

Legal Framework

Changes look to promote more foreign investment
Various forms of business organisation permissible
Special incentives available in certain economic zones
Intellectual property laws divided into three areas





International investors are regulated under the Foreign Business Act

Looking abroad

Regulatory changes aim to encourage international business

A commitment to meet current global business needs by following the trend towards liberalisation continues after the change of government in July 2011. Even the flooding of major parts of the country, which inundated seven major industrial estates and temporarily slowed down manufacturing, did not change Thailand's general course of attracting foreign investment by bringing its legislation in harmony with international norms. The government has introduced important legislation over the last few years, such as the Financial Institutions Business Act and the Deposit Protection Agency Act, as well as amending both the Securities and Exchange Act and the Civil and Commercial Code.

EXPORTS: With exports of goods accounting for roughly 60% of GDP, international trade is a significant factor in Thailand's economic stability and growth. The Thai government takes an active role in creating incentives to attract foreign investors. Thailand was the first country in Asia to introduce legislation to promote foreign investment through such initiatives as the Board of Investment (BOI) and the Industrial Estates Authority of Thailand (IEAT). Under these programmes, foreign investors are allowed to hold full ownership in most qualified projects and are afforded both tax and non-tax benefits, including facilitation of visas and work permits and the right to own land (which is restricted under Thailand's Land Code). The BOI's main concern is to give priority to projects engaging in agriculture, technology, infrastructure and human resources development, conservation of natural resources, as well as other targeted industries. Special consideration is generally given to investment projects located outside Greater Bangkok, with an emphasis on decentralisation of investment into regional areas. The IEAT, meanwhile, is the state enterprise primarily responsible for overseeing national industrial development policy.

TAX BREAKS: The government has taken steps to provide further tax incentives for selected activities. The Bank of Thailand and the Ministry of Finance will commence with the second phase of the Financial Sector

Master Plan over the course of 2010-14, which grants waivers on income tax (both corporate and for individual shareholders), Specific Business Tax, and stamp duty for earnings on mergers and acquisitions activities. Regional operating headquarters are currently also being granted waivers on their corporate taxes for up to 15 years. This is in addition to extensions on the reduced rate of value-added tax, which will remain at its current rate of 7% for at least another year.

FOREIGN OWNERSHIP: Of particular importance for foreign investors is the Foreign Business Act (FBA) of 1999, which serves as the legal basis governing foreign business participation in Thailand. The FBA reserves certain business activities, classified into three lists, for Thai nationals. Under the FBA, a company is considered foreign if half or more of its shares are held by non-Thai natural or juristic persons. Foreign ownership restrictions on manufacturing activities have already been relaxed. While the FBA has not been revised, there is a push to liberalise certain other industries to allow for more foreign participation.

FREE TRADE AGREEMENTS: On a macro-level, Thailand has also been making efforts to open up international trade, particularly when it comes to negotiating free trade agreements. A founding member of ASEAN, Thailand is a signatory to the ASEAN Free Trade Area (AFTA), which came into force in 2010 for the six original ASEAN members (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand), resulting in even greater market access within South-east Asia. The remaining four ASEAN countries (Cambodia, Laos, Myanmar and Vietnam) will join AFTA in 2015, leading to the formation of the ASEAN Economic Community, with the result that import duties will be effectively be reduced to zero throughout the whole of the region.

Thailand has free trade agreements with Australia, China, India, Japan and New Zealand – markets which, when combined, represent nearly half the world's population. Thailand also acceded to the Patent Cooperation Treaty (PCT) in 2009, as the 142nd contracting state.



Foreign ownership of certain businesses is highly regulated

By the book

A look at the kingdom's rules and regulations

FOREIGN INVESTMENT LAW: The most important law governing foreign direct investment in business in Thailand is the Foreign Business Act of 1999 (FBA), which reserves certain business activities for Thais. Under the FBA, the definition of "alien" includes, among other things, foreign nationals, foreign corporations and companies incorporated in Thailand with at least half of their shares held by aliens. Basically, alien ownership in businesses which are reserved under Lists 1, 2 and 3 of the FBA is limited to a maximum of 49%. Business activities that are indicated in List 1 of the FBA, such as farming, forestry, antiques trading and broadcasting, are strictly closed to aliens.

Aliens wishing to exceed the ownership limit in business activities indicated in List 2 of the FBA, which involve national safety, arts and culture, natural resources and the environment, must obtain an alien business license (ABL) from the minister of commerce with the approval of the Cabinet. Business activities indicated in List 3 of the FBA, which include professional services, construction, wholesale, retail, hotel and restaurant and any other kind of service, can be 100% owned by aliens if an ABL is granted by the director-general of the Department of Business Development with the approval of the Foreign Business Committee. An ABL application is a time-consuming process with an unpredictable outcome and is normally granted only to the extent necessary in the specific instance.

The foreign ownership restrictions under the FBA do not apply to US nationals and US corporations.

The Treaty of Amity and Economic Relations between the United States and Thailand allows Americans to own and operate almost all reserved businesses in Thailand except for businesses reserved under the treaty, which include land, inland transportation and communication, provided that the Ministry of Commerce (MoC) is properly notified and that a relevant certificate is applied for by the concerned party.

The FBA provides for substantial penalties for violations, including large fines and possible imprisonment.

INVESTMENT PROMOTION & PRIVILEGES: The Board of Investment (BOI) is responsible for providing incentives to stimulate investment in Thailand. It is empowered to give tax and non-tax incentives to qualified investors. Each category of activities eligible for investment promotion from the BOI will receive different benefits and incentives depending on location, production for export, or industries identified as priority activities. In accordance with the investment decentralisation policy, the BOI basically provides different levels of incentives to projects that are located in three geographical areas (Zones 1, 2 and 3).

Tax incentives consist of import duty reductions or exemption on machinery and raw or essential materials; corporate income tax exemption for three to eight years; double deduction from taxable income of transportation, electricity and water costs; tax exemption for dividends paid out of the exempted profits during the tax exemption period; tax exemption for fees for goodwill, copyright, or other rights received from a promoted activity; and other forms of exemptions similar to those listed above.

One of the attractive non-tax incentives is that investors granted investment promotion by the BOI who are regarded as aliens under the FBA may have 100% ownership in business activities specified in Lists 2 and 3 of the FBA in accordance with the conditions prescribed by such authorities. They shall be exempted from obtaining an ABL but still need to notify the MoC and apply for a certificate. Other non-tax incentives include permission for foreigners to own land and visa and work permit privileges.

APPLICATION REQUIREMENTS: The BOI prescribes criteria for application for investment promotion such as a minimum BT1m (\$31,900) investment, minimum value added of 20%, maximum 3:1 debt-to-equity ratio, industrial standard of ISO 9000 level, new or certified used machinery only, modern production technology, adequate environmental protection, amongst others. The investor must submit an application form along



Investment projects in certain zones are eligible for a number of additional tax-based incentives

with supporting documentation to the BOI to be considered for incentives. In most cases, the processing of an application takes somewhere between six weeks and eight weeks to be completed.

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

FORMS OF BUSINESS ORGANISATION: Under Thai law, the forms of business organisation are sole proprietorship, partnership (unregistered ordinary partnership, registered ordinary partnership and limited partnership), branch office, representative office, regional office, limited company (private company limited and public company limited) or joint venture.

With a sole proprietorship, all of a proprietor's assets, business and personal, are subject to attachment or any other legal action, whether connected to the business or not. The sole proprietor must acquire a taxpayer identification card and value-added tax (VAT) certificate if gross income is expected to exceed BT1.8m (\$57,420) per year. Certain businesses will require a sole proprietorship to obtain a Commercial Registration Certificate at the MoC. A sole proprietorship is subject to personal income tax at progressive rates which range from a low of 5% to a high of 37%.

PARTNERSHIPS: An unregistered ordinary partnership is one in which all partners are jointly liable for all the obligations and debts of the partnership. Each partner must contribute money, property, or services to the partnership. It is not registered with the MoC and is not a legal entity (juristic person). Although it

is not a juristic person, it is considered a separate entity for tax purposes. The partnership must obtain a taxpayer identification card and VAT certificate from the Revenue Department if its gross income is expected to exceed BT1.8m (\$57,420) per year. Some businesses will require an unregistered partnership to obtain a Commercial Registration Certificate at the MoC. An unregistered partnership is subject to personal income tax at progressive rates ranging from 5% to 37%. After-tax profits when distributed to partners are not their taxable income.

A registered ordinary partnership is registered with the MoC, which makes it a juristic entity with a separate and distinct personality from each of the partners. All the partners are jointly and unlimitedly liable for all partnership obligations. A registered ordinary partnership partner may pursue any claim of, or any right acquired by, the partnership against third persons, even if the third person did not actually participate in the transaction. A registered ordinary partnership pays corporate income tax at a rate of 30% on net profits.

A limited partnership is also registered with the MoC and considered a juristic entity with a separate and distinct personality from each of the partners. A limited partnership is one in which the individual liabilities of one or more partners (called "limited partner") are limited to their respective contributions, and one or more partners (called "general partner") are jointly liable without any limitation for all the obligations of the partnership. A limited partnership can only be managed by the partners with unlimited liability. A partner with limited liability who participates actively in the management of the partnership becomes jointly liable, without any limitation, for the partnership's obligations. A limited partnership pays corporate income tax at a rate of 30% on the partnership's net profits. This form of business organisation is common among Thais, but not among overseas investors.

FOREIGN OFFICES: A foreign company may establish a branch office to conduct business in Thailand. The head office must appoint at least one branch office manager to be in charge of operations. A branch office is subject to corporate income tax at the rate of 30% on net profits derived from its business operations in Thailand. Therefore, for tax purposes, a branch office is required to apply for a taxpayer card and VAT certificate (if its gross income is expected to exceed BT1.8m, or \$57,420, per year) and to file annual corporate income tax returns with the Revenue Department within five months after its fiscal year ends. Having a branch office in Thailand, the foreign company will be exposed to civil, criminal and tax liability if the branch office is found to have violated any Thai law.

A regional office or representative office is technically a branch office of a foreign company which carries on permissible non-income-generating service activities on behalf of the head office in Thailand. These offices are strictly prohibited from accepting purchase orders or making sales offers and negotiating and entering into any business arrangement with any customer, sales agent, or other party in Thailand. The

operations of these offices can be financed only by the head office. Even though their income is nil and thus they pay no income tax, these offices still have the duty to file audited financial statements with the Thai authority annually. The only distinction between a regional office and a representative office is the scope of their respective permissible activities. Regional offices are expected:

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

Representative offices are expected:

- To find sources for the purchase of goods or services in Thailand for the head office or affiliates or subsidiaries of the head office;
- To check and control the quality and quantity of goods purchased or manufactured in Thailand by the head office or affiliates or subsidiaries of the head office;
- To provide advice and assistance concerning goods of the head office or affiliates or subsidiaries of the head office sold to agents or consumers in Thailand;
- To disseminate information concerning goods or new services of the head office or affiliates or subsidiaries of the head office;
- To report on business developments in Thailand to the head office or affiliates/subsidiaries of that office.

LIMITED COMPANIES: A limited company, another business category, is generally the form of business establishment most preferred by foreign investors because, among other things, shareholders' liability is limited to the remaining amount unpaid, if any, of the registered capital due on the shares respectively held by them. The incorporation of a limited company must be registered with the Department of Business Development of the MoC. A limited company is managed by a Board of Directors (consisting of at least one director) under the control of the general meeting of shareholders. Capital of a limited company is divided into a number of shares, each having a minimum equal value of BT5 (\$0.16). Three shareholders are required to be maintained while the company is in operation.

Publicly-held companies are subject to the Public Limited Company Act 1992. A public limited company is a company established for the purpose of offering the sale of shares to the public. The minimum number of required shareholders in a public limited company is fifteen. The Board of Directors of a public limited company must consist of at least five directors, the majority of whom must reside in Thailand.

A newly registered company must apply for a taxpayer identification card and VAT certificate with the



Foreign companies can operate local offices, which are governed by different regulations based on type

Revenue Department (if its gross income is expected to exceed BT1.8m, or \$57,420, per year).

JOINT VENTURES: Joint ventures, meanwhile, are permitted under Thai law in two forms. The first is a joint venture in the form of a partnership established by contract between one company and another company or juristic partnership or individual existing only for a particular project. Even if not registered as a legal entity, the "unincorporated joint venture" is treated as a juristic entity by the Revenue Department for the purposes of tax liability. The joint venture must, therefore, apply for a taxpayer identification card and value-added tax certificate (if its gross income is expected to exceed BT1.8m, or \$57,420, per year).

The second form is a joint venture registered as a legal entity. In this form, the joint venture is a type of limited company wherein the joint venture partners hold shares in the agreed proportion.

CAPITAL MARKETS REGULATIONS: Capital raising through initial public offerings and the offering of other securities in Thailand are both regulated by the Securities and Exchange Act 1992, as amended, and are supervised by the Securities and Exchange Commission (SEC). Companies wishing to offer newly issued securities must generally submit an application to the SEC for approval and fulfil pre-offering information disclosure requirements. After the securities are sold to the public, the offering company must undertake securities settlement with the holders in accordance with SEC regulations and disclose information on a continual basis. There is also an additional requirement for issuers to report any acquisition or disposal of securities which causes a person, and their connected persons, to hold shares amounting to 5% or more of the voting rights in a company.

The issuance and offering of foreign equity-based securities was previously prohibited, except when offered only to limited groups of recipients, such as offering foreign securities to employees of the foreign issuer or its Thai subsidiaries under an employee stock



Generally, firms must be at least 51% Thai-held to legally own land

option plan, or offering fully paid ordinary shares to existing shareholders (i.e. rights offering). Effective December 1, 2009, foreign equity-based securities (e.g. shares and warrants on shares) listed on a home (foreign) stock exchange are now permitted to be listed on the Stock Exchange of Thailand (SET), as long as certain requirements are fulfilled.

These requirements include: (a) that the home exchange is a member of the World Federation of Exchanges and shares are listed on the main board; (b) that the home regulator is a member of the International Organisation of Securities Commissions and a full signatory to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information or other comparable memorandum of understanding; (c) that the foreign issuer has a contact person in Thailand; (d) that the value of shares to be issued in Thailand is within the Bank of Thailand's limit; and (e) the approval of the home regulator or evidence that the issuance and offering of securities in Thailand does not breach any home exchange regulation is obtained.

SET RULES: In addition, SET requirements must also be fulfilled. The foreign issuer must: (a) be a listed company on the home exchange for not less than three years; (b) have market capitalisation in the top quartile of all listed companies on the home exchange, or not less than BT10bn (\$319m); (c) have market capitalisation in Thailand of not less than BT300m (\$9.57m), or 5% of registered capital, whichever is lower, or otherwise be able to prove that there will be both a sufficient amount of trading volume and liquidity.

Foreign companies wishing to issue equity-based securities have to submit an application to the SET, and simultaneously file an application to obtain approval from the SEC and file a registration statement and draft prospectus to disclose information to the investing public (filing). If the SET is satisfied qualifications are met, it will issue a Certification of Qualification for final submission to the SEC. After the application, all

supporting documents, and filing are completed, there will be a cooling-off period of at least 14 days.

Once SEC approval and filing are effective, the shares can be offered for sale to the public through underwriters, a process which must be completed within six months from SEC approval, and then listed on the SET.

The offering of existing shares by shareholders (as opposed to the offering of new shares) for listing on the SET is also allowed, provided that the foreign issuer has obtained pre-approval from the SET, and shall be subject to the same qualifications as the offering of new shares. The company must issue a written acknowledgement of such offering and provide representation that it will comply with all requirements, such as those concerning disclosure.

After the securities are listed, the foreign issuer must comply with its home exchange regulations on items such as but not limited to the submission of financial statements, rules for transactions with related parties, reporting on material transactions, reporting on shareholding of directors, management and auditors, and rules for takeovers. Once a foreign security is listed on the SET, the company may issue new securities without listing them on the trading market by simply filing an application to the SEC. This filing requirement will also be exempted if the issuance qualifies as a private placement. Existing shareholders will also be able to trade their shares on the SET, provided that approval from the SET has been granted.

Thailand has started to liberalise activities in other areas of investment, such as derivatives. The Thailand Futures Exchange (TFEX), a subsidiary of the SET, was established on May 17, 2004 as a derivatives exchange. The TFEX is governed by the Derivatives Act 2003, as amended, and supervised by the SEC.

LAND OWNERSHIP: Land ownership in Thailand may be individual or shared. Any Thai national may purchase land in the kingdom. There are, however, restrictions when it comes to foreign ownership.

Under present Thai law, foreign individuals and foreign companies (including companies established under Thai law with foreign shareholding of more than 49% of the total issued shares) are prohibited from owning land in Thailand. Companies incorporated in Thailand which are at least 51% Thai-owned may legally own land. If a company has significant foreign equity, it will be investigated by the Land Department to determine if there is any use of Thai shareholders as nominees on behalf of minority alien shareholders for the purpose of owning land before the company is allowed to register the purchase of the land. However, there are no regulations that prohibit aliens from owning a building within Thailand.

An exception to the foreign ownership rule applies to projects promoted by the BOI and the IEAT. Under these projects, special privileges are given to foreign-owned companies to own land for business operations and for residential purposes of management and employees. Foreign oil companies which meet the requirements of the Petroleum Act may also own land. An alien juristic person may obtain rights to land under

two laws. The first, the Investment Promotion Act of 1977 (Section 27) says a promoted entity is permitted to own land required for the promoted business in such size as the BOI may prescribe, even though it exceeds the limit prescribed under other laws.

The second, the IEAT Act of 1979 (Section 44) says industrial operators and operators of trading for export may be permitted to hold land ownership in an industrial estate or an export industrial zone for the operation of business in a size deemed reasonable by the IEAT Board, even though it may in fact otherwise exceed the limit that is fixed under other laws.

The lease of property or buildings is governed by the Hire of Property General Provisions of the Civil and Commercial Code. Land, houses, condominium units, and other buildings may be leased to aliens for up to 30 years, with possible renewal for another 30 years. However, it should be noted the renewal option might not be enforceable against someone who purchases the property from the lessor. A lease contract of any immovable property for three years or less is not enforceable unless it has been made in writing and signed. Leases of more than three years need to be registered with the Land Office; otherwise, they will be valid for only three years.

CONDOMINIUM OWNERSHIP: The Condominium Act of 1979 allows certain groups of aliens (both individuals and juristic persons) to acquire condominium units in Thailand, provided that foreign ownership in a given condominium project does not exceed, in aggregate, 49% of the total area of all condominium units in the building. Aliens must be able to present correct and complete documentation and evidence as required by the Land Department. Aliens who are eligible to own condominium units include:

- Individual aliens permitted to reside in Thailand under the Immigration Act;
- Individual aliens permitted to enter Thailand under the Investment Promotion Act;
- Juristic persons specified under Sections 97 and 98 of the Land Code which are registered as juristic persons under Thai law (i.e., juristic persons with foreign shareholding of more than 49% of the total issued shares or with foreign majority shareholders, including juristic persons with the aforesaid juristic person holding more than 49% of the total issued shares);
- Juristic persons specified as aliens under the National Executive Council Announcement No. 28 and promoted by the BOI; and
- Individual aliens or foreign juristic persons who bring foreign currency into Thailand to pay for the purchase of a condominium unit, or withdraw money from a Thai baht bank account of a non-resident, or withdraw money from a foreign currency account.

LAND DOCUMENTS: There are various documents under Thai law pertaining to land title/claim. These documents vary in strength from a Land Title Deed (Chanote, the purest form of land ownership representing full and complete ownership rights), through Certificates of Use and Certificates of Possession, to a mere



Condominium and land ownership transactions should be recorded in a formal written document

notice of possession of land. A Condominium Unit Title Deed is evidence of ownership of a condominium unit and has similar significance to a Land Title Deed.

All land and condominium unit transactions should be recorded in a formal written document and registered with the Land Office that is assigned to the province in which the land is physically located.

LABOUR LAWS & REGULATIONS: The main laws governing employment matters in Thailand are: Sections 575-586 of the Thai Civil and Commercial Code on Hire of Services; the Labour Protection Act B.E. 2541 (1998), as amended; the Labour Relations Act B.E. 2518 (1975), as amended; the Social Security Act B.E. 2533 (1990), as amended; the Workmen's Compensation Act B.E. 2537 (1994), as amended; the Alien Employment Act (AEA) B.E. 2521 (1978), as amended; the Royal Decree Naming Professions Prohibited to Aliens (RD) B.E. 2522 (1979); the Labour Court Establishment and Procedure Act B.E. 2522 (1979), as amended; the Home Workers Protection Act B.E. 2553 (2010); and the Occupational Safety and Health Act B.E. 2554 (2011). In addition, most of these laws provide for the promulgation of ministerial regulations, which give additional clarity and set more specific rules. The Civil and Commercial Code forms the basis for contracts in Thailand. In its sections on Hire of Services, it sets out the principles of contractual relationships that are in existence between employer and employee.

The Labour Protection Act, and regulations promulgated thereunder, set the minimum standards and conditions applicable to employment, including minimum wages, working hours, working days, holidays, leave, overtime, severance, notice of termination, the employment of women and children, as well as a number of other related issues.

Employers in Thailand having 10 or more employees must promulgate work rules and regulations (WRR) applicable to their employees, which must address at least certain key matters. WRR must be written in Thai, announced to employees and posted in the workplace,



Companies applying for work permits must have registered capital of at least BT2m per expatriate employee

as well as registered with the relevant Labour Official within certain specified deadlines.

PERSONAL TAX: Tax-resident employees are subject to personal income tax at progressive rates of 10% to 37%. Employers and employees must each contribute to the Social Security Fund an amount equal to 5% of the employee's gross wages up to a maximum employee contribution of BT750 (\$23.93) per month. Employers must contribute funds each year to the Workmen's Compensation Fund. Contributions range from 0.2% to 1% of an employee's annual earnings (up to a maximum amount of BT240,000, or \$7656), depending on the specific risk classification for the employer. Social Security and Workmen's Compensation benefits are set in statute and regulations. Employers and employees may also jointly establish provident funds.

The Labour Relations Act B.E. 2518 (1975) establishes the legal framework applicable to collective bargaining agreements and recognition of trade unions. It provides the framework for negotiations over employment terms and conditions, as well as for the mediation and arbitration of same.

TERMINATION: When terminating employees, employers should bear in mind that termination with cause is only permissible in certain specific situations. In circumstances justifying termination with cause, the employer can terminate employment immediately, and need not pay severance. However, if the employer terminates employment without cause (which is most frequently the case), the employer must serve notice of termination at least one pay period in advance, or as stipulated in the employment agreement, whichever is longer, provide compulsory severance pay, and meet all other employer obligations according to contract, WRR, and applicable personnel policies. Special provisions apply with respect to termination in connection with employer relocation and also with respect to certain kinds of restructuring that is related to the deployment of new technology as well as deployment of new machinery. Employees can also bring claims for

unfair termination. In such cases, the court may, at its discretion, award compensation beyond an employee's legal entitlements (outlined above). In making its determination, the court is to consider various factors, such as the age of the employee, the employee's tenure, the employee's position, and the reason for termination. If the court finds a termination unfair, it may order reinstatement or award monetary damages.

VISAS AND WORK PERMITS: To enter the kingdom, non-Thai nationals require authorisation, such as a visa and/or re-entry permit, though holders of passports from certain countries qualify for visa exemption or visa on arrival. A foreigner coming to Thailand for work should apply for a non-immigrant "B" (business) visa at a Royal Thai Embassy or Consulate, in advance. Foreigners also require work permits, granted by the Ministry of Labour, to legally work. The Alien Employment Act defines the term "work" very broadly – i.e. working by exerting one's physical energy or employing one's knowledge, whether or not for wages or other benefits. Foreigners thus require work permits to engage in volunteer or charity work.

Supporting documents for visa applications vary depending on the country of application and the nationality of the applicant. As for work permits, it is necessary to compile various corporate and tax documents in respect of the employer, as well as documentation pertaining to the employee. Under current regulations, companies applying for work permits must have registered capital of at least BT2m (\$63,800) per expatriate for whom a work permit is sought. A work permit is normally issued within two weeks following the ministry's receipt of a complete application. The processing time can be reduced to one day for companies that receive investment promotion, have at least BT30m (\$957,000) in assets/capital, or that otherwise qualify. Work permits are valid for varying time frames, but the maximum validity is capped at two years, after which time it could be renewed.

INTELLECTUAL PROPERTY (IP) PROTECTION: Thai law provides protection for many forms of IP, including patents, trademarks, copyrights, geographical indications, trade secrets, plant varieties and integrated circuits. Under IP laws, IP owners can obtain exclusive rights to these intangible assets and prevent any person from using or registering their IP rights in bad faith. It is very important for the IP owners to file for registration of any available IP rights in Thailand immediately after creation. Registration offers IP owners full protection under the law, prevents third parties from using or registering the IP rights, and avoids the possibility of IP infringement disputes. Among the forms of IP rights in Thailand, protection is most commonly sought for patents, trademarks and copyrights.

PATENTS: The Thai Patent Act 1979, as amended in 1992 and 1999, provides patent protection for inventions and product designs. Patent registration is granted on a first-to-file basis. If two or more persons have separately and independently made the same invention and each files an application for a patent, the applicant who is the first to file shall be the one that

is entitled to receive the patent. To obtain a patent for an invention, the invention must be novel, inventive and capable of industrial application. If the invention lacks only an inventive step, the inventor may instead file an application for a petty patent. Product designs must be new and must be used for an industrial purpose, including handicrafts.

Under Thai law, however, certain inventions are ineligible for patent protection, namely (1) natural microorganisms and their components, animals, plants, or extracts from animals or plants; (2) scientific or mathematical rules or theories; (3) computer programmes; (4) methods of diagnosis, treatment or cure of human and animal diseases; and (5) inventions contrary to public order, morality, health, or welfare.

After a patent application for an invention is filed, a patent examiner conducts a preliminary examination regarding any minor errors the application might have. The applicant or the agent has 90 days from the date of being notified of any such errors to correct them. The application will then be published in the Patent Gazette for 90 days. The applicant must then request examination of the invention and pay the government fee within five years from the date of publication. The examiner will then examine all documents to determine whether the invention is identical or similar to existing inventions. If the invention fulfils the legal qualifications, the examiner will require payment of the registration fee and grant the patent to the applicant. If not, the application will be nullified.

The main difference in the process of a product design registration is that the applicant is not required to request an examination of the product. For petty patents, after preliminary examination, the Examiner will require payment of the registration fee and then will issue the petty patent. Any interested person may request examination of the petty patent during the one-year publication period. If the petty patent fails to comply with law, the petty patent shall be nullified.

The protection periods of patents for invention, product design, and petty patent are 20 years, 10 years and 6 years respectively from the filing date. However, the owner of a petty patent may request a renewal twice, each time for a period of two years.

TRADEMARKS: Trademark registration in Thailand similarly operates on a first-to-file basis. According to the Thai Trademark Act 1991, as amended in 2000, a mark which is registrable must (1) be distinctive; (2) not be prohibited under the act; and (3) not be identical or confusingly similar to any prior registered trademarks. Due to the number of applications that have been filed with the Thai Trademark Office, the registrar has prolonged the timeframe that is required to conduct a necessary examination.

Based on current Thai practice, it takes 18 to 24 months for the registrar to conduct the examination. If the application is deemed acceptable, it will be published in the Trademark Gazette. Should no objections be filed within 90 days after publication, the registration will be granted, dated as of the day of the filing. The registrar will then issue a notification requesting



Intellectual property is protected under three main categories – patents, trademarks and copyrights

payment of the registration fee, and the Certificate of Trademark Registration will be issued within two months after the registration fee has been paid. Barring any problems, it takes between 18 months and 32 months for a trademark to complete the registration process.

The protection period for a trademark is 10 years from the filing date. A renewal can be filed within 90 days before the expiration for an additional period of 10 years from the date of expiration of the original registration, or from the date of the last renewal.

COPYRIGHTS: According to the Thai Copyright Act of 1994, the owner of a copyright work automatically obtains copyright protection when they create such work. Copyright works under the act include literary, dramatic, artistic, musical, audio-visual and cinematographic works. Protection does not extend to ideas, procedures, processes, systems, methods of use or operation, concepts, principles, discoveries, or scientific or mathematical theories.

Although registration is not required to obtain copyright protection, copyright owners can file an application with the Department of Intellectual Property to record their creation and ownership of the copyright works. The recordation may be used as an official document to indicate the date on which the copyright work was created. However, such recordation can be used as a preliminary assumption only.

If a dispute arises, an opposing party may submit evidence showing that they are in fact the rightful owner of the work concerned.

Generally, copyright subsists for the life of the creator and for 50 years after the creator's death. If the creator is a juristic person, the copyright subsists for period of 50 years after the work is first published or, if unpublished, after its creation. However, copyright in a work of applied art subsists only for a period of 25 years from its creation or from its first publication.

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Darani Vachanavuttivong, Co-Managing Partner and Managing Director of Intellectual Property (IP), Tilleke & Gibbins

Protecting innovation

Darani Vachanavuttivong, Co-Managing Partner and Managing Director of Intellectual Property (IP), Tilleke & Gibbins, on the importance of IP rights

The failure of Thai law enforcement in implementing adequate measures to protect IP rights has resulted in Thailand being placed on the Office of the US Trade Representative (USTR) Priority Watch List for four consecutive years. The annual USTR Special 301 report identifies, among other things, countries that fail to provide sufficient measures for protecting IP rights, and these countries are placed on the Priority Watch List.

More stringent measures are needed to combat this enormous problem and to improve IP protection in the kingdom. Several factors contribute to Thailand's failure to overcome existing IP problems, but each of these can be addressed if there is sufficient political will.

Corruption remains the biggest problem in enforcing IP rights. As long as the government fails to make inroads into reducing the severity of corruption in the country, successful enforcement measures to eradicate IP counterfeiting and piracy problems will remain unachievable. Good governance is a prerequisite if law enforcers are to eliminate IP piracy.

The second obstacle concerns the low levels of innovation in Thailand. A wide range of public policies are needed to stimulate innovation. This includes government subsidies to promote innovation and research and development (R&D). The introduction of legislation similar to the US's Bayh-Dole Act may assist in generating knowledge in universities. It is also necessary for Thailand to encourage private sector innovation to develop its own technological capabilities and reduce reliance on foreign technology. Thailand could learn much from Japan's model for eliminating IP piracy and reinventing itself as a high-tech economy. The government should support innovation by developing short- and long-term plans for fostering R&D investment and introducing a system that rewards Thai entrepreneurs.

Third, the general level of IP awareness in Thailand is low, and it is even lower among certain industrial sectors, government agencies, universities and R&D institutions. Thus, there is a need to educate these stakeholders and policymakers about IP rights. IP education

should also be provided for government agencies and the judiciary. In addition to raising general awareness, another strategy to boost innovation is to provide technical assistance and R&D funding to local businesses, including small and medium-sized enterprises, to help them improve local technological capabilities.

An effective approach for raising IP awareness is to bolster university education. The lack of qualified IP instructors and teaching materials suitable for use in developing countries leads to inadequate teaching standards in universities. This situation can be improved by utilising books written in the local (Thai) language, in addition to other necessary improvements. IP should be taught not as a legal subject, but as an interdisciplinary subject within Thailand's universities.

Finally, the legal environment needs to be streamlined and revised to promote innovation. The lengthy process for granting patents is the primary obstacle to promoting the generation, protection and utilisation of patents by companies and industries. Thailand needs to work toward embedding IP administration into the country's development policies.

Current public policies on IP are not reflective of local industry needs. Strategies must be designed specifically for different IP regimes so that they are tailored to the levels of development and needs of local industries. There is also a need to identify and remove the bottlenecks that exist between the commercial exploitation of IP assets and the level of IP usage in business and economic development in the country.

In conclusion, there is an urgent need to review existing national IP laws and policies in all areas. The Thai government should work to immediately enact the new laws required to tackle IP infringements and piracy, such as landlord liability, anti-camcording, etc. The implementation of these measures will require a consistent and coherent approach. Efforts must be stepped up across all government offices if IP protective measures are to be improved sufficiently and if Thailand is to be removed from the Priority Watch List.