pledge on the back of the instrument. If such an instrument is non-negotiable, either the pledgor or the pledgee or both must notify the parties who will be liable under such instruments of such pledge.

No registration is required for a guarantee, aval, hire-purchase, leasing or conditional sale at the time of execution.

18.5 Public Record and Privacy

With regard to security, public access depends upon the type of security. As for a mortgage, which is the only type of security that falls under the registration requirement, once a mortgaged property has been registered, the registration record will be available for public search.

The record of other types of securities, by contrast, is not available for public access. For example, as only the shareholders are entitled to examine the company’s shareholder registration book, an outside creditor is not entitled to examine it in order to see whether there has been any pledge recorded before taking a pledge thereon.

18.6 Trustee / Security Agent

The use of a security trustee is not common in loans which are governed by Thai law, as the law of Thailand recognizes a legal concept of trust merely in cases where the provisions of the law specifically allow the establishment of trust, for example (i) a trust for purposes of securities, securitization and capital market transactions
under the Trust for Transaction in Capital Markets Act B.E. 2550 (2007) and (ii) a trust-like concept which appears in an issuance of debentures pursuant to the Securities and Exchange Act B.E. 2535 (1992). As for the trust-like concept, the act requires that, if secured debentures are to be issued, the issuer must appoint a debenture holders’ representative having the power to act in his own name for the benefit of all holders of the debentures in, among other things, accepting security (e.g. mortgages, pledges and/or other collaterals) and exercising the right to enforce the collaterals.

In a transaction where there is more than one lender and there is a security agent, the security agent itself usually executes security documents in two capacities, namely (i) for and on behalf of the lenders, and (ii) on its own account as the security agent. In such case, all of the individual lenders do not need to execute the security documents as the security agent can act on their behalf, but such lenders need to be expressly named in the security documents, provided that each individual lender must be registered as a mortgagee.

18.7 Enforcement of Security

Subject to bankruptcy proceedings, enforcement of security interests in Thailand can be made as follows:

18.7.1 Enforcement of a Mortgage

To enforce a mortgage, a written notice must be given to the debtor requiring it to perform the obligations and pay for all accessoril charges within a reasonable time to be fixed in the notice which must not be less than sixty days of the receipt of the creditor’s written notice. In addition, in case of a third-party mortgagor, the creditor is also required to serve a written notice to such third-party mortgagor within fifteen days after the date of the demand notice to the debtor. Should the creditor fails to serve a written notice within the fifteen-day period, the third-party mortgagor will be relieved from the
liability for all interest, compensation and accessorial charges arising after such prescribed period.

A mortgage can be enforced by court order through public auction or foreclosure. Additionally, under the CCC Amendment Act, after the obligation has become due and if there is no other mortgage or registered preferential right over the mortgaged property, the mortgagor is entitled to serve written notice requesting the mortgagee to conduct a public auction of the mortgaged property without entering an action in court. The mortgagee is then required to sell such mortgaged property within one year of the receipt of the mortgagor’s written notice.

In a public auction, the mortgaged property will be sold by the court official, in which the mortgagees (who are entitled to own land) may, at their discretion, bid for the mortgaged property during the public auction. The executing officer may reasonably withhold the sale of the mortgaged property if he deems that the winning bid does not reflect the actual value of the property. The debtor and mortgagor are also entitled to oppose the public auction if the winning bid does not reflect the actual value of the mortgaged property. The court has discretion to approve or reject the winning bid in case where the debtor and/or the mortgagor oppose it.

If there is no other preferential rights over the same property, the mortgagee may enter an action in court in order to foreclose the mortgaged property, given that the following conditions are met prior to the initiation of enforcement proceedings through foreclosure: (i) the debtor has failed to pay interest for five years (imposed and counted before filing the suit of foreclosure); and (ii) the mortgagee has not satisfied the court that the value of the mortgaged property is lower than the amount due.

18.7.2 Enforcement of a Pledge

The pledgee is not required to bring a case to court as a precondition of the enforcement of pledge. To enforce a pledge, a written notice must be given to the debtor requiring it to perform the obligation and
accessories within a reasonable time to be fixed in the notice. If the debtor fails to comply with the notice within the prescribed period, the pledgee is entitled to sell the pledged property only by public auction. The pledgee must state the time and place of the auction in the notice. The parties to the pledge cannot agree to enforce the pledge by any other method in advance but can agree otherwise after the occurrence of an act or omission to act in default.

18.7.3 Enforcement of Guarantee

By virtue of the CCC Amendment Act, to enforce a guarantee, upon a default by the debtor, the creditor must serve a written notice to the guarantor within sixty days of such default, and the creditor may not demand that the guarantor perform the obligation before such written notice reach the guarantor. Should the creditor fails to serve a written notice within the sixty-day period, the guarantor will be relieved from the liability for all interest, compensation and accessorial charges arising after such prescribed period. When the creditor is entitled to demand the guarantor to perform the obligations of the debtor after the default by the debtor, the guarantor has an option to either (i) perform such obligation in its entirety or (ii) exercise his right to perform only specific portion of the debtor’s obligations for which he is liable under to the terms and conditions of the obligations agreed between the debtor and the creditor prior to the default. In this instance, the guarantor will be exempted from the default interest rate.

If there is no payment within the specified period of time under the demand notice, the creditor may file a lawsuit in court, which would take approximately two years in the Court of First Instance, one year in the Appeals Court and two years in the Supreme Court.

18.7.4 Enforcement of Aval and Assignment

To enforce an aval and assignment, the relevant parties may give a demand notice to the counterparty stating its intent to enforce its right. If there is no payment within the specified period of time under the demand notice, the creditor may file a lawsuit in court, which would
take approximately two years in the Court of First Instance, one year in the Appeals Court and two years in the Supreme Court.

18.8 Claims among Secured and Unsecured Creditors

Among creditors, secured creditors holding security over a secured property generally have priority over the claims of unsecured creditors. Subject to preferential right created by law, a mortgage of a property gives the mortgagee a preferential right to claim over the mortgaged property which ranks before any claims of other creditors of the mortgagor under the same property. Where there are several mortgagees on the same property, the mortgagee of a preceding order of registration will have priority over the mortgagee of a succeeding order of registration.

18.9 Choice of Law and Forum

If the proceedings for the enforcement of the loan agreement are taken in Thai courts, the choice of foreign law as the governing law of the loan agreement will be recognized and applied in a case where: (i) such law is proven to the satisfaction of the court and (ii) public order or the good morals of the people of Thailand is not violated. However, in any case, where the security involved is located in Thailand, the laws of Thailand must be applied.

The law of Thailand does not prohibit the agreement for the submission by any person to the non-exclusive jurisdiction of the foreign court, but such agreement does not prevent Thai court from having the jurisdiction over the case if by virtue of the Civil Procedure Code of Thailand it has jurisdiction over the case.

18.10 Recognition and Enforcement of Foreign Judgment

Subject to specific requirements for court proceedings, any foreign judgment or order is not enforceable in Thailand, thus a party involved must initiate a new proceeding. A foreign judgment or order may, nonetheless, at the sole discretion of the court, be admitted as
evidence of an obligation and can be persuasive in new proceedings instituted in Thai court.

The Thai court may enter a judgment either in foreign currency or Thai baht currency, even if the obligations of the debtor are originally denominated in a foreign currency.

19. Telecommunications, IT and E-Commerce Regulations

19.1 Telecommunications

Thailand’s telecommunications industry is currently overseen and regulated by the National Broadcasting and Telecommunications Commission (“NBTC”). The NBTC is an independent regulator established by virtue of the Act on Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services, B.E. 2553 (2010) (“NBTC Act”). The NBTC is empowered to regulate the telecom sector as well as the broadcasting sector.

In addition to the NBTC Act, the Telecommunications Business Act, B.E. 2543 (2000) (“TBA”) plays vital roles in Thailand’s telecommunications industry. The TBA imposes a licensing requirement and relevant rules on anyone wishing to engage in the telecommunications business. All rules under the TBA are promulgated and regulated by the NBTC.

19.1.1 Telecommunications Licenses

The TBA requires all telecommunications business operators to obtain a telecom business license from the NBTC before commencing their telecom businesses in Thailand. These licenses are divided into three types, with each currently separated into two sub-categories (telecom services and internet services) as follows:

(i) Type 1 License: for telecom business operators who do not have a telecommunications network of its own.
Examples of telecom services under a type 1 license include the resale of public switched telecommunication services, international calling cards, MVNOs, store-and-retrieve value added services, etc.

Examples of Internet services under a type 1 license include Internet services, VOIPs, etc.

(ii) Type 2 License: for telecommunications business operators who operate with or without a telecommunications network of its own, and whose undertaking of business is intended for providing services for a limited group of persons, or whose undertaking of business does not have a significant impact on free and fair competition, public interest, or consumers.

Examples of telecom services under a type 2 license include private trunked radio services, call-back or call re-origination services, private packet switched services, VSATs, etc.

Examples of Internet services under a type 2 license include leased lines, switched data services, bandwidth services, data centers, etc.

(iii) Type 3 License: for telecommunications business operators who operate with a telecommunications network of its own, and whose undertaking of business is intended for providing services to a large number of people, and may have a significant impact on free and fair competition, public interest, or when it is necessary to give special protection for consumers.

Examples of telecom services under a type 3 license include fixed line services, mobile telephone services, public packet switched services, satellite networks, etc.

Examples of Internet services under a type 3 license include Internet gateways, Internet exchanges, broadband network
services, integrated service digital networks (ISDNs), international private leased circuits (IPLCs), etc.

19.1.2 Duration of Telecommunications Licenses

The license duration for telecom services are as follows:

(i) A type 1 license is normally granted for a period of 5 years.

(ii) A type 2 license with a network is normally granted for a period of 15 years.

(iii) A type 2 license without a network is granted for a period of 5 years.

(iv) A type 3 license is normally granted for a period of not less than 15 years, and not more than 25 years.

The license duration for Internet services are as follows:

(i) A type 1 license is normally granted for a period of 5 years.

(ii) A type 2 license is normally granted for a period of 5 years.

(iii) A type 3 license is normally granted for a period of 10 years.

19.1.3 Telecommunications License Fees

License fees, renewal fees, and annual fees for the licenses are subject to the rates prescribed by the NBTC. The license fees and renewal fees are currently prescribed on a fixed fee basis which varies depending on the type of license. The current annual fees for all types of licenses are, however, subject to percentage rates at a maximum of 1.5% of the gross revenue from the services.

19.1.4 Spectrum Allocation

The NBTC Act prescribes that any spectrum used for the purpose of telecommunications business operation must be assigned through
auction method in accordance with the criteria, procedures, duration and conditions prescribed by the NBTC. A granted spectrum license is exclusive and non-transferable.

The NBTC plans to carry out a spectrum auction for LTE/4G in 2015.

19.1.5 Foreign Ownership

The TBA has fully liberalized the type 1 license by allowing foreigners to hold 100% of the shares in companies operating under a type 1 license. However, the TBA restricts foreigners under the Foreign Business Act, B.E. 2542 (1999) (“FBA”) to obtain type 2 and type 3 licenses. Foreigners are defined under the FBA as non-Thai nationals, an entity registered outside Thailand, or an entity registered in Thailand in which half, or more than half, of its shares are held by a foreign individual or entities.

In addition to the TBA, companies which operate under type 2 licenses with their own networks or under type 3 licenses, are also restricted from conducting activities prescribed under the Foreign Dominance Notification, B.E. 2554 (2011) (“Foreign Dominance Notification”). The Foreign Dominance Notification prohibits foreigners from having the ability to exert any control or influence which may, directly or indirectly, affect the management or the operation of these companies. Foreigners are restricted from performing any actions which are deemed as “foreigner dominance” which include, for example:

(i) holding voting shares in a company equal to one-half or more of all voting rights;

(ii) having controlling power over the majority vote of a company shareholders’ meeting; or

(iii) having power to appoint or remove one-half or more of all of a company’s directors.
The Foreign Dominance Notification also stipulates a list of specific prohibited foreign dominance actions. These include, for example, holding shares by nominee, having special preferential rights in casting votes, entering into an agreement relating to intellectual property giving exclusive rights to foreigners wherein such agreement renders an effect of transfer of expenses and benefits in return to foreigners, etc.

19.1.6 Universal Service Obligation

The NBTC has imposed duties for all types of licensees to pay for universal service obligation fees (“USO”). The current rate of USO fees is 3.75% of the net revenue of the licensees.

19.1.7 Competition

The NBTC is empowered to provide measures against monopolization, anti-competitive behaviors, and to set measures to promote free and fair competition specifically among telecom business operators. The NBTC has issued a number of notifications to promote competition in the market. These include, for example, significant market players (“SMP”), anticompetitive behaviors, relevant market definitions, and mergers.

(i) Significant Market Players (SMP)

An operator with a market share of more than 40% will be declared a SMP in the market. The NBTC will consider many factors before declaring an operator with a market share between 25%-40% as a SMP. Upon being declared a SMP, the operator will be subject to ex-ante regulations such as local loop unbundling, a retail price cap, and account separation. This means an operator with a market share of less than 25% will be safe from ex-ante regulations.

(ii) Merger Control

The Notification on Merger, Acquisition and Cross Ownership was issued in 2010. It provides rules and procedures for mergers and cross
ownership, including obtaining approval from the NBTC before engaging in these activities. The operator may also be required to submit competition impact assessment and be monitored by the post-merger market and competition for a period of two years.

19.1.8 Consumer Protection

The NBTC issues many regulations in relation to customer protection. For example, the standard contract between a telecom operator and an end-user must be approved by the NBTC in advance. There is also a data privacy regulation which requires telecom operators to collect personal data directly from the customers and retain such information for a certain period. If the telecom operators wish to use, disclose, transfer, or amend the personal data, the telecom operators are required to seek approval from the customer in advance.

19.1.9 Other Interesting Issues

(i) Retail Tariffs

Under the Telecom Tariff Regulation, an operator has two choices in calculating its tariffs: (i) to use the Rate of Return (ROR) model or (ii) to use the price cap set by the NBTC. When an operator wishes to change its retail prices, it is required to notify the NBTC prior to the change.

(ii) Number portability

The Regulation on Mobile Number Portability requires all mobile network operators to implement a mobile number portability system.

(iii) Mobile Virtual Network Operator (MVNO)

The Notification of the NBTC on Mobile Virtual Network Operator, B.E. 2556 (2013) regulates resellers of mobile telephone services. The MVNO under this notification cannot use or control any parts or all of spectrum. Network capacity resold to end users shall be purchased from the mobile licensees.
(iv) Wholesale and Resale Services

Under the Wholesale and Resale Services Regulation, telecom wholesalers and resellers must obtain a license which indicates whether they provide wholesale or resale services.

Wholesale operators who provide certain services, for example Public Switched Telecom Services and Leased Circuit Channel Services, are obligated to resell their services to a reseller without any right of refusal.

19.2 IT/E-commerce

Currently, no central authority oversees or regulates Thailand’s IT/E-commerce industry. Businesses in this sector are subject to a number of regulations and authorities depending upon the arrangements and details of each business. Certain types of IT/E-commerce businesses are also subject to telecommunications regulations and the authority of the National Broadcasting and Telecommunications Commission (“NBTC”). Further details on telecommunications regulations can be found in the Telecommunications Regulations Chapter in 19.1 above.

In late 2014, the Thai government introduced a digital economy plan to promote IT/E-Commerce businesses and the digital environment in Thailand, which are expected to become part of a new economic drive for the country’s future. Ten bills of relevant laws and amendments to certain laws were approved in principle by the Cabinet between December 2014 and January 2015 and are expected to be further considered by the National Legislative Assembly as to whether all or some of them will be enacted.

Among the ten bills, the Cybersecurity Bill is expected to lay out the cybersecurity framework in Thailand and establish a new National Cybersecurity Committee which will serve as a central operation body to respond to cyber threats and co-operate with other relevant agencies. Another interesting bill is the Personal Data Protection Bill. It is expected to provide criteria for collecting, using, and disclosing
of personal data. It is also expected to prescribe the rights of personal data owners and to establish the Personal Data Protection Committee. The Bill to Amend the Existing Computer Crimes Act is also one of the ten bills. It is expected to address certain issues that were not addressed in the Existing Computer Crimes Act, including, for example, distribution of child pornography, the ability for spam mail recipients to “opt-out” of unwanted mailings, and limited liability of service providers for content posted by their customers or service users. Altogether, these will structurally change ICT policy and the regulatory landscape in Thailand.

Below is a summary of certain legislation which plays a vital role in the operation of IT/E-commerce businesses in Thailand at the moment.

19.2.1 Data Privacy

The rights to privacy have long been recognized in the Constitution of Thailand. A person shall have the right to be accorded protection against undue exploitation of personal data. In the absence of specific legislation on data privacy in Thailand, theoretically, any violation of the Constitution that results in damage to others may constitute a wrongful act (a tort) under the Thai Civil and Commercial Code (CCC).

Other pieces of legislation which cover certain aspects of personal data protection in specific areas include, (i) the Official Information Act, B.E. 2540 (1997), which regulates the collection, use, and disclosure of personal data in the possession of government agencies; (ii) the Telecommunications Business Act, B.E. 2543 (2000) and its relevant regulations govern the collection, process and retention of telecom service subscribers’ personal data by telecom operators; and (iii) the Act on the Undertaking of a Credit Data Business, B.E. 2545 (2002) and its relevant regulations govern the collection, process and retention of a person’s credit data.
19.2.2 Computer Crime

The Computer Crime Act, B.E. 2550 (2007) (the “Computer Crime Act”) focuses on the criminal penalties applicable to computer-related crimes and the power of the authorities to investigate these crimes.

The prohibited activities which could be subjected to penalties under the Computer Crime Act include the following examples:

(i) hacking into a computer system of another person which has been installed with access prevention measures;

(ii) disclosing information on prevention measures for accessing the computer of another person in such a way that is likely to cause damages to said person; and

(iii) illegitimately compiling computer data of another person which is being sent in a computer system.

The competent authority under the Computer Crime Act is empowered to demand, request, order, examine, access or seize various evidence and computer systems for the purpose of computer-related crime investigations.

19.2.3 The Electronic Transactions Act

Thailand has promulgated the Electronic Transactions Act, B.E. 2544 (2001) (“E-Transactions Act”) to deal with legal issues brought about by business transacted via electronic means, and to keep pace with the rapid developments in electronic technology. The E-Transactions Act combines the Electronic Transactions Law and the Electronic Signatures Law into one, and has established various methods and rules to support all civil and commercial transactions using electronic data. These include legal recognition of electronic data, methods of dispatch and receipt of electronic data, use of electronic signatures, and the evidential admissibility of electronic data.
The E-Transactions Act has also laid down various rules for electronic signatures, including (i) the consideration as to whether any electronic signature should be deemed as a trustworthy electronic signature; (ii) procedures for the creation of an electronic signature; and (iii) rules for service providers in issuing a certificate in support of an electronic signature.

19.2.4 Direct Sales and Direct Marketing Act

The Direct Sales and Direct Marketing Act, B.E. 2545 (2002) ("DSA") partly controls the marketing of goods or services via distance medium (e.g. web portal, e-marketplace and e-commerce), with the anticipation that consumers will respond through such distance medium. The DSA prescribes registration requirements and other compliance requirements for the operators of these businesses.

19.2.5 Commercial Registration Act

The Commercial Registration Act, B.E. 2522 (1979) ("CRA") and its relevant notifications impose registration requirements and other compliance requirements on all business operators engaging in e-commerce. These include buying or selling goods/services via the Internet, providing Internet services, leasing space in a computer hosting device, and acting as a marketplace for the sale or purchase of goods and services via the Internet.
Appendix A
Schedule of Businesses from which Foreigners are Restricted or Prohibited

Schedule One
Businesses that foreigners are not permitted to operate, for special reasons:

- newspaper, radio, and television businesses;
- lowland farming, upland farming, and horticulture;
- animal husbandry;
- forestry and timber conversions from natural forests;
- fishing for any form of aquatic animal in Thai waters or in Thailand’s Exclusive Economic Zone;
- extraction of Thai medicinal herbs;
- trade in and auctioning of ancient Thai objects or objects of national historical value;
- making or casting images of Buddha and making monk’s bowls; and
- dealing in land.

Schedule Two
Businesses that affect national security or safety:

- domestic transport, by land, water, or air (inclusive of domestic aviation);
• production, disposal, sale, or overhaul of firearms, ammunition, gunpowder, or explosives;

• production, disposal, sale, or overhaul of components of firearms, ammunition, or explosives;

• production, disposal, sale, or overhaul of armaments or military vessels, aircraft, or conveyances; and

• production, disposal, sale, or overhaul of any kind of war matériel or components of war matériel.

Businesses that affect art, culture, customs, and native manufacturing/handicrafts:

• dealing in Thai antiques, objects of art, or handicrafts;

• production of wood carvings;

• raising silkworms, producing Thai silk thread, or weaving or printing patterns on Thai silk textiles;

• production of Thai musical instruments;

• production of articles of gold or silver, nielloware, nickel-bronze ware, or lacquer ware; and

• production of crockery and terra-cotta ware that may be regarded as a form of Thai art.

Businesses that have an impact on natural resources or the environment:

• production of sugar from sugarcane;

• salt farming, inclusive of extracting salt from saline soil;

• making rock salt;
• mining, inclusive of stone blasting or crushing; and
• converting timber to make furniture or articles of wood.

Schedule Three
Businesses in which Thais are not yet prepared to compete with foreigners on an equal footing:

• rice-milling or producing flour from rice or farm plants;
• fishery, limited to propagating aquatic animals;
• forestry, from replanted forests;
• production of plywood, wood veneer, chipboard, or hardboard;
• production of (natural) lime;
• accounting service undertakings;
• legal service undertakings;
• architectural service undertakings;
• engineering service undertakings;
• construction, except (a) construction of things that provide basic services to the public with respect to public utilities or communications and which require the use of special instruments, machinery, technology, or expertise in construction, provided the foreigner has a minimum capital of at least 500 million baht; and (b) other categories of construction, as stipulated in Ministerial Regulations;
• brokerage and agency undertakings, except (a) trading in securities or services concerning futures-trading in
agricultural commodities, financial instruments, or securities;
(b) trading or procuring goods or services needed for
production by, or providing services for, an enterprise in the
same group; (c) trading, purchasing for others, distributing, or
finding domestic or overseas markets in which to sell goods
made domestically or imports as an international trading
business, with a minimum foreign capital investment of at
least 100 million baht; and (d) other lines of business
stipulated in Ministerial Regulations;

- auctioning, except, (a) international bidding that does not
  involve antiques or Thai art works, handicrafts, or objects of
  national historical value; and (b) other types of auctioning, as
  stipulated in Ministerial Regulations;

- domestic trading of indigenous agricultural produce or
  products not prohibited by any present law;

- retail trading of any goods with an aggregated minimum
  capital of less than 100 million baht or a minimum capital for
  each store of less than 20 million baht;

- wholesale trading of any goods, with a minimum capital for
  each store of less than 100 million baht;

- advertising undertakings;

- hotel undertakings, except for hotel management services;

- tourism;

- selling food or beverages;

- breeding, propagating, or improving plants; and

- undertaking other service businesses, except for service
  businesses prescribed in Ministerial Regulations.
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